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NOTICE TO PLEAD
TO: Plaintiff

You are hereby notified to plead to the enclosed Counterclaim within 20 days from service hereof or a default judgment or other adverse action may be taken/entered against you

/s/ Sean P. Kilkenny
Sean P. Kilkenny
Attorney for Defendant

Attorneys for Defendant

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

SOLID WASTE SERVICES, INC DBA J. P. MASCARO
& SONS,

Plaintiff

v.

WHITEMARSH TOWNSHIP,

Defendant

:
:
:
:
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:
:
:
:
:
:

No. 2021-03327

DEFENDANT WHITEMARSH TOWNSHIP’S ANSWER, NEW MATTER, AND
COUNTERCLAIM

Defendant, Whitemarsh Township (“Whitemarsh” or “Township”), by and through its counsel, Kilkenny Law, LLC, hereby files this Answer and New Matter in response to the Complaint for Declaratory and Equitable Relief filed by Plaintiff, Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons (“Mascaro”), and asserts a Counterclaim against Mascaro as follows:

ANSWER OF WHITEMARSH TOWNSHIP

I. INTRODUCTION – NATURE OF ACTION

This matter is a contractual dispute centered upon the Parties rights and responsibilities under a single provision of the waste management bid specifications between Whitemarsh and Mascaro – Section 2.12 (“Section 2.12”). This provision provides, in full:

2.12 Additional Compensation

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 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 Whitemarsh 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. Whitemarsh 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.

A true and correct copy of the Specifications for Collection, Transportation, and Disposal of Residential Solid Waste in the Township of Whitemarsh, Montgomery County, Pennsylvania (“Bid Specifications”) is attached hereto and incorporated herein as **Exhibit “A”**. The Bid Specifications for recycling and solid waste contain the same applicable provisions, as such the word “Contract” includes both contracts.

Pursuant to the Bid Specifications, the Contract was for a three-year term commencing January 2020. Pursuant to Section 2.12, Whitemarsh Township determined the “initial number of residential dwelling units to be serviced” to be 6,500, and Whitemarsh notified Mascaro (the

contractor) “of that number prior to the first collection day under the contract.” See Section 2.12. Accordingly, Whitemarsh paid Mascaro for the first year of the Contract based upon the 6,500 residential housing units as required by the Bid Specifications.

Pursuant to the clear, express language of Section 2.12, Whitemarsh then “re-determine[d] the number of dwelling units to be serviced under the Contract annually at the beginning of [the] Contract year [2021] based upon the refuse tax collection notices sent to residents by the Township.” See Section 2.12. As a result of such re-determination of dwelling units to be serviced at the beginning of 2021, the Township determined that the actual number of dwelling units to be serviced for 2021 was reduced by 986 dwelling units to 5,514 dwelling units. As such, pursuant to the clear, express language of Section 2.12, the “actual number of residential units (excluding multi-family units)” was, in fact, “determined by the Township survey in accordance with the provision of this section [Section 2.12] to be... less than the estimate of 6,500.” See Section 2.12. Therefore, pursuant to the clear, express language of Section 2.12, Whitemarsh utilized the “unit price bid [to] determine compensation to be paid to [Mascaro]” based upon “less than the estimate of 6,500.” See Section 2.12.

After the annual re-determination of dwelling units to be serviced was made pursuant to Section 2.12, Whitemarsh notified Mascaro on September 15, 2020 of the re-determination for the beginning of the Contract’s second year - Contract year 2021. A true and correct copy of Whitemarsh’s September 15, 2020 written notice to Mascaro of the re-determination for 2021 and proof of receipt by Mascaro of the notice on September 23, 2020 are attached hereto and incorporated herein as **Exhibit “B”**.

