IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

ROBERT L. WHITWORTH, PATRICIA A. POSSEL and ROBERT E. POSSEL and SUE G. WARD and DENSON WARD III, on behalf of themselves and all similarly situated persons and entities,	**Case No. CH-21-0423 Part II** **(Hon. Chancellor Jim Kyle)**
PLAINTIFFS, v.	**FIRST AMENDED CLASS ACTION COMPLAINT FOR BREACH OF CONTRACT; BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING; UNJUST ENRICHMENT and DECLATORY JUDGMENT PURSUANT TO TENNESSEE CODE ANNOTATED § 29-14-103 and 104**
CITY OF MEMPHIS, and MEMPHIS GAS, LIGHT & WATER, a division of the CITY OF MEMPHIS	**JURY TRIAL DEMANDED PURSUANT TO TENN. R. CIV. PRO. 38.01 & 38.02**
DEFENDANTS.	

TO THE HONORABLE CHANCELLORS:

Plaintiffs Robert L. Whitworth, Patricia A. Possel and Robert E. Possel, and Sue G. Ward and Denson Ward, III, on behalf of themselves and all other similarly situated persons and entities, by and through their designated attorneys, and for their First Amended Class Action

Complaint allege as follows: All allegations in this First Amended Class Action Complaint are based upon the investigation of counsel, except the specific allegations pertaining to the named Plaintiffs, which are based upon personal knowledge. As of the date of this Complaint, no class discovery has been conducted. As a result, it is likely that once the discovery process is underway, the named Plaintiffs will seek leave to further amend this Complaint to add new factual allegations, new claims and/or new parties.

I.

NATURE OF THE ACTION

1. This is a partial city-wide class action brought under for (i) Breach of Contract, (ii) Breach of the Implied Duty of Good Faith and Fair Dealing, (iii) Unjust Enrichment, and (iv) Declaratory Judgment pursuant to TENNESSEE CODE ANNOTATED § 29-14-103 and 104 in order to remedy Defendants' unlawful actions in charging and collecting garbage pick-up fees from Plaintiffs and the proposed Class Members for garbage pick-up services that Plaintiffs and the Class Members in fact never received. The named Plaintiffs and the Class Members seek a class wide award of compensatory damages against Defendants as well as Declaratory Relief.

II.

SUBJECT MATTER JURISDICTION AND VENUE

2. This Court has original subject matter jurisdiction over this Action pursuant TENNESSEE CODE ANNOTATED § 16-11-101 and 102.

3. Venue is proper in this judicial district pursuant to TENNESSEE CODE ANNOTATED § 20-4-101(a) on the grounds that the cause of action arose in Shelby County, Tennessee. Venue is also proper pursuant to TENNESSEE CODE ANNOTATED § 20-4-101(a) and § 16-11-115(1) on the grounds that Defendants are found and maintains its principal place of

business in Shelby County, Tennessee. Venue is also proper in this judicial district pursuant TENNESSEE CODE ANNOTATED § 16-11-115(3) and (4) on the grounds that this county is the location where the goods were to be provided and/or services rendered.

III.

THE PARTIES AND PERSONAL JURISCTION

4. Plaintiff Robert L. Whitworth is an individual residing in Cordova, Tennessee. Plaintiff Whitworth is a member and proposed representative of a Class of persons and entities who were charged by Defendants and who paid Defendants for garbage pick-up services that they never received.

5. Plaintiffs Patricia A. Possel and Robert E. Possel are a married couple residing in Cordova, Tennessee. Plaintiffs Possels are members and proposed representatives of a Class of persons and entities who were charged by Defendants and who paid Defendants for garbage pick-up services that they never received.

6. Plaintiffs Sue G. Ward and Denson Ward III are a married couple residing in Cordova, Tennessee. Plaintiffs Ward are members and proposed representatives of a Class of persons and entities who were charged by Defendants and who paid Defendants for garbage pick-up services that they never received.

