COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPSHIRE, SS. SUPERIOR COURT

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| ZANE MIRKIN; JEROME GAGLIARDUCCI; WESTERN RECYCLING, INC.; JPZ, INC.; COTTAGE DEVELOPERS LLP, Plaintiffs | ) | CIVIL ACTION NO. 04-192 |
| v. | ) | |
| WASTE MANAGEMENT OF MASSACHUSETTS, INC., Defendant | ) | |
| AND | | |
| WASTE MANAGEMENT OF MASSACHUSETTS, INC. Plaintiff | ) | CONSOLIDATED FROM SUFFOLK COUNTY SUPERIOR COURT, BUSINESS LITIGATION SESSION, C.A. NO. 04-3613-BLS2 |
| v. | ) | |
| COTTAGE DEVELOPERS, LLP; JEROME GAGLIARDUCCI; and ZANE MIRKIN, Defendants | ) | |

**THE DEVELOPERS' MEMORANDUM OF LAW IN OPPOSITION TO WASTE MANAGEMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs, Cottage Developers, LLP, JPZ, Inc., Western Recycling, Jerome Gagliarducci, and Zane Mirkin; and Counter-Defendants Cottage Developers, LLP, Jerome Gagliarducci and Zane Mirkin (collectively, the "Developers"), for their Memorandum of Law in Opposition to Defendant and Counter-Plaintiff Waste Management of Massachusetts, Inc.'s ("Waste Management") Motion for Partial Summary Judgment ("Motion"), state as follows:

## Introduction

Waste Management is not entitled to partial summary judgment on the subject of indemnity because the indemnity language must be read to exclude from its scope losses arising from

Waste Management's own violations of the DEP consent order. Since the DEP found conclusively that this is what happened, as a matter of law, no indemnity is owed. Alternatively, several factual issues remain to be resolved, which will determine whether indemnity is owed.

First, Waste Management violated the DEP consent order by failing to meet deadlines in capping the landfill at issue here. As a result, it badly needed an amendment extending those deadlines, to avoid DEP enforcement sanctions. For this reason only, Waste Management capitulated to the City's threat not to sign the extension amendment and, over Cottage's objections, paid back taxes to the City as the price for the City's signature. Waste Management had no real concern which was implicated under the indemnity language, *i.e.*, that the City would foreclose or otherwise pursue title. The taxes were never an issue. The City never threatened to foreclose. The claimed "loss" was not "in connection with" any failure to pay the tax or stop foreclosure.

Second, Waste Management cannot recover because it caused the loss for which it seeks indemnity. Third, there was no "loss" within the meaning of the indemnity language because there was never any actual effort by the City to foreclose. Fourth, Waste Management failed to provide the Developers with the contractually required opportunity to respond to the City's threats, which they would have successfully done, and avoided any "loss" to Waste Management.

The Motion follows a venue dispute and a lengthy stay to discuss settlement. Discovery has only recently begun; none of the parties have produced any discovery responses or documents. At a minimum, the Motion is premature under Rule 56(f).

## FACTUAL BACKGROUND

The factual background is lengthy, involves many parties, many agreements and transactions.

To the extent possible, in the absence of significant discovery, the background is set forth in the Developers' Rule 9A(b)(5) Response to Waste Management's Statement of Facts and Further Statement of Facts in Opposition to Partial Summary Judgment. (Referred to in the form "SF¶__"). A brief summary is as follows:

From the 1950s through to about 1970, the City of Springfield ("City") operated a 63 acre dump located at the South end of Turnbull Street in Springfield. The site was known as the Cottage Street Dump (hereafter, "Landfill"). SF¶1. Following its use as a dump, and until 2001, no efforts were made to close the Landfill in accordance Massachusetts Department of Environmental Protection ("DEP") standards. SF¶¶2, 6.

