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REPORTER'S RECORD
VOLUME 2 OF 2 VOLUMES
TRIAL COURT CAUSE NO. 2022-CI-06061

TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILLS, INC.,)
Plaintiff)
vs.) 288TH JUDICIAL DISTRICT
CITY OF SAN ANTONIO, TEXAS)
Defendants) BEXAR COUNTY, TEXAS

MOTION FOR INJUNCTIVE RELIEF

On the 22nd day of February, 2023, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Nadine Nieto, Judge Presiding of the 285th Judicial District, held in San Antonio, Bexar County, Texas.

Proceedings reported by computerized stenotype machine.

APPEARANCES

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Mr. James A. Hemphill
SBOT NO. 00787674
E-mail: jhemphill@gdhm.com
Mr. Christopher C. Cyrus
SBOT NO. 24097110
E-mail: ccyrus@gdhm.com
GRAVES DOUGHERTY HEARON & MOODY
401 Congress Avenue, Suite 2700
Austin, Texas 78701
512.480.5600
Counsel for Plaintiff

Ms. Bonnie K. Kirkland
SBOT NO. 24074539
E-mail: bkirkland@dykema.com
Ms. Melanie Fry
SBOT NO. 24069741
E-mail: mfry@dykema.com
CITY OF SAN ANTONIO
112 E. Pecan Street, Suite 1800
San Antonio, Texas 78205-1512
Telephone: 210.554.5500
Counsel for Defendant City of San Antonio

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VOLUME 2

TEMPORARY INJUNCTION

February 22nd, 2023

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1 THE COURT: All right. Ms. Kirkland, I
2 believe it was time for your cross.

3 MS. KIRKLAND: Yes, Your Honor. If I may
4 proceed.

5 THE COURT: You may proceed.

6 **CROSS-EXAMINATION**

7 BY MS. KIRKLAND

8 Q Good morning, Mr. Gregory.

9 A Good morning.

10 Q I've got a few questions. Do you agree that
11 the rights and obligations of the party are set out in
12 the contract between the party?

13 A The entirety of the contract --

14 Q If we look at --

15 A -- I think so.

16 Q -- the original agreement, first amendment, the
17 second amendment, memorandum of understanding, and
18 special addendum.

19 A I -- I believe so.

20 Q Okay.

21 A There certainly have been discussions along the
22 way involving particularities of things that go along
23 with the contract, but the thing that the contract deals
24 with I believe that it does.

25 Q And so would you agree that the only written

1 contract would be reflected in those documents I just
2 addressed?

3 A To the extent there are letters, and like a --
4 like a -- whether a Saturday delivery happens or
5 certain -- the commune -- the City communicates all the
6 time -- not all the time. The City communicates from
7 time to time regarding clean-ups and special events, and
8 they ask us when we'll do them and we do them. Those
9 are not articulated in the contract, but there are
10 things that we -- they ask for and we consent to.

11 Q Sure. And that may be services provided to the
12 City, but that's not services related to the contract.

13 And honestly, Mr. Gregory, I'm just trying
14 to ask, would you agree that the contract between the
15 parties, the obligations is set out in those five
16 documents that we talked about? To the extent there may
17 have been other discussions about separate services,
18 those wouldn't define the contract itself.

19 A I would say generally it does. There are
20 particularities that occur that are -- that are allowed
21 within the frame of the contract, but those things are
22 not discussed particularly within the contract.

23 Q And those wouldn't be -- okay.

24 Let's look at Section 6F of the contract.
25 I think the binder is directly in front of you. If you

1 look at the second tab, which is Tab B, there are two
2 little blue tabs. If you get the second blue tab, that
3 reflects the second amendment, and I'd ask you to turn
4 to page three, please. I just want to review some
5 language.

6 A I have it.

7 Q When we look at 6F, the initial sentence says
8 [as read] TDSL agrees to accept up to 500,000 tons per
9 year of City solid waste hauled by any City vehicle or
10 designated haulers, which includes a City contractor,
11 during the term of this agreement at the rates and
12 adjusted in the manner set forth in this agreement.

13 You agree that TDSL has an obligation to
14 accept 500 tons per year at the contract price; is that
15 correct?

16 A I do. And I'll say that's a carry-over from
17 the first amendment contract which had -- had that in
18 it. And so the second amendment was just honoring what
19 was required in the first amendment --

20 Q Okay.

21 A -- which included delivery to the transfer
22 station as well as delivery directly to our landfill.

23 Q It goes on. If we go down a little bit further
24 in the paragraph, it says TDSL -- so like you said,
25 towards the bottom. [As read] TDSL agrees to accept the

1 City's regularly collected municipal solid waste which
2 includes waste from all City departments, City
3 contractors, and designated City haulers at the City's
4 contracted price.

5 You would agree TDSL has an obligation to
6 accept the City's municipal solid waste at the contract
7 price; is that correct?

8 A Yes.

9 Q And then finally it goes on to define -- state
10 that [as read] such material shall include the same type
11 of waste, including small amounts of brush, white goods
12 and materials from citizen clean-up events as has been
13 customary for the City, as has been processed by the
14 City through the transfer station from 1991 through
15 1996, and other solid waste appropriate for the transfer
16 station.

17 That is the type of solid waste that TDSL
18 agreed to accept at the transfer station; correct?
19 Under this contract?

20 A Yes.

21 Q And TDSL accepted the City's bulky waste from
22 1998 till August 2021; is that correct?

23 A We did accept the -- the bulky waste. Are you
24 speaking particularly of that that was hauled in
25 roll-off trucks?

1 Q Just bulky waste. Bulky waste that was brought
2 to the facility.

3 A We did.

4 Q And does TDSL -- you continue to accept bulky
5 waste from your own haulers and third-parties at the
6 transfer station; is that correct?

7 A We do, and a small amount from the City as
8 well.

9 Q So you would agree then that bulky waste is the
10 type of waste appropriate for the transfer station;
11 correct?

12 A As long as it fits the criteria of fitting in,
13 yes, it is appropriate and we have continued to accept
14 that portion of bulky waste from the City since 2001.

15 Q And do you --

16 A I'm sorry. 2021. I apologize. You were
17 referring to 2021.

18 Q And so just to be clear, from 1998 to 2021, you
19 accepted bulky waste from the City and third parties, is
20 that correct, at the transfer station?

21 A That is correct.

22 Q And so, again, as I mentioned, it's the type of
23 waste that's appropriate for a transfer station, in
24 particular Starcrest?

25 A It's the type of waste; however, it's the type

1 of waste, as it's collected and delivered, changed over
2 time.

3 Q Do you continue to accept bulky waste at
4 Starcrest, Mr. Gregory?

5 A We do.

6 Q Would you -- if we look back one page, it says
7 [as read] All such materials brought to the transfer
8 station by City crews, designated haulers, or City
9 contractors shall be used to calculate the City's
10 100 tons per year requirement.

11 Did I read that correctly?

12 A Exactly where are you?

13 Q Sure. No. Yeah, no, I'll point you to it.

14 If we go back on page three.

15 A Three. Okay. Sorry.

16 Q No, no. That was my fault.

17 You start with the sentence that says all
18 such materials.

19 A Where is it found in the paragraph?

20 Q Towards the bottom. If you -- you'll see the
21 hundred thousand, if that helps kind of orient you on
22 the page. And I can -- I can read it one more time if
23 that helps. [As read] All such materials brought to the
24 transfer station by City crews, designated haulers, or
25 City contractors shall be used to calculate the City's

1 hundred -- 100,000 tons per year guaranteed requirement.

2 THE COURT: It is the very last sentence,
3 sir.

4 A I do see it.

5 THE WITNESS: I do see it now, Judge.
6 Sorry.

7 Q (MS. KIRKLAND) Would you agree that there's no
8 exceptions in that sentence?

9 A It says what it says. I don't see an
10 exception.

11 Q So under the contract, TDS is supposed to
12 accept the solid waste as defined by the contract at the
13 contract price; correct? You would agree with that?

14 A No. No. There's a much more global statement
15 that -- that specifies solid waste collected by the City
16 in a manner as collected from '91 through 1996. So
17 there is much, much, much bulky waste that exists out
18 there that the City never regularly collected and
19 delivered. And really there's a lot of it that the City
20 doesn't collect now and delivers. So to -- I will not
21 say that we're supposed to take any bulky waste that the
22 City delivers regardless of what it is because that's
23 not the case.

24 Q If we turn to page four, though -- because we
25 just looked at the sentence. The sentence doesn't end

1 at 'through 1996'. You would agree the sentence
2 continues on, [as read] and other solid waste
3 appropriate for the transfer station.

4 Correct?

5 A That's part of what I'm talking about. There's
6 a lot of bulky solid waste that's not appropriate for
7 the transfer station, but there's a subset for the
8 City's waste they collected that was specific to what
9 they had regularly collected from 1991 to 1996.

10 That was a subset that defined what waste
11 from the City we could take. It did not necessarily
12 address what waste we could take from residential or
13 third-party haulers then or at some point in time in the
14 future.

15 Q Did you make any -- between 1998 and 2021, did
16 you make any distinction to the City about the type of
17 bulky waste that they delivered to Starcrest?

18 A Yes. We made distinction in our communications
19 to them. When you mean make a distinction, we pointed
20 out the problems that we had of the roll-offs coming
21 from the City's dropoff center before August 2nd, 2021.

22 Q Did you continue to accept the waste?

23 A We continued to accept the waste and hoped that
24 we could negotiate some sort of deal that would provide
25 a compromise or an added rate or another contract

1 because the City -- we provide lots of services,
2 especially our company, Texas Disposal Systems. We'd
3 hoped we could gain another contract that would give us
4 revenue and profit to offset the loss that we were
5 having by taking this waste that was not acceptable
6 under the contract.

7 Q But prior to 2021, you hadn't provided any
8 notice to the City that they were delivering
9 unacceptable bulky waste.

10 A Yes, we had.

11 Q You had sent a default letter or notice to cure
12 to them?

13 A It wasn't in the form of a default letter, but
14 it was in the forms of communications and there are --
15 there are numerous examples. And in my default letter
16 that came on November 22nd of '22, I refer back to a
17 series of letters and communications where we had
18 ongoing discussion concerning the various defaults, and
19 I believe including this one.

20 Q So let's go to that -- the August 2021 letter.
21 Well, before I step -- go forward from there, while
22 we're still in the contract -- and I'm looking at page
23 four. It says [as read] TDSL shall not unreasonably
24 disallow any type of the City's solid waste from being
25 delivered and processed through the transfer station;

1 correct?

