STATE OF SOUTH DAKOTA)):SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT 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 SUPPORT OF MOTION TO COMPEL**

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 Support of Motion to Compel. This brief is accompanied by the Affidavit of Gwen M. Aberle and the Affidavit of Robert J. Galbraith, which are filed simultaneously herewith and specifically incorporated herein by this reference.

FACTUAL BACKGROUND

The South Dakota discovery rules have been set forth to this Court in detail in previous briefings, and will not be restated at such great length herein. However, it is not a thorough

review of the law that is necessary for this Motion to Compel but rather a thorough review of the facts. George Fish, Clifford Fish, and Fish Garbage Service, Inc., (collectively referred to as "Fish") do not contend that the information sought by the City of Rapid City is irrelevant or not discoverable, merely that Fish has exhausted its efforts in attempting to provide the requested information (*See Exhibit 3 to the Affidavit of Robert J. Galbraith)* and that the City is already in possession of all information from the WAM system (*See Brief in Support of Motion for Protective Order, p. 2).*

On February 8, 2012, the City filed a Motion to Compel seeking, among other issues, full and complete responses concerning information contained on the WAM billing system. 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. *See Deposition of Fish Garbage Service, Peggy Fish, p. 68-71.* Essentially, the information for each load or landfill ticket is entered into the computer using the WAM software. After a driver received a landfill ticket from the Rapid City landfill, that ticket was brought back to the office and the information was entered into the computer. *See Deposition of Fish Garbage Service, Peggy Fish, p. 49.* The information that was entered into and could be retrieved from the WAM system consisted of the following:

1. Driver
2. Ticket Number
3. Customer Charge
4. Weight
5. Landfill Charge
6. Material ID
7. All other information received from the driver or included in the landfill ticket.

See Deposition of Fish Garbage Service, Peggy Fish, p. 49-51. After the information was entered into the computer, billing statements were then generated from the WAM system. *See*

Deposition of Fish Garbage Service, Peggy Fish, p. 53. In other words, the WAM system contains most, if not all, of the information pertinent to Fish's operation of their business.

On April 4, 2012, this Court entered a Memorandum Decision holding that "[b]ecause the plain language of SDCL 15-6-34(a) requires Defendants to produce the information in useable form and it is undisputed that the WAM discs are not useable, the City's Motion to Compel is granted." *See Memorandum Decision, dated April 4, 2012, p. 11* (emphasis added). The Court reasoned as follows:

> The Defendants cannot claim that they do not know how their former business was operated, go out of business and then avoid the inquiry about the computer records, as it would circumvent the rules of discovery. They will have to find some method to allow the City access to the information on the discs.

Id. In an effort to limit the amount of information which needed to be obtained from the WAM system, the City sent correspondence to Fish on April 16, 2012, which correspondence identified approximately 9,000 landfill ticket numbers out of the approximately 34,000 landfill tickets for Fish which have been made available in this litigation. The request identified six separate categories of information sought. *See Exhibit 1 to the Affidavit of Robert J. Galbraith.* Those six categories were: (1) Date; (2) Material; (3) Net Units/Quantity; (4) Load Charge; (5) Customer; and (6) Amount Charged to Customer. *Id.* The six categories of information requested were taken directly from the deposition testimony of Joyce Weckwerth concerning what information from each landfill ticket was input into the WAM system. During her deposition, Joyce Weckwerth was provided with a landfill ticket and asked to highlight that information from the ticket which was input into the WAM system. *See Deposition of Joyce Weckwerth, p. 16.* Joyce Weckwerth indicated that the landfill ticket number, material ID, vehicle, net units, and load charge were all input into the WAM system. A copy of the landfill ticket as highlighted by Joyce Weckwerth is attached as Exhibit 2 to the Affidavit of Robert J. Galbraith. As set forth

above, the input of this information was also confirmed by Peggy Fish during the deposition of Fish Garbage Service, Inc.