Whitemarsh Township received no reply, protest, inquiry, or comment from Mascaro for over three (3) months, between the time Mascaro received the Section 2.12 notice on September

23, 2020 and the commencement of the new Contract term on January 1, 2021. As such, commencing January 1, 2021, Whitmarsh determined payment based upon the unit bid price with the noticed, re-determined number of dwelling units (5,514) to be serviced under the Contract in the amount of \$151,579.86. See Section 2.12. However, after Mascaro implied in a March 8, 2021 letter that it would cease its trash collection services unless the original Contract amount for 2020 was paid, despite the Township's right under Section 2.12 to adjust annually upon re-determination of the dwelling units to be serviced, the Township was compelled to pay Mascaro the prior 2020 rate under protest to ensure that trash collection was not interrupted. Mascaro's March 8, 2021 letter whereby Mascaro states it will "extricate itself from the current untenable situation" is attached hereto as **Exhibit "C"**. Accordingly, since January 2021, the Township has been paying Mascaro an unwarranted \$178,685 per month under protest (instead of \$151,579.86 per month) to ensure uninterrupted trash and recycling collection throughout the Township. Such an amount is \$27,105.14 per month above what the 2021 re-determination of dwelling units to be serviced by Mascaro dictates the payment should be. The Township continues to make such excessive payments to Mascaro under protest pending resolution of the matter.

Despite the unambiguous language of Section 2.12, Mascaro desires to either ignore this section of the Contract or insert new language requiring an "actual annual decrease" between Contract years for Section 2.12 to be effective. Interestingly, one wonders whether Mascaro would have claimed additional compensation for 2021 if it was determined from the Township's re-determination that there was an increase (and not a decrease) in the dwelling units to be serviced by Mascaro. Mascaro simply cannot ignore provisions of the Contract when the terms result in an unfavorable outcome to Mascaro.

Furthermore, Section 3.13 of the Bid Specifications precludes Mascaro from claiming any right of rescission or challenging the Contract based on the Township’s redetermination of the number of units to be serviced, regardless of the reason for the reduction in units to be serviced. Pursuant to Section 3.13 of the Bid Specifications, Mascaro acknowledged that it had a “reasonable and adequate opportunity to review the description of the work to be performed, the contract documents, and the locations at which the work will be performed under the contract” and that “any ambiguities, inconsistencies, conflicts or other issues as to the nature of [Mascaro’s] performance under the Contract have been brought to the attention of the Township and resolved.” See Exhibit “A”, Section 3.13. Accordingly, even if Mascaro based its bid amount upon 6,500 units to be serviced, Mascaro had the opportunity to review the actual number of units under the Contract and has acknowledged that any such issue was resolved prior to their execution of the Contract.

Accordingly, because of Mascaro’s failure to recognize the Township’s rights pursuant to Section 2.12, Whitmarsh Township agrees with Mascaro that declaratory relief is necessary to declare the parties’ present and future rights and obligations under the Contract. Moreover, the Township is seeking damages for unjust enrichment and breach of contract for the excessive, unjustified payments the Township has been compelled to pay Mascaro to maintain waste removal in the Township.

II. THE PARTIES.

1. Admitted.
2. Admitted upon information and belief.

3. Admitted in part. Whitmarsh Township is a Home Rule Municipality governed by its Home Rule Charter. However, when matters or issues are not addressed or otherwise applicable to the provisions of the Township's Home Rule Charter, Whitmarsh is governed by the Second-Class Township Code.

4. Admitted.

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

5. Admitted.

6. Admitted.

7. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

8. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. Notwithstanding, it is admitted that the bid based upon 6,500 dwelling units shall be made on a per-unit/per-year basis. By way of further response, the Township did recognize and make payment pursuant to the 6,500 dwelling unit calculation based upon the bid for the first year of the contract.

9. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. It is admitted that, at a minimum, the Township was seeking bids for a three-year contract term with a potential two-year option.

10. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

11. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. Notwithstanding, it is admitted that the bid based upon 6,500 dwelling units shall be made on a per-unit/per-year basis. By way of further response, the Township did recognize and make payment pursuant to the 6,500 dwelling unit calculation based upon the bid for the first year of the Contract.

12. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

13. Admitted.

14. Denied. The averment refers to a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

15. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. By way of further response, it is admitted that Mascaro is not permitted to change the bid conditions or specifications including, but not limited to, the conditions of Section 2.12.

16. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

17. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

18. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. By way of further response, it is admitted that Section 1.03 and Section 2.12 deal with adjustments to compensation to the bidders.

19. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. By way of further response, it is admitted that Section 2.12 dictates the amount of compensation that a successful bidder would receive based upon a change in the number of occupied residential dwelling units based on refuse tax collection notices sent to residents by the Township or its designee.