2 A I believe that's what it said.

3 Q So when we go through -- and, again, you
4 mentioned in August 2021 you sent a cure letter;
5 correct?

6 A August 2nd, 2021, yes.

7 Q Sure. And we can look at it. If you go to Tab
8 C, that -- that would be the letter.

9 A B as -- tab what? I'm sorry?

10 Q Sure. Tab C.

11 A C. All right. I have it.

12 Q So we have a second paragraph. The -- sorry.
13 Actually I'm going to go to page two, two of three,
14 third paragraph down, sort of in the middle. A sentence
15 that starts with [as read] Additionally, from this date
16 forward TDSL will not accept the subject uncompact
17 bulky waste at the current contract rate for regularly
18 collected municipal solid waste.

19 Did I read that correctly?

20 A Yes.

21 Q And so would you agree that prior to this
22 letter you were accepting uncompact bulky waste at the
23 current contract rate?

24 A Yes.

25 Q Prior to August of 2021, you had never told the

1 City that you considered the bulky waste that they were
2 bringing to be a breach of the contract; is that fair?

3 A No.

4 Q You had told them before that you thought it
5 was a breach of the contract?

6 A We told them that -- we had not sent formal
7 notice that it was a breach of the contract. We had
8 told them that it was not allowed in the contract. We
9 argued those points, and we have correspondence back and
10 forth with the City staff where we were -- where we were
11 negotiating and trying to come up with a way to offset
12 that loss and that difference in -- in rate so that they
13 could somehow continue to -- we would allow it to come
14 in perhaps at a different rate or as part of another
15 contract.

16 But, yeah, we have documentation showing
17 that we did identify it as not allowed waste and that it
18 was not something that we wanted or would continue. And
19 as I said yesterday, it just reached a point where we
20 didn't think we were making any headway whatsoever so we
21 had to do the default.

22 Q So would you agree that this is your first
23 formal default notice to the City then?

24 A On -- it's the first formal default notice on
25 that item, yes.

1 Q You would agree after receiving this default
2 letter, the City ceased to bring any bulky waste to
3 TDSL's facility at Starcrest.

4 A They stopped that day.

5 Q So to the extent there was any default or any
6 breach, it was cured consistent with the contract;
7 correct?

8 A It was cured as far as the ongoing shipment of
9 roll-offs with bulky waste from the Bitters site or some
10 of the other sites. It was not cured from a standpoint
11 of what was owed to us for what had been shipped before.
12 And it didn't cover all bulky waste because we continued
13 to receive certain types of bulky waste on occasional
14 community clean-ups where the -- the facility was open.
15 Whether it came from the City or it came from the
16 public, it was -- the City was inviting them in.

17 And then we have special accounts like for
18 Fiesta and with watershed management and public works
19 that will bring things in on a special basis, so there's
20 small amounts.

21 And even in the carts where the garbage
22 trucks pick up the material in the plastic carts by
23 dumping them, there are small amount of bulky waste in
24 that. They're just able to fit inside the cart.

25 Q But you still continue -- is it your position

1 that the City is supposed to pick that waste out and not
2 bring it to Starcrest facility?

3 A Not at all. No, not at all. No.

4 Q Okay.

5 A If it goes in the cart -- just like the dead
6 animals, if it's in the cart, I consider that regular --
7 what was regularly collected waste because -- from --
8 regularly collected from the period '91 to 1996 because
9 they were picking up from -- by hand and they changed to
10 picking it up by -- via a cart.

11 Q And so, again, your complaint in terms of the
12 bulky waste that had to do with the roll-off containers
13 from Bitters that you mentioned in the letter.

14 A Yes.

15 Q Okay. And as soon as they received this
16 letter, would you agree didn't get anymore roll-off
17 container from Bitters; correct?

18 A To my knowledge, we did not from that day on.

19 Q So to the extent there was any default from
20 that, it had been cured which was allowed under the
21 contract. You got 30 days to cure any alleged breach
22 under the contract.

23 A Again, there was no payment made. So the
24 default was that they were hauling it to us as well as
25 there was money owed.

1 Q And that's based on your position that they
2 owed for potential tipping revenue you could have
3 obtained in the seven years prior if there hadn't have
4 been the Bitters site; is that right?

5 A There was three -- there are three parts to the
6 invoice. One part is a credit on what had already been
7 charged the City for the -- the then contract rate. The
8 contract rate has escalated some, more rapidly in the
9 more -- this last year because of the big inflation we
10 have, less in prior years.

11 But whatever the contract rate was, that
12 was deducted or that was shown as a credit, and then
13 there was a charge for the total amount at the gate
14 rate, whatever the gate rate was at the time, and then
15 there was an adjustment for the put or pay because that
16 volume of material did not qualify for -- for the put or
17 pay because it was not an acceptable waste. So it --
18 the net of those three started with a credit and then
19 two additions gave the number that we read.

20 Q And all of that is based on the assumption that
21 the bulky waste that was brought from Bitters was
22 inappropriate under the contract; right? That's based
23 on that assumption.

24 A It was inappropriate for the rate under the
25 contract.

1 Q I understand. I'm just saying your position on
2 those invoices on whether that money is owed, that is
3 completely based on the idea that the type of bulky
4 waste that was being brought was inappropriate under the
5 contract.

6 A Again, we -- we could have taken it had the
7 City identified it and paid for it as a -- at a gate
8 rate. So it was not inappropriate to negotiate a term
9 on what the material was. It was inappropriate because
10 they charged -- we charged them first and then later the
11 higher rate. First the lower rate, the contract rate,
12 and then the higher rate.

13 So the waste was not necessarily
14 inappropriate. The rate that was charged was
15 inappropriate.

16 Q Because the waste is the type of waste you can
17 take at the transfer station; correct?

18 A It is. It's more expensive. It's more bulky.
19 It is -- it slows down the operation. It has to go
20 through the compactor. It's a different waste stream,
21 but we do take it at the transfer station, that type of
22 waste.

23 Q Okay. We're going to go back to the second
24 amendment. Sorry, back to Tab B. The second blue tab,
25 Tab B.

1 A Tab B. Yes, ma'am.

2 Q Would you agree that the City has priority of
3 access to Starcrest?

4 A Hang on. You said B, as in boy?

5 Q Sorry. B is the big tab, and then the second
6 blue tab is the second amendment. And I haven't sent
7 you --

8 A I'm sorry.

9 Q -- to a specific section yet.

10 A I have it now, yes.

11 Q Okay. Just wanted to get us there because I'm
12 going to ask you questions.

13 Okay. And actually I can -- I can take
14 you to -- if you go to page five -- so at the bottom
15 there are obviously page numbers. And Section C talks
16 about party of service to the City, correct, at
17 Starcrest?

18 A Yes.

19 Q In fact, you know, the way it was written is
20 [as read] So in part, this second amendment is intended
21 to ensure to the City first priority for the City's use
22 and access to the transfer station facilities.

23 Do you agree that the City had priority of
24 access to the facilities?

25 A Yes.

1 Q And again, if we look -- if you turn one page
2 over. And page six, number one, [as read] At any time
3 the City shall have the first right to service at the
4 transfer station.

5 So, again, contract reiterates first right
6 to access, first right to service; correct?

7 A Yes.

8 Q So then if you turn one more page to page
9 seven, and we go to Section D, that first sentence says
10 [as read] City and its designated haulers shall have
11 first right of access to any and all capacity at the
12 transfer station for full process and disposal services
13 at the contract price. TDS will have second priority,
14 and third priorities will have last.

15 There's no limitations in that language;
16 would you agree?

17 A Not as that -- not in that, no.

18 Q So the -- there's nothing that says the City
19 has less access if it impacts TDS's profitability;
20 correct? There's no talks of profit in this contact; is
21 that fair?

22 A You're going -- we're starting with three
23 sentences. There's nothing like that stated in these
24 three sentences. Are you going to the whole contract
25 with the -- with the question?

1 Q Yeah. Yes, sir. Sorry.

2 A Will you re-ask the question then?

3 Q Sure. Would you agree there's nothing -- we
4 can either stay in this section or we can go to the
5 whole contract -- that says the City's right to access
6 or priority is limited based on whether or not it
7 impacts TDSL's profitability on the contract?

8 A The contract relates -- the contract assumes
9 that we -- that we will cover our cost. I think that's
10 part of this CPI that's in it.

11 I think the contract assumes and
12 encourages actually the receipt of third-party waste and
13 Texas Disposal Systems, our hauling company's, receipt
14 of waste. The City receives a royalty on that.

15 So it's a -- it's a very complicated
16 contract. It's not so specific down to whether
17 profitability takes merit over priority, so I'm not sure
18 I understand your question.

19 Q Sure. No. I'll ask it as specifically as I
20 can.

21 Is there any promise of profitability to
22 TDSL in this contract for operating Starcrest Transfer
23 Station?

24 A There is a portion of the contract that allowed
25 for the City to -- in the early stages to permit its own

1 landfill and instruct TDS rather than to haul the waste
2 to the TDS landfill close to Buda, that it would haul it
3 to the City's landfill. And in that event, it laid out
4 the -- I don't know if it's a promise. It laid out the
5 basis for a 15-percent markup on what our costs would be
6 because we would no longer have the landfill portion of
7 the contract. We would be hauling the waste to the
8 City's landfill.

9 So I think perhaps there is some sort of a
10 promise or expectation of profit in that section. That
11 didn't happen, by the way. The City didn't permit its
12 own landfill and there -- we did not get paid
13 15 percent, but there was certainly an expectation of --
14 in that section of a 15-percent profit.

15 Q Sure. And that was a very specific section as
16 you mentioned, that should the City open its own
17 landfill there were a lot of different requirements in
18 that, transport was going to be involved. And in that
19 specific circumstance, there was discussions as to
20 whether you would be entitled to a certain profit
21 percentage; correct?

22 A Yes. It's the same operation as the transfer
23 station. It's the same receipt of the waste. It's kind
24 of the same transport. Instead of going to Buda, we're
25 going to wherever that landfill would have been located.

1 We wouldn't have had the landfill disposal
2 portion. The distance and the haul time, the haul wait,
3 the time waiting at the landfill may be different, so
4 that's the reason it was negotiated in the 15-percent
5 markup on what those cost would be.

6 Q And, again, that's in a -- just to reiterate,
7 that's in one paragraph -- that's in one section of the
8 contract noted for a very specific occurrence if it
9 happened; correct?

10 A Yes.

11 Q Regardless of talks of profits and whatnot,
12 would you agree that in Section D of the contract it
13 makes very clear that the City has first right of access
14 to any and all capacity at the transfer station?