7. Plaintiffs Robert L. Whitworth, Patricia Possel and Robert E. Possel, and Sue G. Ward and Denson Ward, III are hereinafter referred to as "Plaintiffs."

8. Defendant City of Memphis (hereinafter referred to as "Defendant" or "the City") is a home rule municipality authorized under Article XI, § 9 of the Tennessee Constitution. Service of process may be accomplished on Defendant through Jennifer A. Sink, the City's Chief Legal Officer, located at 125 North Main Street, Room 336, Memphis, Tennessee 38103.

9. Defendant Memphis Light, Gas & Water (hereinafter referred to as "MLGW") is a Division of the City. Service of process may be accomplished on MLGW through Cheryl W. Patterson, MLGW's Vice President and General Counsel, located at 220 South Main Street, Memphis, Tennessee 38103.

10. This Court has both general and specific personal jurisdiction over each Defendant based upon the fact that each maintains an office in the State of Tennessee and has had substantial and continuous contact with Tennessee as to the garbage pick-up fees charged to the Class Members. As a result, this Court has personal jurisdiction over each Defendant pursuant to TENNESSEE CODE ANNOTATED §§ 20-2-214(1) and (2) and (6) and 20-2-223(1), (3) and/or (4) on the grounds that the claims asserted against it arise from its transaction of business within Tennessee and on the grounds that it has committed a tortious act within Tennessee. Furthermore, each Defendants' contacts and actions were directed toward Tennessee and thus warrant the exercise of personal jurisdiction over it pursuant to TENNESSEE CODE ANNOTATED § 20-2-225(2).

IV.

FACTUAL ALLEGATIONS

A. Summary of Class Allegations

11. Over the last two decades, the City's appetite and need to extract ever increasing revenues from Memphians has grown voraciously. While there are many reasons for this, much of the City's revenue problem lies with a number of City administrations that have wrongfully treated the City as a "jobs machine" whereby the City over-hires employees, and adopted economically unachievable pension plans which wildly reward retirees. As a result, the City has been and is constantly in need of revenues to fund these employees' salaries and pay and to fund its current and former employees' woefully underfunded and unrealistic pension plans.

12. In order to secure sufficient funds to the City's financial misadventures, the City has reached out to annex a number of communities bordering Memphis. These annexations have included the large suburban communities of Hickory Hill (annexed 12/31/1998), Countrywood-Eads (annexed 4/30/2002), Hillshire (annexed 12/31/2002), Getwell West (annexed 11/15/2004), Raleigh North (11/24/2005), Berryhill (annexed 12/31/2006), Southwind-Windyke A (annexed 12/31/2006), South Cordova (annexed 7/1/2012) and South-Windyke B (annexed 12/31/2013)(hereinafter referred to as the "Annexed Communities").

13. With annexation, the City was obligated to provide and extend City services to the residents and businesses of the Annexed Communities in exchange for property taxes. Services extended to the annexed areas included, but not limited to, police and fire protection, and, as relevant to the instant lawsuit, weekly garbage and recycling pick-up, bulk refuge and yard debris pick-up services that are provided to other residents and businesses located in the City of Memphis. .

14. With respect to garbage pick-up services, the City determined that it would not utilize the unionized City garbage employees to all annexed areas. Instead, the City created a separate area named Section E out of the Annexed Communities (hereinafter referred to as "Section ER"). Parts of Hickory Hill and East Memphis and all parts of Windyke and Cordova annexed areas became Section E. Section E is subcontracted to a third-party vendor in order to reduce costs of service to give the City a revenue stream.

15. Thus, in an effort to garner a profit when providing garage pick-up services to the Section E, the City chose to contract with third-party vendors whereby the City could charge the residents and businesses of the Section E the same amount as others in the City, yet pay substantially less to the third-party vendors, thus creating the profitable revenue stream.

16. Specifically, as relevant to this lawsuit, the City contracted with Inland Waste Solutions, LLC (hereinafter referred to as "Inland") and then later with Waste Pro of Tennessee, Inc. (hereinafter referred to as "Waste Pro").

