

Donald L. Ware  
DLW-14  
DW 04-048 - 16 Pages

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

VEOLIA WATER NORTH AMERICA  
OPERATING SERVICES, LLC, f/k/a U.S.  
FILTER OPERATING SERVICES, INC.,

Plaintiff,

CASE NO.:

vs.

CITY OF MULBERRY, FLORIDA,

Defendant.

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**COMPLAINT**

Plaintiff VEOLIA WATER NORTH AMERICA OPERATING SERVICES, LLC.,  
formerly known as U.S. FILTER OPERATING SERVICES, INC., hereby sues Defendant,  
CITY OF MULBERRY, FLORIDA, and alleges:

**JURISDICTION AND PARTIES**

1. This is an action for breach of contract for damages in excess of \$75,000.00 exclusive of costs, interest and attorneys' fees.
2. Plaintiff VEOLIA WATER NORTH AMERICA OPERATING SERVICES, LLC, formerly known as U.S. FILTER OPERATING SERVICES, INC. (hereafter "Veolia"), is a Delaware corporation with its principal place of business in Houston, Texas.
3. Defendant CITY OF MULBERRY, FLORIDA (hereafter "the City"), is a municipal corporation of the State of Florida located in Polk County, Florida.

4. This Court has jurisdiction of this cause pursuant to 28 U.S.C. §1332(a)(1) because the matter in controversy exceeds the sum or value of \$75,000.00 and because this cause is between citizens of different states.

5. This cause of action arose in the Middle District of Florida, and the City is located in the Middle District of Florida. Therefore, venue is proper pursuant to 28 U.S.C. §1391(a).

**BACKGROUND INFORMATION AND GENERAL ALLEGATIONS**

6. Veolia is in the business of designing, building, maintaining and operating water and wastewater treatment facilities. As part of its business, Veolia contracts with local governments to manage their water and wastewater operations.

7. Prior to November of 2001, the City owned and provided for the operation of its water, wastewater and related treatment facilities.

8. On November 6, 2001, the City and U.S. Filter Operating Services, Inc. (“USFOS,” now known as Veolia) entered into an Agreement for Operations, Maintenance and Management Services (the “Agreement”) pursuant to which Veolia agreed to provide for the operation, maintenance and management of the City’s water and wastewater facilities and for maintenance and repair services for the City’s Public Works Department in exchange for compensation as set forth in the Agreement. A true and correct copy of the Agreement is attached hereto as Exhibit A.

9. The initial term of the Agreement was twenty (20) years.

10. The Agreement provides that either party may terminate the Agreement prior to the expiration of the twenty (20) year initial term only for a material breach of the Agreement by the other party and only after giving written notice of the breach and, except in the case of a

breach by the City for non-payment of USFOS' invoices, only after allowing the other party thirty (30) days to cure or commence taking reasonable steps to cure the breach.

11. The Agreement also provides that the City may terminate the Agreement for its convenience at any time twenty-four (24) months after the effective date of the Agreement with no less than one hundred and twenty (120) days prior written notice. In the event that the City terminates the Agreement for any reason other than a material breach by USFOS prior to the termination date of the initial twenty (20) year term, the Agreement provides that the City shall pay to USFOS a termination fee based on the remaining balance of start-up costs made by USFOS.

12. Although the Agreement indicates that the termination fees are set forth in Appendix H to the Agreement, the termination fees are actually set forth in the last page of the original Agreement. The last page of the original Agreement, containing the termination fee schedule, was initialed by the City's Mayor.

13. On May 3, 2004, less than three years into the initial term of the Agreement, the City Council voted to terminate the Agreement.

14. By letter dated May 12, 2004, the attorney for the City advised Veolia that the City had voted to terminate the Agreement. A true and correct copy of this letter is attached as Exhibit B.

15. The City never notified Veolia that it had materially breached the Agreement or provided Veolia with any unjustification for terminating the Agreement that was associated with Veolia's performance of services under the Agreement. As required by the terms of the Agreement, the City never gave Veolia the opportunity to correct any deficiencies or to cure any

such breach. The termination by the City can only be construed as a termination for convenience by the City because the City never provided Veolia with any notice of default or any opportunity to cure such default as required by the terms of the Agreement.

16. Under the Agreement, the termination fee for terminating the Agreement in the third year is \$156,205.60.

17. Veolia demanded payment of the \$156,205.60 termination fee but the City has failed and refused to pay.

18. In or before October of 2003, prior to the City's termination of the Agreement, the City directed Veolia to demolish and remove a pole barn and associated materials and debris in the Public Works storage area. Veolia completed the project and submitted invoices to the City for the work done in the total amount of \$10,231.26. True and correct copies of the invoices are attached as Exhibit C. Veolia has demanded payment of the invoices for the demolition and removal of the pole barn and associated work and the City has refused to pay.