20. Admitted.

21. Denied. The Bid Specifications is a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. By way of further response, it is admitted that the initial number of units to be serviced under the Bid Specifications for the first year of the contract was 6,500 units.

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

22. Admitted.

23. Admitted.

24. Admitted in part. It is admitted that Mascaro's per unit amount for Contract year 2021 for trash services was \$242.04. The remainder of the averment is denied as it refers to Mascaro's written bid response, a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

25. Admitted in part. It is admitted that Mascaro's per unit amount for Contract year 2021 for recycling services was \$87.84. The remainder of the averment is denied as it refers to Mascaro's written bid response, a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied.

26. Admitted in part; denied in part. It is admitted that Mascaro had been the Township's previous trash and recycling services provider. The Township is without information or knowledge of the remainder of the averment and therefore the remainder is denied. By way of further response, any of Mascaro's past practices do not change or dictate the language of the Bid Specifications or the Township's rights or Mascaro's responsibilities thereunder.

27. Denied. The Township is without information or knowledge regarding the process of Mascaro's calculations, and therefore the averment is denied.

28. Admitted.

29. Admitted.

30. Admitted.

31. Admitted.

32. Admitted.

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

33. Admitted.

34. Admitted in part; denied in part. It is admitted that pursuant to Section 2.12 of the Bid Specifications that the **initial** number of residential units to be serviced under the Contract for 2020 was 6,500. The remainder of the averment is specifically denied. By way of further response, Section 2.12 also states that the Township may re-determine the number of dwelling units to be serviced under the Contract annually at the beginning of each Contract year.

35. Denied. The averment refers to Mascaro's written bid response, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied.

36. Admitted.

VI. THE 2021 CONTRACT YEAR

37. Denied. The averment refers to Mascaro’s written bid response, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied.

38. Denied. It is specifically denied that Section 2.11 of the Bid Specifications provides for the monthly payment averred. Rather, Section 2.12 of the Bid Specifications permitted the Township to re-determine the number of dwelling units to be serviced under the Contract annually at the beginning of each Contract year, and therefore the amount to be paid under the Contract. After the Township’s annual re-determination of dwelling units to be serviced was made pursuant to Section 2.12, Whitmarsh notified Mascaro on September 15, 2020 of the re-determination for the beginning of Contract year 2021 but received no reply from Mascaro.

39. Admitted in part; denied in part. It is admitted that the Township paid Mascaro for the re-determined number of dwelling units for Contract year 2021 for January 2021 pursuant to Section 2.12 of the Bid Specifications. Such payments were not “deductions”, but payments in full pursuant to the terms of the Bid Specifications. By way of further response, the Township paid the remainder of the amount claimed by Mascaro under protest due to Mascaro’s implication in its March 8, 2021 letter that it would cease waste collection within the Township. The remainder of the averment or any mischaracterization of such payments is specifically denied.

40. Denied. The averment refers to an email, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied. By way of further response, it is admitted that the Township’s re-determination of the dwelling units to be serviced

by Mascaro decreased by 986 units for Contract year 2021, and that the Township made payment pursuant to such re-determination pursuant to Section 2.12 of the Bid Specifications.

41. Denied. There was a decrease in the number of units to be serviced by Mascaro for 2021 by 986 units. The Township is without information as to what Mascaro defines as an “actual decrease,” but the Township was requesting that only 5,514 dwelling units be serviced for 2021. Further, pursuant to Section 3.13 of the Bid Specifications, Mascaro acknowledged that they had a “reasonable and adequate opportunity to review the description of the work to be performed, the contract documents and the locations at which the work will be performed under the contract” and that “any ambiguities, inconsistencies, conflicts or other issues as to the nature of [Mascaro’s] performance under the Contract have been brought to the attention of the Township and resolved.” See Exhibit “A”, Section 3.13.

42. Denied. The averment refers to a letter, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied.

43. Admitted in part. It is admitted that the Township paid the re-determined amount pursuant to Section 2.12 of the Bid Specifications, the remainder of the averment is denied.

44. Denied. The averment refers to a letter, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied.

45. Denied. The averment refers to a letter, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied. By way of further response, it is denied that there was not a decrease in the number of homes that Mascaro was required to service for 2021.