In 2001, Western Recycling owned and operated a transfer station on Boston Road in Wilbraham. Mr. Gagliarducci and Mr. Mirkin are principals of Western Recycling. Waste Management expressed interest in acquiring the operation. In its dealings with the City of Springfield, Western Recycling and its principals learned of the Landfill and its environmental problems, which were the subject of ongoing dispute between the City and the DEP. SF¶¶24, 26

An arrangement was explored among the City, the DEP, Western Recycling, and Waste Management by which, generally, (1) Waste Management would acquire the Boston Road transfer station operation; (2) an entity in which Mr. Gagliarducci and/or Mr. Mirkin would be principals would take title to the Cottage Street Landfill property; (3) Waste Management would undertake the closure of the Landfill in accordance with DEP guidelines, pursuant to a consent order that would be negotiated with the DEP. SF¶¶28, 29.

Cottage acquired most of the real estate containing the Landfill (53 of the 63 acres) in April, 2002. On or about April 16, 2002, a "Payment Agreement" was entered into between Cottage and the City, on the subject of back taxes owed on the Landfill property. SF¶¶30, 31. At the

time, although the City had a tax foreclosure action pending against the Landfill property, the action had been pending for several years and had never been active. SF¶32. The action had been filed in 1997, when the City had proposed the property be reclaimed for industrial use. SF¶¶3, 106. The DEP had rejected the City's proposals. SF¶106. After 1997, the City had never actively sought judgment or title. SF¶4.

On or about July 30, 2002, various agreements were reached, including a 5 year lease of the Boston Road transfer station facility in favor of Waste Management from JPZ (the "Lease"); a note payable by Waste Management to Western Recycling, Inc. in the amount of $3,000,000, with installments of $750,000 over four years beginning November 1, 2003, (the "Note"); a DEP Administrative Consent Order dated July 30, 2002, which governed closure of the Landfill (the "ACO")(The City, Cottage and Waste Management are parties to the ACO); a Remedial Project Construction Agreement, by which Waste Management agreed with Cottage to complete all the work required under the ACO ("Construction Agreement"); a Representation and Agreement of Guaranty and Agreement As To Other Matters, by which Jerome Gagliarducci and Zane Mirkin, generally, in their individual capacities, guaranteed certain of the obligations of Cottage with respect to the Landfill property (the "Guaranty"). Waste Management Statement, ¶¶ 1, 6, 7; SF¶¶45, 46.

Under the ACO, Waste Management undertook "primary responsibility" for accomplishing the closure in accordance with DEP and ACO requirements. Under the Construction Agreement with Cottage, Waste Management agreed to meet the terms and deadlines of the ACO. SF¶¶38, 48-52.

In 2003, Waste Management failed to meet the deadlines set out in the ACO, resulting in its violation of that DEP order, as well as its breach of the Construction Agreement between Cottage

and Waste Management. SF¶¶64-80.

As a result of its own delay, Waste Management took steps to obtain from the DEP an amendment to the ACO, to extend the deadlines it had already missed. SF¶¶78-81. As a party to the ACO, Cottage was aware of these efforts and cooperated with Waste Management. SF¶82. According to the DEP at that time, without an amendment to the ACO, the Landfill closure project was subject to enforcement action, including operations being halted. SF¶¶69, 73-75, 79.

In January 2004, the amendment to the ACO was negotiated and the DEP requested that it be signed by all parties, including the City. The City then asserted that Cottage had failed to make timely payment under the Payment Agreement and took the position that (1) the Payment Agreement was null and void as a result, and (2) it would not sign the amended ACO until all back taxes, penalties and interest on the Landfill property were paid in full. SF¶¶83-84.

Cottage immediately paid the $18,000 installment owed under the Payment Agreement, but refused to pay the amounts demanded by the City. In discussions and correspondence with the City, Waste Management and the DEP, Cottage took the position that (1) Cottage had not materially defaulted on the Payment Agreement, and even if it had, the City had legitimate means to advance its position and pursue the back taxes in the courts; (2) that the City's position was tantamount to extortion; and (3) that the City's signature was not even required. SF¶¶85-87.

