

TEXAS DISPOSAL SYSTEMS	§	IN THE DISTRICT COURT
LANDFILL, INC.,	§	
Plaintiff,	§	
v.	§	BEXAR COUNTY, TEXAS
	§	
CITY OF SAN ANTONIO, TEXAS,	§	
Defendant.	§	288th JUDICIAL DISTRICT

**PLAINTIFF TEXAS DISPOSAL SYSTEMS LANDFILL, INC.’S  
OPPOSITION TO PLEA TO THE JURISDICTION  
AND PARTIAL MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Plaintiff/Counter-Defendant Texas Disposal Systems Landfill, Inc. (“Plaintiff” or “TDSL”), and files this Opposition to the Plea to the Jurisdiction and Partial Motion to Dismiss (“Plea”) of Defendant/Counter-Plaintiff City of San Antonio, Texas (“City”).

The City incorrectly describes the nature of TDSL’s declaratory judgment claims; those claims relate to its written contract with the City and TDSL’s breach claim that is within the Court’s jurisdiction. The City also misapprehends the nature of TDSL’s limited quantum meruit claim, which is brought only as an alternative to a contract claim; the City does not and cannot contend that the Court lacks jurisdiction over that contract claim. The City’s plea should be denied in whole.

**BACKGROUND FACTS**

The City’s Plea implies that issues regarding the parties’ contractual relationship sprung forth in 2021 in a manner unexpected by the City. In reality, TDSL has attempted for more than a decade – stretching back to 2011 – to address the fundamental problems with the contract. The City’s intransigence left TDSL with no option other than to initiate litigation.

TDSL's substantive claims are primarily for breach of contract and for declaratory judgment regarding that contract. The City's Plea fails to explain the nature of those claims, an understanding of which demonstrates that none of the claims is barred by governmental immunity.

**1. TDSL's contract claims.**

The City has not challenged this Court's jurisdiction to hear any of TDSL's contract claims. Those claims include, but are not limited to, the following:

- **The Put-or-Pay Contract Claim:** Failure of the City to pay sums owed TDSL under the contract. Ex. 1 (First Amended Petition) at 10 ¶ 33. The City is required to take at least 100,000 tons of waste to the TDSL-operated Starcrest Transfer Station each fiscal year, and if the City fails to do this, it still must pay TDSL for 100,000 tons. This is referred to as a put-or-pay provision. In the fiscal year that ended in 2022, the City failed to meet its put-or-pay obligation, but also failed to pay TDSL the sum it owes.<sup>1</sup> The City claims that it was excused from this obligation under certain contractual provisions; TDSL disagrees. The City has no sovereign immunity for this breach of contract claim, pursuant to Texas Local Government Code section 271.152.
- **The Bulky Waste Contract Claim:** Failure of the City to pay sums owed TDSL for additional work the City directed TDSL to perform in connection with the contract – specifically, to accept at Starcrest uncompacted bulky waste, the fee for which is not specified in the contract. Ex. 1 at 10-11 ¶ 34. The City has no sovereign immunity for this breach of contract claim, pursuant to Texas Local Government Code section 271.153(a)(2).

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<sup>1</sup> The City also failed to meet its put-or-pay obligation for the fiscal year that just ended on September 30, 2023.

- **The Duty to Cooperate Contract Claims:** TDSL contends the City has breached its duty under law to cooperate in the contract's performance and its duty under the contract to engage in good-faith discussions regarding adjustment of rates due to changed circumstances. Ex. 1 at 11-12 ¶¶ 35-36.

## 2. TDSL's declaratory judgment claims.

The City does challenge this Court's jurisdiction to hear TDSL's declaratory judgment claims, but inaccurately describes them as related to the quantum meruit claim. Not so. The declaratory judgment claims are based on the *written contract* between the parties, for which any claim of governmental immunity has been waived, as shown above. TDSL seeks declaratory judgment on the following issues:

- **Prior Breach Declaratory Judgment:** That TDSL is no longer required to provide waste disposal services to the City under the terms of the contract due to the City's prior breach, which is the subject of the Put-or-Pay Contract Claim. Ex. 1 at 14 ¶ 44.
- **Priority Declaratory Judgment:** These claims seek interpretation of the contract's priority provisions. Ex. 1 at 14 ¶¶ 45-46. The City itself seeks declaratory judgment that its interpretation of the priority provisions is correct, Ex. 2 (City's Original Counterclaim and Application for Injunctive Relief, without exhibits) at 15-16, and TDSL seeks a declaration that *its* interpretation is correct. This issue relates directly to the Put-or-Pay Contract Claim because the City contends it has not violated the put-or-pay provision; it argues that TDSL has violated the priority provisions, which TDSL vigorously disputes.
- **Impracticability Declaratory Judgment:** TDSL seeks a declaration that it is no longer required to provide waste disposal services to the City under the terms of the

contract because performance has become impracticable due to the occurrence of unforeseen events. Ex. 1 at 15-16 ¶ 47. This claim does *not* seek money damages and relates to the contract that is the subject of the breach claims, particularly the Duty to Cooperate Contract Claims, which are within the Court’s jurisdiction.

- **Good Faith Declaratory Judgment:** TDSL seeks a declaration that the City has an obligation, under the contract, to consider TDSL’s request for a rate adjustment in good faith. Ex. 1 at 16 ¶ 48. This relates directly to the Duty to Cooperate Contract Claims.
- **Dead Animal Declaratory Judgment:** TDSL seeks a declaration that it is not required under the contract to accept bulk loads of dead animals delivered by the City. Ex. 1 at 16-17 ¶ 49. This relates directly to the City’s own claim for declaratory judgment regarding TDSL’s alleged duty to accept dead animals. Ex. 2 at 15.
- **Bulky Waste Declaratory Judgment:** TDSL seeks declarations that it is not required under the contract to accept the City’s delivery of uncompacted bulky waste not regularly collected from residents at the contract’s rates for typical waste. Ex. 1 at 17-18 ¶¶ 50-51. This is directly related to the Bulk Waste Contract Claim.

### **ARGUMENT AND AUTHORITIES**

**I. This Court has jurisdiction over TDSL’s declaratory judgment claims, which relate directly to contract claims that are within the Court’s jurisdiction.**

The City’s Plea regarding TDSL’s declaratory judgment claims is based on a fundamental misapprehension and mischaracterization of those claims. The City contends that the claims are “essentially a repackaging of [TDSL’s] quantum meruit claim,” Plea at 9, which is demonstrably incorrect. The declaratory judgment claims tie to the *contract* claims, over which this Court has jurisdiction and which are not the subject of the City’s Plea. Because the Court has jurisdiction over the contract claims, it also has jurisdiction over the related declaratory judgment claims.

The City appears to argue that the only allowable declaratory judgment claims against a municipality are those challenging the validity of an ordinance or a statute. Plea at 9. Again, that is incorrect. Governmental immunity bars a declaratory judgment action against a municipality if the action is an attempt to “circumvent the State’s sovereign immunity from suit by characterizing a suit for money damages ... as a declaratory-judgment claim.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 371 (Tex. 2009) (ellipsis in original; internal quotation omitted). Immunity applies when a declaratory judgment claim “has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity.” *Texas Parks & Wildlife Dep’t v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011).

TDSL’s declaratory judgment claims are not claims for money damages. They merely seek declarations regarding a contract between the parties that TDSL contends the City has breached. Those breach claims are not subject to governmental immunity, which the Legislature has waived via the adoption of Subchapter I of Local Government Code chapter 271, allowing breach of contract suits against local governmental entities.

The Uniform Declaratory Judgment Act does not create jurisdiction, but rather allows declaratory judgment claims to be brought regarding matters that are otherwise within a court’s jurisdiction. The Act “does not enlarge a trial court’s jurisdiction, and a litigant’s request for declaratory relief does not alter a suit’s underlying nature.” *City of El Paso*, 308 S.W.3d at 370. The “underlying nature” of the suit is TDSL’s breach of contract claims, which are within the Court’s jurisdiction; thus so too are the related declaratory judgment claims. *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 530 (Tex. App. – Austin 2014, no pet.) (governmental immunity does not bar declaratory judgment claims when “the Legislature has waived immunity as to the subject matter of the claim”).

Further, two of the declaratory judgment claims – the Priority and Dead Animals claims – relate to matters that the City itself has put at issue through its own request for declaratory judgment. The City seeks a declaratory judgment that the contract’s priority provisions require TDSL “must” service City trucks at Starcrest “within thirty (30) minutes except in situations of heavy demand whereby more than fifteen (15) or more city-owned haulers attempt to dump at Starcrest within approximately the same time period.” Ex. 2 at 15-16. TDSL contends that the City misreads the contract and that a general reasonableness standard applies to the priority provisions, and requests a declaration to that effect. The City also seeks a declaratory judgment that under the contract, TDSL “has no basis, factual or legal, to refuse to accept the City’s dead animal waste and must accept all waste for the duration of the Agreement.” Ex. 2 at 15. Again, TDSL contends that the City misreads the contract and that TDSL is only required to accept dead animals as delivered at the time the contract was entered, and requests a declaration to that effect. If governmental immunity had otherwise applied to these two declaratory judgment claims of TDSL (it did not, as described above), the City has waived any immunity claim by affirmatively putting these matters at issue. *See, e.g., Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 376–77 (Tex. 2006) (immunity waived “where the governmental entity has joined into the litigation process by asserting its own affirmative claims for monetary relief”; though the City does not assert a claim for monetary relief, it does assert declaratory judgment claims, which waives immunity for corresponding claims). “It would be fundamentally unfair to allow [the] governmental entity to assert affirmative claims against a party while claiming it had immunity as to the party’s claims against it.” *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d at 522, quoting *Reata Const.*, 197 S.W.3d at 375-76 (brackets in original).

Nor are TDSL’s declaratory judgment claims “merely tacked onto a standard suit based on a matured breach of contract.” Plea at 11. The City’s cited authority, *MBM Financial Corp. v. Woodlands Operating Co., LP*, 292 S.W.3d 660, 670 (Tex. 2009), does *not* stand for the proposition that declaratory judgment actions are prohibited if a claim for breach of contract is also pending. In fact, the case states the exact opposite: “the existence of another adequate remedy does not bar the right to maintain an action for declaratory judgment .... Prohibiting declaratory judgments whenever a breach of contract claim is available would negate the Act’s explicit terms covering such claims.” Rather, *MBM Financial* addresses the impropriety of attempting to recover *attorneys’ fees* through a declaratory judgment when the party suffered no damages as a result of the breach of contract. That is not the scenario here; TDSL seeks a declaration of rights and obligations under a contract (as does the City) that is the subject of breach claims, which themselves are within the Court’s jurisdiction and are not barred by immunity.