19. The Agreement provides for an annual Maintenance and Repair Limit to be paid by the City to Veolia. In the event that Veolia's annual maintenance and repair expenditures exceed the limit, the City is to pay the excess to Veolia within thirty (30) days of the receipt of Veolia's invoice.

20. Veolia's maintenance and repair expenditures exceeded the Maintenance and Repair Limit for 2003. Nevertheless, more than thirty (30) days have passed since Veolia submitted the invoice to the City for the demolition and removal of the pole barn and associated work and the City has failed to pay the invoice.

21. Paragraph 1.9 of the Agreement provides that if any litigation is necessary to enforce the terms of the Agreement, the prevailing party shall be entitled to reasonable attorneys fees.

22. Veolia has been compelled to retain the services of the undersigned attorneys and has agreed to pay them a reasonable fee for their services. Veolia seeks to recover its attorneys' fees from the City pursuant to the terms of the Agreement and Florida law.

23. All conditions precedent to the maintenance of this action have occurred or have been performed or fulfilled.

24. The City has breached the Agreement with Veolia by failing and/or refusing to pay Veolia for maintenance and repair expenditures in excess of the annual maintenance and repair limit.

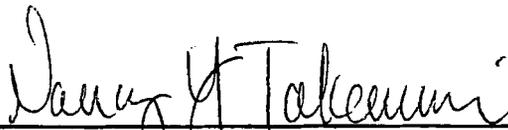
25. The City has breached the Agreement by terminating the Agreement for convenience and failing and/or refusing to pay Veolia the termination fee as set forth in the Agreement, despite repeated requests for payment.

26. The City has also breached the Agreement by failing and/or refusing to make timely payment in full on the invoice submitted by Veolia for the demolition and removal of the pole barn and associated repair and maintenance work despite repeated requests for payment.

27. Veolia has been damaged as a direct and proximate result of the City's failure to pay the termination fee and for the pole barn demolition and removal and associated work.

28. Veolia seeks to recover both pre-judgment and post-judgment interest on all sums due from the City as allowed by the Agreement and/or Florida law.

WHEREFORE Plaintiff VEOLIA WATER NORTH AMERICA LLC, f/k/a U.S. FILTER OPERATING SERVICES, INC., demands judgment against Defendant CITY OF MULBERRY, FLORIDA for damages, prejudgment interest, costs, and attorneys' fees and for such further relief as this Court deems proper.



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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

VEOLIA WATER NORTH AMERICA  
OPERATING SERVICES, LLC, f/k/a U.S.  
FILTER OPERATING SERVICES, INC.

Plaintiff,

v.

CASE NO. 8:05-cv-00712-T-24TBM

CITY OF MULBERRY, FLORIDA

Defendant.

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**DEFENDANT, CITY OF MULBERRY'S AMENDED ANSWER, AFFIRMATIVE  
DEFENSES, COUNTER-CLAIM AND DEMAND FOR JURY TRIAL**

Defendant, CITY OF MULBERRY (the "City"), by and through its undersigned counsel, hereby Answers the Complaint filed by Veolia Water North America Operating Services, LLC f/k/a U.S. Filter Operating Services, Inc. ("Veolia") and shows:

1. Defendant admits the allegations of paragraph one of the Complaint for purposes of jurisdiction only.
2. Defendant admits the allegations of paragraphs two, three, five, six, seven, thirteen, fourteen, and seventeen of the Complaint.
3. Defendant denies the allegations of paragraphs nine, ten, twelve, fifteen, sixteen, eighteen, twenty, twenty-three, twenty-four, twenty-five, twenty-six, and twenty-seven of the Complaint.
4. Defendant admits the allegations of paragraph four of the Complaint for purposes of jurisdiction only.

5. As to the allegations of paragraphs eight and eleven of the Complaint, the Agreement for Operations, Maintenance and Management Services (the "Agreement") speaks for itself; the allegations of paragraph eight and eleven are denied in so far as they are inconsistent with the terms and conditions of the Agreement.

6. Defendant admits the allegations of paragraphs nineteen of the Complaint, but denies that it owes any compensation to Plaintiff.

7. Defendant is without sufficient knowledge to be able to admit or deny the allegations of paragraph twenty-two of the Complaint and therefore denies such allegations.

8. Defendant is entitled to the recovery of its attorneys fees incurred in the defense of this action pursuant to paragraph 1.9 of the Agreement.

