

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

SOLID WASTE SERVICES INC DBA J P MASCARO &
SONS

vs.

WHITEMARSH TOWNSHIP

NO. 2021-03327

NOTICE TO DEFEND - CIVIL

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERENCE SERVICE
MONTGOMERY BAR ASSOCIATION
100 West Airy Street (REAR)
NORRISTOWN, PA 19404-0268

(610) 279-9660, EXTENSION 201

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

SOLID WASTE SERVICES INC DBA J P MASCARO &
SONS

vs.

WHITEMARSH TOWNSHIP

NO. 2021-03327

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: WILLIAM F FOX JR, Esq., ID: 21361

Self-Represented (Pro Se) Litigant

Class Action Suit Yes No

MDJ Appeal Yes No

Money Damages Requested

Commencement of Action:

Amount in Controversy:

Complaint

Case Type and Code

Contract:

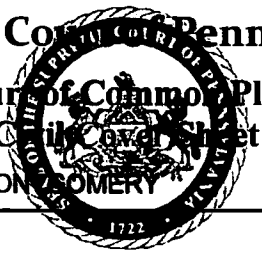
Other

Other: COMPLAINT FOR DECLARATORY AND EQUITABLE

Supreme Court of Pennsylvania

Court of Common Pleas

MONROEMERY County



For Prothonotary Use Only:

Docket No: _____

TIME STAMP

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Commencement of Action:

- Complaint
 Writ of Summons
 Petition
 Transfer from Another Jurisdiction
 Declaration of Taking

Lead Plaintiff's Name:
Solid Waste Services, Inc. d/b/a J. P. Mascaro & Sons

Lead Defendant's Name:
Whitemarsh Township

Are money damages requested? Yes No

Dollar Amount Requested: within arbitration limits
 outside arbitration limits
(check one)

Is this a *Class Action Suit*? Yes No

Is this an *MDJ Appeal*? Yes No

Name of Plaintiff/Appellant's Attorney: William F. Fox, Jr., Albert A. DeGennaro, Gregory W. Fox

Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

Nature of the Case: Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- Intentional
 Malicious Prosecution
 Motor Vehicle
 Nuisance
 Premises Liability
 Product Liability (does not include mass tort)
 Slander/Libel/ Defamation
 Other: _____

CONTRACT (do not include Judgments)

- Buyer Plaintiff
 Debt Collection: Credit Card
 Debt Collection: Other

 Employment Dispute: Discrimination
 Employment Dispute: Other

 Other: _____

CIVIL APPEALS

- Administrative Agencies
 Board of Assessment
 Board of Elections
 Dept. of Transportation
 Statutory Appeal: Other

- Zoning Board
 Other: _____

MASS TORT

- Asbestos
 Tobacco
 Toxic Tort - DES
 Toxic Tort - Implant
 Toxic Waste
 Other: _____

REAL PROPERTY

- Ejectment
 Eminent Domain/Condemnation
 Ground Rent
 Landlord/Tenant Dispute
 Mortgage Foreclosure: Residential
 Mortgage Foreclosure: Commercial
 Partition
 Quiet Title
 Other: _____

MISCELLANEOUS

- Common Law/Statutory Arbitration
 Declaratory Judgment
 Mandamus
 Non-Domestic Relations Restraining Order
 Quo Warranto
 Replevin
 Other: Equitable Reformation or Rescission

PROFESSIONAL LIABILITY

- Dental
 Legal
 Medical
 Other Professional: _____

SECTION A

SECTION B

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

SOLID WASTE SERVICES, INC.	:	
d/b/a J. P. MASCARO & SONS,	:	CIVIL ACTION
<i>Plaintiff,</i>	:	
	:	NO.
v.	:	
	:	
WHITEMARSH TOWNSHIP,	:	
<i>Defendant</i>	:	

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without **further** notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT **HIRING** A LAWYER.

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100 West Airy Street (REAR)
Norristown, PA 19401
610-279-9660, EXTENSION 201

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

SOLID WASTE SERVICES, INC.
d/b/a J. P. MASCARO & SONS
2650 Audubon Road
Audubon, PA 19403,

Plaintiff,

v.

WHITEMARSH TOWNSHIP
616 Germantown Pike
Lafayette Hill, PA 19444,

Defendant.

CIVIL ACTION

NO.

COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF

I. INTRODUCTION – NATURE OF ACTION

This is an action for declaratory and equitable relief by Plaintiff, Solid Waste Services, Inc. d/b/a J. P. Mascaro & Sons ("Mascaro"), a waste service company that engages in the collection, recycling, processing and disposal of residential solid waste and recyclables for municipalities pursuant to competitively bid and awarded contracts, against Defendant, Whitemarsh Township ("Whitemarsh" or "Township"), a Pennsylvania municipal corporation organized and existing under the Second Class Township Code, 53 P.S. § 65101, et seq.