15 That's what it says; correct?

16 A Did you qualify your question? I'm sorry?

17 Q No. Well, I kind of broke it in two, so I'll
18 do it different.

19 A Okay.

20 Q That's a lawyer thing. We talk too much.

21 Would you agree that the City has first
22 right of access to any and all capacity at the transfer
23 station?

24 A I think that's the intent; however, that
25 competes with the intent that other waste also would be

1 hauled through the transfer station and an expectation
2 that there would be one direct dump chute that would be
3 much more appropriate for large garbage trucks to dump
4 into versus the compactor chute, because there's only
5 two chutes at the transfer station. The other one goes
6 into a compactor where it has to feed through a -- like
7 an hourglass. It's a bottleneck, so to speak.

8 And so I don't think it was ever the
9 intent of the City or anyone to say that the public
10 coming into the transfer station would wait for four
11 City trucks to dump before one of the public dumped when
12 the City truck wasn't using that -- that chute, the
13 compactor chute.

14 So I think certainly this says what it
15 says, and the assumption is that it -- if it's more the
16 competing with larger vehicles, I -- and the City who
17 seemingly from the testimony yesterday didn't have a
18 problem at all prior to August 2nd, 2021 and the
19 mediation in 2022, we were -- we were yielding and
20 allowing the public, the smaller haulers, to go use --
21 to use that compactor chute and the City was focused
22 almost entirely on using the direct dump chute.

23 So taken literally, you would have us --
24 the City would have us apply that strictly, and I don't
25 think that was the intent. I think the intent of the

1 City and the Council was the assumption that the public
2 would still be served through this and it would serve no
3 use to have the public back up out on the street and
4 block the street trying to get in waiting on the City to
5 do four dumps to their one when the City wasn't going to
6 use their hopper or their chute in the first place.

7 Does that make sense?

8 Q It does. And my question just gets more to as
9 a general statement. If the City wanted to use that
10 hopper -- and I'm -- you're saying they just don't in
11 practice do the facility the way it runs. If they
12 wanted to, under the contract, they had priority of
13 access to that; correct?

14 A If they wanted to, they do have priority of
15 access. And they could have -- they could ask us to
16 bring in another material handler that would have to be
17 required to push that -- make sure that chute is clear
18 so that the compactor can run and doesn't get bridged
19 over (Mark). They can do that or what happens now is if
20 the city -- and sometimes they do use the compactor
21 chute but if it does bridge as it often does, we have to
22 stop taking waste and processing waste through the
23 direct chute, move the big material handler, which is
24 like a crane, move it all the way over, and it -- the
25 City and we have learned we're just better off not

1 having to stop the use of the direct dump and go unjam
2 the other one. They're better off letting people go
3 where they properly fit.

4 And I don't think we've had any contention
5 or problems with that at all except when the City comes
6 with a point of saying, By God, I've got the right, and
7 you know -- so, yeah, there is the right. I don't think
8 it matches the assumption or the plan or really what is
9 in the City's best interest to do.

10 Q But, again, I'm just -- I was just asking what
11 was in the contract. The contract gives the right;
12 correct?

13 A I think it does, yes.

14 Q And if we go to page ten of the contract,
15 section N. Give you a second to get there.

16 Again the section reiterates, you talked
17 to -- I should say you talked before about the idea --
18 the contract clearly contemplated TDSL may bring its own
19 waste because you have your own commercial haulers;
20 correct.

21 A Well, TDSL is a company that does not haul
22 waste. Texas Disposal Systems Landfill, Inc. owns and
23 operates the landfill and owns this contract. And
24 the -- and the permit that is for Starcrest. Its sister
25 company, Texas Disposal Systems, Inc., is the hauling

1 company. And Texas Landfill Management, LLC, to make it
2 even more confusing, is the one who operates it on
3 contract with TDSL, so...

4 Q And so what I'm -- what I was just getting at
5 is the contract clearly contemplated TDS or, you know,
6 TDSL via its sister company may utilize Starcrest. TDS
7 or TDSL may allow -- charge third-party haulers;
8 correct? I mean that was clearly something that was
9 thought about.

10 A It clearly was thought about, and certainly was
11 the expectation within those third parties that you had
12 the general public, because when the City changed in the
13 early -- in the late '90s when we took over the
14 operation of transfer -- of the transfer station, the
15 City was still picking up with rear loaded trucks where
16 guys or women would pick things up and put it in the
17 truck in the back.

18 Not long after that, they changed to the
19 cart system, like so many of us are aware of today,
20 where you wheel your cart in and out, and the truck
21 comes picks up that cart so it restricted it to pretty
22 much what was in the cart, and the guy or the lady
23 didn't get out of the truck and also handle the material
24 typically on the side. It was just that cart.

25 So when that happened, that resulted in

1 what is -- we thought it was going to result in many,
2 many more citizens bringing their bulky material or
3 things that wouldn't fit in the cart to the transfer
4 station and give us a flow of revenue and a flow of
5 waste that heretofore had been handled by the rear
6 loaded trucks where the people just dumped more things
7 in it.

8 So -- so, yeah, I think the City was fully
9 expecting and needing, wanting, a place for those
10 citizens to be able to bring their waste rather than
11 have to drive across town to dump it, or more likely to
12 have to clean it up when it was illegally dumped.

13 Q So despite the fact that the contract allowed
14 TDS or TDSL to bring in its own waste and/or use
15 third-party haulers, section N specifically notes, if we
16 look at that last sentence, [as read] TDSL shall have
17 the right to accept solid waste from other haulers to
18 the extent that the acceptance of such volume does not
19 interfere with the City's priority and the orderly
20 acceptance of the City collection of vehicles.

21 Correct?

22 A Yes. Again, the City has that choice, that
23 priority.

24 Q We talked about priority of service. In the
25 contract, it requires that TDS -- TDSL use reasonable

1 care to prevent it from taking longer than 30 minutes to
2 service a truck; would you agree with that?

3 A Yes.

4 Q Okay. Would you agree that reasonable care
5 includes having adequate staffing to meet your contract
6 obligations?

7 A It requires a lot of things. Certainly part of
8 it is adequate staffing. Part of it is the -- remember,
9 the operation of the transfer station is what happens on
10 the site at the transfer station. There's a big part of
11 it doesn't happen on site. It's the transfer of that
12 waste to the TDS landfill, dumping it, and bringing that
13 trailer back.

14 So reasonable care involves not only the
15 management of the waste right there at the transfer
16 station, but also getting the waste to the TDS landfill
17 and back. So there's a full maintenance crew that's --
18 which means that we -- reasonable care is making sure we
19 have enough of those people. It involves a number of
20 things: Where they park their trucks; how their service
21 will -- some things we don't control, like the traffic
22 that we experienced today coming in from Austin on the
23 road. The City nor we obviously control that.

24 Q And you stated yesterday when you testified,
25 you mentioned that TDSL was suffering because of the

1 City's inconsistent and unpredictable dumping schedule.

2 Did I understand that correctly?

3 A Yes.

4 Q But it was consistent enough to where you could
5 make a chart detailing the peaks; correct?

6 A Well, it wasn't consistent enough so that I
7 could make the chart. It was so inconsistent, to show
8 it we made the chart.

9 Q I believe that may speak the other way, too,
10 sir.

11 You can predict peak times; can't you?
12 You mention that the top times generally -- if we looked
13 at your graphs, it was between 11:00 and 12:00 every day
14 I believe; is that correct?

15 A It depends on how you -- how you approach it.
16 That was about 25 months period of time, so if you
17 looked at it wholistically at this is 25 months, it
18 didn't go over 192 tons, then, yeah, during that period
19 of time there was a top and there was a bottom of zero
20 and there were many -- all I did was give every hour of
21 every day that waste came into the transfer station over
22 25 months.

23 Q And via that, you could come up with a chart
24 showing peaks and valleys and that was consistent from
25 day-to-day when those peaks and valleys were.

1 A In fact, we did on the other exhibit. For
2 particular time periods, we came up with a chart.

3 Q Okay. So I understand the parties disagree on
4 what reasonable -- the definition of reasonable care.
5 That's not really, you know, what I'm going to ask you
6 about.

7 But you don't disagree that the contract
8 provides if the wait takes longer than 30 minutes due to
9 TDS failing to -- you know, using reasonable care to
10 provide priority of service or reasonable care, the City
11 could divert loads to other sites; correct? You don't
12 disagree with that premise.

13 We have a dispute on what reasonable care
14 is, but you don't disagree that under the contract if
15 there is a determination that TDSL didn't use reasonable
16 care or that TDS wasn't providing priority, the City had
17 an option to divert that tonnage; correct?

18 A It's not as clearcut in any respect if when 30
19 minutes happens, the City can start diverting. There
20 are circumstances, like for instance, if city trucks use
21 the chute -- the compactor chute and it was jammed up
22 and we had to unjam it, that would be a circumstance
23 that would delay the processing of waste. And so that
24 is not -- that's not a lack of reasonable care on our
25 part. We could have two people on site, we could have

1 42 people on site, but one material handler operator
2 would be the one accomplishing that.

3 So there's a lot of different
4 circumstances under reasonable care involving the
5 transport of the waste to and from the landfill and the
6 operation there on the site, some of which involves the
7 City's performance of how -- how often and how large --
8 the time period they bring the trucks in, and how
9 large -- how heavy, how many tons are in the trucks.

10 So, no, nothing is hard and fast on the
11 30-minute rule.

12 Q Well, maybe I didn't phrase it -- because what
13 I was just asking -- again, obviously there's a dispute
14 on how we define reasonable care. But under the
15 contract, is there a set of circumstances where the City
16 could divert loads and tonnage from the Starcrest
17 facility to another facility due to delays of service?

18 A The City can divert loads and tonnages at any
19 point in time. That's totally up to them to have --
20 they just have a put-or-pay requirement of a hundred
21 thousand tons. Really they don't have to haul us
22 anything during the whole year.

23 It's just the -- the reasonable care comes
24 in when the City says, We diverted because you did not
25 use reasonable care and we are going to credit it, and

1 that's when the provisions come in that the on-site
2 program manager has to -- has to be there to make that
3 decision, has to let us know on the day of the event
4 which truck it was so we'll know whether we had
5 reasonable care.

6 We may have very good reason to show that
7 it was not -- we did take reasonable care or -- or the
8 fact that -- like we heard yesterday, if they're making
9 the diversion before the truck ever gets there and we
10 don't even know it for months later, how would -- how
11 would we possibly know what -- what that was?

12 So really the reasonable care -- we always
13 conduct reasonable care and I think we have a record of
14 doing that.

15 The testimony yesterday was we had -- I
16 don't want to mischaracterize it, but I think the word
17 was excellent service up until the time of the -- I'm
18 not sure if it was the August 2nd letter of 2021 or the
19 mediation. But say the earlier one, the August 2nd,
20 that's a pretty good -- I mean, all that many years, 20
21 something years, and really we worked hard to meet that.
22 We worked very hard to earn that.