#### **AFFIRMATIVE DEFENSES**

##### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff has failed to satisfy all conditions precedent to maintaining its action. In order for Veolia to state a claim for termination damages under the terms of paragraph 12.3 of the Agreement, it must have incurred actual start-up costs as set forth in Appendix "H" of the Agreement. Appendix "H" does not set forth any start-up costs; and Veolia has neither advised City that any such costs were incurred, nor has Veolia pled that it has incurred such costs. Moreover, nowhere on the last page of the Agreement does there appear any figure labeled as start-up costs to be incurred by Veolia. The last page was intended to set out projected savings for the City and the potential buyout terms in the event that the City and Veolia later reached agreement for the construction of up to \$200,000.00 of capital improvements which were then paid for by Veolia. No such agreement was ever reached for

the construction of any capital improvements. Absent proof of the expenditure of start-up costs by Veolia, its claim must fail under the terms of the Agreement for failure to satisfy an express condition precedent.

### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff has failed to state a claim upon which relief can be granted. The Agreement provides that City has the right to terminate the Agreement for its convenience at any time twenty-four (24) months after the effective date upon the delivery of specified notice. City's notice of termination is dated more than two years after the effective date, November 6, 2001, and compensation would be due to Veolia only for the unamortized balance of start-up costs incurred by Veolia, as set forth in Appendix "H" of the Agreement. Appendix "H" does not set forth any start-up costs. Veolia has neither advised City that any such costs were incurred, nor has Veolia pled that it has incurred such costs. The last page was intended to set out projected savings for the City and the potential buyout terms in the event that the City and Veolia later reached agreement for the construction of up to \$200,000.00 of capital improvements which were then paid for by Veolia. No such agreement was ever reached for the construction of any capital improvements. Therefore, Veolia cannot state a claim for damages.

### **THIRD AFFIRMATIVE DEFENSE**

The last page attached to the Agreement is not a basis for any obligation on the part of the City because the "buy-out" table merely reflects conditional terms, the basis for which was never agreed to by the Parties or satisfied in fact.

**FOURTH AFFIRMATIVE DEFENSE**

Veolia's claims for sums based on the tables set out on the last page of the Agreement constitute either a claim for liquidated damages, for which no provision is contained in the Agreement, or a penalty, which is unlawful.

**FIFTH AFFIRMATIVE DEFENSE**

In the event that Veolia is able to sustain its argument that the Agreement has an initial term of twenty (20) years, the Agreement is void ab initio. The Charter of the City of Mulberry provides that the City shall not enter into any contract for a period of more than five (5) years.

**SIXTH AFFIRMATIVE DEFENSE**

Veolia materially breached the contract by failing at all times set forth in the Agreement to have a wastewater treatment operator certified pursuant to Florida law present at City's facility, a violation of Florida law.

**SEVENTH AFFIRMATIVE DEFENSE**

The City has fully paid Veolia all sums due under the Agreement.

**EIGHTH AFFIRMATIVE DEFENSE**

Veolia has failed to satisfy all conditions precedent to state a claim for costs incurred in performing additional services. Although the City requested Veolia to demolish a pole barn located on the City's property, Veolia failed to obtain the approval of the City for such

work and did not obtain City's authorization for the expenditure prior to undertaking the work as required under the express terms of the Agreement.

#### **NINTH AFFIRMATIVE DEFENSE**

Veolia waived any claim for compensation for additional services by reason of its failure to obtain authorization from the City prior to undertaking the extra work to demolish the pole barn.

#### **TENTH AFFIRMATIVE DEFENSE**

The City is entitled to sovereign immunity from any claims by Veolia for work alleged to have been performed and for which Veolia failed to obtain a change order or written approval as required by the Agreement, or which was otherwise beyond the terms of the Agreement.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

Claims by Veolia for work alleged to have been performed and for which Veolia failed to obtain a change order or written approval as required by the Agreement, or which was otherwise beyond the terms of the Agreement, are jurisdictionally barred by sovereign immunity.

#### **DEFENDANT'S COUNTERCLAIMS**

Defendant/Counterclaimant, the City of Mulberry (the "City"), hereby counterclaims against Plaintiff/Counterdefendant, Veolia Water North America Operating Services, LLC f/k/a U.S. Filter Operating Services, Inc. ("Veolia"), and for its claims shows:

COUNT I – DECLARATORY JUDGMENT

1. This is an action for declaratory judgment pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §2201. Counterclaimant is uncertain of its rights and seeks a declaration of its rights and obligations under the Agreement for Operations, Maintenance and Management Services (the “Agreement”) entered into by and between Counterclaimant and Plaintiff/Counterdefendant.