In November 2019, the Township solicited competitive bids for the collection of residential trash and recyclables, and mandated that each bidder use a Township-provided Bid Form to compute the total cost of its bid for each contract year and divide that total cost by 6,500 residential units to come to a per unit/per year cost. The Township awarded Mascaro a three year trash and recycling contract, with two one-year options at the Township's discretion, on Mascaro's total five

year price of \$11,014,380 (i.e., \$8,089,380 for trash collection and disposal and \$2,925,000 for recyclables collection and processing).

The Township paid Mascaro in 12 equal monthly installments the full amount of its bid price and contract price for calendar year 2020 (i.e., \$2,131,740). But beginning in 2021, a very serious and actual controversy arose between Mascaro and the Township, which controversy continues to exist and is the reason for this declaratory judgment and equity action.

In January 2021, because of a significant mistake the Township made in its Bid Specifications that Mascaro was mandated to comply with and upon which the Trash and Recycling Contract was solicited and awarded, the Township unilaterally started to make large unwarranted dollar deductions (i.e., \$27,105) from the monthly contract payments due to Mascaro. The mistake in question was entirely the fault of the Township, and the Township indicated the monthly deductions would increase in each contract year (i.e., \$27,381 per month for contract year 2022, \$28,337 per month for contract year 2023, and \$29,461 per month for contract year 2024. These unilateral and unwarranted monthly deductions by the Township will, if continued, total \$1,347,426 over the contract life, which roughly equates to Mascaro's profit margin on this contract.

In layman's terms, the Township is wrongfully and improperly trying to take advantage of its own mistake for which it is entirely responsible and to put the financial burden of the Township's mistake on Mascaro's back. The Township has attempted to justify its monthly deductions on an improper interpretation/construction of a contract clause that provides for additional compensation to be paid to Mascaro if there is an "actual annual increase" in the number of homes in the Township serviced by Mascaro from one year to the next, and that provides for

reduced compensation to be paid to Mascaro if there is an "actual annual decrease" in the number of Township homes serviced by Mascaro from one year to the next.

The undisputed fact here is that there has been no "actual annual decrease" in the number of homes in the Township from 2020, where the Township paid Mascaro its full contract amount, to 2021, where the Township is now unilaterally deducting \$27,105 per month from what it should be paying to Mascaro under the awarded contract. The Township's actions here have nothing whatsoever to do with an "actual annual decrease" in the number of homes in the Township, and everything to do with the Township wrongfully attempting to make Mascaro financially responsible for the Township's mistake. Because there has been no "actual annual decrease" in the number of homes, there should be no monetary reduction in the monthly contract amount being paid by the Township to Mascaro.

Pursuant to § 7533 of the Declaratory Judgments Act, 42 Pa.C.S.A. § 7533, Mascaro is seeking to have this Court construe and declare the parties' rights and obligations under the Contract between them, including the contract clause under which Whitemarsh is now making large dollar deductions from the monthly contract amounts it is paying to Mascaro, which deductions Mascaro believes and avers are improper and unwarranted.

Mascaro is seeking declaratory and equitable relief from this Court, and is asking the Court to enter an order declaring that the Township is prohibited from making such monthly deductions; declaring that Mascaro is to be paid in **full** for those months where deductions have already been made by the Township; and declaring and granting such further declaratory and equitable relief to Mascaro as may be just and appropriate.

II. THE PARTIES

1. The Plaintiff, Solid Waste Services, Inc. d/b/a J. P. Mascaro & Sons ("Mascaro") is a Pennsylvania waste service corporation with its corporate offices at 2650 Audubon Road, Audubon, Montgomery County, Pennsylvania 19403.

2. A significant portion of Mascaro's business involves the collection, transportation, processing and disposal of residential waste and recyclables from Pennsylvania municipalities under contracts that are awarded pursuant to a statutorily required competitive bid process. (53 P.S. § 68102.)

3. The Defendant, Whitemarsh Township ("Whitemarsh" or "Township"), is a municipal corporation organized and existing under the Second Class Township Code, 53 P.S. § 65101, et seq., with its municipal office at 616 Germantown Pike, Lafayette Hill, Montgomery County, Pennsylvania 19444.

4. Historically, the Township has solicited and awarded contracts for the collection of waste and recyclables from Township residential households pursuant to a statutorily required competitive bid process provided for under the Second Class Township Code (53 P.S. § 68102).

III. THE OCTOBER 2019 TOWNSHIP BID SOLICITATION AND RELEVANT BID SPECIFICATION PROVISIONS AND REQUIREMENTS

5. In October 2019, the Township solicited bids for its next long-term waste collection and recycling contract.

6. In connection with that bid solicitation, the Township issued detailed written Bid Specifications for the collection, transportation and disposal of Township residential waste. A copy of those Bid Specifications is attached as *Exhibit A*.¹

¹ The Township also issued Bid Specifications for the collection, transportation and processing of residential recyclables. In all material respects, those Bid Specifications are the same as the *Exhibit A* Bid Specifications attached to this Complaint.