Thereafter, on May 7, 2012, Fish produced five CDs professed to be in compliance with this Court's Order. *See Exhibit 3 to the Affidavit of Robert J. Galbraith.* However, while Fish produced 234,384 documents in its May 7, 2012 response, only 6,215 were even arguably responsive to the City's request. Disc 1 was identified as "Scale Ticket by cust/trans." On Disc 1, Fish acknowledged that it could provide the following information:

a. Customer name
b. Customer number
c. Landfill name/code
d. Date
e. Landfill Rate
f. Tonnage
g. Calculation of Rate X Tonnage
h. Landfill Ticket Number

Id. However, after reconciling the landfill ticket numbers for which information was requested in the letter from the City to Fish on April 16, 2012 and the Fish response on May 7, 2012, it was discovered that of the approximately 9,000 landfill ticket numbers for which information was requested, Fish provided information responsive for only 341.[1] *See Affidavit of Gwen Aberle, ¶ 3.* This office has taken the document identifying the 9,033 landfill tickets for which information was requested and highlighted those landfill ticket numbers for which information was actually provided. *See Exhibit 4 to the Affidavit of Robert J. Galbraith.* Even on the face of the information provided on Disc 1, Disc 1 contained only information from the calendar years 2004 and 2005. There is no information for the years 2003 and 2006 through 2009. *See Affidavit of Gwen Aberle, ¶ 4.*

[1] Also, for each landfill ticket, the City kept the original ticket and provided Fish with a carbon copy. During the course of discovery, Fish has failed to produce the carbon copy for 4,545 of the approximately 9,000 pertinent landfill tickets.

Further, the Fish response indicates that "[t]he amount charged by Fish is located on the individual invoices and not on this spreadsheet." *See Exhibit 3 to the Affidavit of Robert J. Galbraith.* However, such an assertion is directly contrary to the deposition testimony of Peggy Fish and Joyce Weckwerth discussed more fully above. This is also contrary to the information provided by Marcos Glass, which is now relied upon by Fish to suggest that the City already has all information from the WAM system in its possession. Attached as Exhibit D to the Affidavit of Terry Hofer is the first page of a printout of information produced by Marcos Glass during the action captioned *State of South Dakota v. George Fish and Clifford Fish,* CR 10-806, CR 10-807, CR 10-2819 and CR 10-2820. The information included on the printout includes, from left to right: Customer Name, Type of Unit (Roll-off or Compactor), Dumpsite, Date, Dump Quantity or Amount, Amount Charged to Customer, Driver, Truck, Service Address, and Customer Number. *See Exhibit D to the Affidavit of Terry Hofer.* Considering the deposition testimony of Peggy Fish and Joyce Weckwerth, the information provided by Fish on May 7, 2012, and the information produced by Marcos Glass, it is undeniable that Fish could provide information responsive to the six categories identified by the City:

(1) Date;
(2) Material;
(3) Net Units/Quantity;
(4) Load Charge;
(5) Customer; and
(6) Amount Charged to Customer.

In addition, Fish has provided no explanation why information could not be provided for 8,691 of the 9,033 landfill ticket numbers (information, albeit incomplete, was provided for 341 landfill ticket numbers).

Disc 3 contains customer invoices for roll-offs from October of 2005 through 2009. As set forth above, in its May 7, 2012 response, Fish provided information for landfill tickets from

2003 and 2004, however, contrary to the testimony of Peggy Fish and Joyce Weckwerth, as well as the information produced by Marcos Glass, Fish indicated that the charge to the customer could not be provided from the WAM system. As such, Fish has essentially asserted that no information concerning customer charges can be produced for 2003, 2004, and the first 3 quarters of 2005. Such an assertion is not supported by any information received in this litigation. In total, of the 234,384 pages of information found on five discs provided by Fish, less than 3% of the information included was responsive to the City's request.

On May 8, 2012, the City sent a letter consistent with the provisions of SDCL § 15-6-37(a) concerning the lack of responsiveness of those documents produced by Fish. *See Exhibit 5 to the Affidavit of Robert J. Galbraith.*

As opposed to addressing the alleged deficiencies set forth above and included in the City's letter dated May 8, 2012 or providing some explanation concerning why information (albeit incomplete) was only provided for 341 landfill ticket numbers, Fish has now filed a Motion for Protective Order asserting that Fish has fully complied with this Court's Order and that the City is already in possession of the information requested. *See Brief in Support of Motion for Protective Order (WAM).* In their first argument, Fish asserts:

> This court ordered the Defendants Fish to produce the WAM information in a useable form. Exhibit A to the Affidavit of Terry L. Hofer describes what Defendants Fish did to comply with the court's order. The City now has in its possession all of the requested data available from the WAM discs.