The City’s plea to the jurisdiction and motion that TDSL’s declaratory judgment claims be dismissed must be denied.

## **II. TDSL’s alternative quantum meruit claim is within the Court’s jurisdiction.**

TDSL asserts its quantum meruit claim only in the alternative to its Bulky Waste Contract Claim. Ex. 1 at 13 ¶ 41. In the unlikely event that it is held or found that the Bulky Waste Contract Claim is not within the scope of the parties’ existing contract, TDSL seeks to recover under a quantum meruit theory.

The City argues that if it accepts the benefits of services that may fall outside of the contract, it does not have to pay for those services because it is immune from quantum meruit (quasi-contract) claims. However, immunity does not apply to municipalities in the first place when a municipality is performing *proprietary* functions, *i.e.*, acting “of its own volition for its

own benefit and not as a branch of the state.” *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 439 (Tex. 2016). The Supreme Court explained that municipalities do not enjoy the same level of sovereign immunity as the State, and when “a city performs discretionary functions on its own behalf, it ceases to derive its authority—and thus its immunity—from the state’s sovereignty.” *Id.* at 436. Proprietary functions “are those conducted ‘in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government.’” *Id.* The Supreme Court held that this dichotomy applies in the contract-claims context in the same manner it does in the tort context. *Id.* Thus, it is not necessary to reach the statutory waivers of sovereign immunity where immunity does not apply in the first place. *Id.*

Here, the City’s attempt to avoid paying for services that may (or may not) fall outside of the contract relates to a proprietary function of the City, because it seeks to benefit its inhabitants by transferring a monetary loss to TDSL. Thus, immunity does not apply in the first place to TDSL’s quantum meruit claim, and it is not necessary to determine whether the statutory waiver of immunity for contract claims extends to quasi-contract claims. *See id.*; *see also City of Corpus Christi v. Absolute Indus.*, 120 S.W.3d 1, 3 (Tex. App.—Corpus Christi-Edinburg 2001, pet. denied).

In *Absolute Industries*, the court held that a contractor’s claim for interference against a city for attempting to divert waste from the contractor’s facility to the city’s facility was a proprietary function, not barred by immunity, even though it related to waste collection (which is defined generally in the Texas Tort Claims Act as a governmental function in the tort context, Tex. Civ. Prac. & Rem. Code § 101.0215(a)(6)),<sup>2</sup> because the plaintiff complained of the city’s actions

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<sup>2</sup> That the Tort Claims Act describes a function as “governmental” does not mean that the function should be considered “governmental” in non-tort contexts; as the Supreme Court explained, the Tort Claims Act’s definitions “apply expressly to tort claims” and only “aid our inquiry” in non-tort cases when exploring the



taken to avoid a monetary loss to the city at the contractor's expense. *Absolute Industries*, 120 S.W.3d at 3 (“The fact that the contract at issue was a solid waste removal contract is irrelevant; it could have easily been any other type of contract”); *see also City of Houston v. Shilling*, 240 S.W.2d 1010, 1012 (Tex. 1951) (“[s]urely all operations which make it possible for the city to collect garbage are not part of that function in the sense that the city is immune to liability in its performance.”). After its 2016 decision in the first *Wasson Interests* case, the Texas Supreme subsequently cited the holdings of both *Absolute Industries* and *Shilling* with approval. *See Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 152–53 (Tex. 2018).

Even if immunity did apply, cases since *Wasson Interests* have left open the possibility that the statutory waiver for contract claims may extend to quasi-contract claims. The City's primary argument regarding alleged immunity for TDSL's narrow, alternative quantum meruit claim relies on a case that was abrogated by the Texas Supreme Court in *Wasson Interests*. The court in *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App. – San Antonio 2012, pet. denied), held that the Local Government Code waiving immunity for breach of contract claims does not apply to quantum meruit claims, and that the “proprietary/governmental distinction” – in which immunity does not apply in claims against a governmental body based on its proprietary functions – also does not apply to quantum meruit claims due to their omission from the Local Government Code waiver. *Id.* at 603-04. The Texas Supreme Court, however, held that *Wheelabrator* erred by not appreciating the fact that a governmental body has no immunity *ab initio* when sued for a proprietary function, and thus no waiver is necessary (since no immunity exists). *Wasson Interests*, 489 S.W.3d at 438 (noting that *Wheelabrator* incorrectly interpreted the

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governmental/proprietary dichotomy. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 147-483 (Tex. 2018).

Supreme Court’s holdings on derivative governmental immunity). The other cases cited by the City for this proposition, Plea at 8, all pre-date the Supreme Court’s *Wasson Interests* case.

The Eastland Court of Appeals recently summarized the current state of the law on governmental immunity and quantum meruit, stating “the Texas Supreme Court has yet to specifically address whether a claim sounding in quantum meruit was intended to be included in the [Local Government Code’s] immunity waiver provisions.” *Texas Ass’n of School Boards Risk Mgmt. Fund v. Colorado Independent School District*, 660 S.W.3d 767, 774 n.5 (Tex. App. – Eastland 2023, no pet.) (“*TASB*”). As did the *TASB* court, TDSL acknowledges that some courts of appeals post-*Wasson Interests* found certain quantum meruit claims to be barred by immunity, sometimes relying on the same logic as the San Antonio Court of Appeals in *Wheelabrator*.

Here, the City is not immune from TDSL’s quantum meruit claim because the City’s diversion of bulky waste to TDSL was a proprietary function that does not invoke the City’s sovereign immunity. But even if immunity did apply, because this Court has jurisdiction over the Bulky Waste Contract Claim, for which immunity is specifically waived by the Local Government Code, the related quantum meruit claim should also not be barred by immunity due to its inextricable link to the contract claim.

### **CONCLUSION AND PRAYER**

Plaintiff/Counter-Defendant Texas Disposal Systems Landfill, Inc. prays that the City’s Plea to the Jurisdiction and Partial Motion to Dismiss be denied, and that TDSL be granted all other relief to which it may show itself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR TEXAS DISPOSAL  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent to counsel listed below, via electronic mail and/or electronic service as available, on October 23, 2023:

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CAUSE NO. 2022-CI-06061

TEXAS DISPOSAL SYSTEMS	§	IN THE DISTRICT COURT
LANDFILL, INC.,	§	
Plaintiff,	§	
v.	§	BEXAR COUNTY, TEXAS
	§	
CITY OF SAN ANTONIO, TEXAS,	§	
Defendant.	§	288th JUDICIAL DISTRICT

**TEXAS DISPOSAL SYSTEMS LANDFILL, INC.’S FIRST AMENDED PETITION  
AND ANSWER TO COUNTER-CLAIM**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Plaintiff/Counter-Defendant Texas Disposal Systems Landfill, Inc. (“Plaintiff” or “TDSL”), and files this First Amended Petition and Answer to Counter-Claim, and would show as follows:

**SUMMARY**

1. TDSL has provided waste disposal services to the City of San Antonio, Texas (the “City”) since 1993, under a written contract for services that is properly executed on behalf of the City and that has been amended and supplemented numerous times. The City collects municipal solid waste and hauls the waste to the Starcrest Transfer Station, where it is transferred to larger vehicles that hold multiple loads of waste; TDSL then hauls the larger vehicles to the TDSL facility in Travis County for disposal.

2. The City has directed TDSL to perform additional work in connection with the contract for which the City has outstanding amounts owed. Such additional work entailed increased cost to TDSL, for which the City has not compensated TDSL. TDSL seeks compensation for this breach of contract.

3. The City has also failed to comply with its contractual “put-or-pay” obligation for the fiscal year ending August 31, 2022. TDSL seeks compensation for this breach of contract.

The City further continues to misinterpret the put-or-pay and priority provisions of the parties' contract; TDSL seeks declaratory judgment regarding the parties' respective contractual obligations.

4. Additionally or in the alternative, TDSL has provided services to the City that are outside the scope of the parties' contract and has not received payment from the City in an amount that represents the fair market value of those services, nor the rates allowed under the contract. TDSL seeks recovery for the value of those services.

5. Additionally or in the alternative, continued performance of the parties' contract is impracticable due to the occurrence of events (some of which were outside the control of the parties, and all of which were outside the control of TDSL), the non-occurrence of which was a basic assumption on which the contract was made. TDSL thus seeks a declaratory judgment that it has no obligation to continue to perform under the contract due to impracticability, and additionally or in the alternative that TDSL is not required to provide services to the City that result in a loss to TDSL.

### **PARTIES**

6. Plaintiff Texas Disposal Systems Landfill, Inc. is a Texas corporation with its primary place of business in Travis County, Texas.

7. Defendant City of San Antonio is a Texas home-rule municipality. It has been served with process and appeared, and is before the Court.

### **DISCOVERY, JURISDICTION AND VENUE**

8. Plaintiff intends to conduct discovery under Level 3, Rule 190.4, Texas Rules of Civil Procedure.

9. The Court has jurisdiction over this matter because the amount in controversy exceeds the minimum jurisdictional limit. Pursuant to Texas Rule of Civil Procedure 47(c), TDSL seeks monetary relief of more than \$1,000,000, and non-monetary relief.

10. Venue is proper in Bexar County, Texas, under the general venue provisions of Section 15.002(a)(1), Texas Civil Practice & Remedies Code. All or a substantial part of the events giving rise to TDSL's claims occurred in Bexar County, Texas. Additionally, the parties contractually agreed to venue in Bexar County.

### **FACTS**

#### **A. Background and Summary of the TDSL-City Agreement.**

11. TDSL and the City first contracted in 1993 for an arrangement in which the City would use TDSL's waste disposal facilities for some of the waste collected by the City in the northern areas of San Antonio. That contract has been amended and supplemented several times, as described in part herein. Unless specifically described otherwise, use of the term "Contract" herein will refer to the agreement between TDSL and the City, as currently amended and supplemented.

12. The City collects household municipal solid waste from residential locations, which residents set out in specially designed wheeled containers provided by the City that are designed for use in the City's curbside collection system. The waste is picked up and hauled by City route trucks that feature a compacting mechanism. Compaction increases the bulk density of waste materials, which is important to increase efficiency of waste collection and disposal. Without compaction, the City's route trucks would fill up much more quickly, requiring significantly more trips to empty the trucks so additional waste can be collected. Such compaction also improves the

efficiency of waste being processed through the Starcrest Transfer Station and the compaction of waste into legally allowed payloads transferred to the TDSL landfill.

13. When a City garbage route truck is full, the driver takes the load to the Starcrest Transfer Station (“Starcrest”), which is located north of the San Antonio International Airport. At the transfer station, the route truck’s contents are transferred to a large trailer that holds several route truckloads. The trailer, when full, is pulled by a truck to the TDSL landfill facility in southern Travis County. Under the Contract as originally agreed upon, TDSL operated Starcrest, while the City held the TCEQ permit allowing Starcrest to operate, as well as owning the real property where Starcrest is located.