7. Section 1.01 of the Bid Specifications, titled "Scope of Services," states that:

"For the purposes of bidding in response to this invitation to bid, **6,500** residential housing units are to be provided with these services, as of January 1, 2020...."

(See *Exhibit A*, Section 1.01, p. 3.)

8. Section 1.01 of the Specifications also provides in four different paragraphs that:

"This bid shall be based on 6,500 dwelling units and shall be made on a per-unit/per year basis."

(See *Exhibit A*, Section 1.01, p. 3.)

9. The Township sought bids for a three year contract term with up to two option years, and for a five year contract with up to two option years. (See *Exhibit A*, Section 1.01, p. 3.)

10. Section 1.04 of the Specifications required in part that "[a]ll bids must be submitted on the Bid Form," and Section 1.21 of the Specifications mandated that: "Each bidder shall submit his or her bid for collection, transportation, and disposal of residential solid waste on the Bid Form included in and made a part hereof." (See *Exhibit A*, Sections 1.04; 1.21, pp. 6, 12.)

11. The "Proposal Bid Form" included as part of the Specifications mandates in four separate paragraphs that:

"This bid shall be based on 6,500 dwelling units and shall be made on a per-unit/per year basis."

(See *Exhibit A*, p. 39, Proposal Bid Form.)

12. Another mandatory requirement of the Bid Specifications was that:

"All bidders must attend a **MANDATORY PRE-BID MEETING**, at the Whitmarsh Township Public Meeting Room, ... on **Tuesday, October 15, 2019, at 10:00 A.M.** Failure to attend the mandatory pre-bid meeting will render a bidder ineligible to submit a bid proposal pursuant to these specifications."

(See *Exhibit A*, p. 1; emphasis in original.)

13 Five potential bidders, including Mascaro, attended the Mandatory Pre-bid Meeting.

14. In response to a question at the Pre-bid Meeting that asked, "How was the 6,500 household figure determined," the Township responded in writing that "[t]hat figure is based on the number of refuse fees billed and received by the Township during the most recent tax season."

(See *Exhibit B* attached.)

15. Section 1.22 of the Specifications states in part that: "No conditions, exclusions, or changes to the bid conditions or specifications shall be allowed." (See *Exhibit A*, Section 1.22, p. 12.)

16. Section 1.17 of the Specifications, titled "Award of Contract," provides in relevant part that:

"Award of the contract by Whitemarsh Township, if made, will be made...to the lowest responsible bidder whose bid complies in all respects with the requirements as stated herein. **In determining the lowest responsible bidder, the Township shall utilize the total bid price for all years included in each Bid, including optional extension periods.**"

(See *Exhibit A*, Section 1.17, p. 11; emphasis in original.)

17. Section 2.11 of the Specifications, titled "Payments," provides that:

"The Township shall pay to the successful bidder one-twelfth of the agreed upon contract price...in equal monthly installments, commencing January 1, 2020."

(See *Exhibit A*, Section 2.11, p. 21.)

18. There are two sections in the Specifications that deal with the payment of additional compensation to the successful bidder. Those two are Sections 1.03 and 2.12.

19. Section 1.03 of the Specifications states in part that:

"The successful bidder shall receive additional compensation over and above the base consideration of the number of occupied residential dwelling units requiring service greater than the specified units in Section 1.01 [6,500 units]...as specified in Section 2.12 of this document."

(See *Exhibit A*, Section 1.03, p. 6.)

20. Section 2.12 of the Specifications, titled "Additional Compensation," provides that:

"If the actual number of residential units (excluding multi-family units) is determined by the Township survey in accordance with the provisions of this section, to be more or less than the estimate of 6,500, the unit price bid will determine the amount of compensation to be paid to the successful bidder.

"The initial number of residential dwelling units to be serviced shall be determined by Whitmarsh Township based on a survey of dwelling units to be provided by the Township, and the Township or its designee shall notify the contractor of that number prior to the first collection day under the contract. Whitmarsh Township or its designee shall re-determine the number of dwelling units to be serviced under the contract annually at the beginning of each contract year based on:

"Refuse tax collection notices sent to residents by the Township or its designee and provided to the contractor prior to the first collection day under the contract."

(See *Exhibit A*, Section 2.12, p. 21.)

21. As noted in paragraph 14 above, the Township-provided survey as to the initial number of units to be serviced established that that number is 6,500 units. This information was conveyed in writing to all prospective bidders before bids were submitted (see *Exhibit B* attached), and was conveyed to Mascaro before the contract was started.

IV. THE RECEIPT OF BIDS AND AWARD OF CONTRACT BY THE TOWNSHIP

22. The Township received bids in response to its solicitation for trash and recycling services on November 1, 2019.

23. Although five companies attended the Mandatory Pre-bid Meeting, Mascaro was the only company to submit a bid. Its total five year bid for trash and recycling services was \$11,014,380.

