

1-CIT/TRO-NOT/ADG  
ORIGINAL

CAUSE NO. 09-14759

FILED  
07/23/18 11:16

REPUBLIC WASTE SERVICES OF TEXAS, LTD. D/B/A DUNCAN DISPOSAL

Plaintiff,

vs.

DALLAS WASTE DISPOSAL & RECYCLING, INC.

Defendant.

IN THE DISTRICT COURT

E-116th

*[Signature]*

JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION  
AND  
APPLICATION FOR TEMPORARY RESTRAINING ORDER  
AND TEMPORARY INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Republic Waste Services of Texas Ltd., d/b/a Duncan Disposal complaining of Dallas Waste Disposal & Recycling, Inc. (hereinafter referred to as the "Defendant") and for cause of action respectfully states:

*Discovery Control Plan*

1. Per Texas Rule of Civil Procedure 190, the Plaintiff alleges that Discovery Control Plan No. 2 (suits involving more than \$50,000) should apply to this case.

*Parties and Venue*

2. The Plaintiff, Republic Waste Services of Texas, Ltd. d/b/a Duncan Disposal (hereinafter referred to as "Duncan Disposal" or the "Plaintiff"), is a Texas Limited Partnership whose principal place of business is located in Dallas County, Texas.

3. The Defendant, ~~Dallas Waste Disposal & Recycling, Inc.~~ (hereinafter referred to as "Dallas Recycling") is a Texas domestic for-profit corporation. The Defendant may be served with process

1-CIT/TRO-NOT/ADG  
*[Signature]*

by delivery of the citation along with a copy of this Petition to ~~Richard Szarkowski~~, its registered agent, at ~~3300 Pluto Street, Dallas, Texas 75212~~, its registered office.

4. Venue is proper in Dallas County, Texas under Section 15.002 (a) of the Texas Civil Practice & Remedies Code.

*Facts upon which Claim is Based*

5. Duncan Disposal is in the contract waste disposal business in the Dallas-Fort Worth area. Among other services, they provide solid waste collection and disposal using “roll-off” waste disposal containers. These containers are placed at a customer’s site and serviced from time to time per agreement. Servicing consists of picking up a full container to take to a disposal facility site and leaving an empty container at the customer’s location. The containers come in several sizes, but the most common, and the ones the narrative in this petition is concerned with, are of 30 yard and 40 yard capacity. These containers are stored at Duncan’s yard in Hutchins when not in use. The acquisition cost of these containers is around \$3,000 to \$5,000 each.

6. Duncan Disposal paints all of its equipment, including its containers, with a distinctive color called “Sage Green” and which is unlike the color any competitor in the Dallas area uses. This color paint is applied at the factory for new container purchases and by Duncan from time to time for regular maintenance.

7. Earlier this year, an audit disclosed that in excess of 100 containers were missing. Duncan’s Dallas General Manager Phil Miesner (“Mr. Miesner”) personally, and other Duncan staff members, made inquiry into the loss and discovered that a number of Duncan’s containers were showing up at various locations throughout Dallas County that were serviced by competitors. One of those competitors is Dallas Waste Disposal & Recycling, Inc. (“Dallas Recycling”), located at 3300 Pluto Street, Dallas, Texas.

8. Around six months ago, Wes Whitworth, a supervisor in Duncan's Arlington office observed a container in Grand Prairie, Texas. This container bore Dallas Recycling's name decal, and was painted blue, the color Dallas Recycling uses. It had a white stenciled equipment number. The blue paint was chipped and revealed Duncan's Sage Green underneath. The container also had a name plate of Industrial Service Supply Company, a vendor from whom Duncan buys containers, still on this container. Mr. Whitworth reported to Mr. Miesner that he contacted the Grand Prairie police department and subsequently, he recovered the container. One Jerzy Bednarczyk, an employee of Dallas Recycling, came to the scene and, when asked, had no explanation for how Dallas Recycling obtained this container.

9. On or about November 2, 2007, Duncan located another container bearing the blue paint typical of Dallas Recycling equipment and bearing a stenciled number 4029, at 2405 Belt Line Road in Carrollton, Texas. This container's blue paint was chipped in several places which exposed the Duncan "Sage Green" paint underneath. The serial number plate on this Container had been pried off.