23 We used reasonable care. We still use
24 reasonable care. There's just a dispute what's
25 reasonable care with having two people, six people, 16

1 people, that -- that sort of thing, and that's where I
2 think cost gets involved and certainly the dispute on
3 whether the City is in default.

4 Q I'm not sure you answered my question, so I'm
5 going to just ask it real direct.

6 Assume -- and you -- however we define
7 reasonable care, assume TDSL in a certain situation does
8 not exercise reasonable care. Would you agree that the
9 contract allows the City to divert tonnage that would be
10 delayed by more than 30 minutes to another facility, and
11 be allowed to count that weight towards its put-or-pay
12 requirement under the second amendment?

13 A They do have the right to -- to notify us what
14 it is. They do have the right to count it. We have the
15 right to challenge it or question it, knowing the
16 information that they have to provide. It doesn't
17 automatically mean that they get a credit on the
18 put-or-pay.

19 Q Do you agree that prior to March 2022 it rarely
20 took longer than 30 minutes for a city truck to be
21 serviced at the transfer station?

22 A You're speaking of our transfer station when
23 you say 'a transfer station'?

24 Q The Starcrest Transfer Station.

25 A The transfer station.

1 I think there were times that it took more
2 than 30 minutes. I don't think it mattered to the City
3 because whether they were using the direct dump solely
4 or sometimes using the compactor, I think they were able
5 to manage their routes. And so I -- I would not think
6 that there were times -- that there was no time that
7 they waited more than 30 minutes. I think they did wait
8 more than 30 minutes at times, especially on those peak
9 times.

10 Q But, again, my question goes more towards do
11 you agree that prior to March of 2022, based on what --
12 well, the City testified -- you heard them yesterday --
13 that prior to March of 2022 they rarely waited -- not
14 never, but rarely waited longer than 30 minutes for a
15 truck to be serviced; would you agree that that's true?

16 A No.

17 Q So they were regularly experiencing delays
18 longer than 30 minutes?

19 A At times there were delays longer than 30
20 minutes. Again, I don't think they -- it bothered them
21 that much because they were aware that we were doing all
22 we could within the way we operated the facility, that
23 whatever it was that was holding them up was being --
24 was being handled, and it may be a traffic jam or an
25 accident on I-35 so that a trailer is not there to put

1 waste in.

2 But, no, I think they did wait.

3 Q Would you -- after the mediation failed in
4 March of 2022, TDSL reduced staffing at the Starcrest
5 Transfer Station; correct?

6 A Yes.

7 Q If we look at the second amendment, which
8 hopefully is still open, if we go to section G, it's on
9 page seven.

10 A Paragraph G? Yes, I have it.

11 Q It says [as read] TDSL that shall provide for
12 disposal of dead animals collected on city streets and
13 alleys and brought to the transfer station by the City.

14 From 1993 to August of 2021, I believe
15 yesterday -- and correct me if I'm wrong -- did you
16 testify that TDSL had accepted dead animals brought to
17 the facility by the City; correct?

18 A Yes, both in the regularly collected waste --
19 before the cart system came in, they came in with the
20 waste. And even after the cart system came in, we've
21 always collected those without objection as we did --
22 the City had a route -- and it may have been more than
23 one route, but I know it had one route truck that picked
24 up roadkill, so to speak, from the -- on the streets and
25 allies and we accepted that as well.

1 Q But you have not accepted dead animals for over
2 a year from the City; is that correct?

3 A I think it started on March 9th or 10th, so
4 it's not quite a year.

5 Q Oh, okay. Would you agree since March 9th or
6 10th you haven't accepted dead animals at Starcrest?

7 A I think that is the time that it was cut off.

8 Q And does TDSL intend to continue to refuse to
9 accept dead animals at the facility?

10 A We will accept animals. We will accept them
11 today. We just won't accept them at the rate that the
12 City is contending because they don't qualify. They're
13 not -- they're not regularly collected waste as was
14 collected from 1991 to 1996, so it's a -- it's a special
15 waste. When it comes in a truck just of special waste,
16 we don't take that. Commingled with the waste, we're
17 accepting it every day. We never stopped taking that.

18 If I -- maybe I need to correct my
19 testimony from a couple of questions before. We had --
20 we really never stopped taking dead animals commingled
21 with residential waste. That continues today, and I
22 have no intention of changing it. It's just the
23 separated loads, segregated loads, that don't qualify.

24 Q So unless the City pays a special rate for it,
25 TDSL will not accept that waste?

1 A That's correct.

2 Q You testified yesterday that the City can
3 retain access to Starcrest if it pays the invoices from
4 January 2023 to date; correct? And pays the higher
5 disposal rate going forward; is that right?

6 A Specifically, to be real correct, from
7 January 16th forward, if it pays what we have billed,
8 the gate rate, the City will continue to have access to
9 the transfer station, and all other charges will be
10 dealt with in litigation.

11 Q Would you agree --

12 A All prior charges, let's put it that way. All
13 prior charges.

14 Q Would you agree that that was not TDSL's
15 position prior to the hearing?

16 I'll point you to Exhibit F in the -- Tab
17 F, page four. This was the letter that you sent in
18 November of 2022. I believe you've referenced that
19 before; is that right?

20 A I did reference this letter earlier in my
21 testimony today.

22 Q And so in that letter, you noted specific cures
23 that would be -- that are required of the City before it
24 would lose access, and that included payment of past due
25 invoices of which you listed multiple, including the

1 bulky waste invoices you had said before, and an
2 agreement as to increase of disposal rates.

3 That was what was noted in that letter;
4 correct? And if it was not done, you would lose -- the
5 City would lose access to Starcrest under the terms of
6 the contract.

7 A The letter makes it -- makes it clear. First
8 of all, the letter, to start off with, is styled in its
9 reference line, Notice of Default for Period and
10 Extension of Agreement to September 30, 2025, but on the
11 first page.

12 It was calling out the defaults. A way to
13 cure those defaults was discussed.

14 And are you speaking of the second
15 paragraph particularly for your question?

16 Q Yes, on page four. I just --

17 A Under acceptable cure of defaults --

18 Q Yes, on --

19 A -- and consequence of lack of cure?

20 Q Yes. You specific -- what you noted as those
21 cures, and you said a failure to do those cures would
22 result in failure -- would -- loss of access to the
23 facility at the contract rate; correct?

24 Those were the cures that you told the
25 City you needed in November of 2022. It wasn't pay

1 invoices related to the new contract rate. It was pay
2 all past invoices, including the 12 million in bulky
3 waste; is that right?

4 A That was the acceptable cure and that's what it
5 took to cure the defaults.

6 Q Right.

7 A Curing of defaults is something that deals with
8 the litigation and that's what we were mediating is
9 mostly the litigation.

10 We -- there are provisions in here that
11 stated very clearly that they could -- the City could
12 continue accepting waste into the transfer station by
13 paying the -- gate rate.

14 Q Can you please turn to Exhibit J? This in
15 February of 20 -- couple of weeks ago.

16 A Excuse me?

17 Q Exhibit J.

18 A Exhibit J.

19 Q Yes, sir.

20 A And we can point that -- if you want to come
21 back to this November letter, I can point out in the
22 letter where it makes it clear that the City had the
23 right to pay the gate rate and continue paying
24 regardless of whether they cured the rest of the
25 past-due payment.

1 Q I understand, but in that letter they had to
2 pay all back-invoices --

3 A No.

4 Q -- or pay the gate rate.

5 A No, ma'am. No, ma'am.

6 Can I go down to the next paragraph of the
7 one that you just called out? The middle -- in other
8 words, go to page four of seven. You pointed to the
9 second paragraph under acceptable cure and defaults and
10 consequences of lack of cure.

11 I would go to the third paragraph where it
12 explains that the City can continue receiving -- coming
13 to Starcrest based on the payment of the gate rate and
14 what the conditions are to that.

15 Q Sure. You said you could pay the public gate
16 rate if you didn't want to cure these defaults, as you
17 said; correct?

18 A Yes, ma'am.

19 Q Okay. That was my point.

20 A Okay.

21 Q So in J when you said -- if we go to Exhibit J
22 and we look at the letter that you sent then, again, it
23 noted, You need to cure the defaults or you're going to
24 lose access.

25 That's what it said in that last

1 paragraph; correct? The defaults that you noted in the
2 November 22nd letter.

3 A That goes to curing of the default.

4 Q Right. But so now what you're saying is the
5 City can retain access to the facility if they pay the
6 last four invoices. So if they want to get access to
7 the facility tomorrow or have access, they need to pay
8 the four invoices that you have sent since January 15th;
9 correct?

10 A Yes.

11 Q Okay. Would you agree that that amount of
12 invoices totals over \$700,000?

13 A I don't know exactly what it totals. It
14 totals -- you have the bills. It totals what the bills
15 are.

16 Q And so if I represented that it was
17 approximately 700,000, any reason to dispute that?

18 A I don't have a reason to dispute it.

19 Q And the City has partially paid the invoices;
20 would you agree with that?

21 A Yes, I do.

22 Q And that number is a little under 300. Any
23 reason to dispute that?

24 A I don't recall from mid January on what has
25 been paid and what hasn't been paid.

1 Q So if TDSL has invoiced 700,000, the City's
2 paid a little under 300,000, what TDSL would need the
3 City to pay today to keep access for tomorrow is
4 \$500,000 today; is that correct? If -- if my math is
5 right.

6 A Whatever the difference is. It's just the
7 bills from January 15th on to -- actually at
8 January 16th, on to today. And that's -- what is today?
9 That's a month.

10 Q That's fine. No, and as I said -- you said the
11 difference; right? So if the difference is 500,000,
12 which is what we roughly calculate it to be, that is the
13 amount that the City would need to pay today to keep
14 access to Starcrest tomorrow; is that correct?

15 A Yes. And going on forward, they would have
16 to -- they would have to pay. So I don't want to give
17 the impression that the City could stop all payment
18 altogether for the next two years and we would continue
19 to service. It's still based on -- they become a public
20 customer from a pricing standpoint.

21 Q They would have to pay the higher rate;
22 correct?

23 A They would have to pay the gate rate and the
24 conditions that we -- that are in the letter that we --
25 the February -- the November 22nd letter, it has

1 conditions tied to that.

2 Q And, again, so if the City won't pay that back
3 money, the 500,000, and won't agree to pay this higher
4 non-contract gate rate going forward, TDSL does intend
5 to lock out the City tomorrow from the facility.

6 A If the City doesn't pay what they owe us since
7 January 15th, 2023, and based on the gate rate of \$40
8 per cubic yard, their only other option is -- we gave a
9 choice of a lower rate of the \$64.89 per ton, but that
10 is -- that is a different -- that's a different set of
11 circumstances. All of this follows ten years of
12 negotiating with the City to try to come up with
13 something, but the City just has to pay one or two of
14 those things.