24. Mascaro's bid for trash services for the three year contract with two option years totaled \$8,089,380 and was as follows:

YEAR	TOTAL PRICE	UNITS	PER UNIT/ PER YEAR
2020	\$1,563,900	6,500	\$240.60
2021	\$1,573,260	6,500	\$242.04
2022	\$1,591,980	6,500	\$244.92
2023 (Option)	\$1,647,360	6,500	\$253.44
2024 (Option)	\$1,712,880	6,500	\$263.52
GRAND TOTAL	\$8,089,380		

25. Mascaro's bid for recycling services for the three year contract with two option years totaled \$2,925,000 and was as follows:

YEAR	TOTAL PRICE	UNITS	PER UNIT/ PER YEAR
2020	\$567,840	6,500	\$87.36
2021	\$570,960	6,500	\$87.84
2022	\$574,080	6,500	\$88.32
2023 (Option)	\$594,360	6,500	\$91.44
2024 (Option)	\$617,760	6,500	\$95.04
GRAND TOTAL	\$2,925,000		

26. Prior to the issuance of the Township's October 2019 Bid Solicitation and Specifications, Mascaro had been the Township's trash and recycling service provider for a number of years and was familiar with the costs of performing the Township's trash and recycling services. Mascaro prepared its bid in response to the October 2019 Solicitation on a cost plus profit basis. (i.e., projecting the costs for each contract year and adding to that a reasonable profit, to come up with a total price). In other words, Mascaro's bid proposal (dollar bid) for each contract year was

based upon its prior experience in knowing the volume of trash and recyclable materials that it collected in the Township, how many trucks were required, how many employees, and all of the additional costs related to the job (fuel, maintenance, insurance, wages, employee benefits, etc.), to which it added a reasonable profit to come up with a total price.

27. Based on its total trash and recycling bid amount for each contract year and on the Township's Proposal Bid Form that mandated that the bid be based on 6,500 units to get a per unit/per year cost, Mascaro divided its total bid price for each contract year by 6,500 units to get a per unit/per year price based on 6,500 units. The mandatory Proposal Bid Forms for trash and recycling services that mandated that each bidder base its bid on 6,500 units are attached as *Exhibit C*.

28. At a Public Meeting on November 14, 2019, the Township awarded Mascaro a three year trash contract with two option years for a total bid price of \$8,089,380, and a three year recycling contract with two option years for a total bid price of \$2,925,000, for a total contract award of \$11,014,380.

29. The Township Trash Collection Specifications included as Exhibit H a copy of the contract that the successful bidder was required to sign and return to the Township with the required performance bond. (See *Exhibit A*, pp. 51-53.)²

30. Section 1.14 of the Specifications provided in part that:

"The lowest responsible and responsive bidder shall be awarded the contract and shall execute the contract and furnish the required performance bonds or security within ten days after receiving notice from Whitemarsh Township that such bidder has been so selected."

(See *Exhibit A*, Section 1.14, p. 10.)

² The Recycling Contract Specifications contained an identical contract to be signed and returned to the Township with the required performance bond.

31. Section 1.11 of the Specifications, titled "Contract Bond," provided in part:

"Prior to the execution of the service contract, the successful bidder will be required to **furnish** a performance bond for the faithful performance of the contract, effective for the full term of the contract, in an amount equal to one hundred percent (100%) of the total price of the contract regardless of whether a three (3) year or a five (5) year contract is awarded, and including all option years bid as part of this contract."

(See *Exhibit A*, Section 1.11, p. 9.)

32. As required by the Specifications, on December 12, 2019, Mascaro sent the Township a signed original of the Form Trash Contract included as part of the Bid Specifications in the amount of its total trash bid price (i.e., \$8,089,380), together with a one hundred percent performance bond in that same amount. (See *Exhibit D* attached.) Mascaro also sent to the Township a signed Recycling Contract and a one hundred percent performance bond.

V. **MASCARO CONTRACT PERFORMANCE AND TOWNSHIP PAYMENT HISTORY IN CALENDAR YEAR 2020**

33. The commencement date under Mascaro's newly awarded Trash and Recycling Contracts was January 1, 2020. (See *Exhibit A*, Section 1.01, p. 3.)

34. Prior to that commencement date, the Township, in accordance with Section 2.12 of the Specifications, confirmed that the initial number of residential units to be serviced under the contract was 6,500 units, which was the number that the Township's Bid Specifications and Proposal Bid Form mandated that Mascaro use in computing its bid.

35. Mascaro's bid and contract award for trash services in 2020 was \$1,563,000 and its bid and contract award for recycling services was \$567,840, for a total trash and recycling bid and contract award of \$2,131,740. (See paragraphs 24 and 25 above.)

36. As required by Section 2.11 of the Specifications, Mascaro billed the Township one-twelfth (1/12) of the 2020 contract amount (i.e., \$177,645) in each month of 2020, and the Township paid that full amount each month to Mascaro.