14. Compaction of waste by route trucks is essential to the viability of TDSL’s Starcrest operation. Landfills charge by the ton for disposal of waste, and the landfill’s cost for disposal likewise is affected by both weight and volume. When waste is compacted, the trailers that haul waste to the TDSL landfill can hold more waste by weight (in other words, more weight in the same volume) than it could if the waste were not compacted and/or noncompactable. The hauling of non-compacted waste requires significantly more trips between Starcrest and the TDSL landfill, with accompanying materially increased expenditure. Once the waste is deposited into a trailer at Starcrest, it is difficult and time consuming to further compact, so the compaction must be done by the City route trucks.

15. The Contract provides per-ton rates the City will pay TDSL for city-collected waste brought to Starcrest. The Contract also provides that the City will bring a minimum of 100,000 tons per year to Starcrest; if the City fails to do so, it must pay TDSL as if it did in fact bring 100,000 tons to Starcrest (a “put-or-pay” provision). The rates agreed upon by TDSL and the City were based in part on the waste delivered by City route trucks being compacted residential waste

that could be hauled to the landfill more efficiently. The rates were also based in part on the shared understanding that the waste subject to the contract would be the same type of regularly collected waste materials that were delivered and processed by the City through Starcrest from 1991 through 1996.

16. In addition to receiving waste from City route trucks, TDSL is allowed to accept waste at Starcrest from private haulers and members of the public. TDSL may establish its own rates for accepting such waste and is not restricted by the discounted rates charged to the City. The rates agreed upon by TDSL and the City were based in part on TDSL's ability to generate additional revenue per ton of waste through these sources.

17. At the time the Contract was entered, the City conducted twice-yearly collections of bulky waste from residences. As defined by City ordinance "bulky waste" consists of "irregularly sized items that do not readily fit into refuse containers." Bulky waste includes appliances, mattresses and box springs, among other large items. During the City's bulky waste collections, the City collected the waste using trucks with compacting ability, so that bulky waste was delivered to TDSL at Starcrest in a compacted state. At other times, residents and other private haulers could bring bulky items directly to Starcrest, and would be charged rates set by TDSL that were higher than those it charged to the City, in recognition of the fact that non-City-hauled bulky waste would typically be non-compacted and thus would be significantly more expensive for TDSL to process through Starcrest and haul to its landfill and dispose of there.

18. The Contract does not generally require TDSL to accept "special waste" from the City at Starcrest at the discounted City rate. "Special waste" is typically defined as non-hazardous waste that requires special handling beyond that required for municipal solid waste; the City's ordinances define special waste in a manner consistent with this usage. Although dead animals



are considered special waste, the Contract provides that TDSL will provide for disposal of dead animals that are collected on City streets and alleys as part of the City's typical municipal solid waste collection. The Contract does not provide for the bulk disposal of dead animals, such as may be collected from veterinary or other facilities.

19. The Contract provides that annual adjustments in the rate charged the City by TDSL will be based on the Consumer Price Index (CPI) for All Urban Wage Earners and Clerical Workers, All Items, for the Southern Region of the United States. A basic assumption of the parties, at the time the Contract was entered, amended and supplemented, was that the use of this CPI would serve as an adequate proxy for the increased expenses over time that TDSL would incur in connection with the Starcrest operations, the transfer of waste to the TDSL landfill, and the disposal of waste in the landfill.

20. Through amendments and supplements to the Contract, TDSL now holds the TCEQ permit to operate Starcrest. The termination provisions of the Contract now differ between those governing TDSL's operations in accepting City-hauled waste, and those regarding the operation of Starcrest. While either party may terminate the former provisions upon five years' notice, TDSL may continue operating Starcrest after such termination, in recognition of TDSL's significant investment in improving the Starcrest facilities. Contract amendments and supplements also provide that both TDSL and the City intend "to increase the operating efficiency of the [Starcrest] Transfer Station."

21. The Contract provides that TDSL "shall use reasonable care" to service City trucks at Starcrest so that the trucks are not "required to wait more than 30 minutes," with some specific allowances for periods of heavy demand.

22. The Contract also provides that TDSL will not bear the cost for modification to Starcrest requested by the City.

**B. Subsequent Events Relevant to the TDSL-City Relationship.**

23. The Contract's use of the CPI as the guide for future rate increases due to rising costs of doing business was based on the parties' mutual understanding that the CPI would be an accurate proxy for such costs. However, neither party anticipated that costs associated with TDSL's operation of Starcrest would increase in a manner far outpacing the CPI; the non-occurrence of such an event was a basic, shared assumption of the parties at the time the Contract was entered. The CPI's failure as such a proxy has been recognized by the development of indices that are more indicative of the cost of running a waste operation, such as the Refuse Rate Index, which takes into account the price of diesel fuel, labor costs, and vehicle and equipment repair and maintenance. The increased costs for many of these items have significantly outpaced the overall CPI. The failure of CPI as an adequate proxy is an event outside the control of the parties and was not anticipated by the parties at the time they agreed to use the CPI.

24. The City also has unilaterally changed its bulky waste practices in a manner not anticipated by the parties, and the non-occurrence of which was a basic assumption on which the contract was made. In addition to conducting twice-yearly bulky waste collection with compacting trucks, the City has established four separate bulky waste drop-off sites that residents can use at any time, at no charge. The City then hauls this bulky waste to Starcrest in roll-off containers without compacting it, directing TDSL to perform additional work in connection with the Contract, resulting in increased cost for TDSL. As a result, TDSL has disposed of thousands of tons of uncompacted bulky waste, including thousands of items such as mattresses and box springs that could be compacted significantly, had the City collected the waste at curbside in its compactor

trucks. Hauling these uncompacted bulky items to the TDSL landfill greatly reduces the efficiency of the Starcrest operations, increasing TDSL's costs with no offsetting increased revenue, as well as increasing the costs of disposing of the material at the landfill. Moreover, before the City offered this free bulky waste drop-off service, residents needing to dispose of bulky waste at time other than the scheduled twice-yearly City pickups would bring their bulky waste to Starcrest, for which TDSL could charge rates commensurate with the cost of hauling and disposing such uncompacted waste rather than the discounted rates for disposal of City waste. The City's post-Contract change in policy deprived TDSL of this income stream, thus effectively rendering the disposal of bulky items even more costly. Moreover, one of the City's four bulky waste drop-off sites is less than one mile from Starcrest; records indicate that in 2019, this site had the most traffic of the four sites.

25. The Second Amendment to the Contract specifies that TDSL will accept at the Contract rate the "regularly collected municipal solid waste ... as has been customary for the City, as has been processed by the City through the Transfer Station from 1991 through 1996." The waste transferred by the City from its free bulky waste drop-off centers to Starcrest in City-owned roll-off containers falls outside the terms of the Second Amendment to the Contract as it is not regularly collected compacted waste, nor were such types of un-compacted waste regularly received and processed through Starcrest by the City from 1991 to 1996, as referenced in the Contract. Accordingly, this waste is not within the scope of the Contract rates and similarly does not count toward the City's put-or-pay obligation for those years. The City acknowledged this fact when it ceased delivering bulky waste to Starcrest in August 2021, after TDSL learned of and notified the City of the impermissible practice. TDSL has invoiced the City for the disposal of such waste in previous years, representing the difference between the Contract rate (for which this

waste was not eligible) and the Starcrest gate rate (which was the proper rate applicable to such waste), as well as for the put-or-pay shortfall realized when removing this impermissible waste stream from the City's annual delivery requirements. The City has failed to pay these invoices, constituting a default by the City.

26. The City demanded that repairs be done at Starcrest, including to the unloading area, which repairs TDSL accomplished. The Contract, as amended by the Special Addendum, provides that TDSL "shall not bear the cost for any modifications to the permit or facility requested of TDSL by the City." The City has not reimbursed TDSL for the cost of this repair.

27. The extent, if any, to which the City has been engaged in bulk hauling of dead animals to Starcrest (as opposed to the incidental collection of dead animals from streets and alleys as mixed with other municipal solid waste) is unknown to TDSL at this time. If such hauling has taken place, the City has not informed TDSL, and the City would be required to pay the higher rate TDSL is allowed to charge for special waste.

28. Due to the increased costs to TDSL discussed herein, TDSL has been forced to reduce the expenses it incurs in operating Starcrest. It is possible that at certain times and days, despite the use of reasonable care, TDSL will not be able to service all City vehicles within 30 minutes, including in periods of heavy demand.

29. The City can claim offsets from its put-or-pay obligation only if it complies with specific procedures in the Contract. If City vehicles must wait at Starcrest for more than 30 minutes "due to the failure of TDSL to use reasonable care," the City may be able to divert the truckload of waste to another area landfill and deduct the tonnage of that truckload from its put-or-pay tonnage requirement. However, the City may make such deduction only if it complies with the procedure set forth in the Contract. The City must (1) designate an Onsite Program Manager;

(2) show that a City vehicle was actually “required to wait longer than 30 minutes” at Starcrest due to TDSL being unable to provide “normal services ... using reasonable care”; (3) make a determination, by its Program Manager, whether the vehicles are to be diverted; and (4) provide notice to TDSL of any diversion “on a daily basis.”

30. The City fell more than 35,000 tons short of its put-or-pay obligation for the fiscal year that ended August 31, 2022. TDSL sent the City an invoice for \$1,151,774.56 for this shortfall on September 30, 2022, but the City still has not paid and is now in default.

31. The City has claimed that it is not required to pay TDSL for this put-or-pay shortfall because it is claiming a setoff right for allegedly diverting truckloads of waste to other landfills due to wait times of more than 30 minutes at Starcrest. However, the City did not comply with the Contract’s requirements and thus is not entitled to claim a setoff. The City’s interpretation of the setoff provisions is contrary to both the language and intent of the Contract, and provide TDSL with no mechanism to confirm the accuracy of the City’s setoff claims.

### **CAUSES OF ACTION**

#### **I. Breach of Contract.**

32. TDSL restates all preceding paragraphs as if set forth fully herein.

33. The City has failed to pay TDSL for the City’s put-or-pay shortfall for the fiscal year ended August 31, 2022, as set forth above. The City is in breach of the Contract due to this failure. TDSL seeks damages for breach of contract in the amount the City owes TDSL for this shortfall, along with court costs and attorneys’ fees as provided in the Contract and Section 38.001, Texas Civil Practice & Remedies Code.

34. TDSL provides waste disposal services to the City under a written contract properly executed on behalf of the City. The City has directed TDSL to perform additional work in

connection with the Contract for which the City has outstanding amounts owed. Such additional work includes, without limitation, the delivery of excess uncompacted bulky waste and, upon information and belief, bulk-collected dead animals. Complying with this additional work directed by the City entailed increased cost to TDSL, for which the City has not compensated TDSL. TDSL seeks damages for breach of contract, along with court costs and attorneys' fees as provided in the Contract and Section 38.001, Texas Civil Practice & Remedies Code.