10. After discovering the container in Carrollton, Mr. Miesner contacted Jill McAgg, who identified herself as the general manager of Dallas Recycling. She agreed to take the container back to their yard and permit Duncan personnel to inspect that container and others. To this date, Dallas Recycling has not permitted such an inspection, despite requests made directly and through its attorney.

11. On or about November 5, 2007, Mr. Misener went to the Home Depot location in Irving with Randy Allen, another Duncan employee, and observed two containers bearing Dallas Recycling's name, painted blue, and bearing stenciled numbers 3152 and 3098. Both containers' blue paint was chipped in several places which revealed Duncan's Sage Green color underneath.

Container 3152 also had a plate still attached bearing serial number 104917. This number was the number of a container Duncan had purchased from Roll-Offs USA in Durant Oklahoma on or about May 9, 2002. A true copy of that invoice is attached as Exhibit 1 to the Affidavit of Phil Miesner, attached hereto as Exhibit A and incorporated by reference. The serial number plate on container 3098 appeared to have been removed. Mr. Miesner called the Irving Police Department, who impounded the 3152 container, and, after further investigation, released it to Duncan. The Irving P.D. did not impound the other container, explaining that the exposed Sage Green paint was not enough evidence in their estimation to seize that one. Irving P.D. made a report number 07-33633 regarding this incident.

12. Jill McAgg telephoned Mr. Miesner later on November 5, 2007, and made the statement that she could not find any paperwork identifying container 3152 that indicated when Dallas Recycling purchased it. She stated that Dallas Recycling buys "99.9%" of their containers new, and the only used containers she was aware of were acquired along with the purchase of a company called UNESCO in 2000 or 2001. As stated above, the invoice for Duncan's purchase of container 3152 was dated May 9, 2002.

13. In an ongoing internal investigation conducted during the month of November 2007, Duncan learned that Duncan employees stole a number of its containers and sold them one to Malio Lozano, who appears to own and operate S & H Waste Disposal, at 1120 Dowdy Ferry Road in Dallas. This address is proximate to Duncan's yard in Hutchins.

14. Lozano informed Duncan's investigators of the names of several persons involved in the theft of containers. Tony Bennett, one of the employees, when confronted with the information, refused to say anything and was terminated. Duncan's investigation so far indicates that Lozano also sold containers to a number of Duncan's competitors.

15. Mr. Miesner is informed by Duncan's paint vendors that paint can be scientifically analyzed and compared with samples to ascertain whether it came from the same source. He was further informed that there is a high degree of reliability for this procedure, but that it is necessary to have the suspect paint to compare with samples.

16. Mr. Miesner believes that it is necessary to restrain Dallas Recycling from repainting, altering, selling, or otherwise disposing of any of its roll-off containers until Duncan or persons authorized by the court have had an opportunity to inspect those containers and Dallas Recycling's records. The containers are portable and can be removed with relative ease. With one exception, the ones we have been able to observe had the serial number plates removed and other identifying features altered. The Sage Green paint referred to in this affidavit can be removed by sandblasting, and repainting, while expensive, cannot match the \$4,000 plus cost of the containers if purchased new.

*Count One*

*Conversion*

17. Duncan Disposal realleges the specific averments contained in paragraphs 1 through 16 and incorporates same herein.

18. At all material times, Duncan Disposal owned, possessed, or had the right to immediate possession of the waste containers described herein, those containers being its personal property. Dallas Recycling exercised dominion and control over those containers inconsistent with Duncan's rights with respect to those containers and Duncan thereby suffered damages.

19. All conditions precedent to Duncan Disposal's recovery against the Defendant for conversion of the Equipment have occurred or have been performed.

*Count Two*

*Claim for Damages under the Texas Theft Liability Act*

20. Duncan Disposal realleges the specific averments contained in paragraphs 1 through 19 and incorporates same herein.

21. Duncan Disposal had a possessor right in the containers described herein. Dallas Recycling unlawfully appropriated the property without the effective consent of Duncan Disposal, with the intent to deprive the owner of its property interest in those containers. Duncan Disposal suffered damages directly, proximately, and consequentially thereby.

22. All conditions precedent to Duncan Disposal's recovery against the Defendant under the Texas Theft Liability Act have occurred or have been performed.

*Count Three*

*Attorneys' Fees*

23. Duncan Disposal realleges the specific averments contained in paragraphs 1 through 22 and incorporates same herein.

24. The Texas Theft Liability Act provides for recovery of attorneys' fees by the prevailing party. Plaintiff asserts it right to recover its attorneys' fee and expenses of litigation.