VI. THE 2021 CONTRACT YEAR AND THE LARGE DOLLAR DEDUCTIONS THE TOWNSHIP MADE TO MASCARO'S MONTHLY BILL

37. Mascaro's bid and contract award for trash services in 2021 was \$1,573,260 and for recycling services was \$570,960, for a total 2021 bid and contract award of \$2,144,220. (See paragraphs 24 and 25 above.)

38. As required by Section 2.11 of the Specifications, Mascaro's one-twelfth monthly contract payments for calendar year 2021 is to be \$178,685 per month.

39. Mascaro billed the Township for the first one-twelfth monthly amount (i.e., \$178,685) in January 2021, but the Township refused to pay that amount and unilaterally deducted \$27,105.14 from that invoice. The Township also deducted \$27,105.14 from Mascaro's \$178,685 February 2021 monthly invoice.

40. By a December 30, 2020 email to Mascaro, the Township's Financial Director suggested that the number of homes in Whitemarsh Township serviced by Mascaro decreased by 986 units from 2020 to 2021, and because of this decrease of 986 units serviced by Mascaro, there should be a \$1,465.04 deduction from Mascaro's 2021 monthly bills, for a total annual deduction of \$17,580.48 in 2021. (See *Exhibit E*.)

41. However, the undisputed fact is that there was no actual decrease in the number of homes from 2020 to 2021 being serviced by Mascaro, let alone an actual decrease of 986 homes.

42. By letter dated January 19, 2021, Mascaro responded to the Township's Financial Director, advising that Mascaro's January 2021 invoice in the amount of \$178,685 was correct,

advising that there should be no \$1,546 deduction from that invoice, and detailing the reasons why. (See *Exhibit F* attached.)

43. On January 25, 2021, the Township paid \$151,579.86 of Mascaro's January 2021 \$178,685 invoice. The Township unilaterally and wrongfully deducted \$27,105.14 from that invoice.

44. On January 26, 2021, Mascaro wrote to the Township Finance Director, advising again that it was entitled to full payment of its January 2021 invoice, and noting that the Township's \$27,105.14 deduction from that invoice far exceeded the 1,465.04 deduction referenced in the Financial Director's December 30, 2020 email. (See *Exhibit G* attached.)

45. By letter dated January 26, 2021 to Mascaro's General Counsel, the Township's Solicitor, referencing Section 2.12 of the Bid Specifications,³ advised that the Township would be deducting \$27,105.14 from each of Mascaro's 2021 monthly invoices, for a total 2021 deduction of \$325,261.68. The Solicitor gave as the reason for the deduction that from 2020 to 2021, there was an actual large decrease in the number of homes in the Township being serviced by Mascaro (i.e., a decrease of 986 homes). (See *Exhibit H* attached.) The undisputed fact, as acknowledged by the Township, is that there has not been a decrease of 986 homes in the Township being serviced by Mascaro from 2020 to 2021. In fact, there has been no decrease in the actual number of homes being serviced by Mascaro in the Township from 2020 to 2021.

46. The reason that the Township started to make large dollar deductions from Mascaro's monthly bills in January 2021 is because the Township discovered that it made a big numerical mistake in the Bid Specifications and Proposal Bid Form that Mascaro was mandated

³ The Township's Bid Specification documents, including the Proposal Bid Form that Mascaro was mandated to use in submitting its bid, are incorporated into the Contract between Mascaro and the Township. (See *Exhibit A*, Section 2.00, p. 13; *Exhibit A*, Form Contract, ¶ 2, p. 51; *Exhibit D*, signed contract submitted by Mascaro to the Township.)

to comply with and upon which the Trash and Recycling Contract was awarded. The Township's big numerical mistake was that it mandated in the Specifications and the Bid Proposal Form that bids be based upon 6,500 homes, only to discover a year later that it should have mandated that the bids be based on 5,514 homes. The Township has acknowledged to Mascaro that the Township was entirely responsible for this numerical mistake.

47. The Township is now attempting to justify its large dollar deduction from Mascaro's monthly bills on a faulty and improper interpretation/construction of Sections 1.03 and 2.12 of the Bid Specifications. Those sections provide for additional compensation to be paid to Mascaro if there is an "actual annual increase" in the number of homes in the Township being serviced by Mascaro from one year to the next, and provide for reduced compensation to be paid to Mascaro if there is an "actual annual decrease" in the number of homes in the Township being serviced by Mascaro from one year to the next. (See *Exhibit A*, Sections 1.03, 2.12, pp. 6, 21.)

48. The Township is wrongfully attempting to take financial advantage of Mascaro for a numerical mistake in the Bid Specifications and Bid Proposal Form for which the Township is entirely responsible. The purpose of Sections 1.03 and 2.12 is not to allow the Township to correct a numerical mistake that the Township made in its Bid Specifications to place the financial burden of that mistake on a third party that had nothing to do with the mistake. The purpose of Sections 1.03 and 2.12 is to provide the successful bidder with an increase or a decrease in compensation if the actual number of homes being serviced by the bidder increases or decreases from one year to the next. The purpose of those sections is not to retroactively correct a substantial numerical mistake made by the Township in its Bid Specifications.