15 Q I'm trying real hard not to interrupt you, but
16 we really do -- I'm trying to make it as expeditious as
17 possible.

18 A I apologize.

19 Q My question is just if the City won't pay the
20 500,000 and won't agree to pay the higher gate rate
21 going forward, is it accurate that TDSL will not allow
22 them to access the facility -- Starcrest facility
23 tomorrow?

24 A Yes.

25 Q And the idea that the City needs to pay this

1 higher gate rate is based completely on TDSL's position
2 that the City breached the contract and therefore TDSL
3 doesn't have to be held to the contract terms anymore;
4 is that correct?

5 A Yes, the breach and default. They're in
6 default.

7 THE COURT: For this witness, move on the
8 next one, this Court must understand, will the City lose
9 access meaning there will be a lock on the gate and the
10 City cannot gain access or do you mean that the City
11 will lose access inasmuch as the City will need to just
12 pay a gate rate?

13 THE WITNESS: The second. There will not
14 be a lock.

15 THE COURT: Okay.

16 THE WITNESS: We will continue to operate
17 the transfer station. We welcome the cities to bring
18 every load. We will accept their load. They -- the
19 rate just will change.

20 THE COURT: But they will have physical
21 access.

22 THE WITNESS: Hundred percent.

23 THE COURT: Thank you.

24 Q (MS. KIRKLAND) But to be clear, to retain the
25 physical access they would have to pay \$500,000 today;

1 correct?

2 A They would have to pay their bills since
3 January 15th.

4 Q And if the math is you've billed them 700,000,
5 they paid you approximately 300, they would have to pay
6 you \$500,000 today; correct?

7 A These -- yes. That's the --

8 Q Okay.

9 A That's what they owe us. If we're going to
10 negotiate and this is a mediation type thing where we
11 make that 30-day payment, I can do -- I can do that, but
12 that's the -- that's the -- that is the -- the default
13 letter we sent, that's the -- that's the condition that
14 we made. We just made it effective January 15th because
15 of the prior defaults in those other -- in those other
16 matters.

17 Q So in addition to that --

18 THE WITNESS: Under no circumstances will
19 they be locked out.

20 THE COURT: Under no circumstance.

21 THE WITNESS: Under no circumstance.

22 Q (MS. KIRKLAND) But they'd have to pay the
23 money and they would have to agree to a rate that is
24 double the contract rate going forward; correct?

25 A They'd have to agree to either the per cubic

1 yard or \$64.89 per ton.

2 Q And if they refuse to pay that, because it's
3 inconsistent with the contract, you would lock them out.

4 A There will be no lock involved.

5 Q You will deny them access.

6 A They will have access upon payment. If they
7 pay at the gate like any other customer does, they have
8 access. This is a self -- totally self-imposed thing by
9 the City.

10 So if the City wants to say they can't go
11 in, we're not keeping them out. They become a cash
12 customer from a standpoint of money. We just -- I will
13 not continue a 200,000-dollar a month loss under the
14 circumstance given the default condition that the City
15 is in. We're not in default. The City is in default.

16 Q Do you know how much that would cost the City
17 over the year to pay that higher gate rate?

18 A By the \$64.40 -- and 89-cent -- I'm sorry.
19 \$64.89 per ton, the difference in that and their current
20 rate --

21 Q About double?

22 A -- the gate rate as you say --

23 Q About double?

24 A -- is approximately six -- \$588,000 I think is
25 what it comes to, based on 100,000 tons which is of

1 their Council-approved budget 1.99 percent of that
2 approved solid waste services budget.

3 Q You've charged them \$700,000 for a month, so --
4 and if we -- the difference between what the City
5 believes is paid or is owed and what you've charged them
6 results in \$500,000 in a month. If we multiply that by
7 12, is that \$6 million?

8 A The -- you asked me how much more -- I mis --
9 perhaps I misunderstood your question. I thought you
10 asked what that added cost would be to pay the higher
11 rate. That added cost is on top of the -- what is the
12 current rate? \$34.27?

13 Q I believe it's 36.23.

14 A 36.23. Sorry. Thank you. Okay.

15 That is a given. That would be paid.
16 That's not in dispute. The difference between that rate
17 and the \$64.89 is, I believe, \$588,000 a year for a
18 hundred thousand tons, assuming they delivered a hundred
19 thousand tons.

20 It works out \$28 a ton different. So that
21 times a hundred is 2.8 -- am I figuring it wrong?

22 Q So still it's over --

23 A I apologize if --

24 (Admonishment by the Stenographer)

25 MS. KIRKLAND: Sorry.

1 Q (MS. KIRKLAND) Even by your calculations, over
2 \$3 million higher than it would normally be.

3 A I -- I haven't calculated it. I'll take your
4 word for it. I'm sorry if I --

5 Q No, that's fine.

6 A My memory failed me on it. I calculated this
7 before. I was calling it out from memory. I may be
8 wrong.

9 Q Let's take a step back.

10 Where in the contract does it say that you
11 can deny access to Starcrest if the City -- if there's a
12 dispute over an invoice, if they fail to pay an invoice?

13 A I think the assumption in any contract for
14 specific performance requires that each side
15 specifically perform. If one side totally fails to
16 perform, I think it allows the right for the side who is
17 not in breach to -- to amend or augment, change, the way
18 that they -- that they have to operate. I don't think
19 the contract in any way, shape or form says that we
20 should lose two-and-a-half million dollars a year.

21 Q Is there anywhere in the contract that allows
22 you to deny access to the City for failure to pay an
23 invoice?

24 A I think it does, particularly in the area of
25 where they've had 30 days to pay and they don't -- and

1 they don't pay.

2 Now whether it says if they don't pay they
3 are denied, I -- I can't call that out. But I have --
4 but it's like all the contracts that we have, which are
5 thousands, there's an assumption that specific
6 performance is required.

7 Q There's a whole section on remedies in the
8 contract; correct? On what you can do if one side has
9 an issue with the other side?

10 A There are probably several sections in the
11 contract since it's been amended several times, but
12 there are sections, yes.

13 Q Do any of those remedies allow you to deny
14 access to Starcrest?

15 A I can't point to one specifically.

16 Q Do you agree that per the contract neither side
17 can unilaterally change the disposal rate?

18 A Clearly the contract allows for a contract
19 price that you're referring to and it requires for other
20 material that can come into the site that wouldn't
21 qualify for that rate and the parties would negotiate
22 and either agree on a rate or it would go to the gate
23 rate. And it has a clause in it allowing for special
24 waste, that TDS would set that rate. There is not a
25 negotiation on that. It's -- the City either has to

1 accept it or just not haul to the -- to the transfer
2 station.

3 Q I'll phrase it a little differently.

4 Do you agree, per the contract, that
5 neither side can unilaterally change the disposal rate
6 for municipal solid waste delivered to Starcrest?

7 A There are things within the definition of
8 municipal solid waste that do not fit in the acceptable
9 waste category. As we mentioned yesterday, tires.
10 There are numerous types of things under solid waste
11 that do not fit within the contract rate.

12 Q So even though the contract may say it's
13 appropriate municipal solid waste, if you disagree
14 you'll charge a different rate?

15 A There's nowhere that this contract requires us
16 to take all municipal waste at the contract rate.

17 Q Does the contract say that the City is
18 obligated to agree to change the method of calculating
19 future rate increases if asked to by TDS?

20 A I don't know where it says that they are
21 obligated to.

22 Q You would agree that the contract, as we saw
23 before, makes it very clear that access is one of the
24 City's priorities in the agreement; correct?

25 A Yes.

1 Q And Starcrest is the City's property; correct?

2 A Yes.

3 Q TDS is leasing it.

4 A TDS leases and TDS owns the -- the permit.

5 Q You've asserted multiple times that operating
6 the transfer station has become commercially

7 impracticable; right? Is that correct?

8 A Under certain circumstances, when it's
9 overloaded or --

10 Q Sure. I'll rephrase.

11 A Rephrase your question, please.

12 Q You noted that TDSL is losing more than
13 \$200,000 a month related to Starcrest; is that correct?

14 A Yes. Yes.

15 Q Is that the whole contract or just on City's
16 waste?

17 A It's on the City's waste.

18 Q So you're making a profit on the whole contract;
19 correct?

20 A No.

21 Q So are you saying the whole contract has become
22 commercially impracticable to perform?

23 A The whole contract involves a number of things.
24 It involves access to this market for collection of
25 commercial waste for our company Texas Disposal Systems.

1 That is a very, very valuable commodity that Texas
2 Disposal Systems, Inc., the hauling company, has access
3 to a commercial market in one of the largest cities in
4 the nation.

5 That commercial access can't be cut off
6 until January -- at the soonest September of --
7 September 30, 2025. That -- there is a value to us
8 having that.

9 Does it translate into profit? No, it
10 doesn't. It translates into the ability to have access
11 to the commercial market --

12 Q So --

13 A -- because -- so the City can cut off access to
14 commercial haulers to even haul within the -- within the
15 community.

16 Q So if the transfer station has become -- if
17 it's become commercially impracticable to perform your
18 obligations under the contract, as part of your relief
19 are you asking the Court to relieve you or to rescind
20 the contract, void the contract?

21 A No.

22 Q You want to keep operating the transfer
23 station; correct?

24 A Yes.

25 Q You want the contract to continue.

1 A Yes.

2 Q Because you receive other revenue from the
3 transfer station or affiliated with -- from having
4 possession of the transfer station; correct?

5 A We do, in fact, receive other revenue. There
6 are a small amount of third-party haulers that come in
7 and TDS hauls into it and we have a Garden-Ville
8 operation, a store, there on the property, and we
9 operate the trucking operation that services San Antonio
10 out of that same site.

11 Q So to be clear, if the temporary injunction
12 isn't granted, TDSL will not allow the City to access
13 the -- to dump its municipal waste at Starcrest at the
14 contract rate as of tomorrow; is that correct?

15 A Only in the sense of at the contract rate.
16 They will be welcome to dump, they'll be welcome to come
17 in just as they always have. We will just not accept it
18 on a on-going basis at the same rate.

19 Q And that's -- your decision to do that is
20 purely based on the idea that they have -- your position
21 that the City has previously breached the contract.

22 A In several ways.

23 Q But you want the contract to continue to go on;
24 correct?

25 A Absolutely.

1 Q You just don't want to have to perform your
2 obligations under it.

3 A No. No, we will fully perform our obligations
4 under it. We just want -- we have a basis to ask for a
5 higher rate because the City is in default in numerous
6 categories.

7 Again, under a scenario I believe as
8 you're laying out, you would require us to operate the
9 transfer station even if the City didn't pay anything
10 for the next two-and-a-half years. Well, that's --
11 again, that's not a specific performance that -- that we
12 would -- that we could be comfortable with.