Over Cottage's strong objection, Waste Management apparently elected to pay the amount demanded by the City, approximately $1,000,000, in order to obtain the City's signature to the amended ACO. Waste Management Statement ¶24. Waste Management now seeks the amounts it has paid the City under the indemnity language of the Guaranty.

## ARGUMENT

### A. The Developers' Indemnity of Waste Management Does Not Encompass Losses Arising from Waste Management's Violation of the Consent Order

If Waste Management's payment to the City was a "loss," it was "in connection" with its own violation of the ACO, not any failure of the Developers to make payments or stop foreclosure. The Guaranty provides:

> The Developers [Mirkin and Gagliarducci] agree that they will make or cause to be made when due all payments called for under the [Tax Payment Agreement] and in all events will make all payments and take all other action necessary to prevent any foreclosure or similar action for non-payment of taxes and related sums, of [probably should be "or"] any sale, taking or other lien on the Cottage Street Property; and further will indemnify and save [Waste Management] harmless from and against all loss, cost, liability and expense [Waste Management] may suffer or incur in connection with any failure of the Developers to do so.

Like other contracts, indemnity provisions are to be reasonably construed "in accordance with the parties' intention, with reference to the parties' situation when the provisions were negotiated, and in a manner 'to effectuate the purpose sought to be accomplished.'" See, New York, N. H. & H. R. R. v. Walworth Co., 340 Mass. 1, 3 (1959). The obvious concern of the language is not the non-payment itself, but the potential consequences of non-payment, namely, action by the City against the property based on delinquent taxes. Above all, Waste Management wanted to prevent interruption of its operations at the Landfill. There were two sources for such potential interruption: DEP enforcement or title in someone other than Cottage. Non-payment by itself does not harm Waste Management. Only title in the City could do so.

The language "and in all events," before the requirement to take action, must necessarily include the circumstances here, where City takes the position that the tax payment was not made and threatens not to sign an ACO Amendment, which was rendered necessary by Waste Management's failure to meet ACO deadlines. In such circumstances, the Developers are

specifically charged with "tak[ing] all other action necessary to prevent any foreclosure or similar action for non-payment of taxes." The indemnity encompasses only those losses "in connection with any failure of the Developers to do so."

As an initial matter, by the Guaranty's plain language, any failure to make the tax payments does not end the indemnity inquiry. The Developers must take action to prevent title from falling into the City's hands. They must be permitted to do so, and any question of indemnity must be premised on their "failure" to do so, not just any failure to make payment. Otherwise, the language requiring the Developers to take action would be rendered meaningless surplusage, a result at odds with the required reasonable interpretation. See Whelan v. Frisbee, 29 Mass. App. Ct. 76, 79 (1990).

Contemporaneous agreements must be construed together for purposes of showing what the true contract between the parties was. Smith v. Boston and Maine Railroad, 88 Mass. 262 (1863); Davis-Hill Co., Inc. v. Wells, 254 Mass. 118 (1925). The Guaranty which is the basis for Waste Management's claims was one of more than a dozen agreements entered into on the same day, July 30, 2002, between Waste Management and Mr. Gagliarducci, Mr. Mirkin and the companies with which they are associated, including primarily Cottage, which owned the Landfill property. (SF¶45). These agreements must be construed together.

In its Construction Agreement with Cottage, Waste Management

- agreed to "complete all the Work as specified in the [ACO];"
- agreed "to use its best efforts to complete the Work in an expeditious and economical manner consistent with the interests of [Cottage];"
- represented that it had "familiarized itself with the nature and extent of the ACO" and factors "that in any manner may affect cost, progress, performance or furnishing of the Work;"
- agreed that its obligation to "properly and timely perform and complete the Work in

accordance with the Contract Documents [including the ACO] shall be absolute;"

- agreed that Cottage "shall not be responsible for [Waste Management's] failure to perform or furnish the Work in accordance with the Contract Documents [including the ACO]." SF¶¶47-52.

The indemnity language relied on by Waste Management must be read consistently with these provisions. Specifically, proper construction of the indemnity should exclude from its scope any losses arising from the failure of Waste Management to meet the ACO's October 31, 2003 Phase I capping deadline. This result follows from reading together the series of contracts executed contemporaneously by the parties.

