STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

CITY OF RAPID CITY, a Municipal Corporation Plaintiff, v. GEORGE FISH, CLIFFORD FISH, RANDALL MEIDINGER and FISH GARBAGE SERVICE, INC., a South Dakota Corporation, Defendants. RANDALL MEIDINGER, Third Party Plaintiff, v. JERRY WRIGHT, JOHN LEAHY, LINDA HANSEN, and DARYL BISHOP, Third Party Defendants.	Civil No. 09-2171 **BRIEF IN OPPOSITION TO MOTION TO WITHDRAW**

COMES NOW, the above-named Plaintiff, City of Rapid City (the "City"), a municipal corporation, by and through its undersigned counsel of record, John K. Nooney, and respectfully submits this Brief in Opposition to Motion to Withdraw.

PROCEDURAL HISTORY

This action was commenced by the City of Rapid City ("City") by service of a Summons and Complaint, dated December 23, 2009, on the Defendants, George Fish, Clifford Fish, Fish Garbage Service, Inc. and Randall Meidinger. On February 12, 2010, counsel, Terry L. Hofer,

filed an Answer on behalf of the Defendants George Fish, Clifford Fish, and Fish Garbage Service, Inc. Due to issues with the criminal proceedings commenced against the Defendants, discovery did not begin until August of 2011. On August 19, 2011, the City served the Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions on each of the Defendants. Among other information, the discovery requested documents and information concerning loads of refuse dumped by Fish Garbage Service, Inc. at the City landfill for a free or reduced charge. *See Exhibits 1-3 to Affidavit of Robert J. Galbraith in Support of Motion to Compel, dated February 8, 2012.* It has been discovered throughout the course of this litigation that much of the information sought by the City concerning loads dumped for free or reduced rates exists on the WAM server. WAM Software provides billing and operations software for waste haulers. The WAM system was utilized by Fish for the compilation of data, the generation of reports, and the production of billing statements to its customers. Because the WAM software and server were transferred by Fish to Red River Service Corporation, a Subpoena Duces Tecum to Red River Service Corporation was served on November 9, 2011. *See Exhibit 1 to the Affidavit of Robert J. Galbraith, dated November 28, 2011.* Red River Service Corporation brought a Motion to Quash that Subpoena which was subsequently denied by the Court. *See Order Denying Motion to Quash Protective Order, dated December 9, 2011.* During the deposition of Red River Service Corporation, Red River Service Corporation produced two CDs of information from the WAM server. However, WAM information must be accessed using WAM software. *See Affidavit of Gwen M. Aberle in Support of Motion to Compel, dated February 8, 2012.* Because the WAM software existed only on the server at Red River Service Corporation, the CDs contained unusable information. *Id.*

In a further effort to obtain the information from the WAM server, counsel for the City sent two separate meet and confer letters pursuant to SDCL § 15-6-37(a) on January 18, 2012 and January 26, 2012. *See Exhibits 4-5 to Affidavit of Robert J. Galbraith in Support of Motion to Compel, dated February 8, 2012.* On February 8, 2012, the City filed a Motion to Compel, asking the Court to Order the Defendants George Fish, Clifford Fish, and Fish Garbage Service, Inc. to provide full and complete answers to the first set of discovery which had been outstanding since August of 2011. On April 4, 2012, the Court entered a Memorandum Decision ordering the Defendants to provide the WAM information in "useable form."

On May 7, 2012, the Defendants, George Fish, Clifford Fish, and Fish Garbage Service, Inc., by and through their counsel, produced what was alleged to be full and complete responses to the discovery in accordance with the Court's Order. *See Exhibit 3 to the Affidavit of Robert J. Galbraith, dated June 14, 2012.* On May 8, 2012, the City responded by mailing a meet and confer letter pursuant to SDCL § 15-6-37(a) setting forth the deficiencies in the responses provided. *See Exhibit 5 to the Affidavit of Robert J. Galbraith, dated June 14, 2012.*

Because of the Fish Defendants' continuous refusal to provide the information from the WAM server to the City, the City was forced to file a second Motion to Compel on June 14, 2012, approximately 10 months after the information was first requested. That motion remains pending before this Court.

Patrick Duffy's first appearance in this matter dates back to shortly after the first set of discovery was served on the Defendants in August of 2011. Mr. Duffy filed a Notice of Appearance on August 25, 2011. *See Exhibit 1 to Affidavit of John K. Nooney.* Mr. Duffy appeared on behalf of the Defendants, George Fish, Clifford Fish, and Fish Garbage Service, Inc.