Id. at p. 3. However, Fish has provided any indication why information was not produced concerning 8,691 of the 9,033 landfill ticket numbers at issue. Nor has Fish provided any explanation as to why much of this information could be obtained by Marcos Glass but not Fish. Instead, Fish relies entirely upon *Halder v. International Telephone & Telegraph Co.,* 75 F.R.D. 657 (E.D.N.Y. 1977) for the proposition that "once the information is in the hands of the party

requesting it, that party bears the burden of locating and assimilating the information he desires." *See Brief in Support of Motion for Protective Order (WAM), p. 4.* Such was the argument of Fish at the first Motion to Compel hearing prior to the Court's Memorandum Decision on April 4, 2012. However, the entire premise of Fish's argument relies on the assumption that Fish has provided the City with the information it desires. Fish would have this Court believe that all responsive information has been produced and that the City is seeking to have Fish reproduce that information in some fashion that proves the City's case. However, quite the opposite is true. As set forth above, Fish has provided information for less than 4% of the landfill ticket numbers requested (information was provided for only 341 of over 9,000 landfill ticket numbers). The City is not asking that Fish generate numerous reports concerning the different aspects of the City's case, but rather that Fish provide the City with the underlying data which has been entered into the WAM system. The current request is no different than asking for a computer printout of payments received upon a promissory note. In some essence, a report is generated. However, that report merely identifies the underlying data relevant to the case.

In the event it is the inclusion of only specific landfill tickets that Fish objects to, information for approximately 9,000 landfill ticket numbers was requested in an effort to minimize the discovery burden. Should which to provide the requested information for all 34,000 + landfill tickets, the City has no objection to the same. The simple fact that Fish may believe that the provision of the requested information helps prove the City's case does not make such provision objectionable. The City is entitled to discovery of the underlying facts of this case. Those facts are contained within the WAM system.

In Fish's second argument, Fish asserts that because the City is in possession of the information compiled by Marcos Glass from the WAM system, that Fish is relieved of any

obligation to produce or verify information from its own operations and billing system. During Marcos Glass' testimony, he indicated that "[t]he process was fairly lengthy because we – we had to contact a vendor that built the database for Fish Garbage. And in that process, in speaking with them over the phone, they walked me through the steps in printing out the data that was there in their system...Again, what we did is through the vendor we contacted them by phone, and they took me step by step and explained to me as to what type of files, what was the name of the data that we needed to find, and the actual files that pertained to drivers, dates, and types of vehicles...the program automatically creates a spreadsheet[.]" *See Testimony of Marcos Glass, pp. 274-275.* In other words, Marcos Glass followed step-by-step instructions from WAM to pull the information from the system. Marcos Glass does not have any personal knowledge of the information which was downloaded from the system and cannot attest to its accuracy. Fish can. As previously ruled upon by this Court, "[t]he Defendants cannot claim that they do not know how their former business was operated, go out of business and then avoid the inquiry about the computer records[.]"

As was made abundantly clear in the criminal litigation, counsel for Fish (Mr. Duffy has acted as counsel in both the criminal and civil litigation) has previously shown that the credibility of information received from third parties may certainly be attacked.[2] At one point, Ms. Catlette was asked "Your reports and your testimony at the Grand Jury and here is only as good as the data that you received, correct?". In this circumstance, the information received is from the WAM system controlled and maintained by Fish. However, in its Motion for Protective Order (WAM), Fish seeks to avoid attesting to the veracity or foundation of the WAM information. The information requested consists of business records of Fish, input into the

[2] See Testimony of Ann Catlette attached to the Affidavit of Terry L. Hofer as Exhibit G and attached to the Affidavit of Robert J. Galbraith as Exhibit 7.

WAM system by Fish, and for which Fish continues to have possession, custody, or control. The desire of Fish to avoid the production of or attestation to any information from the WAM system presumably allows Fish to attack the credibility of witnesses at the time of trial using any inaccuracies contained in Fish's own information. Fish has the ability to reproduce the very same information downloaded by Marcos Glass, Fish has the ability to verify or discredit the information downloaded by Marcos Glass, and Fish has the ability to conduct further examination of that information. The City does not. To force the City to rely solely upon the information produced by Marcos Glass, without any representations having been made by Fish as it concerns that information is contrary to the very purpose of discovery. As this Court is well aware, "[d]iscovery rules are designed 'to compel the production of evidence and to promote, rather than stifle, the truth finding process.'" *Dudley v. Huizenga,* 2003 SD 84, ¶ 11, 667 N.W.2d 644, 648 (citing *Magbuhat v. Kovarik,* 382 N.W.2d 43, 45 (S.D.1986); *Chittenden & Eastman Co. v. Smith,* 286 N.W.2d 314, 316 (S.D.1979)). To the extent any of Fish's own information, contained in the report of Marcos Glass, is inaccurate, the City has no means to authenticate the same or question Fish concerning the veracity thereof. The City's only source of WAM information is the information downloaded by Marcos Glass. Fish, on the other hand, has the report of Marcos Glass and unfettered access to the information contained on the WAM system. Allowing Fish to refuse to provide their own information accomplishes nothing but to "stifle" the "truth finding process."

