

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY  
CIVIL DIVISION

FILED  
FT. SMITH DISTRICT  
2020 NOV 25 AM 10:52  
Patty Henderson  
CLERK  
PLAINTIFF

JENNIFER MERRIOTT, individually  
and on behalf of those similarly situated

Vs.

Case No. CV-17-637

CITY OF FORT SMITH, ARKANSAS

DEFENDANT

**ANSWER OF THE DEFENDANT, CITY OF FORT SMITH, ARKANSAS, TO  
PLAINTIFF'S FOURTH AMENDED AND SUBSTITUTED COMPLAINT**

COMES NOW the Defendant, the City of Fort Smith, Arkansas ("City"), and for its Answer to the Fourth Amended and Substituted Complaint (hereinafter referred to as "Complaint" or "Plaintiff's Complaint") of Plaintiff, Jennifer Merriott, states and alleges:

1. The City denies each and every material allegation set forth in the Complaint as fully as though said allegations were set forth herein word for word and denied word for word, except those allegations which may be hereinafter expressly admitted. The City states there is no basis in law or fact for Plaintiff's Complaint and, consequently, it should be dismissed as a matter of law.

2. With respect to footnote one in the Complaint, the City admits that Plaintiff previously filed two pleadings styled as "Third Amended and Substituted Complaint," the first of which was struck by the Court's Order of August 31, 2020. The City does not have sufficient information to form a belief regarding the allegation that the filing of Plaintiff's second "Third Amended and Substituted Complaint" was a "mistake;" however, the City notes that Plaintiff filed such pleading on September 29, 2020, and failed to serve the City with that pleading until November

10, 2020.

3. Plaintiff's Complaint contains multiple assertions that the City "deceive[d] the public," "mislead the public," made "false or misleading statements," and engaged in a "sham recycling operation." *See e.g.*, Complaint, paras. 1, 14, 23, 39, and 40. The City expressly denies such allegations and any and all similar allegations. Moreover, such allegations and all similar allegations are improper and immaterial to Plaintiff's claims of illegal exaction and unjust enrichment. As such, all such allegations should be struck pursuant to Rule 12(f) of the Arkansas Rules of Civil Procedure.

4. The City admits the allegations in the first sentence of paragraph 1 of the Complaint. The remaining allegations of paragraph 1 are denied by the City.

5. With reference to paragraph 2 of the Complaint, the City admits that the Court has jurisdiction over the subject matter of this action. The allegations relating to the nature of Plaintiff's claim as set forth in paragraph 2 do not require a response by the City. To the extent a response is required, the City denies that Plaintiff has any viable cause of action, either under a theory of the illegal exaction provisions of the Arkansas Constitution or under common law.

6. With reference to the allegations of paragraph 3 of the Complaint, the City does not have sufficient information to form a belief regarding Plaintiff's residency or her status as a taxpayer and, therefore, denies same on information and belief. The City denies that the Plaintiff has standing to institute this action either on behalf of herself or on behalf of others. The City denies the assertions that it has "apportioned payments for the City's residential curbside recycling program" from fees received by the City for the collection and disposal of solid waste.

7. The City admits the allegations of paragraph 4 of the Complaint.

8. The City denies the allegations of paragraph 5 of the Complaint.

9. The City denies the allegations in the first sentence of paragraph 6 of the Complaint.

The ordinances referenced in paragraph 6 of the Complaint speak for themselves and no response by the City is required.

10. Paragraph 7 of the Complaint is a reference to a provision of the Arkansas Code; as such, it is a statement of law and does not require a response by the City.

11. The City admits the allegations in the first two sentences of paragraph 8 of the Complaint. The references to specific provisions of the City's Code of Ordinances and the Arkansas Code speaks for themselves.

12. The City denies the allegations in paragraph 9 of the Complaint.

13. Paragraph 10 of the Complaint is a reference to a specific provision of the regulations of the Arkansas Department of Environmental Quality and no response to the same is required by the city. The provisions and the regulations of Arkansas governmental entities speak for themselves.

14. The City denies the allegations of paragraph 11 of the Complaint Plaintiff has attempted to improperly restrict and characterize the City's solid waste collection and disposal efforts to a particular definition within the cited regulation of the ADEQ. Instead, the regulations of the ADEQ speak for themselves.

15. The City denies the allegations in the first sentence of paragraph 12 of the Complaint. The City admits the remaining allegations of paragraph 12.

16. The City admits the allegations in paragraph 13 of the Complaint.

17. The City denies the allegations in paragraph 14 of the Complaint.

18. With respect to the allegations in paragraphs 15 through 18 of the Complaint, the City acknowledges that, beginning in October, 2014, and continuing through a portion of 2017, some residential solid waste, which previously had been processed to separate economically recoverable waste prior to landfilling or other mean of disposal, was not so processed prior to landfilling due to reasons beyond the City's control.

19. The City denies the allegations of paragraph 19 of the Complaint. The City expects some Fort Smith residents continued to voluntarily separate recyclables, as defined by City ordinance, from the remainder of their solid waste; however, the extent of such voluntary separation or expectation is unknown.