46. Admitted in part. It is admitted that the Township paid Mascaro to service 6,500 homes for 2020 and then re-determined that number of homes that Mascaro was required to service

to 5,514 homes for 2021 pursuant to the Township's right of re-determination under Section 2.12 of the Bid Specifications. The remainder of the averment is specifically denied as stated.

47. Denied. The averment refers to the Bid Specifications, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied. Such misstatement includes, but is not limited to, a quotation of the document providing for an "actual annual decrease" when such language does not appear in the Bid Documents. By way of further response, the Township did pay Mascaro compensation pursuant to Section 1.03 and 2.12 for Contract year 2020 that resulted in a windfall of profits to Mascaro for 2020. Thereafter, pursuant to the permitted re-determination of units to be serviced pursuant to Section 2.12 of the Bid Specifications, the Township continued to pay Mascaro the correct number of homes (5,514) that Mascaro was required to actually service in 2021.

48. Denied. The averment refers to the Bid Specifications, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied. Such misstatement includes, but is not limited to, the purported purposes of the sections and that Section 2.12 requires an "actual annual decrease" in the number of units to be serviced for a re-determination to occur, when such language does not appear in the Bid Documents. The Township is permitted under Section 2.12 to perform a re-determination and adjust payment accordingly, and the Township is pursuing its rights under the Bid Documents in good faith. Furthermore, pursuant to Section 3.13 of the Bid Specifications, Mascaro acknowledged that they had a "reasonable and adequate opportunity to review the description of the work to be performed, the contract documents and the locations at which the work will be performed under the contract" and that "any ambiguities, inconsistencies, conflicts or other issues as to the nature of [Mascaro's] performance

under the Contract have been brought to the attention of the Township and resolved.” See Exhibit “A”, Section 3.13.

49. Denied. The averment refers to a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied.

50. Denied. The averment refers to a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied.

51. Admitted in part. It is admitted that the Township met with Mascaro in an attempt to discuss the ongoing dispute. Any characterizations or purported statements from such meeting are specifically denied and proof is demanded at trial.

52. Admitted in part. It is admitted that Mascaro communicated with the Township regarding the Township’s re-determination of the units to be serviced by Mascaro pursuant to Section 2.12 to discourage the Township from pursuing its rights under the Bid Specifications. The remainder of the averment is denied as stated.

53. Admitted in part. It is admitted that the Township initially paid Mascaro the February 2021 payment for the re-determined number of units to be serviced pursuant to Section 2.12. By way of further response, the Township paid the remainder of the amount claimed by Mascaro under protest due to Mascaro’s implication in its March 8, 2021 letter that it would cease waste collection within the Township. The remainder of the averment is denied as stated.

54. Denied. The averment references a written document that speaks for itself and any manner of reinterpretation or misstatement of such document is denied. By way of further response, because of this letter and Mascaro’s statement that it will “extricate itself from the untenable situation”, the Township has made payment to Mascaro under protest for the January and February 2021 bills in the amount unjustly demanded by Mascaro.

MASCARO’S COUNT I – DECLARATORY RELIEF

55. The Township incorporates by reference its above responses as if set forth in full.

56. Admitted.

57. Admitted in part. It is admitted that declaratory relief will end the current controversy.

58. Admitted.

59. Admitted.

60. Admitted in part. It is admitted that both parties are requesting this Court to interpret the Contract between them to declare the rights, status, obligations, and other legal relations between the parties under the Contract.

61. Admitted.

62. Denied. The averment sets forth a conclusion of law to which no response is required. By way of further response, Section 2.12 of the Bid Specification speaks for itself and is clear and unambiguous. Despite Mascaro’s repeated misstatements of Section 2.12, nowhere in Section 2.12 does it provide that there needs to be an “actual annual decrease” in the number of units to be serviced by Mascaro for the Township to make a re-determination of the units to be serviced. Rather, Section 2.12 provides for an express right for the Township to make a re-determination before each Contract year and adjust compensation accordingly.