13 We think it's unreasonable to lose this
14 kind of money and we think it's unreasonable that the
15 City doesn't pay the things that are in default, but the
16 litigation will determine that and that will be -- that
17 will carry out over the next two or three years on -- on
18 whether we're in default, TDSL, and whether the City is
19 in default, in what ways.

20 Q So -- but, again, you are -- you're going to
21 consider the City in breach and take these actions
22 against them related to Starcrest, but you admit the
23 litigation is still going. There's been no
24 determination that the City has actually breached the
25 contract; correct? That's your position?

1 A There has been no determination that the City
2 has breached the contract. The litigation will continue
3 regardless.

4 Q Would you agree that before August of 2021,
5 TDSL was accepting the City's municipal waste at the
6 contract rate?

7 A Yes.

8 Q And that TDSL was accepting dead animals from
9 the City?

10 A Yes.

11 Q And that TDSL was giving the City priority of
12 service?

13 A Yes.

14 MS. KIRKLAND: Just one second.

15 (Sotto voce discussion between Ms. Fry and
16 Ms. Kirkland)

17 MS. KIRKLAND: Pass the witness, Your
18 Honor.

19 THE COURT: All right. Mr. Hemphill?

20 MR. HEMPHILL: Yes, Your Honor.

21 **REDIRECT EXAMINATION**

22 BY MR. HEMPHILL

23 Q Mr. Gregory, if you could turn to Tab C in that
24 notebook in front of you.

25 A C?

1 Q C, which is the August the 2nd, 2021 notice of
2 default letter.

3 A I have it.

4 Q And turn to the page that says at the top
5 Exhibit 2, page one of two. It's an attachment to part
6 of that exhibit. There's an invoice.

7 A Exhibit page -- Exhibit 2, page one of two. I
8 have it.

9 Q Okay. Just want to clear up something that was
10 asked of you on cross-examination.

11 Do any of the amounts in that invoice
12 represent the claim by TDSL of lost revenue it could
13 have obtained from other parties other than the City?

14 A Yes. The mid section, the roll-off charge --
15 yardage charge at \$40 a cubic yard.

16 Q But is that a lost revenue from parties other
17 than the City or a shortfall in what TDSL claims the
18 City should pay?

19 A It is the second you said. It's the shortfall
20 of what we claim the City should pay. We believe much
21 of that would have come from the transfer station and
22 would have come in at \$40, but that is an assumption on
23 our part. That is a shortfall.

24 Q So is it fair to say that this invoice is based
25 on actual waste that the City actually brought to TDSL?

1 A Oh, absolutely.

2 Q Okay.

3 A 8,227 loads.

4 Q And if I remember correctly, I think Mr.
5 Newman's testimony yesterday was that the City thought
6 that TDSL's service was excellent before, I think, it
7 was March of 2022; is that your recollection?

8 A As I said earlier, I didn't remember whether it
9 was March 9th of 2022 or August 2nd of 2021. I think it
10 was the March, but I'm not sure.

11 Q One or the other, whichever date it is that
12 Mr. Newman testified the City was satisfied with TDSL's
13 service, before that date, whichever date that was,
14 either August or March?

15 A Yes. And I would have expected him to say
16 that. We worked very, very hard to meet that
17 requirement.

18 Q And was a strict four-to-one
19 city-to-other-hauler priority strictly observed during
20 that period that Mr. Newman said he was satisfied with
21 the service?

22 A It was partly yes and partly no. There's a
23 part that -- like I -- like I explained a while ago with
24 the -- with the direct dump chute that the trucks can
25 dump directly into versus the chute that has the

1 compactor. There's basically been an understanding with
2 the City that they will use the direct dump. It gets
3 too disruptive when they do -- sometimes they do use the
4 compactor.

5 Also, when even the City comes in with a
6 small load, when it weighs across the scale and it's a
7 small load because it's their second load of the day or
8 for whatever reason it's just not very much weight and
9 we actually need just a few thousand pounds to fill out
10 the load, they'll bring -- we, our staff, will bring
11 that load forward of the City or even a TDS load to
12 finish out that trailer to get it out so that the next
13 load -- truck can dump its own load.

14 I think there was no dispute about that
15 and no complaint about it because both parties were
16 aware that the whole idea was to move the waste as
17 quickly as possible, to process it through, and provide
18 open trailers for the direct dump to operate in. That
19 was in the City's best interest and our best interest,
20 and it certainly was in the best interest of keeping the
21 lanes moving and room for the trucks to queue up to
22 dump.

23 Q Let me see if I can accurately summarize that
24 then.

25 Is it fair or not to say that during the

1 time that the City has testified it was satisfied with
2 TDSL's performance at the Starcrest Transfer Station, at
3 times a strict four-city vehicles to one-non-city
4 vehicle priority was not observed for reasons of
5 efficiency? Is that fair to say or not?

6 A That is fair to say, yes.

7 Q If I can just get a moment of indulgence.

8 Mr. Newman testified rightly, I think,
9 yesterday that this is an important matter to him and
10 was given the opportunity to tell the Court who was here
11 to show that it was an important matter. I would like
12 you, with the Court's indulgence, to just let the Court
13 know whether this is as important to TDSL and who has
14 been in attendance.

15 A It is extremely important to TDSL. It's very
16 important to me. It's gone on for 30 years. It's a
17 long, long-term contract. I've owned the business since
18 1977, so we -- we continue to have a great interest in
19 staying in the San Antonio market and operating in the
20 market.

21 It's a very, very competitive business and
22 there's lot of influence on the City, and that's another
23 issue that's a trial-time issue.

24 But to let you know who I have with me,
25 how important it is to them, is Gary Newton, our general

1 counsel, Brandon Smitheal, who is the director over all
2 of our satellite operations. Brandon, raise your hand.
3 There you are. They're smiling. Including Starcrest.

4 Peter -- Peter, I always butcher your last
5 name. Give it to me.

6 MR. STRENKOWSKI: Strenkowski.

7 A Strenkowski. Okay.

8 Ryan, he's the senior counsel, a lawyer in
9 our firm, Ryan Hobbs, who has been -- his father helped
10 negotiate this contract with -- with me back in the day.
11 Adam Gregory, my -- my son, and Tom Mistler, our
12 COO/CFO.

13 Thank you for that.

14 Q Thank you, Mr. Gregory.

15 MR. HEMPHILL: No more questions. Pass
16 the witness.

17 MS. KIRKLAND: No more questions.

18 THE COURT: All right. Thank you,
19 Mr. Gregory.

20 (Witness steps down)

21 MR. HEMPHILL: Respondent rests.

22 THE COURT: Thank you. Pleased to have
23 all of you in the courtroom.

24 Now what we'll do from here is I will take
25 closing arguments, and I'm going to go beyond

1 12:00 because I'd like for you to finish and wrap up
2 closing arguments so that the Court can think on this
3 and be deliberative because I know that we're talking
4 about a deadline of tomorrow.

5 And the Court understands that while there
6 isn't a lock that there is a -- so I want you to address
7 this in the closing arguments. I was under the
8 impression that the City was going to be locked out.
9 There isn't a physical lock; however, it's actually the
10 same because the City will not have access, and so the
11 City will not have physical access unless it agrees to
12 pay an increased rate. Okay. That is the Court's
13 understanding, and so I understand the -- the
14 importance.

15 So I'd like to go ahead and begin closing
16 arguments so that then I can take this up for the
17 afternoon. All right? Okay.

18 MS. KIRKLAND: If I may proceed.

19 THE COURT: Yes, please.

20 **CLOSING ARGUMENT**

21 MS. KIRKLAND: The only question before
22 the Court today is whether the City has established that
23 it has a right to the status quo. To be entitled to
24 injunctive relief, the City had to establish it has a
25 cause of action, has a probable right relief on that

1 cause of action, and that it established that it has
2 probable, imminent and immediate harm, and that that
3 harm would be irreparable.

4 The City is satisfied that we're -- as to
5 element one -- and as the Court can take note via the
6 pleadings on file, the City has filed the request for
7 declaratory judgment. The declarations are specifically
8 geared towards asking for the Court's interpretation of
9 the rights and obligations under the party -- under the
10 contract. So the City has satisfied the first element.

11 The evidence also demonstrates that the
12 City has a likelihood to recover on its requests. The
13 City is asking for specific declarations on the parties'
14 rights and responsibilities under the agreement, related
15 to both what the appropriate disposal rate should be,
16 how that disposal rate should be calculated in the
17 future, acceptance of dead animals, and the City's right
18 to priority of service.

19 The contract itself is the City's evidence
20 that it is likely to succeed on the merits of its
21 request; therefore, the City has established it has
22 satisfied the second element of a request for a
23 temporary injunction.

24 The City has unequivocally established
25 that if the TI is not granted it will suffer imminent

1 and irreparable harm for which there's no adequate
2 remedy at law. It's not just money. It's not just
3 paying a higher rate.

4 What TDSL is trying to do is essentially
5 handcuff the City from accessing -- it's a facility that
6 it owns, that it contracted for priority of service to,
7 and it's doing -- without having any kind of legal
8 adjudication to that. It's essentially saying, City,
9 prepay my breach of contract damages now. And if you
10 don't do that, I'm not going to abide by the contract.
11 I'm not going to be held to that.

12 When we -- in terms of talking about harm,
13 we've established that, despite having no legal basis
14 for its breach of contract claim and commercial
15 impracticability claim, TDSL is threatening to hold the
16 City hostage in the only way it can: To withhold access
17 to the City's transfer station at a rate that's
18 appropriate, and ultimately threatening the health and
19 safety of the public as David Newman testified to.

20 It is easy to simplify the harm and say
21 the City could just take longer routes; it could -- but
22 that wholly misses the harm that Mr. Newman testified
23 to. It's not just a longer day. It's a 13-to-14-hour
24 day on these employees operating large, complicated
25 machinery. The machinery itself, it's not just

1 putting -- it's putting mileage on it, wear and tear on
2 equipment that's not easily fixable because the parts
3 aren't readily available. And they can't be easily
4 replaced because there's a back order on these type of
5 trucks. So it's more than that.

6 And when you look at the employees
7 themselves working these longer days, you can't just fix
8 this by throwing employees and trucks at it. As I said,
9 trucks are hard to come by, employees even harder. You
10 know, it takes them a long time. These 13, 14-hour
11 days, they won't do this for long. They don't have to.
12 So as the City loses staff, as equipment begins to go
13 down, this problem just expounds on itself.

14 It's also -- the more time -- the more
15 time on the road is more complicated because it is more
16 interactions with the public. You've got these large
17 trucks now in traffic on highways where they didn't
18 generally do that because they go to these other
19 disposal sites. They are now later so they are
20 interacting with kids coming home from school, playing
21 in the neighborhood. We have people parking on the
22 street and now they can't get to their curbside pickups
23 as easy.