35. Additionally or in the alternative as necessary, parties to a contract have a duty to cooperate to the extent necessary for the contract's performance. A party cannot hinder, prevent, or interfere with another's ability to perform its duties under a contract. The City's actions have included without limitation the City's management of bulk hauling of uncompacted and uncompactable bulky waste, thus depriving TDSL profitable tipping fee revenue by providing free bulky waste collection centers (transfer stations) both close by and elsewhere within the City, and potentially the commercial collection of dead animals to the Starcrest Transfer Station. These actions have hindered, prevented, or interfered with TDSL's ability to perform its duties under the contract for the contracted-for rate. This constitutes a breach of the Contract by which TDSL has been damaged. TDSL seeks damages for breach of contract, along with court costs and attorneys' fees as provided in the Contract and Section 38.001, Texas Civil Practice & Remedies Code.

36. Additionally or in the alternative if necessary, if the City refuses to consider a good-faith request by TDSL to adjust payment rates, the City would violate Section 4 of the parties' 1995 and subsequently amended Contract. That provision specifically allows TDSL to propose changes in the payment rate, and allows the City access to certain financial documents if such a proposal is made by TDSL. This provision must be read to impose some obligation on the City. A fundamental principle of contract interpretation is that all provisions of a contract should be

harmonized and given effect such that no provision will be rendered meaningless. Even absent this provision, TDSL would always have the right to request an adjustment in payment rates. By specifically mentioning this right in the contract, some commensurate obligation must be imposed on the City, or else the provision allowing TDSL to propose payment rate changes would be rendered meaningless. The City has continued to ignore the TDSL request for a rate increase and/or for an alternate source of profitable revenue for years. This constitutes a breach of the Contract by which TDSL has been damaged. TDSL seeks damages for breach of contract, along with court costs and attorneys' fees as provided in the Contract and Section 38.001, Texas Civil Practice & Remedies Code.

37. Additionally or in the alternative as necessary, the roll-off tonnage from the City's free bulky waste collection centers does not count toward the 100,000 ton minimum of regularly collected Municipal Solid Waste required to be delivered by the City each year to the Starcrest Transfer Station. This constitutes a breach of the Contract by which TDSL has been damaged in the amount of the difference in tons between the minimum Put or Pay shortage tonnage less the roll off tonnage from the City's free bulky waste collection centers. TDSL seeks damages for breach of contract, along with court costs and attorneys' fees as provided in the Contract and Section 38.001, Texas Civil Practice & Remedies Code.

38. Additionally, under the Contract, TDSL has no obligation to pay for alterations to the Starcrest facility requested by the City. TDSL repaired the Starcrest drop-off area at the City's request, but has not been reimbursed by the City. This constitutes a breach of the Contract by which TDSL has been damaged in an amount equal to that it expended in accomplishing the City's request. TDSL seeks damages for breach of contract in that amount, along with interest, court

costs and attorneys' fees as provided in the Contract and Section 38.001, Texas Civil Practice & Remedies Code.

39. Additionally, to the extent that the City has engaged in hauling of commercially collected dead animals or dead animals that were not collected from streets or alleys to Starcrest, the City has not paid TDSL the Contract rate for special waste applicable to such hauling. If such bulk hauling has occurred, it constitutes a breach of the Contract by which TDSL has been damaged in an amount equal to that the City is obligated to pay under the Contract. TDSL conditionally seeks damages for breach of contract in that amount, along with court costs and attorneys' fees as provided in the Contract and Section 38.001, Texas Civil Practice & Remedies Code, if the City has engaged in such bulk hauling.

## **II. Quantum Meruit.**

40. TDSL restates all preceding paragraphs as if set forth fully herein.

41. Additionally or in the alternative as necessary, TDSL has rendered valuable services for the City that were accepted by the City, but were not within the scope of the parties' Contract. The City was reasonably notified that TDSL expected to be paid for those services. Specifically, TDSL's services in transferring and disposing of uncompacted and uncompactable bulky waste from the free citizens' drop-off (transfer station) facilities are outside the Contract's scope, and the reasonable value of such services is significantly greater than the Contract rate for processing, transfer, and disposal of "regularly collected Municipal Solid Waste, as had been processed by the City through the transfer station from 1991 to 1996." TDSL seeks damages under quantum meruit for the reasonable value of its services that has not been paid by the City, along with court costs and attorneys' fees as provided in Section 38.001, Texas Civil Practice & Remedies Code.



### **III. Declaratory Judgment.**

42. TDSL restates all preceding paragraphs as if set forth fully herein.

43. Additionally or in the alternative as necessary, TDSL seeks declaratory judgment as stated herein, pursuant to the Texas Uniform Declaratory Judgment Act, Chapter 37, Texas Civil Practice & Remedies Code. Specifically, as a person interested in the Contract, TDSL seeks a declaration of its rights, status, or other legal relations under the Contract, as set forth herein, pursuant to Section 37.004, Texas Civil Practice & Remedies Code.

44. TDSL seeks declaratory judgment that it is no longer required to provide waste disposal services to the City through Starcrest at the Contract rates, due to the City's prior breach by failing to pay to TDSL for the shortfall in the City's put-or-pay requirement for the fiscal year ended August 31, 2022, as set forth above, and that TDSL is entitled to charge and collect from the City TDSL's standard gate rate for all City waste disposed of through Starcrest since the time of the City's failure to cure such breach after TDSL provided the City with notice of the breach.

45. TDSL seeks declaratory judgment that the Contract's requirement for TDSL to use "reasonable care to ensure that no vehicle of the City or its designated haulers will be required to wait more than 30 minutes" does not obligate TDSL to provide a level of service that guarantees no City vehicle will wait more than 30 minutes if doing so would result in TDSL experiencing a net negative revenue in servicing the City, and/or that the "reasonable care" provision does not require TDSL to operate in a net negative revenue fashion in servicing the City.

46. Additionally or in the alternative, TDSL seeks a declaratory judgment regarding the construction of the Contract's provisions regarding priority, the City's put-or-pay obligation, and the City's limited right to claim setoff from its put-or-pay obligation. TDSL seeks declaratory judgment that the City is not entitled to receive an offset unless it complies with the Contract's

provisions, including (1) designating an Onsite Program Manager; (2) showing that a City vehicle was actually “required to wait longer than 30 minutes” due to TDSL being unable to provide “normal services ... using reasonable care”; (3) determining, through its Program Manager, whether the vehicles are to be diverted; (4) providing notice to TDSL of any diversion “on a daily basis”; and (5) demonstrating that TDSL failed to use “reasonable care.”

47. Additionally or in the alternative, TDSL seeks declaratory judgment that it is no longer required to provide waste disposal services to the City through Starcrest at the Contract rates, because such performance has become impracticable. Since the formation of the Contract, events have occurred, the non-occurrence of which was a basic assumption on which the Contract was made. Specifically, the CPI has failed to serve as an adequate proxy to TDSL’s increased costs in performing its obligations under the Contract. The cost to TDSL in performing the City’s request for services under the Contract has increased well beyond the normal range of cost increases that could be anticipated, in 1995 and afterwards, and TDSL’s prospect for the receipt of revenue from parties other than the City were rendered unfeasible by unpredictable City actions. The failure of the CPI as an adequate proxy was unforeseen and unforeseeable by both parties to the Contract, as was the City’s development and operation of free bulky waste collection centers (transfer stations) for residents and other haulers with their own vehicles and trailers. Both parties held a basic assumption that adjustment of the Contract price based on the CPI would adequately provide for TDSL’s increased costs; this basic assumption has proven untrue, particularly since TDSL was deprived of the profitable revenue that would have come from the residents and small haulers who deliver bulky waste to the City’s free bulky waste collection centers (transfer stations). TDSL’s burden in performing under the Contract has become so great as to be unreasonable under the current circumstances. The failure of the CPI as an adequate proxy is due to circumstances

outside the control of either TDSL or the City. TDSL has employed reasonable efforts to overcome the greatly increased costs of performance under the Contract, which reasonable efforts have failed. Due to this impracticability, TDSL's duty to render waste transfer performance under the terms of the Contract is discharged. TDSL seeks a declaratory judgment that it is no longer obligated to perform under the Contract due to the above-described impracticability.

48. Additionally or in the alternative as necessary, TDSL seeks a declaration that the Contract imposed an obligation on the City to consider TDSL's proposals for rate increase in good faith. The Contract specifically allows TDSL to propose changes in the payment rate. This provision imposes an obligation on the City to engage in negotiations for rate adjustments. The City has been informed on several occasions that due to events unforeseen by both parties in 1995 when rates were quoted to the City, the current Contract rates resulted in a substantial loss to TDSL each month due to changes in operations implemented by the City over the years and due to the unforeseen and unforeseeable increase in costs not captured by the Contract's use of the CPI as a proxy for TDSL's actual increased costs. However, the City continually ignored for years TDSL's requests for a rate increase and/or for an alternate source of profitable revenue. TDSL seeks a declaration that the Contract obligates the City to consider proposed rate increases in good faith, and that the City's refusal to do so is a breach of the Contract, which precludes the City's continued benefit of a below-cost rate.

49. Additionally or in the alternative as necessary, TDSL seeks declaratory judgment that the Contract does not require it to accept at Starcrest dead animals collected by the City other than those collected by City route trucks from City streets and alleys as an incidental part of their regular collection of residential waste, and that the Contract does not require TDSL to accept at Starcrest dead animals collected by any type of collection vehicle operated by the City or its

representative if the vehicle's primary purpose is the collection of dead animals rather than the regular collection of residential waste with the incidental collection of dead animals from City streets and alleys as was the practice at the time of the Contract.

50. Additionally or in the alternative as necessary, TDSL seeks declaratory judgment that the Contract does not require it to accept uncompacted bulky waste from the City's bulky waste collection centers (transfer stations) at the rates set forth for "regularly collected Municipal Solid Waste, as had been processed by the City through the transfer station from 1991 to 1996." The processing of such uncompacted bulky waste is outside the scope of the Contract and is not qualified to be an acceptable waste under the Contract Put or Pay of the City's regularly collected municipal solid waste.