63. Denied. The averment sets forth a conclusion of law to which no response is required. By way of further response, Section 2.12 of the Bid Specification speaks for itself and is clear and unambiguous. Despite Mascaro’s repeated misstatements of Section 2.12, nowhere in Section 2.12 does it provide that there needs to be an “actual annual decrease” in the number of

units to be serviced by Mascaro for the Township to make a re-determination of the units to be serviced. Rather, Section 2.12 provides for an express right for the Township to make a re-determination before each Contract year and adjust compensation accordingly. Mascaro has received excessive payments for the services Mascaro rendered to the Township for the first year of the Contract, and now demands that such excessive payments continue for the next Contract years despite the Township's clear right of re-determination under Section 2.12 and notice to Mascaro of its intent to do the same, to which Mascaro provided no response.

64. Denied. The averment sets forth a conclusion of law to which no response is required. By way of further response, the Township also desires the Court to interpret the party's rights and obligations under the Contract.

WHEREFORE, Whitmarsh Township prays this Honorable Court grant declaratory relief by entering an Order as set forth in the Township's Counterclaim.

MASCARO'S COUNT II
REFORMATION OR RECISSION OF TRASH AND RECYCLING CONTRACT
ON THE BASIS OF MISTAKE

65. The Township incorporates by reference its above responses as if set forth in full.

66. Denied. The averment sets forth Mascaro's alternative relief sought and therefore no response is required. By way of further response, it is specifically denied that Mascaro is entitled to equitable relief to have the Contract reformed or rescinded. Mascaro is a sophisticated, established business operation with significant experience in waste collection contracts and at all times was represented by legal counsel during the bidding process. The Township has a right to have the terms of the Contract applied as stated therein to ensure waste collection and to preserve the health, safety, and welfare of the residents of Whitmarsh Township.

67. Denied. The averment refers to the Bid Specifications, a written document that speaks for itself, and any manner of reinterpretation or misstatement of such document is denied.

68. Admitted. It is admitted that the bills and payments made for Contract year 2020 were made as set forth in the Bid Specifications, as the Township was required to make such payments for the first year prior to the Township's right to re-determine the number of units to be serviced by Mascaro in 2021 pursuant to Section 2.12.

69. Denied as stated. It is admitted that the Township's re-determination resulted in a decrease to allow payment to be based on 5,514 for contract year 2021, as provided under Section 2.12. By way of further response, whether such reduction was a result of a miscalculation, a reduction in the number of residents, or a change in laws that results in less units to be serviced is irrelevant and immaterial to the Bid Specifications. The Township's right of re-determination and recalculation of payments was not constrained under the Bid Specifications for any reason. Moreover, pursuant to Section 3.13 of the Bid Specifications, Mascaro acknowledged that they had a "reasonable and adequate opportunity to review the description of the work to be performed, the contract documents and the locations at which the work will be performed under the contract" and that "any ambiguities, inconsistencies, conflicts or other issues as to the nature of [Mascaro's] performance under the Contracts have been brought to the attention of the Township and resolved." See Exhibit "A", Section 3.13.

70. Denied as stated. It is admitted that the Township's re-determination under Section 2.12 resulted in a reduction in the number of units to be serviced by Mascaro under the Contract. Whether such reduction was a result of a miscalculation, a reduction in the number of residents, or a change in laws that results in less units to be serviced is irrelevant and immaterial to the Bid Specifications. Furthermore, pursuant to Section 3.13 of the Bid Specifications, Mascaro agreed

that they had the opportunity to review the work to be performed, and the locations of the work, and resolved any ambiguities, inconsistencies, conflicts, or other issues with the Township.

71. Admitted in part. It is admitted that the actual number of dwelling units to be serviced in 2021 is 5,514 dwelling units. The remainder of the averment is denied as the Township lacks sufficient information to respond to Mascaro's averment and calculations therein, and proof is demanded at trial.

72. Denied as stated. It is admitted that the Township's re-determination under Section 2.12 resulted in a reduction in the number of units to be serviced by Mascaro under the Contract. Whether such reduction was a result of a miscalculation, a reduction in the number of residents, or a change in laws that results in less units to be serviced is irrelevant and immaterial to the Bid Specifications. Furthermore, pursuant to Section 3.13 of the Bid Specifications, Mascaro agreed that they had the opportunity to review the work to be performed, and the locations of the work, and resolved any ambiguities, inconsistencies, conflicts, or other issues with the Township.