17. For the last six (6) years, both Inland and Waste Pro, on behalf of the City, have failed and refused to provide weekly garbage, recycling and bulk and yard waste pick-up, leaving trash literally piling up in the Section E. These acts and omissions have caused the residents and businesses of Section E to not receive the services for which they contracted and for which they have paid. Further, these acts and omission have caused significant health concerns due to the massive amount of garbage that has not been fully and timely disposed of by the City and its vendors.

B. <u>The City contracts with Inland to provide garbage pick-up for the Section E and enacts an ordinance that prevents Section E's customers from using anyone other than the City and its agents to provide garbage service.</u>

18. In or about February 2014, the City contracted with Inland for weekly garbage pick-up in the Section E consisting of solid waste placed in ninety (90) gallon trash cans to be provided to customers as well as bi-weekly pick up of yard/waste, bulk items and recyclable items at an annual cost to the City of $4,253,222.28. This annual cost roughly equaled a $9.88 per residential household in the Section E per month.

19. The City, through MLGW, entered into a contract with Plaintiffs and the Class to provide garbage pick-up, for which MLGW would bill and collect from them.

20. However, the City chose to charge the customers in Section E approximately $22.00 per month so that the City could make a profit as well as be in parity with the cost of garbage pick-up for customers located in the City but not in Section E. This charge would later be increased by the City over the years.

21. The City also adopted an ordinance which prohibited Section E customers

from contracting with any vendor to pick up their garbage other than as provided by the City. As a result, these customers were forced to contract with the City and pay it for the garbage services that the City would provide through Inland.

22. In January 2015, Inland fitted all trash carts in Section E with what is known as a radio frequency identification tag ("RFID") which allowed Inland to verify which dates and times its employee conducted a garbage pick-up for the City's customers. As a result, the records of Inland will establish the wholesale failure to timely collect the trash of the named Plaintiffs and the proposed Class Members.

C. Defendants failed to provide Section E customers with proper garbage pick-up services via its vendor Inland.

23. Throughout 2015 through 2018, the City woefully failed to provide weekly trash/recycling cart pick-up service as well as bi-weekly yard waste and bulk pick-up. Despite numerous complaints from the Class Members, the City failed to correct the failure its agent, Inland, to provide proper garbage services. In short, the City breached its contractual obligations to Plaintiffs and the Class Members, proximately causing them to pay for services that they were promised but did not receive.

D. In response to the continuous failure of Inland to properly pick-up garbage for the City in Section E, the City contracts terminates Inland and hires Waste Pro.

24. In 2018, the City, recognizing it abysmal failure to deliver timely and proper trash pick-up service to Plaintiffs and those in the Section E , terminated its contract with Inland and entered into a contract with Waste Pro for approximately $13,000,000 annually to provide trash pick-up services to Section E customers. The City's Waste Pro contract of trash service provided for weekly solid waste pick-up and bi-weekly bulk/yard waste pick up.

25. Unfortunately, under Waste Pro, the City's trash collection remained deplorable, unreliable and each Section E residence/business received late by day(s), hit and miss service

routinely, and at times, not at all for weeks. Since early 2020 outside the cart service of 2 bags was eliminated and by mid-2020, and officially announce in October 2020 businesses/residences no longer received recycling service. Even though service was reduced, the fee for service was not reduced. . As a result, the City is now seeking to terminate Waste Pro' contract.

V.

CLASS ACTION ALLEGATIONS

26. The named Plaintiffs bring this action as a Class Action pursuant to Rule 23.01 and pursuant Rule 23.02(3) of the Tennessee Rules of Civil Procedure as defined follows:

> From March 30, 2015 to the present, Plaintiffs and all similarly situated persons and entities who paid MLW for garbage pick-up service provided by Inland Waste Solutions, LLC (and its assignees, if anyone) and Waste Pro of Tennessee, Inc (and its assignees, if anyone)(hereinafter referred to as the "Class" or the "Class Members").
>
> Excluded from the Class are the Judge assigned to this matter and any member of the Judge's staff and immediate family.