Fish has previously argued, and does so again in its Motion for Protective Order (WAM) that the City seeks to have Fish prove its case. Quite the opposite is true. The City has engaged in extensive analysis of that information, albeit incomplete, which has been provided to date. However, the information requested from the WAM system is essential to the preparation of the

City's case. According to the records produced, from 2003 to 2009, Fish has dumped an estimated total of 30,000 tons of free or reduced loads at the Rapid City landfill. However, given the refusal of Fish to provide the information requested from the WAM system, less than 25,000 tons can be matched with customer invoices, to date. For the tonnage which has been accounted for, Fish paid the City a total of approximately $113,000 in dump fees over 7 years. Over that same time period, Fish billed its customers in excess of $1,300,000 for dumping those very same loads. However, this analysis cannot be completed for the remaining 5,000 tons or more of free or reduced loads dumped by Fish without the production of the WAM information.

For a very small percentage of its customers, Fish itemized the "Hauling Fee" and "Landfill Fee" on its invoices. For example, in the invoice to Family Thrift Center on April 1, 2007, there are four separate loads included. *See Exhibit 8 to the Affidavit of Robert J. Galbraith.* Those loads are charged to the customer as follows:

03/02/07	1 Compactor Pull	Hauling Fee			$80.00
		Landfill Fee	2.46 tons	$47.00/ton	$115.62
03/09/07	1 Compactor Pull	Hauling Fee			$80.00
		Landfill Fee	2.36 tons	$47.00/ton	$110.92
03/16/07	1 Compactor Pull	Hauling Fee			$80.00
		Landfill Fee	2.50 tons	$47.00/ton	$117.50
03/23/07	1 Compactor Pull	Hauling Fee			$80.00
		Landfill Fee	3.88 tons	$47.00/ton	$182.36

Id. Only because the tonnage is included on the customer invoice, the corresponding landfill ticket can be located. For example, notwithstanding the pass-through-charge to Family Thrift Center for a Landfill Fee in the amount of $115.62 (2.46 tons X $47.00 per ton) the corresponding landfill ticket # 803137 shows that Fish identified the load as clean cardboard and

paid $0.00 to the Rapid City landfill. *See Exhibit 8, p. 2. to the Affidavit of Robert J. Galbraith.* The same is true for each of the remaining loads.

03/09/07 Pass-Through-Fee $110.92 (2.36 tons X $47.00/ton)

Ticket # 804288 Material: Clean Cardboard Amount Paid: $0.00

03/16/07 Pass-Through-Fee $117.50 (2.50 tons X $47.00/ton)

Ticket # 805574 Material: Clean Cardboard Amount Paid: $0.00

03/23/07 Pass-Through-Fee $182.36 (3.88 tons X $47.00/ton)

Ticket # 806943 Material: Clean Cardboard Amount Paid: $0.00

See Exhibit 8 to the Affidavit of Robert J. Galbraith. In other words, on one invoice, covering only one month, for one customer, Fish billed its customer pass-through Landfill Fees in the total amount of $526.40, while paying $0.00 at the Rapid City landfill. In total, there were 271 loads of clean cardboard declared by Fish for loads taken from Family Thrift Center wherein Fish billed Family Thrift Center a pass-through "Landfill Fee" at full price. *See Affidavit of Gwen Aberle, ¶ 5.* This resulted in charges to Family Thrift Center of an additional $51,271.33. *See Affidavit of Gwen Aberle, ¶ 5.* Further, the majority of testimony received to date indicates that the compactor loads hauled from Family Thrift Center all contained rotted vegetables or produce and waste in addition to cardboard. *See Deposition of Don Anderson, p. 25; Deposition of Steve Pope, p. 81-82.*