73. Denied as stated. It is admitted that the Township's re-determination under Section 2.12 resulted in a reduction in the number of units to be serviced by Mascaro under the Contract. Whether such reduction was a result of a miscalculation, a reduction in the number of residents, or a change in laws that results in less units to be serviced is irrelevant and immaterial to the Bid Specifications. By way of further response, the Township paid Mascaro for 6,500 units for 2020 and re-determined the payments owed for 2021 to be based upon 5,514 units per the Township's right under Section 2.12.

74. Denied. The Township is without information or knowledge as to how Mascaro bases its bid. Furthermore, pursuant to Section 3.13 of the Bid Specifications, Mascaro agreed that they had the opportunity to review the work to be performed, and the locations of the work,

and resolved any ambiguities, inconsistencies, conflicts, or other issues with the Township prior to entering into the Contract.

75. Denied. It is denied that the Township made a substantive and material mistake based upon any assumptions. Further, prior to the Township's re-determination, the Township made payment as required to Mascaro regardless of whether any mistake was made. Furthermore, pursuant to Section 3.13 of the Bid Specifications, Mascaro agreed that they had the opportunity to review the work to be performed, and the locations of the work, and resolved any ambiguities, inconsistencies, conflicts, or other issues with the Township prior to entering into the Contract.

76. Denied. The averment sets forth a conclusion of law to which no response is required. By way of further response, it is specifically denied that there is a material misconception of an essential element of fact as the Contract clearly provide the right of the Township to re-determine the number of units being served under Section 2.12 and Mascaro's ability to determine any such facts and resolve with the Township under Section 3.13.

77. Denied. The averment sets forth a conclusion of law to which no response is required. It is specifically denied that the Contract should be equitably reformed or rescinded. By way of further response, and reformation of the Contract would run afoul of Pennsylvania's public bidding laws.

78. Denied. The averment sets forth a conclusion of law to which no response is required.

79. Denied. The averment sets forth a conclusion of law to which no response is required.

WHEREFORE, the Township respectfully requests that this Court dismiss Count II of Mascaro's Complaint and deny Mascaro's claim for equitable relief.

NEW MATTER

80. Whitemarsh Township's Answer and New Matter set forth above in paragraphs 1 through 79 above are incorporated herein by reference as if set forth herein at length.

81. Pursuant to Pennsylvania's public bidding laws and requirements, the Township has no legal ability to change the bid amounts and terms after a bid is issued and awarded.

82. Mascaro's claim is barred pursuant to Section 2.07 of the Bid Specifications wherein Mascaro holds the Township harmless from any material breach of the Contract by Mascaro.

83. Mascaro's claim is waived due to Mascaro's failure to respond to the Township's September 15, 2020 notice of re-determination effective at the beginning of the Contract's second year - Contract year 2021, despite receiving said notice over three (3) months prior to the commencement of the 2021 Contract year. See Exhibit "B".

84. Mascaro's Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

85. The Township did not breach any duty or obligation owed to Mascaro.

86. No act or omission of the Township caused or was a substantial factor in causing any damages and/or losses of which Mascaro complains, the existence of which is denied.

87. Mascaro suffered no compensable damages and/or losses.

88. If Mascaro suffered any alleged damages and/or losses, such damages and/or losses were caused by persons and/or entities over whom the Township had no control, nor duty to control, or for whom the Township is not responsible.

89. Plaintiff's claim may be barred, in whole or in part, by the doctrines of waiver, release, estoppel, and/or unclean hands.

90. At all times pertinent hereto, the Township acted in a reasonable and lawful manner, and in compliance with all applicable laws.

91. The Township did not breach any contract with Mascaro.

92. The Township adopts and incorporates any and all defenses or new matter that it might have upon the Bid Specifications.

93. The Township hereby gives notice that it intends to rely on other such defenses or new matter that may become available during the course of discovery and thus reserves the right to amend its Answer and New Matter to assert such defenses.

WHEREFORE, Whitemarsh Township prays this Honorable Court grant declaratory relief by entering an Order as set forth in the Township's Counterclaim, and respectfully requests that this Court dismiss Count II of Mascaro's Complaint and deny Mascaro's claim for equitable relief.