51. Additionally or in the alternative as necessary, TDSL seeks declaratory judgment that it is not required under the Contract to accept uncompacted bulky waste from the City's bulky waste collection centers (transfer stations) at the rates set forth in the Contract, due to impracticability. Since the formation of the Contract, events have occurred, the non-occurrence of which was a basic assumption on which the Contract was made. Specifically, the City has materially changed the manner in which it handles bulky waste and the manner in which such waste is brought to Starcrest for TDSL to process. While at the time the Contract was entered into such compactable waste was brought to Starcrest in compacted form, and much bulky waste was hauled by residents and commercial haulers to area landfills, the City subsequently opened its own citizens bulky waste collection centers (transfer stations) to receive loads of waste from residents and small haulers, and began bringing large volumes of such waste in roll off container loads in uncompacted form, necessitating different processing, transfer, and disposal by TDSL at a materially higher cost and depriving TDSL from receiving the same bulky waste loads into the

Starcrest Transfer Station at a profitable tipping fee. The cost to TDSL in processing, transferring, and disposing of such uncompacted and uncompactable waste has increased well beyond the normal range of cost increases that could be anticipated, due to the uncompacted nature of the waste and the City offering free disposal of bulky waste at its transfer stations. The change in the City's policy and practices was unforeseen and unforeseeable by TDSL at the time of contracting, and the City did not inform or disclose to TDSL any plans to change the basic assumptions that (1) bulky waste from the City would be managed differently, and (2) TDSL could charge higher rates for uncompacted and uncompactable bulky waste from non-City sources, both of which were basic assumptions that have proven untrue. If TDSL is required to process either the City's compacted or uncompacted bulky waste through Starcrest for the Contract's rates, TDSL's burden in performing under the Contract has become so great as to be unreasonable under the current circumstances. The change in the City's policy and practices was outside the control of TDSL. TDSL has employed reasonable efforts to overcome the greatly increased costs of performance under the Contract, which reasonable efforts have failed. Due to this impracticability, TDSL's duty to render performance of the transfer of the City's uncompacted and uncompactable bulky waste, as well as the City's compacted waste, under the terms of the Contract is discharged. Should it be held that the Contract obligates TDSL to process and transfer the City's uncompacted and uncompactable bulky waste at the Contract's rate, TDSL seeks a declaratory judgment that it is no longer obligated to perform the transfer of waste under the Contract due to the above-described impracticability.

52. TDSL further seeks recovery of court costs, and of its reasonable and necessary attorneys' fees for bringing this declaratory judgment action, pursuant to Section 37.009, Texas Civil Practice & Remedies Code.

### **JURY DEMAND**

53. TDSL demands a trial by jury and has tendered the appropriate jury fee.

### **LIMITATIONS**

54. The parties have entered into a series of tolling agreements beginning August 2, 2021 and extending through the date of filing of this Petition. Therefore, all causes of action and damages claims that existed on August 2, 2021 remain within the statute of limitations.

### **ANSWER TO COUNTER-CLAIM AND AFFIRMATIVE DEFENSES**

55. TDSL denies generally the allegations in the City's Original Counterclaim and Application for Injunctive Relief and pursuant to Rule 92, Texas Rules of Civil Procedure, requires strict proof of those allegations.

56. TDSL asserts the affirmative defense of prior material breach. The City has breached the Contract by its failure to pay for the put-or-pay shortfall for the fiscal year ending September 30, 2022, as set forth herein. The City's prior material breach excuses TDSL from any obligation to continue accepting the City's waste at the inadequate rate set forth in the Contract. The City is also in prior material breach by its failure to negotiate a revised rate, as anticipated in the Contract.

57. TDSL asserts the affirmative defenses of impracticability and unconscionability. As described herein, continued performance by TDSL at the Contract rates has been rendered impracticable and/or unconscionable by changed circumstances unforeseen and unforeseeable at the time of the Contract.

### **CONCLUSION AND PRAYER**

Wherefore, premises considered, Plaintiff Texas Disposal Systems Landfill, Inc. seeks judgment against Defendant City of San Antonio, Texas as set forth herein for breach of contract

and additionally or in the alternative for quantum meruit and for damages caused by the City's actions under such legal theories; and additionally or in the alternative seeks declaratory judgment regarding its obligations or lack of same under the Contract as set forth herein; and recovery for court costs and attorneys' fees as provided in the Contract, in Section 38.001 and/or Section 37.009 of the Civil Practice & Remedies Code; and for all such further relief, in law or in equity, as it may show itself justly entitled.

Respectfully submitted,

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(512) 480-5600 phone

/s/ James A. Hemphill

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ATTORNEYS FOR PLAINTIFF  
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent to counsel listed below, via electronic mail and/or electronic service as available, on August 15, 2023:

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Counsel for Defendant

*/s/ James A. Hemphill*

\_\_\_\_\_  
James A. Hemphill  
Christopher H. Trickey



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Filing Code Description: FIRST AMENDED PETITION

Filing Description: OF TEXAS DISPOSAL SYSTEMS LANDFILL, INC.  
AND ANSWER

Status as of 8/17/2023 11:35 AM CST

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**CAUSE NO. 2022-CI-06061**

TEXAS DISPOSAL SYSTEMS  
LANDFILL, INC.,

Plaintiff,

VS.

CITY OF SAN ANTONIO, TEXAS,

Defendant.

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IN THE DISTRICT COURT

288<sup>TH</sup> JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**DEFENDANT’S ORIGINAL COUNTERCLAIM AND APPLICATION FOR  
INJUNCTIVE RELIEF**

Defendant City of San Antonio, Texas (“the City”), files this its Original Counterclaim against Plaintiff/Counter-Defendant Texas Disposal Systems Landfill, Inc. (“TDS”) and Application for Injunctive Relief and, in support thereof, would respectfully shows the Court as follows:

**I. ORIGINAL COUNTERCLAIM**

**A. Discovery Level and Rule 47(c) Disclosure**

4. Discovery is being conducted in this case under a Level 3 Discovery Control Plan pursuant to Texas Rule of Civil Procedure 190.4.

5. Defendant/Counter-Plaintiff seeks only non-monetary damages in the form of declaratory relief and injunctive relief as described herein.<sup>1</sup> Defendant/Counter-Plaintiff further demands judgment for all the other relief to which Defendant/Counter-Plaintiff is entitled.

**B. The Parties**

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<sup>1</sup> See TEX. R. CIV. P. 47.

6. Plaintiff/Counter-Defendant Texas Disposal Systems Landfill, Inc., (“TDS” or “Plaintiff/Counter-Defendant”) is a Texas corporation with its principal office located in Travis County, Texas and has already appeared in this action and may be served through its counsel of record pursuant to Tex. R. Civ. P. 21a

7. Defendant/Counter-Plaintiff City of San Antonio (“the City”) is a Texas home-rule municipality. The City has already appeared in this action through its undersigned counsel.

**C. Jurisdiction and Venue**

8. The Court has subject matter jurisdiction over this suit and the relief requested herein because the amount in controversy is within the jurisdictional limits of this Court and because Defendant/Counter-Plaintiff seeks declaratory relief pursuant to Section 37.003 of the Texas Civil Practice and Remedies Code. The Court also has subject matter jurisdiction as the City’s counterclaim arises out of the same occurrence that is the subject matter of TDS’s claims.

9. Venue is proper as currently maintained in Bexar County, Texas. Venue is proper in Bexar County pursuant to § 15.002(a)(1) of the Texas Civil Practice and Remedies Code because all or a substantial part of the events or omissions giving rise to the claims in this lawsuit occurred in Bexar County. Moreover, the parties contractually agreed that venue would be in Bexar County.

**D. Factual Background**

***Solid Waste Management Department***

10. As one of the city-services provided to residents, the City provides regular waste collection services to over 368,000 customers, including collection of recycling and organic materials.<sup>2</sup> Such services are managed by the City’s Solid Waste Management Department (“SWMD”).<sup>3</sup>

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<sup>2</sup> See Exhibit A, Affidavit of David Newman.

<sup>3</sup> See *id.*

11. SWMD provides weekly curbside collection of residential garbage, recycling, and organics materials<sup>4</sup>. SWMD also provides curbside brush and bulky item collection two times per year.<sup>5</sup> SWMD operates four bulky waste drop-off sites, three household hazardous waste drop-off sites, and two brush drop-off sites.<sup>6</sup> Additionally, SWMD offers special collections such as dead animal collection from city streets, bagged leaf collection, and special out-of-cycle collections.<sup>7</sup> SWMD also collects the downtown litter baskets and cleans up over 9,000 illegal dumping locations and over 250 miles of litter across the City.<sup>8</sup> In total, the City collects more than 600,000 tons of waste each year via its various activities and services.<sup>9</sup>

12. Weekly curbside collections makes up approximately 350,000 tons of that total.<sup>10</sup> After being collected by SWMD, depending on the material at issue, the material is transported to either a contracted recycling company, a contracted organics composting company, or a disposal site. SWMD currently has three contracts for disposal, including the agreement with TDS, which provide access to three disposal sites within the City.<sup>11</sup> For curbside collection, collection workers are scheduled to work a 10-hour day and must complete his or her entire route each day before logging out.<sup>12</sup> Garbage routes are designed to be completed in two truckloads.<sup>13</sup> The collection drivers will collect the waste from the customers on their assigned routes until the truck is full.<sup>14</sup> Once full, the drivers travel to a designated dump site (geographically determined) to empty the

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<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See Exhibit A.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See Exhibit A.*

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

load and then return to the route.<sup>15</sup> The drivers then complete the collection of their route and, once the collection is finished, empty the second load at the disposal site to complete their day.<sup>16</sup> Any delays in traffic or at the dump site greatly affect the drivers' ability to finish on time and provide the necessary service for the citizens of San Antonio.<sup>17</sup>

13. Given the myriad of services provided, the provision of proper and efficient waste collection services is logistically complicated and requires the detailed coordination of employees, equipment, and operations.<sup>18</sup> To provide its services, SWMD employs more than 800 individuals operating out of twelve (12) locations.<sup>19</sup> For curbside collections alone, the City operates over 160 trucks daily.<sup>20</sup> Additionally, there are approximately another 130 SWMD vehicles operated daily collecting other materials, including bulky waste/brush, litter, and dead animals.<sup>21</sup> Given the coordination necessary to ensure timely service on a daily basis, any unforeseen complication can have a ripple effect significantly affecting operations.<sup>22</sup>

### ***The Agreement***

14. With the City-owned landfill coming to the end of its permitted life and with new changes in landfill regulations in the 1990's, the City permanently closed all of its City-owned landfills.<sup>23</sup> In 1993, after engaging in the bid procurement process, the City entered into three

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<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See Exhibit A.*

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *See Exhibit A.*

<sup>23</sup> *See id.*

separate contracts with Waste Management, Inc., Browning Ferris (now Republic Services), and TDS related to the disposal of the City's regularly collected solid waste.<sup>24</sup>