27. **Numerosity.** The requirements of Rule 23.01(1) are satisfied in that there are too many Class Members for joinder of all of them to be practicable. Upon information and belief, these Class Members exceed 43,000 in number. This Class, as defined above, meets the numerosity requirement.

28. **Commonality.** The claims of the Class Members raise numerous common issues of fact and/or law, thereby satisfying the requirements of Rule 23.01(2). These common legal and factual questions, which may be determined without the necessity of resolving individualized factual disputes concerning any Class Member, include, but are not limited to, the following questions:

Questions of Fact

(i) How many Class Members paid MLGW for trash pick-up service?

(ii) What is the total amount of trash pick-pick payments made by the Class Members?

(iii) How many times did the City fail to timely collect the Class Members' trash?

Questions of Law

(i) Whether the City and/or MLGW owed a contractual or quasi contractual obligation to timely collect the Class Members' trash.

(ii) Whether the City and/or MLGW owed breached its contractual or quasi contractual obligation to timely collect the Class Members' trash.

(iii) Whether the City and/or MLGW, in the absence of any contractual or quasi contractual obligation, have been unjustly enriched by payments from the Class for garbage collection services that the Class Members did not receive.

29. **Typicality**. The claim of the named Plaintiff is typical of the unnamed Class Members because they have a common source and rest upon the same legal and remedial theories, thereby satisfying the requirements of Rule 23.01(3). For example, the named Plaintiff's claims are typical of the claims of the Class because Plaintiff and all Class Members were injured or damaged by the same wrongful practices in which Defendants engaged, namely receiving payments for trash collection which the Class Members and the Plaintiffs did not receive.

30. **Adequacy of Representation.** The requirements of Rule 23.01(4) are satisfied in that the named Plaintiffs have a sufficient stake in the litigation to vigorously prosecute their claims on behalf of the Class Members and the named Plaintiffs' interests are aligned with those of the proposed Class. There are no defenses of a unique nature that may be asserted against Plaintiffs individually, as distinguished from the other members of the Class, and the relief

sought is common to the Class. Plaintiffs do not have any interest that is in conflict with or is antagonistic to the interests of the members of the Class, and has no conflict with any other member of the Class. Plaintiff has retained competent counsel experienced in class action litigation, including consumer and financial services class actions, to represent him and the Class Members in this litigation.

31. To wit, Plaintiffs' chosen counsel – Watson Burns, PLLC – has successfully prosecuted class actions in several matters. *See, e.g., Babb, et. al. v. Wilsonart International, Inc.* Civil Action No. 01818-04, Div. 4 (Cir. Ct. Shelby County, Tennessee filed Mar. 30, 2004)(appointed Co-Lead Class Counsel to consumer class action involving defective kitchen countertops owned by over 10,000 consumers; case was certified as a nationwide class action and ultimately settled for a compensatory damages of $23.5 million to the class); *Howard et al v. Wilkes & McHugh, P.A.*, Case No. 2:06-cv-02833-JMP-cgc (W.D. Tenn. 2006)(appointing Watson Burns, PLLC as Class Counsel and ultimately approving $ 4 million settlement in connection with overcharged legal fee); *Stephenson et al v. Fearnley & Califf, PPLC*, Civ. Action No. 06-67 (Dyersburg Circuit Ct. 2006)(Watson Burns, PLLC appointed Class Counsel in connection with settlement regarding unlawful title insurance fees charged by law firm); *Squires v. The ServiceMaster Co. and Clayton Dubilier & Rice, Inc.*, CH-08-0471-Part II (Chancery Ct. Shelby Co., Tennessee filed Mar. 11, 2008)(appointed Co-Lead Class Counsel to employees who held options on ServiceMaster stock that had been wrongfully canceled; case settled on a class basis for $1 million); *Ham et al. v. Swift Transportation Co., Inc.* Case No. 2:09-cv-02145-JTF (W.D. Tenn. filed Mar. 11, 2009)(appointed Co-Lead Class Counsel to class of approximately 8,700 student truck drivers who lost their commercial drivers licenses based on the alleged wrongful actions of Swift's trucking driving school; case settled for compensatory