COUNTERCLAIM OF WHITEMARSH TOWNSHIP

Whitemarsh Township hereby asserts a Counterclaim against Mascaro as follows:

COUNT I – DECLARATORY JUDGEMENT

94. The Township incorporates by reference its above Answer and New Matter as stated in paragraphs 1 through 93 above, as if set forth herein at length.

95. The Pennsylvania Declaratory Judgment Act, 42 Pa.C.S. §7533, provides:

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

96. Both parties agree that there is a written contract between the parties and the rights, status, and other legal relations of the parties are affected by such contract, namely the Contract incorporating the Bid Specifications.

97. Both parties seek this Honorable Court's determination of the Contract and the party's respective rights and obligations thereunder.

98. Specifically, the Township seeks this Honorable Court's determination that the Township has the right, pursuant to Section 2.12 of the Contract, to tender payment to Mascaro for the 2021 Contract year based upon the re-determined amount of units to be serviced by Mascaro.

99. Namely, it is the Township's position that Section 2.12 of the Bid Specifications permits the Township to make an annual re-determination of dwelling units to be serviced by Mascaro based upon refuse collection tax notices sent to residents and, if the actual number of residential units (excluding multi-family units) is determined by the Township to be less than the estimate of 6,500, the unit price will determine the amount of compensation to be paid to Mascaro.

100. Due to Mascaro's failure to recognize the Township's right of re-determination under Section 2.12, an actual controversy over the Contract's language exists.

WHEREFORE, Whitmarsh Township prays this Honorable Court to grant the Township's request for declaratory relief by entering an Order:

(a) Declaring that the proper and reasonable interpretation/construction of Sections 2.12 and 3.13 of the Contract between Mascaro and the Township is that the Township is entitled to make an annual re-determination of dwelling units to be serviced by Mascaro based upon refuse collection tax notices sent to residents for that year and, if the actual number of residential units (excluding multi-family units) is determined by the Township to be less than the estimate of 6,500, the unit price bid by Mascaro will determine the amount of compensation to be paid by Mascaro, the successful bidder;

(b) Declaring that, as a result of the Township's annual re-determination for Contract year 2021, the Township is only contractually obligated to pay Mascaro's unit bid price for 2021 (\$242.04 for trash and \$87.84 for recycling) for the re-determined amount of units (5,514 units) for the 2021 contract year. As such, the Township is contractually obligated to pay Mascaro an annual amount of \$1,818,958.32 (\$1,334,608.56 for trash and \$484,349.76 for recycling based upon 5,514 units at the 2021 unit bid price), payable in 12 monthly payments of \$151,579.86.

(c) Declaring that the unit bid price for subsequent Contract years shall continue to be based upon 5,514 units unless another annual re-determination made pursuant to Section 2.12 results in a determination that more or less units will be serviced by Mascaro for such year.

(d) Declaring that Mascaro is bound by the terms of the Contract with the Township and the bid amounts voluntarily chosen and submitted by Mascaro according to the Contract's terms.

(e) Declaring that the Township is entitled to a refund for any portion paid to Mascaro for the contract year 2021 in excess of the amount owed for 5,514 unit based upon the unit bid price.

(f) Compelling Mascaro to continue to follow the terms of the Contract that obligate Mascaro to collect the Township's trash and recycling pursuant to the Contract's terms (as declared by this Court) and strictly forbidding Mascaro from "extricating" itself from its contractual obligations to the Township.

(g) Declaring that Mascaro shall pay the Township all costs, expenses, and attorneys' fees incurred in defending and pursuing this matter pursuant to Section 2.07 of the Contract.

(h) Granting the Township such other declaratory relief as this Honorable Court deems just and appropriate.

COUNT II – BREACH OF CONTRACT

101. The Township incorporates by reference its above Answer and New Matter as stated in paragraphs 1 through 100 above, as if set forth herein at length.

102. Three elements are necessary for a cause of action for breach of contract: 1) the existence of a contract, including its essential terms, 2) a breach of the contract, and 3) resulting damages. Meyer, Darragh, Buckler, Bebeneck & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C., 137 A.3d 1247 (Pa. 2016).

103. The Township and Mascaro entered into the Contract that incorporated the Bid Specification after Mascaro was awarded the bid for the Contract.

104. Mascaro breached the Contract with the Township by demanding excessive payments under the Contract above and beyond the payment tendered by the Township based upon the re-determination of units to be serviced for contract year 2021 pursuant to Section 2.12 of the Contract.