24 So it's not just time. It's not just
25 longer time. It's all of that that goes into it. There

1 will be more accidents. All of that is unquantifiable.
2 You can't -- it's not a harm that can be remedied with
3 money now or with money later via damages.

4 And to reiterate, there's no mechanism
5 under the contract that would allow TDSL to take the
6 actions that it's taking. This -- we looked at multiple
7 provisions in the contract where it was very clear that
8 keeping access to the facility was critically important,
9 and it even references because of public health and
10 safety.

11 And it's important that they get the -- at
12 the contract rate, too, because that's what they
13 bargained for. That's what they budget for. That's
14 what they have access to.

15 As Mr. Newman testified, it's an
16 enterprise fund. They have the money they have, what
17 they earn. They can't just reach further into the
18 pockets. It's going to City Council. It's going to
19 ratepayers at the end of the day saying, Hey, I've got
20 to pay more so I need you to pay more.

21 TDSL's claim for impracticability, again,
22 it's without merit. First, other than saying they're
23 losing money, TDSL has not established that the
24 performance was, in fact, impossible or impractical.
25 And they aren't even seeking to have the contract

1 rescinded, which is generally the request that you would
2 get if you want commercial impracticability.

3 That's not what they want. They want to
4 keep the lease because it is beneficial to them. They
5 just don't want to perform their obligations under it,
6 meaning accepting the City's waste at the contract rate.

7 It's important to remember that they
8 unilaterally extended the contract for two years. So
9 for them to say they're taking a loss on it at \$200,000
10 a month, if that's true they willingly went into that as
11 of January 15th, 2022 -- 2023 by extending the contract.

12 And last, just as a legal point,
13 commercial impracticability is an affirmative defense.
14 They're using it as a sword. It's not a sword. It's
15 not an affirmative claim. It's a shield if the City
16 brought a breach of contract claim. So I think they're
17 not using it appropriately either.

18 So to the extent TDSL is claiming that the
19 City breached, a breach as I mentioned that hasn't been
20 adjudicated by the Court, one for which the City has
21 statute of limitation defenses which is raised in its
22 answer because some of these -- the invoices when you
23 see them, they go back to 2013. As you know, statute of
24 limitations doesn't exceed that far.

25 Or even if TDSL was excused because it's

1 commercially impracticable so they're excused from
2 performance, its remedy is damages. It's terminating
3 the contract. Those would be its remedies, not locking
4 the City out of its own facility to essentially extort
5 concessions for a higher rate on a 20-year contract
6 that's been going on.

7 To the contrary, the contract is written
8 to make it very clear, again as I mentioned, that access
9 is a priority, is a concern in that it was paramount to
10 them.

11 And, again, I think we can't lose site of
12 the numbers. We talk about the numbers. You know, we
13 looked at -- they've sent four invoices since
14 January 15th that total \$700,000. Even if you just
15 looked at it again from the difference from what the
16 City paid and from what they would be claiming, you
17 know, it's essentially \$500,000 a month, \$6 million a
18 year. If this litigation goes on for two years, that's
19 12 million. If it goes on for three -- as Your Honor
20 knows, that can happen -- that's 18. It's not nothing.

21 And more importantly, as I mentioned, it
22 can't be lost that, again, they're asking the City to
23 pay now on a breach that hasn't even been proven which
24 is why if TDSL is allowed to prevent access to the City,
25 again, the City will suffer immediate and irreparable

1 harm. There is no amount of money now again or at the
2 end that will make up for the damage and the disruption
3 this will to the City, to its operations, to the public
4 who will now be experiencing this.

5 The evidence shows that the City is
6 entitled to maintenance of the status quo. Again, that
7 is what we're asking for again today.

8 The last peaceable time between the
9 parties was before the August 2021 letter. Before then,
10 the City had access to dispose of municipal solid waste
11 at the Starcrest facility at the contract rate. Rate
12 increases were established per the CPI. Dead animals
13 were accepted and the City was receiving priority of
14 service.

15 The City's request for injunction is
16 designed to maintain the status quo pending trial. I
17 ask the Court to grant its application for injunction to
18 avoid imminent harm. The City is willing to post a
19 bond, and the City is ready to set this matter for
20 trial on the merits.

21 We really appreciate the Court's
22 consideration. I know you gave additional time. Thank
23 you for that. The City would ask for the relief.

24 THE COURT: Thank you, Ms. Kirkland.

25 Mr. Hemphill, you may proceed.

1 MR. HEMPHILL: Yes, Your Honor. I do so
2 much appellate work, I'm just more comfortable standing
3 if that's acceptable to the Court.

4 THE COURT: Of course.

5 **CLOSING ARGUMENT**

6 MR. HEMPHILL: A party such as the City
7 that's seeking the extraordinary remedy of temporary
8 injunctive relief has to meet a high burden. We would
9 submit that the evidence shows that the City has failed
10 in that burden in multiple respects, but I'd like to
11 talk about four discrete issues: Adequate remedy at
12 law; likelihood of success on the merits; the
13 prohibition against injunctions commanding specific
14 performance of a contract, which is what the City is
15 asking for; and balance of the equities.

16 So let's start with adequate remedy at
17 law. That's obviously the overarching issue when
18 considering temporary injunctive relief. The City must
19 show reasonably certain imminent harm that's likely to
20 occur absent the injunctive relief it seeks.

21 Now, this -- the City's application is
22 about a lot more than access. And I'll get to that in a
23 minute. But the City really focuses on access as the
24 keystone to their argument of irreparable harm, so I
25 think we need to look at that in more detail.

1 We had testimony, a parade of horrors,
2 if you will, about things that might happen if the City
3 loses access. I think a lot of them were speculative.
4 There was testimony that there ultimately may be delays
5 in picking up garbage, that drivers would leave after
6 two weeks. I think that's entirely speculative.

7 But in addition to that, because the City
8 focuses so much on lack of access being their -- their
9 argument for lack of adequate remedy at law, I asked
10 Mr. Newman what the City planned to do if there was no
11 injunction. Right? Are they going to give up the
12 access? Are they going to pay and have a damages claim
13 and continue to access the landfill?

14 I think it's a fundamental question
15 because I think the City's argument about imminent,
16 irreparable injury, again, turns on loss of access,
17 which is not a given.

18 And so I asked Mr. Newman what the City
19 planned to do, and I think I had to ask him several
20 times because at first he was saying, Well, we'll --
21 we'll do whatever we're legally allowed to do, and
22 hopefully respectfully I asked him again. And I
23 think the reason I did that was because it seemed odd
24 that if the City was going to have such great loss --
25 great incalculable damage if they lost access, it seemed

1 odd that the City would choose to lose access rather
2 than pay and have a damage claim. That just seemed like
3 an odd thing.

4 So finally I think what Mr. Newman said
5 was, Well, we don't know what we're going to do if
6 there's not an injunction. We don't know.

7 In other words, they might not lose
8 access, so fundamentally the City hasn't shown that it
9 will actually lose access in the absence of an
10 injunction . And as we pointed out, that is within the
11 City's control. And I understand the City doesn't think
12 it's in breach, and I'm going to talk about that in a
13 minute. I think it's pretty clear that they are without
14 a doubt on at least one element, and I'll talk about
15 that.

16 But it's also crystal clear that the City
17 will not lose access and will not suffer any imminent,
18 irreparable injury even under its own theory if it goes
19 forward and pays the rate and maintains its
20 counterclaims against TDSL.

21 Now, this kind of dovetails on the second
22 issue, which is likelihood of success on the merits that
23 I'd like to talk about.

24 So why isn't TDSL restricted to charging
25 the contract rate? Well, what is the claim at issue?

1 What is the claim that the City has to show likelihood
2 of success on the merits?

3 Well, the City has a declaratory judgment
4 claim arguing that TDSL is in fact restricted to the
5 contract rate. That's a claim. They have to show
6 they're likely to succeed on that claim, but the City
7 hasn't made that showing because it has forfeited its
8 right to the contract rate due to prior material
9 breaches.

10 So one of the things that we heard is,
11 Well, these have not been adjudicated. These claims
12 have not been adjudicated.

13 True, but that ignores what the City's
14 burden is. The City has to show a likelihood of success
15 on the merits of its claim.

16 We talked about -- heard evidence about
17 the bulky waste invoices and transportation
18 modifications and that sort of thing. And I'm not
19 discounting those at all, but really what I'd like to
20 focus on is the put-or-pay shortfall for the previous
21 fiscal year, because I don't think it can be any more
22 clear that the City hasn't met its burden to prove
23 likelihood of success on its merits that TDSL is
24 restricted to the contract rate because of the evidence
25 of prior breach.

1 First of all, the City has a contractual
2 remedy for violation of the priority provision and that
3 is to deduct from the put-or-pay obligation any waste
4 that's diverted if it's diverted pursuant to the terms
5 of the contract.

6 What the contract requires is clear and
7 unambiguous. A route truck has to have waited at
8 Starcrest for more than 30 minutes; the City must have a
9 designated on-site manager who makes the decision to
10 divert the truck to another landfill; the 30-minute-plus
11 wait at Starcrest must be due to TDSL's lack of
12 reasonable care; and there has to be a daily log of
13 diversions sent to TDSL.

14 Mr. Newman candidly admitted in his
15 testimony that for the fiscal year ended September 30th
16 of 2022, the City didn't do any of those things, but it
17 still is claiming a deduction. It's not entitled to the
18 deduction. They had no designated on-site
19 representative.

20 Mr. Newman testified that a decision to
21 divert is often done by Mr. Castillo, someone who is
22 usually not even at the landfill, and -- excuse me, at
23 Starcrest -- not at Starcrest. And the trucks weren't
24 required to wait at Starcrest for more than 30 minutes
25 or sometimes not at all, that he'd divert trucks before

1 they even got to Starcrest.

2 How do we know they would have had to wait
3 30 minutes? Well, in the City's best guess, they would
4 have had to. But that's not what the contract says. It
5 says in the event a truck is required to wait at
6 Starcrest more than 30 minutes, it can be diverted.

7 And the City made no effort to show that
8 the diversions or the waits were due to lack of
9 reasonable care by TDSL. In fact, the City reads the
10 reasonable care provision completely out of the
11 contract. And I'll talk about that in a minute.

12 The City hasn't -- isn't entitled to any
13 put-or-pay deduction for the past fiscal year. There's
14 been a notice of default. There's been a notice to
15 cure. There's been an invoice for that put-or-pay
16 shortfall.

17 Mr. Newman admitted that the amount was
18 correct, he just thought that they were entitled to
19 deduct it. But they haven't shown the likelihood of
20 success on that argument that they were likely to deduct
21 it, and that excuses TDSL from any obligation to only
22 charge the contract.