15. The City originally entered into a contract with TDS for landfill disposal in 1993 ("the Original Contract").<sup>25</sup> The City agreed to provide TDS a certain amount of tonnage of waste (100,000 tons) per year at an agreed upon price for disposal at TDS's landfill in Buda, Texas.<sup>26</sup> TDS agreed to accept the City's waste (up to 350,000 tons per year) at the contractually determined rate.<sup>27</sup> The Original Agreement set the initial disposal rate for the first three years, then established how any increase to such rate after the third year would be determined.<sup>28</sup> The Original Contract was set to expire in 1998 (with the option for five additional one-year extensions).<sup>29</sup>

16. The Original Agreement also contemplated that the City and TDS would enter into negotiations concerning TDS's potential use and operation of the City's Starcrest Transfer Station ("Starcrest").<sup>30</sup> A transfer station is a site where recyclables and waste are collected from multiple sources, sorted, and bundled in preparation for processing or transport to a landfill.<sup>31</sup> At Starcrest, the City would have its collection trucks (those nearby to the facility geographically) dump their collected loads at the facility.<sup>32</sup> These loads would be dumped into larger tractor trailer trucks that would then transport the load to a landfill or another facility as appropriate (*i.e.*, for recyclables).<sup>33</sup> By gathering multiple smaller loads into one larger load for transport, the City could transport the waste or other materials to their ultimate destination more efficiently and cost effectively by

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<sup>24</sup> *See id.*

<sup>25</sup> *See* Exhibit B, the Agreement.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See* Exhibit A.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

making fewer trips.<sup>34</sup> Third parties such as residents or commercial trash haulers could also dump waste at the facility for a fee (providing a revenue source for the City).<sup>35</sup> The City had owned and operated Starcrest since July 1982.<sup>36</sup> At the time, the City was using city-operated trucks loaded at Starcrest to haul waste to TDS's disposal site in Buda to satisfy the contractual requirements of the Original Agreement.<sup>37</sup>

17. The Original Contract was amended in 1995 to extend the contract duration to September 30, 2025 ("the First Amendment").<sup>38</sup> Under the First Amendment, the City was obligated to provide 50,000 tons of waste per year to TDS at TDS's Buda landfill.<sup>39</sup> TDS was obligated to accept up to 500,000 tons of the City's municipal waste annually at the contractually established rate.<sup>40</sup> The First Amendment again set out the disposal rates for the first two years of the Amendment, then provided the method by which future increases to the disposal rate would be established.<sup>41</sup> Additionally, the First Amendment noted that the parties would enter into negotiations regarding TDS's potential operation of Starcrest.<sup>42</sup>

18. In 1998, the City and TDS finalized negotiations related to Starcrest and executed a second amendment to the Original Contract ("the Second Amendment").<sup>43</sup> Pursuant to the Second Amendment, TDS would lease and operate Starcrest and accept the City's solid waste at the site for an agreed upon rate. TDS was obligated to accept up to 500,000 tons of the City's waste

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<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See id.*

<sup>38</sup> *See* Exhibit B.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See* Exhibit B.

annually at the contractual rate.<sup>44</sup> As it had before, the City continued to have any annual tonnage obligation to provide to TDS as well.<sup>45</sup> As in the Original Agreement and First Amendment, the Second Amendment established the disposal rate to be paid by the City for dumping waste at Starcrest for the first two years of the agreement then set out the mechanism for determining any rate increases thereafter.<sup>46</sup>

19. In operating Starcrest, TDS had to accept the City's solid waste brought to the facility; however, so long as TDS gave city-haulers priority of service as set out in the Agreement, TDS could also accept waste at Starcrest from TDS's own trucks as well as from third parties, such as private citizens, at whatever rate TDS chose.<sup>47</sup> Thus, TDS had a separate stream of revenue from the site. TDS could also operate a retail landscape materials operations at this site for additional revenue.<sup>48</sup>

20. The Second Amendment was set to expire on January 15, 2023, unless TDS chose to extend the contract to expire in 2025 to coincide with the expiration of the First Amendment.<sup>49</sup>

21. Together, the Original Contract, First Amendment, and Second Amendment are referred to herein as the Agreement. At a high level, under the Agreement, the City has an obligation to deliver 100,000 tons of solid waste to TDS for disposal annually (either via delivery to the landfill in Buda or dumping at Starcrest currently operated by TDS).<sup>50</sup> For its part, in addition to other requirements, TDS has an obligation to accept up to 500,000 tons of solid waste from the City at the contractually set rate.<sup>51</sup> The Agreement sets out the various obligations of the

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<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See Exhibit B.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See generally, Exhibit B.*

<sup>51</sup> *See id.*



parties including the annual disposal rate the City pays per ton of waste and how future increases of the disposal rate would be determined.<sup>52</sup>

***TDS seeks to unilaterally modify the Agreement and breaches the Agreement***

22. For more than twenty years, TDS and the City performed their obligations under the Agreement.<sup>53</sup>

23. On August 2, 2021, TDS sent the City a letter invoking the mediation clause of the Agreement as a prerequisite to litigation.<sup>54</sup> In the letter, TDS claimed that that the annual increases on the disposal rate were insufficient given a reduction in revenue and increase in costs (including costs driven by the City's allegedly improper dumping of bulky waste at Starcrest).<sup>55</sup> TDS included two invoices both dated with the same date as the letter. One invoice was for alleged extra costs associated with bulky waste delivered to Starcrest by the City from January of 2013 through 2021.<sup>56</sup> The second invoice was for alleged costs to make a repair at the facility in October of 2017.<sup>57</sup>

24. TDS had accepted bulky waste at Starcrest without complaint since 2013 and the contract has no prohibition on the dumping of bulky waste at Starcrest.<sup>58</sup> Moreover, TDS had been billing and invoicing the City separately for any bulky waste dumped at the site, which the City had paid as received.<sup>59</sup> Regardless, to avoid further issue until the dispute could be resolved, the City immediately ceased delivering bulky waste to Starcrest as of August 3, 2021, and has not

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<sup>52</sup> *See id.*

<sup>53</sup> *See Exhibit A.*

<sup>54</sup> *See Exhibit C, TDS's 08/02/2021 correspondence invoking mediation.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See Exhibit A.*

<sup>59</sup> *See Id.*

delivered bulky waste to the site since that date; thereby curing any alleged default caused by the delivery of bulky waste to Starcrest.<sup>60</sup> However, the City disagreed that it owed TDS any payment for either invoice.<sup>61</sup>

25. On November 19, 2021, the City informally met with TDS to try to resolve the issues raised in TDS's August letter.<sup>62</sup> In the meeting, TDS requested an increase in the disposal fee beyond that required by the Agreement and sought to change how future increases would be calculated.<sup>63</sup> The City did not agree to the changes given the changes were inconsistent with, and not required by, the Agreement.<sup>64</sup> Three days later, without justification, TDS announced that it would no longer accept dead animals at Starcrest on the belief that the City was collecting commercially collected dead animals (*i.e.*, animals from veterinary offices and not off the street) and dumping them at Starcrest.<sup>65</sup> After the City spoke with TDS to assure TDS that it was not dumping commercially collected dead animals, TDS agreed to resume accepting dead animals on November 24th.<sup>66</sup> However, two weeks later, in violation of the Agreement, TDS announced that dead animals could no longer be dumped on Saturdays.<sup>67</sup> Additionally, TDS also announced that Starcrest would close earlier each weekday and would not be available after hours or on the weekends as it had been before.<sup>68</sup>

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<sup>60</sup> *See id.* The Agreement requires that notice of alleged default must be provided to the defaulting party and time allowed to that party to cure the alleged default. To the extent TDS claims that the City's dumping of bulky waste at Starcrest was inconsistent with the Agreement, the City cured any alleged default the day it received notice.

<sup>61</sup> *See Exhibit A.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See Exhibit A.* The City regularly collects approximately 25,000 dead animals off of city streets and alleys annually.

<sup>68</sup> *See id.*

26. On March 9, 2022, the City and TDS unsuccessfully mediated the contract dispute.<sup>69</sup> The next day, after the mediation failed, the City began to experience significant delays in service at Starcrest.<sup>70</sup> TDS reduced personnel at Starcrest and added additional steps for dumping.<sup>71</sup> Where it had previously rarely taken the City more than thirty minutes for a truck to dump a load at Starcrest, the City trucks now began to experience regular delays of more than an hour (with some incidents of trucks waiting almost two hours) causing huge delays in servicing the City's routes and increasing operational issues.<sup>72</sup> The day after the mediation, TDS also stated that it would accept no dead animals on any day at Starcrest and has refused to accept collected dead animals since that date.<sup>73</sup>

27. On March 31, 2022, TDS filed its lawsuit against the City alleging claims of breach of contract and quantum meruit as well as seeking declaratory judgment. The City denied all such claims as baseless.

28. On May 16, 2022, the City sent its first Notice to Cure to TDS advising TDS to cure the service delay issues and to accept dead animals at Starcrest in accordance with the Agreement.<sup>74</sup> While there were minor improvements in the services times after receiving the Notice, long delays remained such that the City had to begin diverting trucks to other landfills for dumping in an attempt to prevent the excessive delays from impacting operations.<sup>75</sup> Additionally, TDS continued to refuse to accept dead animals.<sup>76</sup> Thereafter, the parties agreed to a second mediation.

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<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See* Exhibit D, the City's 5/17/2022 Notice of Default to TDS.

<sup>75</sup> *See* Exhibit A.

<sup>76</sup> *See id.*

29. In September of 2022, pending mediation, the City sent a second Notice to Cure regarding TDS's failure to provide priority to City trucks as required by the Agreement and failure to maintain equipment at Starcrest.<sup>77</sup> The City's drivers were reporting that TDS was not complying with the proper ratio of servicing the City haulers before other haulers required by the Agreement.<sup>78</sup> Also, a scale at the facility was reportedly broken.<sup>79</sup> Both issues were (on top of the ongoing service issues) contributing to continued delays in the service of the City's trucks.<sup>80</sup> As a direct result of TDS's conduct and failure to abide by the Agreement, the City did not meet the tonnage requirements under the Agreement for 2022 for the first time in the decades-long duration of the Agreement.<sup>81</sup>

30. On November 22, 2022, TDS sent its response to the City's default notices and disputed the City's assertions.<sup>82</sup> The letter also served as TDS's Notice to Cure to the City for alleged defaults by the City related to the Agreement.<sup>83</sup> The Notice included both old and new assertions of default (including the tonnage shortage for 2022).<sup>84</sup> The Notice gave the City until January 15, 2023 to cure the alleged defaults (including payment of over \$12,000,000 in alleged amounts owed).<sup>85</sup> Per the Notice, if the City does not capitulate to TDS's unlawful and baseless demands, TDS will deny the City access to Starcrest or, alternatively, will allow the City access so long as the City pays the standard gate rates charged to third-party customers (*i.e.*, not the

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<sup>77</sup> See Exhibit E, The City's 9/16/2022 Notice of Default to TDS.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Exhibit A.