49. By letter dated January 28, 2021, Mascaro's General Counsel replied to the Township Solicitor's letter of January 26, 2021. (See *Exhibit I* attached.)

50. In that letter, Mascaro's General Counsel advised (a) that no deductions were warranted from Mascaro's monthly bills; (b) that from 2020 to 2021 there has not been an actual decrease of 986 homes being serviced by Mascaro under the Contract; (c) that the purpose of Sections 1.03 and 2.12 of the Specifications is not to correct a numerical mistake the Township made in its Bid Specifications; and (d) that the Township, by its monthly bill deductions, is wrongfully attempting to take financial advantage of Mascaro for a numerical mistake in the Bid Specifications and Proposal Bid Form for which the Township is entirely responsible. (See *Exhibit I* attached.)

51. On February 5, 2021, Mascaro company representatives and Township representatives met at the Township building to discuss the ongoing contract dispute. Prior to that meeting and at that meeting, the Township acknowledged that it was responsible for the numerical mistake in the Bid Specifications and Proposal Bid Form. At that meeting, the Township asked if there was anything Mascaro could do to help the Township with its problem.

52. Mascaro made several written suggestions to the Township of how it might assist or help the Township, which suggestions did not involve deductions from Mascaro's monthly bills or any agreement that there had been an actual decrease from 2020 to 2021 in the number of homes in the Township being serviced by Mascaro. The Township did not concur with any of those suggestions.

53. In February 2021, the Township deducted another \$27,105.14 from Mascaro's monthly bill. If the monthly deductions were to occur over the potential five year term of the Contract, they would total \$1,347,426.

54. By letter dated March 8, 2021, Mascaro notified the Township that it "cannot and will not" accept unwarranted deductions from its monthly bills for contract services, and that the

Township's actions "are forcing us to move forward towards alternative relief, including a rescission of the Contract between us." (See *Exhibit J* attached.)

COUNT I – DECLARATORY RELIEF

55. Mascaro incorporates by reference the averments contained in paragraphs 1 through 54 above as if the same were set forth herein at length.

56. A serious and actual controversy between Mascaro and the Township currently exists regarding the interpretation/construction of Specification Sections 1.03 and 2.12 and the rights, status and obligations of the parties thereunder. Both Mascaro and the Township are interested parties in this action.

57. The declaratory relief sought by Mascaro will end the serious and actual controversy that currently exists between them.

58. § 7532 of the Declaratory Judgments Act provides that:

"Courts of record, within their respective jurisdictions, shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree."

42 Pa.C.S.A. § 7532.

59. § 7533 of the Declaratory Judgments Act provides in relevant part that:

"Any person interested under a ... written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a ... contract, ... may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status, or other legal relations thereunder."

42 Pa.C.S.A. § 7533.

60. Mascaro is requesting this Court to construe and interpret the Contract between Mascaro and the Township, particularly Specification Sections 1.03 and 2.12, and to declare the rights, status, obligations and other legal relations of Mascaro and the Township thereunder.

61. Section 7534 of the Declaratory Judgments Act provides that: "A contract may be construed before or after there has been a breach thereof." 42 Pa.C.S.A. § 7534.

62. Mascaro believes that the proper and reasonable interpretation/construction of Sections 1.03 and 2.12 of the Trash and Recycling Contract between Mascaro and the Township is that under those Specifications/Contract sections, Mascaro is entitled to additional compensation from the Township only if there is an "actual annual increase" in the number of Township homes serviced by Mascaro from one year to the next, and that Mascaro is entitled to reduced compensation from the Township only if there is an "actual annual decrease" in the number of Township homes serviced by Mascaro from one year to the next. Mascaro believes that this Court should grant declaratory relief to that effect.

63. Mascaro believes that it would be improper and unreasonable for this Court to interpret/construe Sections 1.03 and 2.12 of the Trash and Recycling Contract between Mascaro and the Township so as to allow the Township to reduce the monthly compensation paid to Mascaro where there has been no "actual annual decrease" in the number of Township homes serviced by Mascaro from one year to the next (i.e., from 2020 to 2021) as the Township as done in this case by reducing Mascaro's monthly compensation by \$27,105.14 when there has been no "actual annual decrease" in the number of Township homes serviced by Mascaro from 2020 to 2021.

64. Mascaro has a direct, substantial and immediate interest (a) in its Trash and Recycling Contract with the Township; (b) in the monthly compensation it is entitled to from the

Township under that Contract; (c) in having this Court interpret/construe that Contract, particularly Specification Sections 1.03 and 2.12; and (d) in having this Court declare Mascaro's rights, status, obligations and/or other legal relations thereunder.