23 Now, the third issue, specific performance
24 of a contract. I think it's instructive to look at what
25 the -- what the City is asking the Court to order,

1 because they're not just asking the Court to order
2 continued access to Starcrest. They're also asking for
3 a ruling from the Court that TDSL can't deny access to
4 Starcrest because the City doesn't pay its invoices.

5 So under the relief that the City is
6 asking for, there is no obligation for them to pay
7 invoices of any kind. They want access, and they want
8 the Court to order that TDSL cannot deny access for
9 failure to pay.

10 They want an order that TDSL is enjoined
11 from conditioning the City's access and use of Starcrest
12 on its payment or agreement to pay a disposal rate in
13 excess of 36.23 per ton for the entirety of 2023. Not
14 only is that specific performance which can't be ordered
15 in a temporary injunction, but it also is a decision on
16 the merits of the case which is -- it's premature to do.

17 And even -- I think even more
18 overreaching, the City is asking for a court order that
19 TDSL can't even bill at anything other than what it --
20 what the City says is the correct contract rate. Can't
21 even send them a bill. That's part of -- part of the
22 City's request.

23 Mr. Newman was -- was candid when he said
24 the City wants this Court to order TDSL to perform
25 specifically under the contract, and we've cited the

1 case law that that's not appropriate in the temporary
2 injunction context because breach of contract damages
3 are subject to money calculation. They are not
4 irreparable. There is an adequate remedy at law for
5 contract damages.

6 The access issue that we talked about, and
7 then all these other issues that the City is asking for
8 relief on, are contract performance issues. And for a
9 party that is relying so heavily on the contract, it's
10 kind of interesting that the City's interpretation of
11 the contract is frequently different than what the
12 contract's language is, because we've talked about the
13 put-or-pay issue just a minute ago where the City
14 contract says, Here's what you have to do. On-site
15 manager, wait more than 30 minutes, no reasonable care,
16 daily reports, that they haven't done any of that.

17 And -- and then the priority provision
18 similarly, Mr. Newman was -- was very candid about that.
19 He said reasonable care doesn't matter to the City. The
20 City says if TDSL doesn't service trucks within 30
21 minutes, they are in breach of the priority provision.

22 Again, that's not what it said. And as a
23 matter of fact, Mr. Gregory testified that sometimes due
24 to the nature of the transfer station, which operates
25 kind of as a funnel, it's impossible to service every

1 truck within 30 minutes. The contract says reasonable
2 care.

3 The City's interpretation of the contract
4 is wrong and it just can't be the subject of a temporary
5 injunction.

6 Last point, balance of the equities. The
7 last of the four. Mr. Gregory testified the City --
8 that TDSL is losing \$200,000 a month servicing the City
9 contract, almost two-and-a-half million dollars a year.

10 So we have to consider -- well, let me --
11 let me say one more thing. I believe the word
12 Mr. Newman used in his testimony about it was that
13 whether or not TDSL is losing money on this contract is
14 immaterial to the City. It's not immaterial to TDSL,
15 and I'd respectfully suggest that it should not be
16 immaterial to the Court because the Court, in deciding
17 whether to issue a temporary injunction, is required to
18 balance the evidence, so I think the equities do come
19 into play.

20 How would TDSL be harmed by the injunction
21 the City seeks versus how would the City be harmed by no
22 injunction?

23 TDSL, if the City's injunction is granted,
24 would continue to lose money, would be forced to take
25 all of the City's waste of any kind, even if the City

1 refuses to pay, and apparently would be required to meet
2 a service standard different than that in the contract
3 that would read reasonable care out of the contract,
4 which at times is impossible to meet.

5 On the other hand, the City apparently
6 doesn't have a plan what it's going to do if there's no
7 injunction so we can't really say what the harm to the
8 City is going to be if there's no injunction. We do
9 know that absent an injunction, the City's choice is to
10 pay the bills or to lose access. That's absolutely what
11 TDSL says. No question about that.

12 But it can't say which one it would
13 choose. The City can't say which one it would choose
14 because it doesn't have a plan even though it relies on
15 the concept of lost access to satisfy its high burden of
16 showing irreparable injury.

17 If the harm from loss of access would be
18 as great as the City is making it out to be, it seems
19 unfathomable that they'd actually choose losing access
20 over paying and having a damage claim. And the City's
21 only response to why they don't pay is, Well, we don't
22 think we have to honor the contract and it's not in the
23 budget.

24 So we think the balance of the equities
25 weighs in favor of TDSL on this. The access is one

1 not the City -- you know, he says the City doesn't have
2 a plan and that's unfathomable. Right. It's
3 unfathomable that the City could lose access to
4 Starcrest. And so to say that it's no harm, no, that is
5 the harm, that the City hasn't come up with a plan
6 because there is no plan if that happens. And if they
7 have to deal with it, they have to deal with it.

8 But to sit here, if I had -- if the City
9 had a plan, well then they have a plan so it's no big
10 deal. No, they don't have a plan. It is a big deal,
11 and so we would ask the Court -- we know the Court has
12 taken this seriously, and we would just ask the Court to
13 consider all the evidence that they've seen. And,
14 again, we think we're entitled to the injunction.

15 Thank you.

16 THE COURT: All right. Since it is TDSL's
17 intent to deny the City access as of tomorrow, I need to
18 have my decision this afternoon, so I'm going to take a
19 couple of hours to reach my decision and then I will
20 notify the parties.

21 MS. KIRKLAND: Your Honor, I have a
22 proposed order which I've presented to opposing counsel,
23 if I may.

24 THE COURT: Yes.

25 MS. KIRKLAND: And, again, this would be

1 the order that we would ask.

2 MR. HEMPHILL: And we have one as well.
3 And I don't mean to be difficult. There's a place on
4 the City's proposed order for agreed as to form. I just
5 don't think I can agree to anything as to form, just
6 because of the content of the order. So I think it
7 depends upon what the Court's ruling is so I think it's
8 premature for me to --

9 THE COURT: I think the Court would just
10 sign sua sponte and without any signatures.

11 MR. HEMPHILL: Sure.

12 THE COURT: So I will decide in your
13 e-mails --

14 MS. KIRKLAND: Your Honor, the only other
15 matter I bring up just so in case we -- while we're all
16 here, there is obviously the issue of a bond that may be
17 required if the Court does grant it, and I don't know if
18 we need to have that discussion now, and a trial date
19 should the Court be so inclined to grant the temporary
20 injunction.

21 THE COURT: So while I review this, I do
22 need to consider Mr. Hemphill's idea of what he thinks a
23 bond, and so I do need to know this so that if it's in
24 the order I would like to put that in the order.

25 MR. HEMPHILL: Yes, Your Honor. I think

1 that what we said in our pleading is I think we've
2 produced evidence that the loss -- that TDSL is losing
3 \$200,000 per year, I think one year of that loss at
4 \$2.4 million would be an appropriate bond.

5 MS. KIRKLAND: And while the harm -- the
6 bond is intended to reflect the potential harm and I
7 understand they're saying it's 2.4, again, we would
8 argue it's an unproven number. It's obviously
9 completely subjective and that hasn't been put on.

10 I think the main thing I would say though
11 is a bond is intended to provide security for them and
12 we are talking about -- we've talked about it being the
13 City. The idea that it would need to be 2.4 million
14 feels like a significant amount for an untested number.
15 We would ask for a nominal bond, somewhere in the
16 50,000 -- 25 to 50,000 of that amount, I think that
17 would be appropriate to secure -- to provide security
18 should this be an issue.

19 MR. HEMPHILL: And the only response --
20 I'm sorry, Your Honor. The only response I would have
21 to that is I don't think it's an unproven number. I
22 think there's testimony as to what the number would be
23 and that's -- that's evidence. That's the only evidence
24 in the record at this time.

25 THE COURT: And the Court has discretion

1 with respect to the bond.

2 MS. KIRKLAND: Obviously, Your Honor.

3 MR. HEMPHILL: Yes.

4 THE COURT: So trial date.

5 MS. KIRKLAND: Yeah. That, we haven't
6 talked about. I don't even -- I know just in setting
7 trials recently in Bexar County, I believe they're
8 pretty far out right now, but we're ready -- I mean, we
9 are ready to set it. So whenever the Court feels is
10 appropriate, I'm happy to work with Mr. Hemphill.

11 MR. HEMPHILL: You know, I think for a
12 setting -- for an initial setting, you know, I think the
13 Court knows the docket better than we do. I know my own
14 docket is pretty full until November.

15 THE COURT: Okay.

16 MR. HEMPHILL: That's the input I can
17 give.

18 THE COURT: Okay. Well, for an initial
19 setting the Court would wish it to be -- you know, we're
20 February now, would wish it to be in 2023. I have to
21 make -- I would just need to make one call to the
22 monitoring judge that I know quite well and just say
23 what can we do to make that happen.

24 MS. KIRKLAND: Sure.

25 THE COURT: I think that it's important

1 that there's a trial date as soon as practicable because
2 of the losses that have been testified to and whether or
3 not that -- that bears out. Okay? But as far as an
4 equitable decision, that needs to be sooner than later.

5 MS. KIRKLAND: We agree, Your Honor.

6 THE COURT: Okay.

7 MR. HEMPHILL: Yeah.

8 THE COURT: So I will find out and I
9 will -- I will actually notify you of the trial date.
10 Okay?

11 MR. HEMPHILL: Very good.

12 THE COURT: And then if you obviously
13 can't do that, then the parties will move to continue
14 it.

15 MS. KIRKLAND: We'll discuss it.

16 MR. HEMPHILL: Fair enough.

17 MS. KIRKLAND: Thank you, Your Honor.

18 THE COURT: All right. You'll have my
19 decision by the end of the day today.

20 MS. KIRKLAND: Thank you, Your Honor.

21 MR. HEMPHILL: Thank you, Your Honor.

22 THE COURT: Thank you so much.

23 (Recess)
24
25

1 STATE OF TEXAS
2 COUNTY OF BEXAR

3
4 I, Gina K. May, Official Court Reporter in and for
5 the 285th Judicial District Court of Bexar County, State
6 of Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record in the above-styled
11 and numbered cause, all of which occurred in open court
12 or in chambers and were reported by me.

13 I further certify that this Reporter's Record of the
14 proceedings truly and correctly reflects the exhibits,
15 if any, offered by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$2682.00 and
18 was paid by GRAVES DOUGHERTY HEARON & MOODY.

19 This the 27th day of February, 2023.

20

21 /s/ Gina K. May

22 Gina K. May, CSR
23 Texas CSR 5273
24 Expiration: 10/31/2023
25 285th Judicial District
100 Dolorosa, 4th Floor
San Antonio, Texas 78205
gina.may@bexar.org