<sup>81</sup> See *id.*

<sup>82</sup> See Exhibit F, TDS's 11/22/2022 correspondence regarding "default."

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

reduced contractual rate in the Agreement).<sup>86</sup> If the City refuses to pay the gate rate, TDS will prevent the City from using the Starcrest facility.<sup>87</sup> Further complicating the threat, the public gate rate uses a different measurement for disposal loads than the contractual measurement such that it would be impossible for the City to reconcile what amount should be paid for each load under the Agreement as opposed to what TDS will attempt to charge (the public rate).<sup>88</sup> Relatedly, as a clear indication that TDS intends to move forward with its threat, TDS recently requested a list of City vehicles that would be accessing Starcrest and their capacity yardage.<sup>89</sup>

31. At the end of the Notice, despite all of TDS's assertions that the Agreement is an unfair financial burden and other claims included in its Petition, the letter also exercised TDS's option to extend the Agreement for an additional two years to 2025.<sup>90</sup> By separate letter, TDS also sent its annual notice of proposed rate increase to the City.<sup>91</sup> In the letter, TDS recognized what rate would be proper under the Agreement but then asserted that the rate would more appropriately be twice the Agreement rate.<sup>92</sup> The City responded that the appropriate rate, and thus what the City will pay, is the rate set by the Agreement.<sup>93</sup>

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<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See* Exhibit A. TDS public gate rate is calculated and charged by cubic yard whereas the Agreement's disposal rate contemplates payment for tonnage. When charging by the cubic yard, TDS does not weigh load being disposed—TDS charges based on the size of the truck bringing the waste. Without the weight, the City is unable to calculate the proper amount to be paid for each load under the contract, which is a rate per ton. It should be noted that SWMD's collection trucks are fully enclosed making an accurate visual estimate of volume inside this enclosed truck impossible.

<sup>89</sup> *See* Exhibit G, TDS 1/11/2023 correspondence regarding truck information.

<sup>90</sup> *See* Exhibit F.

<sup>91</sup> *See* Exhibit H, TDS's 11/22/2022 correspondence regarding 2023 rates.

<sup>92</sup> *See id.*

<sup>93</sup> *See* Exhibit A.

32. Accordingly, the City now files this counterclaim to seek a declaration of the City's rights and TDS's obligations under the Agreement. The City further seeks injunctive relief to maintain the status quo of the parties' relationship pending the outcome of this litigation.

**E. Causes of Action**

**COUNT ONE – DECLARATORY JUDGMENT**

33. Defendant/Counter-Plaintiff incorporates and re-alleges all previous paragraphs by reference as if fully set forth herein.

34. The facts described above present an actual controversy within this Court's jurisdiction. A real and substantial controversy exists between the parties regarding the parties' obligations in their business relationship.

35. A valid and enforceable contract exists between the City and TDS. The Agreement contains the following relevant provisions:<sup>94</sup>

*Section 6(F) of the Agreement (Second Amendment – “disposal rates”*

TDSL agrees to accept up to 500,000 tons per year of City solid waste hauled by any City vehicle or designated haulers...during the term of this Agreement at the rates as adjusted in the matter set forth in this Agreement...TDSL agrees to accept the City's regularly collected Municipal Solid Waste, which includes waste from all City department, City contractors, and designated City haulers at the City's contracted price...The City's need to process additional volumes and types of waste materials appropriate for the transfer station shall be reasonably accommodated over time by good faith modifications to the Transfer Station by TDSL.

*Section of the Agreement (Second Amendment)*

B. TDSL shall operate the Transfer Station at a minimum of Monday through Friday of each week from 7:00 a.m. to 5:00 p.m....

C. Priority to City for Service: Pursuant to Ordinance No. 85263, passed December 5, 1996, which provide in part that this Second Amendment is intended to the City, “First priority for the City's use and access to the Transfer Station facilities, thereby affording the City a first right of service and limiting working or services available to third parties at any time the City may so choose or need the station's capacity.”

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<sup>94</sup> See Exhibit B.

It is understood that the purpose of the foregoing requirements is to protect the City's right to first priority for daily capacity to the Transfer Station.

(1) At any time, City shall have the first right of service at the Transfer Station, but especially, on Monday, Tuesday, Thursday, and Friday....

(2) In case of simultaneous demand from the City and its designated haulers, and TDS or other haulers, the City and its designated haulers, and TDS and other haulers will wait in separate lines for the same services. When the City and its designated haulers and TDS and other haulers are waiting for the same services, the City, and its designated haulers, will be allowed service four vehicles to every one by TDS or other haulers. TDSL shall use reasonable care to ensure that no vehicle of the City or its designated haulers will be required to wait more than 30 minutes. For purposes of this Agreement, TDSL shall be deemed to have used reasonable care even though trucks belonging to the City or its designated haulers have to wait more than 30 minutes, if the wait is due to large numbers (15 or more vehicles) of collection trucks owned by the City or its designated haulers arriving at the Transfer Station within approximately the same time period.

(3) In the event that a City vehicle is required to wait longer than 30 minutes as a result of (i) TDSL not providing the City first right to service at the Transfer Station or (ii) TDSL being unable to provide normal services to the Transfer Station using reasonable care, the City's on-site Program Manager will determine, at his/her sole discretion whether City vehicles are to be diverted to another landfill. If City vehicles are diverted due to the failure of TDSL to use reasonable care, TDSL will:

- a. Pay the City the added cost to transport and dispose of waste [at a designated alternative site]...
- b. Take immediate steps to put the Transfer Station back in service...
- c. Credit towards the City's requirement to deliver 100,000 tons annually all tons diverted from the Transfer Station to another disposal facility...

D. The City and its designated haulers shall have first right of access to any and all capacity at the Transfer Station for full process and disposal services at the contract price. TDS will have second priority. Third parties will have last priority....

G. TDSL shall provide for disposal of dead animals collected on City streets and alleys and brought to the transfer station by the City or its designated haulers between the hours of 7:00 AM and 6:00 PM, Monday through Friday and 7:00 AM to Noon on Saturday...

T. City shall pay TDSL a disposal rate per ton for all municipal solid waste delivered to TDSL at the Transfer Station pursuant to this Second Amendment ("Disposal Rate

at Transfer Station”) of \$19.13 for the period of March 1, 1997 to September 30, 1997, and \$20.62 for the period of October 1, 1997 to September 30, 1998....Beginning on October 1, 1998, and continuing on the same date each year thereafter, the Disposal Rate at the Transfer Station shall be adjusted by the Consumer Price Index as defined in Section 6B of the First Amendment....

*Section 6(B) of the Agreement (First Amendment (as referenced in Second Amendment) — “Disposal Rate Increases”*

CPI, as used herein, means the “Consumer Price Index” determined by the United States labor’s Bureau of Labor Statistics Consumer Price Index. All Urban Wage Earners and Clerical Workers, All Items, for the Southern Region of the United States, or the successor of such index, or if no successor index is designated, then other index as may be agreed by the parties hereto. The base index shall be September, 1995.

36. Pursuant to Chapter 37 of the TEX. CIV. PRAC. & REM. CODE, the City seeks a declaration of the rights, status, and other legal relations between the parties, including but not limited to, pursuant to the Agreement, the following declarations:

i. Under the Agreement, TDS has no right to refuse the City access to Starcrest or prevent the City from dumping solid waste at Starcrest; therefore, TDS must continue to allow the City’s access to Starcrest for dumping of solid waste;

ii. Under the Agreement, the disposal rate for solid waste dumped by the City at Starcrest for the year 2023 is \$36.23 per ton, therefore, the City is not obligated to pay more than \$36.23 per ton for all solid waste dumped under the Agreement and TDS cannot refuse service to the City for failure to pay a rate beyond the contract rate;

iii. Under the Agreement, for the duration of the contract through 2025, the disposal rate will increase or decrease as follows:

(a) 2024: The 2023 rate plus or minus any change in the CPI index as defined in Section 6B of the First Amendment;

(b) 2025: The 2024 rate plus or minus any change in the CPI index as defined in Section 6B of the First Amendment; and

iv. Under the Agreement, TDS has no basis, factual or legal, to refuse to accept the City’s dead animal waste and must accept all waste for the duration of the Agreement; and

v. Under the Agreement, the City haulers dumping at Starcrest must be serviced within thirty (30) minutes except in situations of heavy demand whereby



more than fifteen (15) or more city-owned haulers attempt to dump at Starcrest within approximately the same time period.

37. The City requests such other declaratory relief of all other rights and obligations, as necessary, as between the parties.

38. Pursuant to Tex. Civ. Prac. & Rem. Code § 37.009 and the contract between the parties, the City further seeks recovery of its attorneys' fees and costs as are reasonable and necessary, equitable, just, and as permitted by the Court in securing the aforementioned declaratory relief against TDS.

### **COUNT TWO – APPLICATION FOR INJUNCTIVE RELIEF**

39. Defendant/Counter-Plaintiff incorporates and re-alleges all previous paragraphs by reference as if fully set forth herein. **To be clear, TDS is threatening to disrupt the City's solid waste operations, which could cause ripples impacting the City and its customers (residents of the City)—impacting public health and safety, as nothing more than an aggressive attempt to force the City to renegotiate a contract that the City has no obligation to renegotiate.**

40. The purpose of a temporary injunction “is to preserve the *status quo* of the litigation’s subject matter pending a trial on the merits.”<sup>95</sup> In the injunction context, the status quo is “the last, actual, peaceable, non-contested status that preceded the pending controversy.”<sup>96</sup> To obtain injunctive relief the City must prove: “(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.”<sup>97</sup>

41. “To establish a probable right to relief, a party is not required to prove that it will prevail at a final trial in order to invoke the trial court’s discretion to grant a temporary injunction.

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<sup>95</sup> *Butnaru v. Ford Motor Co.*, 84 S.W. 3d 198, 205 (Tex. 2002).

<sup>96</sup> *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

<sup>97</sup> *Butnaru*, 84 S.W.3d at 204 (Tex. 2002).

Rather, a probable right of recovery is shown by alleging a cause of action and presenting evidence tending to sustain it.”<sup>98</sup>

42. An injury is irreparable if it cannot be adequately remedied at law—*i.e.*, if the injunction applicant cannot be adequately compensated in damages or if damages are very difficult to measure by any certain pecuniary standard.<sup>99</sup> “Thus, if damages do not provide as complete, practical and efficient a remedy as may be had by injunctive relief, the trial court does not err in granting temporary injunction so long as the other elements of injunctive relief are satisfied.”<sup>100</sup>

43. Texas Civil Practice and Remedies Code § 65.011 sets forth the various grounds for an injunction and provides in pertinent part:

Sec. 65.011. GROUND GENERALLY. A writ of injunction may be granted if:

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;

(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions....