As one of the July 30, 2002 transaction agreements, Waste Management executed an August 1, 2002 Promissory Note ("Note"), in favor of Western Recycling. Waste Management Statement, ¶12. The Note calls for Waste Management to make four annual payments of $750,000, and contains offset language:

> [Western Recycling] … agrees that in the event that any payment is not made when due (a) for municipal real estate taxes … other than those taxes covered by the [Tax Payment Agreement] or (b) which is required under the Cottage Street Tax Agreement; or if any action is taken to foreclose any taking or lien (now existing or hereafter arising) for municipal real estate taxes heretofore or hereafter levied against the Cottage Street Property or any portion thereof … the maker [i.e., Waste Management] … may make any such payment or otherwise pay any amount it reasonably deems necessary to suspend or terminate such foreclosure action without need for prior notice to the payee hereof; and upon the making of such payment the amount thereof shall be offset from the $750,000 payment last due hereunder …

Note at 2. The offset language demonstrates that any payments by Waste Management, beyond the modest installment payments owed under the Tax Payment Agreement, must be tied to actual foreclosure efforts by the City ("suspend or terminate such … action"), and moreover, that any such payment is measured by an objective "reasonably necessary" standard. This language confirms that the indemnity language of the Guaranty must be read to exclude payments by Waste Management arising from its own failures to meet the deadlines in the ACO,

in light of Waste Management's undertakings in the Construction Agreement.

In short, Waste Management agreed with Cottage and its principals that it could not seek indemnity for losses arising out of its own failures to meet ACO deadlines. This presents one of the basic fact issues in this case: whether Waste Management paid the City back taxes to obtain the City's signature on the ACO amendment, which was needed because of Waste Management's violation of the original ACO. If so, no indemnity is owed by the Developers.

There is little doubt on the undisputed facts that the indemnity sought by Waste Management arose directly from Waste Management's own failure to meet the deadlines of the ACO. Under the ACO as the "primarily responsible" contractor, and under the Construction Agreement, Waste Management agreed to meet with October 31, 2003 Phase I capping deadline. SF¶¶ 38, 47-52. By that date, it was supposed to have brought enough fill material, which met DEP criteria, to the site to fill out the area designated as the Phase I target in the ACO. SF¶¶40, 57. Waste Management's failure was entirely of its own making.

The requirements of the ACO, as to materials and deadlines, and the means by which they will be met, are not arrived at randomly, or imposed on the parties by the DEP. The owner and its contractor must submit to the DEP several plans and studies well in advance of its approval in the form of an ACO, among them as are relevant here (1) a Preliminary Closure Plan ("PCP"); (2) a Corrective Action Design ("CAD"); and (3) Materials Management and Operations Plan ("Materials Plan"). SF¶¶ 35, 54, 56, 57, 59. Every aspect of the means necessary to meet the Phase I capping deadline is covered at length in these documents or in the DEP Guidelines. SF¶¶7-21. The volume of fill necessary is precisely defined. The sources of the fill anticipated to be used are proposed and reviewed. The type of fill that will meet DEP criteria under the applicable regulations is spelled out in detail. SF¶¶7-21, 35, 54-59.

As to the sources of fill, for example, Waste Management proposed that 40% of the fill would come from Western Recycling, the same facility the Developers were selling to Waste Management through the same July 30, 2002 transaction. The 60% balance would come from other sources. SF¶59.

Under the ACO, Waste Management had fifteen months to finish Phase I – July 30, 2002 to October 31, 2003. Ultimately, Waste Management fell far short of delivering sufficient fill to the site by the deadline, but it had another problem at the outset. For the first seven months after it signed the ACO, it failed to obtain the necessary approvals and permits even to commence delivering fill to the Landfill. SF¶¶ 65, 68. This was over half the time it was permitted. As for the fill Waste Management eventually took delivery of, to complete the Phase I capping, it simply failed to take steps to ensure enough fill was supplied. SF¶¶61-68, 71.