damages and debt write off valued in excess of $17 million); *Youngblood v. Linebarger, Goggan, Blair & Sampson, LLP*, Case No. 10-cv-2304 SHM-tmp (W.D. Tenn. filed 2010) (appointed Co-Lead Class Counsel in class action against law firm for its collection of an unlawful attorney fee from delinquent real property taxpayers) and *Youngblood v. Linebarger, Goggan, Blair & Sampson, LLP*, CH-13-0899-Part III (Chancery Ct. Shelby County, Tennessee filed June 18, 2013)(subsequent case settlement in state court for $7.4 million).

32. **Predominance and Superiority.** All of the requirements for Rule 23.02(3) are satisfied because the common factual and legal issues identified above are sufficiently cohesive to warrant adjudication by representation. In particular, the Plaintiffs and the Class Members have suffered a common cause of injury, requiring Plaintiffs and Class Members to pay for trash collection services that they did not receive. The Class Members' legal claims arise exclusively under Tennessee law and, therefore, do not involve the application of other states' laws which may have varying degrees of liability and proof. Class action treatment is also superior to other available methods for the fair and efficient adjudication of this controversy, because individual litigation of the claims of all Class Members is economically unfeasible and procedurally impracticable. The likelihood of individual Class Members prosecuting separate claims is remote and, even if every Class Member could afford individual litigation, the court system would be unduly burdened by individual litigation in such cases. Additionally, individual litigation would also present the potential for varying, inconsistent or contradictory judgments while magnifying the delay and expense to all parties and to the court system, thus resulting in multiple trials of the same legal issue and creating the possibility of repetitious litigation.

33. As a result, the desirability to concentrate litigation in this forum is significantly present. Plaintiffs know of no difficulty to be encountered in the management of this action that

would preclude its maintenance of a class action. Relief concerning Plaintiffs' rights under the laws herein alleged and with respect to the Class would be proper.

VI.

CAUSES OF ACTION

COUNT 1 – BREACH OF CONTRACT

34. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

35. By virtue of imposing trash collection fees upon Plaintiffs and the Class Members, a contract was formed between the City and/or MLG&W and the Plaintiffs and Class Members for the weekly collection of solid waste and the bi-weekly collection of bulk/yard waste, based upon the rates billed by MLG&W at the City's direction.

36. As alleged in detailed above, the City and/or MLG&W breached their contractual duties to the Plaintiffs and the Class Members by consistently and materially failing to timely and properly collect this trash. As a direct and proximate result of Defendants' contractual breaches, Plaintiffs and the Class Members have suffered compensatory damages for millions of dollars.

37. At this juncture, the Plaintiffs and the Class Members estimate that their trash was only picked up timely approximately 40% of the time during the Class period, meaning that they overpaid trash collection charges by approximately 60%. Assuming that, on an annual basis, the Class Member consist on average to be 35,000 customers, each of whom was paid an average payment of $25.00 per month, the Plaintiffs and the Class Members have over paid Defendants approximately $38,850,000.00. Following discovery, the Plaintiff can more accurately state this number.

COUNT 2 – BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

38. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

39. Under Tennessee law, every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement, including the contractual obligations owed by the City and/or MLG&W to the Plaintiffs and the Class.

40. As alleged in detailed above, the City and/or MLG&W breached their contractual duties to the Plaintiffs and the Class Members by consistently and materially failing to timely and properly collect trash as paid for by the Plaintiffs and the Class Members. Defendants knew of the consistent failures to timely collect this trash and, as such, had an implied duty to refund the Class for payments that they had made but for which they did not receive the trash services. Further, given that the Defendants knew of these consistent failures to timely collect trash for Plaintiffs and the Class, Defendants had an implied duty to cease to impose charges or to lower such charges to be commensurate with the actual level of trash service that Defendant would indeed deliver to Plaintiffs and the Class.