20. The City denies the allegations of paragraph 20 of the Complaint. The City acknowledges that it continued to operate its entire sanitation fleet in its sanitation program during the period of time referenced in paragraph 20. The City denies it improperly used its entire sanitation fleet to collect and dispose of solid waste.

21. The City asserts that the allegations of paragraph 21 of the Complaint are improper. The City does not deny its ability to provide information to Fort Smith residents. The wisdom and propriety of informing is a discretionary policy decision, and the City denies that Plaintiff has the authority or position to compel information be disseminated. The City denies any legal obligation to inform or not to inform or necessity to inform or not.

22. The City denies the allegations of paragraph 22 of the Complaint. The provision of the Arkansas Code referenced in paragraph 22 speaks for itself.

23. With respect to the allegation regarding the City's purported failure "to inform its residents," in paragraph 23 of the Complaint, the City reiterates its response above in paragraph

21 of this Answer. The City denies the remaining allegations in paragraph 23 of the Complaint.

24. With reference to the allegations in paragraph 24 of the Complaint, including all subparagraphs thereof, the City denies that it engaged in a practice of making false and misleading statements. The City admits the exhibits referenced in paragraph 24 are attached to the Complaint. The emails or other documents referred to in paragraph 24 speak for themselves; however, the City expressly denies that it intentionally made false or misleading statements. The City denies that Plaintiff has accurately characterized the communications referenced in paragraph 24. The City denies the remaining allegations in paragraph 24, including all subparagraphs thereof.

25. The City does not have sufficient information to form a belief regarding the allegations set forth in paragraph 25 of the Complaint and, therefore, denies the same on information and belief.

26. The City denies the allegations of paragraph 26 of the Complaint. The media release referenced in paragraph 26 speaks for itself and the City asserts that Plaintiff has not accurately characterized said release.

27. The City denies the allegations in paragraphs 27 and 28 of the Complaint.

28. The City admits the allegations in paragraph 29 of the Complaint.

29. With reference to the allegations in paragraph 30, the City admits the cost associated with its collection and disposal of solid waste, including recyclables, are paid from the Sanitation Department's operating fund, which includes revenues of that department. The City denies the remaining allegations in paragraph 30.

30. The City denies the allegations in the first sentence of paragraph 31 of the Complaint.

With the exception of the reference to the District Court, the City admits the allegations in the second sentence of paragraph 31. The City denies the allegations in the last sentence of paragraph 31.

31. The City denies the allegations in the first sentence of paragraph 32 of the Complaint. With reference to the remaining allegations in paragraph 32, the City asserts that the operating fund of the Sanitation Department is an enterprise fund which pays for all costs of the Sanitation Department.

32. With respect to the allegations of paragraph 33, the City admits that it has levied rates and charges relative to the collection and disposal of garbage and other waste. Any reference to Fort Smith Ordinance 25-278 speaks for itself and thus any reference to it requires no response by the City. The City denies that residential sanitation customers are charged any fee for the collection and disposal of recyclables and further denies the remaining allegations of paragraph 33 of the Complaint.

33. With reference to the allegations in paragraph 34 of the Complaint, the City admits its residential customers are obligated to pay the City's sanitation fees. The City admits that its sanitation customers are subject to a penalty in the event of non payment of sanitation fees. The ordinance referred to in paragraph 34 speaks for itself. The City denies the remaining allegations of paragraph 34.

34. The City admits the allegations in the first sentence of paragraph 35 of the Complaint. The City admits that the costs incurred by the Sanitation Department are paid exclusively from the operating fund of the Sanitation Department. The City denies that any residential sanitation fees are allocated to funding any specific service of the Sanitation

Department.

35. With respect to paragraph 36 of the Complaint, the City admits that any costs associated with collection of recyclables are paid from the Sanitation Department's operating fund. The City denies that all of the purported "costs" identified in paragraph 36 are costs of collecting recyclables within the City.

36. The City denies the allegations of paragraph 37 of the Complaint.

37. The City denies the allegations of paragraph 38 of the Complaint. Moreover, Plaintiff's reference to a "confidential or fiduciary relationship" is inappropriate and immaterial to Plaintiff's claims and should be stricken in accordance with the Court's Order entered on August 31, 2020, herein. The resolution referenced in footnote 2 of the Complaint speaks for itself. The City denies that such resolution imposes any "public trust" or a legal obligation on the City. The City denies that Ark. House Resolution 1043 of 2013 is attached to the Complaint as Exhibit 9.

38. The City denies the allegations of paragraph 39 of the Complaint.

39. The City asserts that the allegations of paragraph 40 of the Complaint are improper. The City reasserts its response above in paragraph 21 of this Answer. The City denies that there is any validity to Plaintiff's allegations of impropriety in the City's use of its entire sanitation fleet in collecting and disposing of solid waste. The City denies that it misled Fort Smith residents.

40. With reference to paragraph 41 of the Complaint, the City denies that it "duped residents" with respect to its collection and disposal of solid waste. The City expects some Fort Smith residents continued to voluntarily separate recyclables, as defined by City ordinance, from

the remainder of their solid waste; however, the extent of such voluntary separation is unknown. The City denies the remaining allegations of paragraph 41.