In negotiating a new deadline, Waste Management attempted to persuade the DEP that circumstances beyond its control had prevent it from meeting the original deadline. The DEP, by its letter from Robert Bell, chief regional counsel, dated December 30, 2003 responded to Waste Management's letters:

> WM also asserts in the letter that it did not supply shaping and grading materials in the amounts and on the schedule it initially anticipated, due to construction delays at its C&D processing facilities relating to weather and permitting issues. However, WM could have anticipated that some amount of time is needed for preparing applications and reviewing/issuing permits. In any event, the Department is not aware of any permitting delays. Also, a variety of materials for shaping and grading were available from a number of sources, not just WM's processing facilities. Mr. Solheid's letter also asserts that there may be delays in the Department imposing a ban on disposal of unprocessed C&D, and such a delay will interfere with future schedules. However, that assertion, even if true, might affect the future, not the failure to cap Phase I by the ACO deadline of October 31, 2003.

(SF¶72). In its December 30, 2003 letter, the DEP rejected Waste Management's attempt to escape the responsibility for the delay:

> However, the force majure provision does not apply for a number of reasons. First, WM's notice is not timely. Notice must be within 15 days of knowledge that the obligation will not be met. The notice asserting a force majure situation was the letter dated December 4, 2003, which was more than 15 days after WM had such knowledge. Therefore, WM waived the force majure provisions. Second, aside from timeliness, **WM in the letter did not demonstrate the failure to cap by the deadline was without the fault of WM or not under its control**. Finally, as set forth at ACO ¶V.5, increased costs are not relevant to the force majure provision. As to WM's assertion of economic impossibility, which applies to whether DEP in its sole discretion will consider a schedule change, WM has not made a sufficient demonstration of economic impossibility other than conclusory statements.

SF¶73. (emphasis added). Waste Management never appealed these findings. Instead, it sought an amendment to the ACO, extending the deadlines it had missed. Waste Management had not missed by a little; it requested a two year extension of what it had originally agreed would be a fifteen month period. SF¶¶78, 82.

By signing Amendment No. 1 to the ACO, Waste Management conclusively admitted that it failed to abide by the original July 30, 2002 ACO, giving rise to the DEP's requirement of an amendment. SF¶82. Its reason for doing so was to appease the DEP, and prevent any DEP enforcement action, based on its own failures to comply with agreed ACO deadlines.

The City used the requirement of its signature on that amendment as the basis of a threat to withhold its signature if back taxes were not paid. SF¶¶83-85, 92. Waste Management paid the City, not because the City was threatening to foreclose or take action against the property, but because it needed the ACO amendment, to avoid DEP enforcement action, based on its own failure to meet the ACO. In the five years of the pending tax action, the City had not sought to advance the case or obtain title. The City made no threat that it would foreclose on the Landfill property; only that it would withhold its signature. SF¶¶4, 93-94. The City did not want title and did not threaten to foreclose or take title.

Based on this background, it is undisputed that Waste Management did not "incur" a "loss, cost, liability and expense" under the Guaranty's indemnity "in connection with any failure of [the Developers] to" make payments under the Tax Payment Agreement or prevent foreclosure. If the Waste Management payment of back taxes to the City was a "loss" subject to indemnity, it arose "in connection" with Waste Management's own failures to comply with the ACO and need for an ACO amendment. Waste Management's sole concern in bowing to the City's demand was to obtain the City's signature, and thereby avoid adverse action by the DEP. It was not at all concerned about the City holding title. The claimed losses are, therefore, excluded from the indemnity clause's scope, based on the contemporaneously executed Construction Agreement. No indemnity is owed as a matter of law.

The Developers request judgment in their favor on this issue, including with respect to claimed rights of offset under the Note, under Mass.R.Civ.Pro. 56(c). Alternatively, a fact issue is presented for trial on this central issue of the cause of the claimed loss and summary judgment must be denied.