41. As a direct and proximate result of Defendants' breach of the implied duty of good faith and fair dealing, Plaintiffs and the Class Members have suffered compensatory damages for millions of dollars.

42. At this juncture, the Plaintiffs and the Class Members estimate that their trash was only picked up timely approximately 40% of the time during the Class period, meaning that they overpaid trash collection charges by approximately 60%. Assuming that, on an annual basis, the Class Member consist on average to be 35,000 customers, each of whom was paid an average payment of $25.00 per month, the Plaintiffs and the Class Members have over paid Defendants

approximately $38,850,000.00. Following discovery, the Plaintiff can more accurately state this number.

COUNT 5 – UNJUST ENRICHMENT

43. Plaintiffs incorporates all allegations of fact in all preceding paragraphs as if set forth fully herein.

44. Pleading in the alternative to Counts 1 & 2 above, Plaintiffs allege that by imposing and collecting trash pick-up fees from Plaintiffs and the Class for services that the Defendants failed to provide, a benefit was conferred upon Defendant by Plaintiffs and the Class Members by the payment for trash collection fees. Defendants ultimately received and appreciated from such monetary benefit. However, Defendants' acceptance and retention of such benefit under such circumstances is inequitable for them to retain the benefit without payment of the value thereof. The benefit accepted and retained by Defendants is unjust.

45. As a result of the unlawful acts and practices described above, Defendants have been unjustly enriched by the payment of trash collection fees it received from Plaintiffs and the Class but which they failed to provide to Plaintiffs and the Class Members. Defendants, therefore, have been unjustly enriched at the expense of Plaintiffs and the Class. Plaintiffs and the Class are entitled to damages as a result of Defendant's unjust enrichment.

46. At this juncture, the Plaintiffs and the Class Members estimate that their trash was only picked up timely approximately 40% of the time during the Class period, meaning that they overpaid trash collection charges by approximately 60%. Assuming that, on an annual basis, the Class Member consist on average to be 35,000 customers, each of whom was paid an average payment of $25.00 per month, the Plaintiffs and the Class Members have over paid Defendants approximately $38,850,000.00. Following discovery, the Plaintiff can more accurately state this number.

COUNT 4 – DECLARATORY JUDGMENT PURSUANT TO TENNESSEE CODE ANNOTATED § 29-14-103 and 104

47. Plaintiffs incorporates all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

48. Plaintiffs and the Class Members seek declaratory judgment pursuant to TENNESSEE CODE ANNOTATED § 29-14-103 and 104 that by imposing and collecting trash collection fees from Plaintiffs and the Class Members Defendants owed the legal obligation to timely and properly collect trash on a weekly and bi-weekly basis, pursuant to the pick-up schedules established by Defendants and that Defendants have breached this legal obligation.

VII.

PRAYER FOR RELIEF

WHEREFORE, the named Plaintiffs and the Class Members demand judgment against Defendants the City of Memphis and Memphis Light, Gas & Water, a division of the City of Memphis, on each Count of the Complaint and pray for the following relief:

1. Issue service of process and serve the Defendant;
2. Issue an Order certifying that this action may be maintained as a class action, appointing Plaintiffs and their counsel to represent the Class, and directing that reasonable notice of this action be given by Defendants to all Class Members;
3. Grant any reasonable request to amend Plaintiffs' Class Action Complaint to conform to the discovery and evidence obtained in this Class Action;
4. Empanel a jury to try this matter;
5. Award each plaintiff Class Member compensatory damages who has suffered same, the total amount of which is $38,850,000.00;

6. Award costs and expenses incurred in this action pursuant to Rule 54 of the Tennessee Rules of Civil Procedure;

7. Award pre-and post-judgment interest in the amount of 10% per annum pursuant to TENNESSEE CODE ANNOTATED § 47-14-123 in amount according to the proof at trial; and

8. Grant the Plaintiffs and Class Members such further relief as the Court may deem just and proper.

Respectfully submitted,

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