105. Mascaro breached the Contract with the Township by stating that it will “extricate itself from the untenable situation” created by the terms of the Contract, despite Mascaro’s obligation to the Township under the Contract. See Exhibit “C”.

106. As a result of Mascaro’s statement that it will “extricate itself from the untenable situation” created by the terms of the Contract, the Township has been compelled to pay Mascaro under protest in the excessive amounts unjustly demanded by Mascaro and will continue to do so pending the resolution of this matter to ensure trash and recycling collection for its residents.

107. As a result of the Township’s compelled, protested payments to Mascaro, the Township is paying amounts far in excess of the amounts required under the Contract for Contract year 2021.

108. The Township’s compelled over-payments under the Contract have resulted in, and continue to result in, financial damages to the Township.

109. Section 2.07 of the Contract entitles the Township to collect damages, judgements, losses, expenses, fees, attorneys’ fees, and costs arising out of a material breach by Mascaro to perform or comply with any of the covenants, agreements, terms, or conditions contained in the Contract.

110. The Township is entitled to attorneys’ fees, expenses, and costs incurred due to Mascaro’s material breach of the Contract.

WHEREFORE, Whitmarsh Township respectfully requests that this Honorable Court grant judgment in its favor and against Mascaro for damages in excess of \$50,000.00 along with the Township’s costs, expenses, and attorneys’ fees, and any and all other relief that this Court deems just.

COUNT III – UNJUST ENRICHMENT

111. The Township incorporates by reference its above Answer and New Matter as stated in paragraphs 1 through 110 above, as if set forth herein at length.

112. Mascaro has been unjustly enriched at the expense of the Township for being paid excessive amounts by the Township, under protest, to service 6,500 units when the amount of units actually required to be serviced per the Contract is only 5,514 units.

113. The elements of unjust enrichment are: 1) benefits are conferred upon a party by the other party, 2) the receiving party appreciates such benefits, and 3) it is inequitable under the circumstances for the receiving party to retain such benefits without payment of value to the conferring party. Lackner v. Glosser, 892 A.2d 21 (Pa. Super 2006).

114. The Township has conferred, and continues to confer, a benefit upon Mascaro for the contract year 2021 by paying \$178,685 per month under protest to Mascaro under the Contract when only \$151,579.86 per month is owed, resulting in a continuing overpayment per month of \$27,105.14 for the Contract year 2021.

115. Mascaro has retained and continues to retain the overpayment amounts made by the Township, despite only servicing 5,514 units instead of 6,500 units.

116. As Mascaro is servicing 5,514 units but is being paid to service 6,500 units, it is inequitable for Mascaro to retain the Township's monthly overpayments of \$27,105.14.

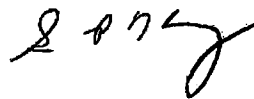
117. The Township is compelled to continue such overpayments due to Mascaro's statement that it will "extricate itself from the current untenable situation" and the Township's need to ensure solid waste and recycling collection for the health, safety, and welfare of its residents. See Exhibit "C".

118. Such compelled overpayments are being made by the Township although there is no contractual obligation to make such payments under the Contract.

WHEREFORE, Whitmarsh Township respectfully requests that this Honorable Court grant judgment in its favor and against Mascaro for damages in excess of \$50,000.00 along with and any and all other relief that this Court deems just.

Respectfully submitted,

KILKENNY LAW, LLC

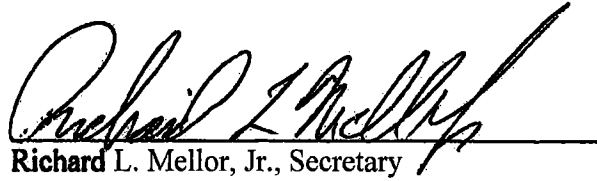


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Attorneys for Defendant

Date:4/2/21

VERIFICATION

I, Richard L. Mellor, Jr., Secretary of Defendant, Whitmarsh Township, do hereby verify that the statements set forth in the forgoing pleadings are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A., Section 4904 relating to unsworn falsification to authorities.


Richard L. Mellor, Jr., Secretary

Dated: 4/2/21