**B. Waste Management Cannot Claim Indemnity for a "Loss" of its Own Making**

Alternatively, indemnity is not owed because Waste Management caused its own loss. As discussed above, construing the Guaranty and the Construction Agreement together yields a reading by which Waste Management cannot claim indemnity for the consequences of its own failures to meet the terms of the ACO. Even in the absence of such language, this is also the common law rule. "[A]bsent explicit language to the contrary, an indemnity agreement will not be interpreted as extending to liability resulting from damage or injury which is inevitable in the indemnitor's performance of the contract, or is attributable to the indemnitee's actions." 9 Mass. Jur. § 6.50 at 361-62, citing Massachusetts Turnpike v. Perini Corp., 349 Mass. 448 (1965).

In Perini, the indemnity provision stated that Perini "shall hold, indemnify, and save harmless [the turnpike] against all suits, claims or liability of every name and nature, for or on account of any injuries to persons or damage to property arising out of or in consequence of the acts [of Perini in performing its work]." During work on the turnpike, a number of abutting landowners sued the Authority for takings of land, damage to real property and blocked access, based on the road construction. The claims were found by the Court to have been attributable to the sovereign act of appropriation of property by the turnpike authority itself, such that no indemnity was owed by the contractor to the turnpike authority, despite the broad language. Id.

As described above, Waste Management paid the City to obtain the City's signature on the ACO amendment only because it had breached the ACO by failing to meet the deadlines, and Waste Management had to have the extension. No indemnity is owed, and no right of offset is available. At a minimum, fact issues preclude summary judgment as to whether the claimed losses were "in connection with" any failure of the Developers, or rather Waste Management's violation of the ACO.

### C. Waste Management Did Not Sustain a "Loss" Subject to Indemnity

In the first instance, Waste Management did not sustain a "loss" within the meaning of the Guaranty. In the absence of such a loss, indemnity is not owed. See, Com. v. Garrity, 43 Mass. App. Ct. 349 (1997)(most of claimed losses not within scope of indemnity).

Here, Waste Management was confronted with a threat from the City that it would not sign the ACO extension, an extension made necessary by Waste Management's violation of the ACO, in failing to meet the Phase I capping deadline. Waste Management paid to get the City's signature, to get the ACO amendment, to avoid DEP enforcement action. There was no "loss" in

connection with any failure of the Developers to prevent foreclosure for the simple reason that there was never a threat that the City would foreclose. SF¶94.

Similarly, where action for loss was premature, there is no obligation to indemnify. In Victor v. Levine, 267 Mass. 442 (1929), the plaintiff alleged that he was surety upon a bail bond for a man named Harris and that the defendant had agreed to indemnify him from "any loss which he may suffer by reason thereof." Harris failed to appear and was defaulted. The plaintiff sued on the indemnification provision, asserting that because of Harris' default a claim was about to be made. The SJC held that the plaintiff had failed to state a case because there was no allegation in the bill that any "loss" had been suffered or that the obligation to indemnify had yet arisen. Id.; Cochrane v. Janigan, 344 Mass. 296, 304 (1962).

When Waste Management made voluntary payment to the City in January 2004, to obtain the City's signature on the ACO deadline extension, there was no "loss" – no threat of foreclosure or efforts to foreclose by the City. Even if such a loss could have materialized later, there was no loss at the time Waste Management made its voluntary payment. Waste Management's hasty payment to restore ruptured relations with the DEP and get the project on track does not turn something not a "loss" into a "loss." No indemnity is owed.

**D. Waste Management Prevented Cottage from Successfully Responding to the City's Demand**

Under the Guaranty, there are two obligations which both must be breached to trigger indemnity: first, to make payments under the Tax Payment Agreement; and second, to take all action necessary to prevent foreclosure or any sale, taking or lien. This second requirement provides that Mr. Gagliarducci and Mr. Mirkin be given the opportunity to "take all other action necessary to prevent any foreclosure or other similar action for non-payment of taxes and related

sums, of any sale, taking or other lien on the Cottage Street Property." Waste Management Statement, ¶11.