44. The decision to grant an injunction rests with the trial court’s sound discretion and is reviewed for an abuse of discretion.<sup>101</sup> “When a trial court holds a hearing on a temporary

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<sup>98</sup> *Savering v. City of Mansfield*, 505 S.W.3d 33, 39 (Tex. App.—Fort Worth 2016, pet. denied) (citing *Oil Field Haulers Ass’n v. R.R. Comm’n*, 381 S.W.2d 183, 196 (Tex. 1964); *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 220 (Tex. App.—Fort Worth 2009, pet. denied)).

<sup>99</sup> *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *Butnaru*, 84 S.W.3d at 204; *Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 692 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Lifeguard Benefit Servs., Inc. v. Direct Med. Network Solutions, Inc.*, 308 S.W.3d 102, 111 (Tex. App.—Fort Worth 2010, no pet.)).

<sup>100</sup> *Id.*

<sup>101</sup> *Butnaru*, 84 S.W.3d at 204.

injunction, the only question ‘is whether the applicant is entitled to preservation of the status quo of the subject matter of the suit pending trial on the merits. The ruling on the temporary injunction may not be used to obtain an advance ruling on the merits.’”<sup>102</sup> As such, “[t]he trial court has broad discretion in determining whether the pleadings and evidence support a temporary injunction.”<sup>103</sup>

45. In support of its request for injunctive relief, the City has attached hereto:

Exhibit A — Affidavit of David Newman

Exhibit B — The Agreement (the Original Contract, First Amendment, and Second Amendment)

Exhibit C — TDS’s 08/02/2021 correspondence invoking mediation

Exhibit D — The City’s 5/17/2022 Notice of Default to TDS

Exhibit E — The City’s 9/16/2022 Notice of Default to TDS

Exhibit F — TDS’s 11/22/2022 correspondence regarding “default”

Exhibit G — TDS 1/11/2023 correspondence regarding truck information

Exhibit H — TDS’s 11/22/2022 correspondence regarding 2023 rates

46. Based on the facts and allegations recited herein, the City satisfies all of the required elements for injunctive relief. The City satisfies the first element of its request for injunctive relief because it asserts a claim for declaratory judgment against TDS and alleges facts which satisfy the elements of the asserted claim.

47. The City has satisfied the second element as the City has established a probable right to the relief sought in its injunction request because it has established it is entitled to a

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<sup>102</sup> *Stewart Beach Condo. Homeowners Ass'n v. Gili N Prop Invs., LLC*, 481 S.W.3d 336, 346 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (citing *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981)).

<sup>103</sup> *Intercontinental Terminals Co., LLC*, 354 S.W.3d at 898 (citing *Recon Exploration, Inc. v. Hodges*, 798 S.W.2d 848, 851 (Tex. App.—Dallas 1990, no writ); *Pub. Util. Comm'n of Tex. v. Gen. Tel. Co. of the Sw.*, 777 S.W.2d 827, 829 (Tex. App.—Austin 1989, writ dism'd)).

declaratory judgment (as to those declarations set out above), and has presented enough evidence “to raise a bona fide issue as to [its] right to ultimate relief.”<sup>104</sup>

48. The parties understood how critical it was that the City always have access to Starcrest and that TDS must accept the City’s waste as it was repeatedly discussed in the Agreement.<sup>105</sup>

### Second Amendment

#### *Purpose and Severability*

Operation of the Transfer Station is an essential City service directly impacting public health. Therefore it is paramount to the public interest in both relationships, that it be understood and agreed between the parties that the subject matter of this Second Amendment is in all ways severable from and independent of the subject matter of the Original Agreement and first Amendment in the event of a default under either the Original Agreement and its First Amendment or this Second Amendment with the exception of certain provisions as set forth in this Second Amendment.

#### *Disposal Rate (Paragraph 6(F))*

TDSL agrees to accept up to 500,000 tons per year of City solid waste hauled by any City vehicle or designated haulers...during the term of this Agreement at the rates and adjusted in the matter set forth in this Agreement...TDSL agrees to accept the City’s regularly collected Municipal Solid Waste, which includes waste from all City department, City contractors, and designated City haulers at the City’s contracted price...The City’s need to process additional volumes and types of waste materials appropriate for the transfer station shall be reasonably accommodated over time by good faith modifications to the Transfer Station by TDSL.

#### *Transfer Station (Section 18)*

B. TDSL shall operate the Transfer Station at a minimum of Monday through Friday of each week from 7:00 a.m. to 5:00 p.m....

C. Priority to City for Service: Pursuant to Ordinance No. 85263, passed December 5, 1996, which provided in part that this Second Amendment is intended to the City, “First priority for the City’s use and access to the Transfer Station facilities, thereby affording the City a first right of service and limiting working or services available

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<sup>104</sup> *Regal Entm’t Grp. v. iPic-Gold Class Entm’t, LLC*, 507 S.W.3d 337, 346 (Tex. App.—Houston [1st Dist.], 2016, no pet.).

<sup>105</sup> See Exhibit B.

to third parties at any time the City may so choose or need the station's capacity." It is understood that the purpose of the foregoing requirements is to protect the City's right to first priority for daily capacity to the Transfer Station.

(1) At any time, City shall have the first right of service at the Transfer Station, but especially, on Monday, Tuesday, Thursday, and Friday....

D. City and its designated haulers shall have first right of access to any and all capacity at the Transfer Station for full process and disposal services at the contract prices....

N...TDSL shall also have the right to accept solid waste from other haulers, to the extent that the acceptance of such volume does not interfere with the City's priority and the orderly acceptance of City collection vehicles.

*Dispute Resolutions (Section 19)*

C. Extraordinary Contractual Remedies Available to City

(1) ***In recognition of the fact that the City requires daily access to the Transfer Station because the operation of the Station is an essential City service potentially impact public health***, the City shall have certain extraordinary remedies under the circumstances outlined in this paragraph. These extraordinary remedies are in addition to, and not to the exclusion of, any and all remedies the City may have at law and in equity to enforce the terms of this contract or to protect the public health, safety and welfare...

49. Thus, based on the facts and allegations recited herein, the City has shown that it satisfies the third element of this request for injunctive relief, and that it will suffer probable and imminent harm, or that there is a well-grounded probability that such expected harm will occur, unless TDS is restrained.<sup>106</sup> Without intervention from this Court, the City will lose access to dumping at the Starcrest property, which could have significant consequences for its operations.<sup>107</sup> Critically, the lack of access to Starcrest is necessary to ensure that the City can continue to provide an essential city service.<sup>108</sup> The Agreement repeatedly notes the City's need for not only access but priority to the site, emphasizing the importance of access to Starcrest.<sup>109</sup> Denying the City

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<sup>106</sup> See *Howell v. Tex. Works' Comp. Comm'n*, 143 S.W.3d 416, 432 (Tex. App.—Austin 2004, pet. denied).

<sup>107</sup> See Exhibit F; see also Exhibit A.

<sup>108</sup> See Exhibit A.

<sup>109</sup> See Exhibit B.

access to Starcrest would impact SWMD's ability to complete daily collection in a timely and efficient manner, which will have a ripple effect throughout the Department's operations (including increased costs for equipment and personnel).<sup>110</sup> The City contracted for three disposal sites, and contracted for priority of service at Starcrest, because it is critical that the City have sufficient disposal access to meet its daily operational needs, and failure to have such access, even for one day, impacts the City's ability to provide the services depended on by its residents and, ultimately, public health if it cannot meet those needs.<sup>111</sup>

50. While less important than public health, but still significant, TDS's refusal to allow access to Starcrest also impacts the City's ability to meet its contractual requirements under the Agreement (by preventing the City from meeting its tonnage requirements).<sup>112</sup> Additionally, TDS's unilaterally change of the disposal rate impacts the City's ability to perform consistent with the terms of the Agreement. By charging the City the public gate rate (which does not require weighing of the truck), TDS will create a situation where the City has no ability to track the tonnage dumped at Starcrest so that the City can properly issue payment per the Agreement.<sup>113</sup>

51. Unless this Court immediately restrains TDS, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, the City will suffer irreparable injury. It is at risk of immediately losing access to a disposal site—one at which it has priority rights. If the City is prevented from exercising that right, there is risk that the City will no longer have access to sufficient sites to fulfill the City's disposal needs, which impacts the public's health and safety as discussed above.<sup>114</sup>

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<sup>110</sup> See Exhibit A.

<sup>111</sup> See *id.*

<sup>112</sup> See Exhibit B.

<sup>113</sup> See Exhibit A.

<sup>114</sup> See *id.*; see also Exhibit B.

52. The City requests that the Court issue a temporary injunction prohibiting TDS from continuing to act in contravention of the Agreement. Specifically, to maintain the status quo during the pendency of this litigation, the City is requesting that:

- i. TDS be enjoined from preventing the City from accessing Starcrest and dumping solid waste at Starcrest until the conclusion of this litigation;
- ii. TDS be enjoined from charging the City a disposal rate beyond \$36.23 per ton for solid municipal waste dumped by the City at Starcrest in 2023;
- iii. TDS be required to weigh all the City trash haulers and bill the City per ton for all waste dumped at Starcrest as required by the Agreement and that TDS further be prohibited from modifying its method of charging for solid waste dumped by the City at Starcrest in a manner inconsistent with the Agreement; and
- iv. TDS be required to provide priority of service to the City waste haulers in accordance with the Agreement.

53. Defendant/Counter-Plaintiff further requests that the Court set this Request for Temporary Injunctive Relief for a hearing and, after the hearing, issue a temporary injunction against TDS as requested above.

54. The City further requests that the Court set its request for permanent injunctive relief for a full trial on the merits and, after the trial, issue a permanent injunction against TDS in the same manner as requested in the City's Application for Temporary Injunctive Relief, *supra*.

55. All indispensable parties to this Lawsuit are joined as required under TEX. R. CIV. P. 39.

**II.**  
**CONDITIONS PRECEDENT**

56. Pursuant to Texas Rule of Civil Procedure 54, all conditions precedent to Counter-Plaintiff's claims for relief have been performed or have occurred.

**III.**  
**BOND**

57. The City is willing to post bond in the amount which the Court determines is necessary and to serve as adequate security for the injunctive relief requested herein.

**IV.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant City of San Antonio respectfully prays that this Court:

- i) Enter declaratory judgment in favor of Defendant/Counter-Plaintiff the City as requested herein;
- ii) Award the City reasonable and necessary attorneys' fees and costs incurred in this action;
- iii) Grant the City's request for injunctive relief as described herein; and
- iv) Award the City's such other and further relief, general or special, at law or in equity, to which it is justly entitled.

Respectfully submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record via email, according to the Texas Rules of Civil Procedure on this the 12<sup>th</sup> day of January, 2023:

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