WHEREFORE, Mascaro prays this Honorable Court to grant Mascaro declaratory relief by entering an Order:

(a) declaring that the proper and reasonable interpretation/construction of Sections 1.03 and 2.12 of the Trash Contract between Mascaro and the Township is that under those Contract sections, Mascaro is entitled to additional compensation from the Township only if there is an "actual annual increase" in the number of Township homes serviced by Mascaro from one year to the next, and that Mascaro is entitled to reduced compensation from the Township only if there is an "actual annual decrease" in the number of Township homes serviced by Mascaro from one year to the next;

(b) declaring that it would be improper and unreasonable for this Court to interpret/construe Sections 1.03 and 2.12 of the Contract between Mascaro and the Township so as to allow the Township to reduce the monthly compensation paid to Mascaro when there has been no "actual annual decrease" in the number of Township homes serviced by Mascaro from one year to the next (i.e., from 2020 to 2021) as the Township has done in this case by reducing Mascaro's monthly compensation by \$27,105.14 when there has been no "actual annual decrease" in the number of Township homes serviced by Mascaro from 2020 to 2021;

(c) declaring that the Township shall cease and desist from making monetary deductions under Section 2.12 from Mascaro's monthly bill for trash and recycling services unless there is an "actual annual decrease" in the number of Township homes serviced by Mascaro from one year to the next;

(d) declaring that the Township cannot use the provisions of Section 2.12 to make Mascaro financially responsible for a large numerical mistake in the Bid Specifications and Proposal Bid Form that Mascaro was mandated by the Township to comply with, which numerical mistake was entirely the fault of the Township;

(e) declaring that the Township promptly pay to Mascaro any amounts previously deducted from Mascaro's monthly trash and recycling bills under Section 2.12; and

(f) granting Mascaro such other declaratory relief as the Court deems just and appropriate.

COUNT II - EQUITABLE REFORMATION OR RESCISSION OF TRASH AND RECYCLING CONTRACT ON THE BASIS OF MISTAKE

65. Mascaro incorporates by reference the averments contained in paragraphs 1 through 64 above as if the same were set forth herein at length.

66. As an alternative to the declaratory relief sought in Count I above, Mascaro seeks as equitable relief the reformation or rescission of its Trash and Recycling Contract with the Township on the basis of mistake.

67. As noted above, (a) the Township's October 2019 Bid Specifications for the Trash and Recycling Contract mandated in several places that bids "shall be based on 6,500 dwelling units"; (b) the Township's "Proposal Bid Form," which was a part of the Specifications and which all bidders were required to use, mandated that "[t]his bid shall be based on 6,500 dwelling units and shall be made on a per-unit/per year basis"; (c) when asked at the Mandatory Pre-bid Meeting, "How was the 6,500 household figure determined," the Township responded in writing that "[t]hat figure is based on the number of refuse fees billed and received by the Township during the most recent tax season"; and (d) Mascaro based its bid response for each contract year on a cost plus profit basis, and, as mandated by the Township's Proposal Bid Form, divided its total price for

each contract year by 6,500 units to get a per unit/per year price, which it recorded on the Bid Form. (See paragraphs 7, 8, 10, 11, 12, 14, 24, 25 and 27 above.)

68. In calendar year 2020, Mascaro billed the Township one twelfth of its \$2,131,740 2020 contract price each month, and each month the Township paid that full \$177,645 monthly amount to Mascaro.

69. About a year after the Township solicited bids for its Trash and Recycling Contract and awarded that Contract to Mascaro, the Township discovered that it made a large numerical mistake in the Bid Specifications and Proposal Bid Form that Mascaro was mandated to comply with and upon which the Trash and Recycling Contract was awarded. The Township's large numerical mistake was that it mandated in its Bid Specifications and in its Proposal Bid Form that bids be based upon 6,500 residential units to get a per unit/per year cost, when it should have mandated that the bids be based on 5,514 units.

70. The Township has acknowledged that it made this large numerical mistake.

71. If the Township had not made this large numerical mistake, and if the Township's Bid Specifications and Proposal Bid Form had mandated, as it should have, that "[t]his bid shall be based on 5,514 dwelling units and shall be made on a per unit/per year basis," then Mascaro's total bid price of \$8,089,380 for trash services for the three year contract with two option years based on 5,514 units would have been as follows:

YEAR	TOTAL PRICE	UNITS	PER UNIT/ PER YEAR
2020	\$1,563,900	5,514	\$283.62
2021	\$1,573,260	5,514	\$285.32
2022	\$1,591,980	5,514	\$288.72
2023 (Option)	\$1,647,360	5,514	\$298.76
2024 (Option)	\$1,712,880	5,514	\$310.64
GRAND TOTAL	\$8,089,380		

And Mascaro's total bid price of \$2,925,000 for recycling services for the three year contract with two option years would have been as follows:

YEAR	TOTAL PRICE	UNITS	PER UNIT/ PER YEAR
2020	\$567,840	5,514	\$102.98
2021	\$570,960	5,514	\$103.55
2022	\$574,080	5,514	\$104.11
2023 (Option)	\$594,360	5,514	\$107.79
2024 (Option)	\$617,760	5,514	\$112.03
GRAND TOTAL	\$2,925,000		

(See and compare with paragraphs 24 and 25 above where Mascaro used the Township's mistaken mandate of 6,500 units to get a per unit/per year price for each contract year.)