By immediately paying the City what it was demanding, Waste Management prevented Mr. Gagliarducci and Mr. Mirkin (and Cottage) from taking any meaningful action to address the City's extortionate position. Mr. Gagliarducci and Mr. Mirkin were prepared to take legal action if necessary to block the City's threats. SF¶104. For failure to provide this contractually required opportunity, Waste Management cannot claim indemnity.

The common law is to the same effect: a party to a contract cannot interfere with the other party's performance and then claim breach by the other party. Cetrone v. Paul Livoli, Inc., 337 Mass. 607 (1958); Celluci v. Sun Oil Co., 2 Mass. App. Ct. 722 (1974). "Where the defendant unjustifiably prevents the plaintiff from performing under the contract, there is a breach of contract by the defendant which excuses the plaintiff from further performance, and precludes recovery under it by the defendant." 9 Mass. Jur., Commercial Law, § 5.12 at 247, citing Cetrone v. Livoli, Inc., 337 Mass. 607 (1958).

The Developers were obligated under the Guaranty to prevent adverse action by the City against the Landfill property. To the extent Waste Management prevented them from dealing with the City's threat or from taking adverse action against the property, Waste Management may not recover on the Guaranty. Waste Management could not interfere with Cottage's ability to address the claim of breach by the City under the Tax Payment Agreement (by paying) and then claim that the Guarantors breached the Guaranty by failing to do so.

If Waste Management had given Cottage the required opportunity to respond to the City's threat to withhold its signature and demand for full payment of all back taxes, Mr. Gagliarducci

and Mr. Mirkin would have taken any or all of the following successful actions to respond to the City's demands:

First, it could have persuaded the DEP that the City's signature was not necessary; or obtained a court order to this effect. The DEP's counsel Robert Bell suggested to the Developers' attorney, Frank Fitzgerald, that this might be possible. SF¶89.

Second, it could have filed suit against the City for an injunction against further threats based on non-payment of the Tax Agreement or to compel the City's signature on the Amended ACO. The following grounds would have been successfully asserted:

- Non-payment was not a material breach. To support a claim of breach of contract, there must be a material breach, defined as a breach of an "essential and inducing feature of the contract". Bucholz v. Green Bros. Co., 272 Mass. 49, 52 (1930); Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 470 (1991); Lease-It, Inc. v. Massachusetts Port Authy., 33 Mass.App.Ct. 391, 396 (1992). This is normally a question of fact for the fact finder. See Boston Housing Authy. v. Hemingway, 363 Mass. 184, 200 (1973); Lease-It, Inc., 33 Mass.App.Ct. at 396. The non-payment under the Tax Payment Agreement was not material: the amount was relatively small, and it was promptly cured. Therefore, the Tax Payment Agreement remained in full force and effect.
- Equity prohibits the exploitation by a contracting party of a technical breach of a contract to obtain an extreme remedy. The frequent example is the case of a landlord exploiting a late payment of rent as grounds to evict a tenant. If the breach is insignificant, even if there is a default clause, Massachusetts courts will not allow termination. See, e.g., Kaplan v. Flynn, 255 Mass. 127, 129-131 (1926); Howard D. Johnson Co. v. Madigan, 361 Mass. 454, 457-459 (1972) (failure to submit gross sales figures, and when such figures were finally produced, failure to have them signed by a responsible financial officer of lessee). Non-payment under the Tax Payment Agreement was a technical, non-substantive breach. On equitable grounds, under the circumstances, the City would have been precluded from exploiting the breach.
- Even if the Tax Payment Agreement were revoked, Cottage was entitled to notice and hearing on the City's claim for back taxes before the City could take tax title. The City had filed a tax action in 1997 in Land Court in Boston. SF¶¶3-4. The former owners had raised several good defenses. SF¶3. Cottage as the new owner had standing to raise those defenses and was further entitled to hearing and trial in the pending tax action on the question of taxes owed. The requirement of a trial would have exposed the City's position as a

bluff – the City would never have taken judgment or title; alternatively, the amount of back taxes would have been reduced or eliminated.