2. The City and Veolia entered into the Agreement on or about November 6, 2001.

3. The Agreement sets forth the terms and conditions under which Veolia was to perform operation and maintenance of the City’s water and wastewater facilities and maintenance and repair services for the City’s Public Works Department. Operation and maintenance of wastewater facilities must be undertaken in accordance with Florida law and the Rules of the Florida Department of Environmental Protection.

4. Florida law requires the owner and operator of the City’s wastewater treatment facility to have an operator certified pursuant to Florida law present at the facility, to log their activities at the plant in an appropriate record and to sign discharge monitoring reports submitted to the Florida Department of Environmental Protection. For a sustained period of time of approximately eight (8) months, Veolia failed to have the required licensed operator at the City’s facility causing the City and Veolia to be in violation of Florida law.

5. The City did not, and could not by the exercise of reasonable diligence, discover the absence of the certified operator until it resumed custody and control of the wastewater facility and the records of its operation during the term on the Agreement.

6. Veolia's failure to abide by Florida law in the operation of the City's wastewater facility materially breached the Agreement.

7. Article 12.2 of the Agreement provides that either Party may terminate the Agreement for cause.

WHEREFORE, the City seeks a declaration by the court that the City is entitled to terminate the Agreement for cause on the date of the material breach and prior to its termination for convenience.

**COUNT II – DAMAGES – Recoupment of Fees Paid**

8. Defendant/Counterclaimant realleges and incorporates paragraphs 1-7 of the Counterclaims as if set forth fully herein.

9. After the date on which Veolia materially breached the Agreement by reason of its failure to abide by Florida law in the operation of the City's wastewater facility, the City unknowingly continued to pay Veolia the sums purportedly due under the Agreement for the operation and maintenance of the City's wastewater system.

10. Because Veolia wrongfully charged fees for services after the date of the termination for cause by the City, the City has sustained damages in the amount of the wrongful payments.

11. Veolia improperly charged the City for various projects that exceeded the \$2,000.00 limit for capital expenditures as defined under A-6 of Appendix A to the Agreement without written authorization as required by Section 2.13 of the Agreement and in violation of the City's sovereign immunity.

12. Because Veolia wrongfully charged the City for projects that exceeded \$2,000.00 without prior written authorization or change orders, the City has sustained damages in the amount of the wrongful charges paid by the City.

13. After resumption of custody and control of the City's wastewater facility, the City determined that during the term of the Agreement, Veolia had paid at least one of its employees for a period of several months after the employee had left its employment and continued to bill the City for the payroll in violation of the Agreement.

WHEREFORE, the City demands damages, costs and attorney's fees against Veolia for its material breach of the Agreement, including but not limited to damages in the form of payments wrongfully charged by Veolia after it materially breached the Agreement and expenses that were improperly charged by Veolia without the required written authorization or change order in violation of the City's sovereign immunity.

**COUNT III – DAMAGES –**

**Failure to Return Inventory and Negligent Maintenance**

14. Defendant/Counterclaimant realleges and incorporates paragraphs 1-13 of the Counterclaims as if set forth fully herein.

15. Upon resumption of custody and control of the City's wastewater facility, the City determined that Veolia failed to return to the City a pump with a replacement value of over \$15,000.00, and certain other valuable items, all as required by the Agreement.

16. During the term of the Agreement, Veolia failed to properly, and in conformance with customary and well established engineering practice, perform certain maintenance and repairs to a portion of the City's right-of-way thereby causing deleterious

soil erosion that has, and will in the future continue to cause damage to the City's road and protective right-of-way safety railing.

17. As a result of Veolia's defalcation and negligence as set forth above, Veolia has breached the Agreement, and the City has sustained monetary damage.

WHEREFORE, the City demands damages, costs and attorneys fees against Veolia.

**THE CITY DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.**

By: s/ John W. Wilcox

**JOHN W. WILCOX, ESQ.**

Florida Bar #188725

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Counsel for the City of Mulberry

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31<sup>st</sup> day of May, 2005, I electronically filed the foregoing with the clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Nancy Takemori, Fowler White Boggs Banker, P.A., 501 East Kennedy Boulevard, Suite 1700, P.O. Box 1438, Tampa, Florida 33602 and to John D. Emmanuel, Fowler White Boggs Banker, P.A., 501 East Kennedy Boulevard, Suite 1700, P.O. Box 1438, Tampa, Florida 33602.

s/ John W. Wilcox  
ATTORNEY

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