41. The allegations in the first sentence of paragraph 42 are argumentative and erroneously assume that the City “perpetrated a fraud.” The remaining allegations of paragraph 42 are references to provisions within the Arkansas Code which speak for themselves.

42. With respect to paragraph 43 of the Complaint, the City admits that it “could have” informed residential sanitation customers of the City’s temporary inability to separate economically recoverable residential waste prior to landfilling due to reasons beyond the control of the City. The wisdom of doing so is a political issue not properly brought for review of this Court. The City repeats and asserts its response above in paragraph 21 of this Answer. The City denies the remaining allegations of paragraph 43.

43. With respect to the allegations of paragraph 44 of the Complaint, the City denies that it misled its citizens. With respect to the remaining allegations of paragraph 44, the City acknowledges that, beginning in October 2014 and continuing through a portion of 2017, some residential solid waste, which previously had been processed to separate economically recoverable waste prior to landfilling or other disposal, was not so processed prior to landfilling by reason of causes beyond the City’s control.

44. The City denies the allegations in the first sentence of paragraph 45 of the Complaint. With respect to the allegations in the second sentence of paragraph 45, the City resserts its response above in paragraph 21 of this Answer. The City denies the remaining allegations of paragraph 45.

45. The City admits the allegations in paragraph 46 of the Complaint.



46. The City denies the allegations of paragraphs 47 through 49 of the Complaint. The City specifically denies that it used “public funds to deceive the public.”

47. The City denies the allegations in the first two sentences of paragraph 50 of the Complaint. With respect to the allegation regarding “informing the public,” the City reasserts its response above in paragraph 21 of this Answer. With respect to the remaining allegations in paragraph 50, the City acknowledges that beginning in October 2014 and continuing through a portion of 2017, some residential solid waste, which previously had been processed to separate economically recoverable waste prior to landfilling or other disposal, was not so processed prior to landfilling due to causes beyond the City’s control.

48. The City denies the allegations in paragraph 51 of the Complaint and the City denies that Plaintiff has any viable claim against it.

49. The City denies the allegations of paragraph 52 of the Complaint.

50. With reference to the allegations of paragraph 53, the City adopts and realleges the answers and responses set forth in the foregoing provisions of this Answer as fully as though said responses and answers were set forth herein word for word.

51. The allegations contained in paragraphs 54 through 58 of the Complaint are denied by the City.

52. With reference to the allegations of paragraph 59 of the Complaint, the City acknowledges that the Plaintiff, to the extent that she is a citizen and resident of the State of Arkansas, is entitled to the protections afforded by virtue of Article 16, Section 13 of the Arkansas Constitution. The City denies that Plaintiff, or any other affected person, is entitled to a refund under the allegations of the Complaint inasmuch as the City has not illegally exacted

any tax, fees or other monies from affected persons.

53. The City denies the purported class definition allegations of paragraph 60 of the Complaint.

54. With reference to the allegations of paragraph 61 of the Complaint, the City adopts and alleges the answers and responses set forth in the foregoing provisions of this Answer as fully as though said responses and answers were set forth herein word for word.

55. With reference to the allegations of paragraph 62 of the Complaint, the City admits that Plaintiff paid sanitation fees to the City, but the City denies that those fees, in contrast to all revenues of the Sanitation Department's operating fund, were used to pay for any singular function, including the collection and disposal of recyclables, of the Sanitation Department.

56. The City denies the allegations set forth in paragraphs 63 through 65 of the Complaint.

57. The allegations of paragraph 66 of the Complaint appear to be merely a statement of Plaintiff's legal position herein and thus do not require a response by the City. The City denies that there is any basis for Plaintiff's asserted unjust enrichment claim and the City denies that there is any basis for class action proceedings in this matter.

58. The City denies the allegations of paragraphs 67 through 73 of the Complaint.

59. With reference to the "wherefore clause" contained in Plaintiff's Complaint, the City denies that there is any basis in law or in fact for the Plaintiff's asserted claims against the City. The City states that there is no basis for any of the relief requested in the "wherefore clause;" however, the City does acknowledge that this Court previously certified Plaintiff's unjust enrichment claim as a class action by Order entered on January 25, 2018, and thereafter modified

said certification by Order entered on August 31, 2020.

60. Pleading in the affirmative, the City asserts the affirmative defenses of accord and satisfaction, estoppel, laches, license, setoff and waiver as defenses to the claims of Plaintiff.

WHEREFORE, Defendant, the City of Fort Smith, Arkansas, prays that Plaintiff's Fourth Amended and Substituted Complaint be dismissed and that the Defendant be granted such further relief to which it is entitled.

CITY OF FORT SMITH, ARKANSAS

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By: \_\_\_\_\_

  
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CERTIFICATE OF SERVICE

This certifies that I, Colby T. Roe, have served a copy of the foregoing upon all parties of record except those whom I represent via electronic transmission and/or by depositing a true and correct copy of the same in the United States mail at Fort Smith, Arkansas, in a properly addressed envelope with the necessary postage affixed hereto, on this 25th day of November, 2020, addressed to the following:

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Colby T. Roe