Notwithstanding the fact that Mr. Duffy had represented Clifford Fish throughout the criminal proceedings, Mr. Duffy saw no conflict of interest in representing all Fish Defendants. A signature line was included for Mr. Duffy on all future pleadings filed on behalf of the Fish Defendants.

Jeffrey Fransen works in Mr. Duffy's office. Mr. Fransen's first appearance on record in this matter occurred recently. On June 1, 2012, the Fish Defendants and Meidinger filed a Motion for Leave to Amend to Assert Counterclaims, Third Party Claims and Cross Claims ("Motion for Leave to Amend"). *See Exhibit 2 to Affidavit of John K. Nooney.* The Motion for Leave to Amend was signed by Terry L. Hofer, Patrick K. Duffy, and Jeffrey J. Fransen, each on behalf of George Fish, Clifford Fish, and Fish Garbage Service, Inc. Although Mr. Duffy had been involved in the civil litigation for approximately 10 months and involved with Clifford Fish for over a year, Mr. Duffy saw no conflict of interest in continuing to represent the Fish Defendants and signing the Motion for Leave to Amend on behalf of all Fish Defendants. Mr. Fransen had also appeared on behalf of Clifford Fish during the criminal proceedings. Notwithstanding Mr. Fransen's involvement in this matter for over a year, Mr. Fransen saw no conflict of interest in representing the Fish Defendants and signing the Motion for Leave to Amend on behalf of all Fish Defendants. Further, as counsel for the Fish Defendants, Messrs. Duffy and Fransen have had within their control, the ability to review all WAM information which has been pursued by the City for over 10 months now.

Since the Motion for Leave to Amend was filed on June 1, 2012, there has been no additional discovery completed in this matter. The only additional actions taken were briefings to the Court by both parties concerning the WAM information. On June 14, 2012, the City filed its second Motion to Compel. Within the Motion to Compel, the City has set forth both that the

information requested by the City can be obtained from the WAM server, and that the Fish Defendants have failed to do so. Further, the City provided several examples of Fish Garbage Service, Inc. invoices that seemingly show evidence of misdeclared loads as further evidence of why the information must be obtained. In providing this information, the City used documents and information, belonging to the Fish Defendants and which has been in the possession or control of the Fish Defendants since before the inception of this litigation.

After the Motion to Compel was filed, the Fish Defendants filed a Motion for Continuance on June 25, 2012, signed by Messrs. Hofer, Duffy, and Fransen. *See Exhibit 3 to the Affidavit of John K. Nooney.* Messrs. Duffy and Fransen each filed a Motion to Withdraw on June 26, 2012. *See Exhibits 4-5 to the Affidavit of John K. Nooney.* Notwithstanding Messrs. Duffy and Fransen's ability to review all of the information included in the Motion to Compel as counsel for the Fish Defendants, no conflict arose until the City filed its Motion to Compel. The only possible explanation for Messrs. Duffy and Fransen's newly discovered conflict of interest appears to be that the City has enlightened counsel with "new information" which has been in their possession for over a year.

Because of the lack of information provided in Messrs. Duffy and Fransen's Motions to Withdraw, on June 27, 2012, this Court directed counsel to provide a more specific statement of the grounds for withdrawal. *See Exhibit 6 to the Affidavit of John K. Nooney.* On July 2, 2012, counsel for the City received correspondence from Messrs. Duffy and Fransen disclosing an *ex parte* communication with the Court and further providing that "based upon information recently learned we have a conflict of interest as between Clifford Fish, individually, Clifford Fish as a corporate officer, George Fish and the Corporation." *See Exhibit 7 to the Affidavit of John K. Nooney.* Messrs. Duffy and Fransen continue on to state "[w]e represent all three in this case.

We believe the information we have learned creates non-waivable conflicts." *Id.* No further information has been provided.

ARGUMENT AND AUTHORITY

The authority for counsels' withdrawal from a pending action is found in *SDCL § 16-18-31* and the South Dakota Rules of Professional Conduct, Rule 1.16. *SDCL § 16-18-31* provides as follows:

> No attorney who has appeared of record in any civil or criminal proceeding shall be permitted to withdraw in any pending action except by order of the court after notice to all parties concerned.

Messrs. Duffy and Fransen have filed a Motion to Withdraw with the Court consistent with *SDCL § 16-18-31.* However, pursuant to *SDCL § 15-6-43(e)*, when a motion is based upon facts not appearing in the record, the Court must take evidence by affidavit or oral or deposition testimony. No such evidence has been provided in this case. Neither Mr. Duffy, nor Mr. Fransen have submitted an affidavit to the Court concerning the alleged conflict of interest. As such, there currently is no evidence before the Court upon which the Motions to Withdraw can be granted. Messrs. Duffy and Fransen's *ex parte* letter to the Court is not sworn testimony upon which any ruling can be made. However, because the *ex parte* letter is the only form of information which has been received to date, the City files this objection based upon the unverified representations made therein.