*Application for Issuance  
of a Temporary Restraining Order  
and Temporary Injunction*

25. The Plaintiff re-alleges the specific averments contained in paragraphs 1 through 24 and incorporates same herein.

26. Based on the facts related in this Plaintiff's Original Petition as supported by the Affidavit of Phil Miesner general manager of Duncan's Hutchins Facility, attached hereto, as Exhibit A, and made a part of this Petition and Application for all purposes, Duncan requests a Temporary

Restraining Order and Temporary Injunction, against Dallas Recycling prohibiting the Defendant from repainting, altering, concealing, selling, or disposing of any 30 yard and 40 yard roll-off containers in its possession, or subject to its control, whether stored in its yards, or in service at customer's sites.

27. There is an immediate danger that, unless restrained, the Defendant Dallas Recycling, or culpable employees thereof, could repaint, alter, conceal, sell, or dispose of waste containers so as to make it difficult or impossible for Duncan to identify containers that have been stolen and are in Dallas Recycling's possession. If this would occur, Duncan would be irreparably harmed, and left without an adequate remedy at law.

28. The identification of three and possibly four of Duncan's waste containers in the possession or control of Dallas Recycling, one of which was identified with enough certainty to allow the Irving Police Department to impound it and later turn it over to Duncan, give rise to a probable likelihood of Duncan's success in this case in a trial on the merits.

29. The Plaintiff is ready and willing to post a Temporary Restraining Order Bond in the amount set by this court and conditioned according to law.

*Prayer*

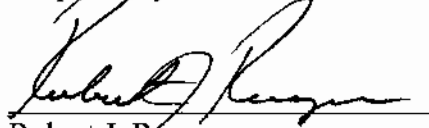
WHEREFORE, PREMISES CONSIDERED, the Plaintiff, Republic Waste Services of Texas, Ltd., d/b/a Duncan Disposal, prays that:

- (1) The Defendant Dallas Waste Disposal & Recycling, Inc. be cited to appear and answer herein;
- (2) Duncan Disposal be granted possession of any waste containers in its possession that are proved to be Duncan Disposal's property by a preponderance of the evidence;
- (3) Duncan Disposal be granted judgment against Defendant for damages in a sum in excess of the Court's minimum jurisdictional amount, together with

prejudgment and post-judgment interest as provided by law;

- (4) Duncan Disposal be granted judgment against the Defendant, jointly and severally, based on the Defendant's conversion of the containers for a sum in excess of the Court's minimum jurisdictional amount, together with prejudgment and post-judgment interest as provided by law;
- (5) Duncan Disposal be granted judgment against Defendant for reasonable attorneys' fees;
- (6) Duncan Disposal be granted judgment against the Defendant for all costs of court; and
- (7) Duncan Disposal be granted such other and further relief, special or general, legal or equitable, to which Duncan Disposal may show itself justly entitled.

Respectfully submitted,



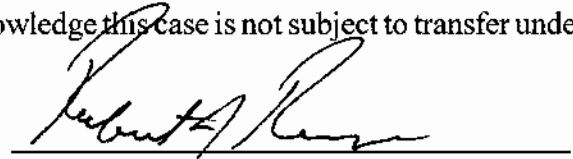
Robert J. Reagan  
State Bar No. 16630980  
REAGAN & McLAIN  
6060 North Central Expressway  
Suite 690  
Dallas, Texas 75206  
214.691.6622  
214.691.2984 (FAX)

*Attorney for Plaintiff Republic  
Waste Services dba Duncan Disposal*

#### LOCAL RULE 2.02 CERTIFICATE

The undersigned certifies, pursuant to Local Rule 2.02, he has notified by telephone and delivered a copy of the foregoing Application for Temporary Restraining Order with attached proposed order by e-mail to [roj@fostexlaw.com](mailto:roj@fostexlaw.com) and Fax to 214.219.9309, to Roger Foster, attorney at law, who the undersigned believes to be attorney for the Defendant Dallas Waste Disposal & Recycling, Inc., in this case at 10:00 A.m. on December 18, 2007.

Counsel further certifies that to the best of his knowledge this case is not subject to transfer under Local Rule 1.06.

  
ROBERT J. REAGAN