- The City's conduct violated its own obligations as a party under the ACO, as a party being jointly and severally liable with Waste Management and Cottage for violations of the ACO. SF¶37. The City violated its duties and the covenant of good faith and fair dealing by withholding signature solely to extort payment of an unrelated obligation, which denied the other parties (Waste Management and Cottage) the benefit of the ACO agreement. The City could have been enjoined from refusing to sign.

On these grounds, Cottage would have obtained an injunction against the City preventing it from following through with its threat to withhold its signature; and if necessary, would have forestalled or eliminated any action by the City to move against the property on the basis of back taxes (no such action had been threatened). By precipitously paying the City over a million dollars, on the flimsy pretext of the City's empty threats, Waste Management directly interfered with the Developers' ability to address successfully the City's conduct and prevent foreclosure or other indemnified loss. As a consequence, no indemnity is owed under the Guaranty. At a minimum, fact issues remain which require the denial of summary judgment.

**E. For Lack of Discovery, the Motion Should Be Denied Under Rule 56(f)**

If a party opposing a summary judgment motion is not able to present facts "essential to justify his opposition," the Court may deny the motion, order discovery to be had, or "make such other order as is just." Mass.R.Civ.Pro. 56(f). Here, the parties filed separate actions in Northampton (the Developers) and in Boston (Waste Management) on August 13, 2004. The ensuing venue dispute was not resolved until November, 2004. The parties agreed to a stay pending settlement discussions and obtained an order to this effect. For this reason, the Developers did not insist on responses to the document requests it had served on Waste Management with their complaint. The stay was ordered lifted in July, 2005. SF¶105.

The Developers' served document requests on Waste Management with the Complaint; and Interrogatories on August 23, 2005. As of the date of this Opposition, no discovery responses had been received from Waste Management. The Developers issued subpoenas for documents to the Commonwealth of Massachusetts Department of Environmental Protection ("DEP") and the City of Springfield (the "City") in August, 2005. Documents were produced by the DEP's copy service to counsel (in part) on October 6, 2005. The City produced documents on October 11, 2005. SF¶105. By agreement, the Developers' opposition to Waste Management's motion for summary judgment was due Oct. 13, 2005. The complete set of DEP documents had not been received as of this date, and counsel had little chance to closely review the City's production.

Waste Management has not produced any of the requested documents or provided any interrogatory answers. No depositions have been noticed or held from any witness. Based on the background described in this Opposition and related papers, and the disputed fact issues identified, the Developers submit that such discovery is "essential to justify" its opposition the Waste Management's motion. Such discovery may prove conclusively, from Waste Management's own internal files, that it knew there was no indemnifiable loss at stake, such as a City threat to title, when it paid back taxes to the City; or that Waste Management sought to pre-empt any effort by the Developers to contest the City's refusal to give its signature; or that payment was made solely to avoid sanctions from the DEP. Similarly, the City's witnesses may explicitly confirm that in January 2004, the City never intended to try to obtain title or initiate foreclosure efforts.

There likely were also understandings or communications between the City and Waste Management (and perhaps the DEP), to which the Developers were not privy, which would shed light on whether Waste Management's claimed loss arose "in connection" with any claimed

failure of the Developers. Summary judgment should be denied on the basis that discovery essential to the Developers' case remains to be taken.

## Conclusion

For all of the foregoing reasons, Waste Management's Motion for Partial Summary Judgment should be denied, in its entirety, including as to indemnity and any claimed rights of offset.

PLAINTIFFS, ZANE MIRKIN; JEROME GAGLIARDUCCI; WESTERN RECYCLING, INC.; JPZ, INC.; COTTAGE DEVELOPERS LLP

By: _____

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## CERTIFICATE OF SERVICE

I, John E. Garber, Esq., hereby certify that on this 13th day of October, 2005, I served a copy of the foregoing by Federal Express to counsel.

Subscribed under penalties of perjury.

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John E. Garber, Esq.