Of the most concern to the City is Messrs. Duffy and Fransen's representation that a non-waivable conflict of interest exists. While Mr. Hofer has not yet filed a Motion to Withdraw, to the extent Messrs. Duffy and Fransen have a non-waivable conflict of interest, it is unclear to the City how Mr. Hofer does not have that same conflict. To the extent a non-waivable conflict does not exist, Messrs. Duffy and Fransen have not stated an appropriate grounds for their withdrawal

from this litigation. Through conversations with Mr. Hofer, counsel for the City understands that Mr. Hofer does not intend to file a motion to withdraw at this juncture as he does not perceive that a non-waivable conflict exists. *See Affidavit of John K. Nooney, ¶ 2.* However, to the extent there is a non-waivable conflict, the City anticipates that a Motion to Withdraw will also be filed by Mr. Hofer. Should Mr. Hofer also file a Motion to Withdraw, the Fish Defendants will be unrepresented by counsel. As set forth in detail above, the City has spent 10 months and thousands of dollars pursuing discovery which the Fish Defendants continue to fail and refuse to provide. If this Court allows the Fish Defendants to continue without counsel, the chances of obtaining that discovery appear to be minimal. Further, prior to recent Motion for Continuance filed by the Fish Defendants, this case was set for trial in December of this year. Before this Court allows the withdrawal of counsel for the Fish Defendants, some assurances need to be made that the Fish Defendants will continue to retain counsel in this matter and that the City's discovery requests, which have been the subject of two Motions to Compel, are answered in their entirety.

Notwithstanding Messrs. Duffy and Fransen's unverified affirmation of a conflict of interest, "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." South Dakota Rules of Professional Conduct, Rule 1.16(c). The City respectfully requests that this Court order Messrs. Duffy and Fransen to continue their representation of the Fish Defendants until all discovery issues have been fully resolved and until adequate assurances have been provided that the Fish Defendants will continue to be represented by counsel in this matter.

CONCLUSION

For the foregoing reasons, the Plaintiff, the City of Rapid City, respectfully requests that this Court enter an Order denying the Motions to Withdraw of Patrick Duffy Jeffrey Fransen until adequate assurance can be made that the Fish Defendants will continue to be represented by counsel and until all outstanding discovery is adequately and appropriate answered in full.

Dated this 9th day of July, 2012

JOHN K. NOONEY
ROBERT J. GALBRAITH
Attorneys for Plaintiff
NOONEY SOLAY & VAN NORMAN, LLP
632 Main Street, 2nd Floor / P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846

CERTIFICATE OF SERVICE

I, John K. Nooney, attorney for Plaintiff, hereby certify that a true and correct copy of the foregoing was served as indicated upon:

Terry L. Hofer Bangs, McCullen, Butler, Foye & Simmons P.O. Box 2670 Rapid City, SD 57709-2670 thofer@bangsmccullen.com *Attorneys for Defendants George Fish, Cliff Fish and Fish Garbage Service, Inc.*	[x] U.S. Mail [ ] Federal Express [ ] Hand Delivery [ ] Facsimile Transmission [x] Email
Paul R. Winter Angela M. Colbath Attorney at Law, P.C. 409 Kansas City Street Rapid City, SD 57701 winterlaw@rushmore.com acolbath@rushmore.com *Attorneys for Defendant and Third Party Plaintiff Randall Meidinger*	[x] U.S. Mail [ ] Federal Express [ ] Hand Delivery [ ] Facsimile Transmission [x] Email
Patrick Duffy Patrick K. Duffy, LLC 629 Quincy Street, Ste 105 P.O, Box 8027 Rapid City, SD 57709 jglanzer@duffylaw.pro *Attorneys for Defendants George Fish, Cliff Fish and Fish Garbage Service, Inc.*	[x] U.S. Mail [ ] Federal Express [ ] Hand Delivery [ ] Facsimile Transmission [x] Email
Jerry D. Johnson Banks, Johnson, Kappelman & Becker P. O. Box 9007 Rapid City, SD 57709 jdjbjck@aol.com *Attorneys for Third Party Defendants*	[x] U.S. Mail [ ] Federal Express [ ] Hand Delivery [ ] Facsimile Transmission [x] Email

this 9th day of July, 2012.

JOHN K. NOONEY