72. Here, the Township made a large numerical mistake in its Bid Specifications, in its Bid Proposal Form, and in what it told all of the prospective bidders at the Mandatory Pre-bid Meeting, as it relates to the number of housing units to be served under the Trash and Recycling Contract.

73. The Township's Specifications and Proposal Bid Form mistakenly mandated that 6,500 units be used to calculate a per unit/per year cost for each contract year, when the Township should have mandated that 5,514 units be used.

74. As mandated, Mascaro based its bid on the mistaken 6,500 unit number in computing its per unit/per year cost, when the actual number should have been 5,514 units. Mascaro mistakenly relied upon the Township's mistaken unit number when making its bid, because the Township mandated that it rely upon that number.

75. Here, the Township made a substantive and material mistake as to a basic assumption on which the Trash and Recycling Contract was solicited and entered into (i.e., the number of units the bid was to be based on), which mistake Mascaro relied upon, as mandated by

the Specifications and Proposal Bid Form, and which mistake had a material effect on the per unit/per year price sought by the Township and submitted by Mascaro.

76. Under Pennsylvania law, a contract entered into under a material misconception as to an essential element of fact may be rescinded or reformed upon the discovery of the mistake, if the misconception entered into the contemplation of both parties as a condition of assent, and the parties can be placed in their former positions regarding the subject matter of the contract. *Gocek v. Gocek*, 612 A.2d 1004, 1006 (Pa. Super. 1992); *Temp Plan Services v. Koresko*, 12 A.3d 401, 410 (Pa. Super. 2010).

77. Based upon applicable law and the substantive and material mistake made in this case, the Trash and Recycling Contract between Mascaro and the Township should be either equitably reformed or equitably rescinded.

78. If the Court determines equitable reformation of the Trash and Recycling Contract on the basis of mistake is appropriate, Mascaro's total contract bid price for each contract year should be divided by 5,514 units (and not the mistaken 6,500 units) to get a correct per unit/per year price as noted in paragraphs 71 and 72 above.

79. If the Court determines that equitable rescission of the Trash and Recycling Contract on the basis of mistake is appropriate, Mascaro agrees to continue to perform the trash and recycling services at its bid price until such time as the Township is able to solicit new bids and award a new contract. Equitable rescission would return the parties to where they were before the current contract was bid and awarded.

WHEREFORE, as an alternative to the declaratory relief sought in Count I above, Mascaro prays this Honorable Court to enter an Order:

(a) equitably reforming the Trash and Recycling Contract on the basis of Mascaro's total contract bid price for each contract year divided by 5,514 units (and not the mistaken 6,500 units) to get a correct per unit/per year price as set forth in paragraphs 71 and 72 of this Complaint; or

(b) rescinding the Trash and Recycling Contract between the Township and Mascaro, and returning the parties to where they were before the current contract was bid and awarded, with the express direction that Mascaro continue to perform contract services at its bid price until such time as the Township is able to solicit new bids and award a new contract; and

(c) granting such other alternative equitable relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ William F. Fox, Jr.

William F. Fox, Jr., Esquire
Attorney I.D. No. 21361
2650 Audubon Road
Audubon, PA 19403
484-398-6500

/s/ Albert A. DeGennaro

Albert A. DeGennaro, Esquire
Attorney I.D. No. 39399
2650 Audubon Road
Audubon, PA 19403
484-398-6500

/s/ Gregory W. Fox

Gregory W. Fox, Esquire
Attorney I.D. No. 200846
2650 Audubon Road
Audubon, PA 19403
484-398-6500

Attorneys for Plaintiff

VERIFICATION

I, Pasquale N. Mascaro, President of Solid Waste Services, Inc. d/b/a J. P. Mascaro & Sons, verify that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: March 15, 2021



Pasquale N. Mascaro

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ William F. Fox, Jr.

William F. Fox, Jr., Esquire
Attorney I.D. No. 21361
2650 Audubon Road
Audubon, PA 19403
484-398-6500

/s/ Albert A. DeGennaro

Albert A. DeGennaro, Esquire
Attorney I.D. No. 39399
2650 Audubon Road
Audubon, PA 19403
484-398-6500

/s/ Gregory W. Fox

Gregory W. Fox, Esquire
Attorney I.D. No. 200846
2650 Audubon Road
Audubon, PA 19403
484-398-6500

Attorneys for Plaintiff