There is no itemization of "Hauling Fees" vs. "Landfill Fees" for the vast majority of Fish's customer invoices. For example, included on the invoice to Aramark Facilities, dated June 1, 2006, there were three separate loads hauled by Fish for Aramark on May 30, 2006. *See Exhibit 9 to the Affidavit of Robert J. Galbraith.* Two of those loads consisted of 10 yard rolloffs while the remaining load was a 20 yard flat rolloff. One of the landfill ticket numbers for which

information was requested was ticket # 757146. *See Exhibit 9, p. 2 to the Affidavit of Robert J. Galbraith.* Ticket # 757146 corresponds to a load dumped by Fish for Aramark on May 30, 2006.[3] That load would presumably be one of the three rolloffs included in the invoice. However, it is impossible to determine whether the load was a 10 yard rolloff or 20 yard rolloff. As such, it is impossible to determine whether Fish billed its customer $150.00 or $235.00 for the load, which Fish declared as alternative cover at the Rapid City landfill and subsequently dumped for free. If Fish were to produce, as requested, the "amount charged to the customer," from the WAM system it could then be determined which charge corresponds with ticket # 757146. Unfortunately, the report of Marcos Glass does not include any information on this load.

If the WAM information were provided, the analysis can be completed. For example, in the invoice to Kurtz Construction, dated January 1, 2007, included are two separate loads hauled by Fish for Kurtz Construction on December 19, 2006. *See Exhibit 10 to the Affidavit of Robert J. Galbraith.* One of the landfill ticket numbers for which information was requested was ticket # 793656. *See Exhibit 10, p. 2 to the Affidavit of Robert J. Galbraith.* Ticket # 793656 corresponds to a load of manure dumped by Fish at the Rapid City landfill on December 19, 2006. It is impossible to determine from the ticket itself, the customer for whom the load was dumped (Ticket # 793656 is one of the 4,545 landfill tickets which Fish has failed to produce in discovery. Only those tickets which have been produced by Fish contain the handwritten notation concerning the customer at the top of the ticket, as seen on the Aramark ticket discussed above. Fish drivers added that notation after the original was separated from the carbon copy). Notwithstanding this fact, using the information received from Marcos Glass, it can be

[3] The handwritten notation "Aramark" included at the top of the ticket was written by the Driver.

determined that the customer was Kurtz Construction. *See Exhibit 10, p. 3 to the Affidavit of Robert J. Galbraith.* Ticket # 793656 contained a dump weight of 1.94 tons. If the ticket is reviewed in conjunction with the WAM information, the only dump on December 19, 2006 of 1.94 tons was the dump for Kurtz Construction. In other words, the load identified in Ticket # 793656 was declared by Fish at the Rapid City landfill as manure, for which Fish paid $0.00. Fish then billed Kurtz Construction $150.80 ($145.00 + tax) for that load. *See Exhibit 10 to the Affidavit of Robert J. Galbraith.* This is one of over 400 loads from local businesses who do not produce manure, but which were declared by Fish as manure at the Rapid City landfill. If it were not for the WAM system information, there would be no way to complete this analysis.

As more fully set forth above, it is contrary to the very purpose of the discovery rules to allow Fish to refuse to produce its own information and force the City to rely completely upon the information received from Marcos Glass. As further evidence of the same, the information of Marcos Glass does not contain all of that information requested by the City. Fish has acknowledged the ability to provide the following information from the WAM system:

a. Customer name
b. Customer number
c. Landfill name/code
d. Date
e. Landfill Rate
f. Tonnage
g. Calculation of Rate X Tonnage
h. Landfill Ticket Number

Fish acknowledges the ability to provide the landfill ticket number from the WAM system. Because Marcos Glass was merely following the instructions of WAM personnel, Marcos Glass' information downloaded from the WAM system does not include the landfill ticket number. This information can clearly be provided. Further, the deposition testimony of Peggy Fish and Joyce Weckwerth, as well as the information produced by Marcos Glass make it abundantly

clear that in addition to the information included above, Fish can also provide the "amount charged to the customer" for each respective landfill ticket number. There seems to be little question that the WAM system provides the capability to provide the following information:

(1) Date;
(2) Material;
(3) Net Units/Quantity;
(4) Load Charge;
(5) Customer; and
(6) Amount Charged to Customer.

This is the total extent of the information the City has requested that Fish produce. Whether Fish chooses to provide this information for the approximately 9,000 landfill ticket numbers identified or all 34,000 + ticket numbers makes no difference to the City. However, Fish has an obligation to provide the same.

ARGUMENT AND AUTHORITY

Under South Dakota law, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." SDCL §15-6-26(b). It is well settled that the scope of pretrial discovery is construed broadly. *Bean v. Best*, 80 N.W.2d 565 (S.D. 1957). Fish does not dispute that the information is relevant and not subject to privilege. The broad construction given to the discovery rules is necessary to accommodate the three purposes of the discovery process in order to: "(1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989) (*citing* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2001 (1970)). The City seeks to obtain evidence from Fish for use at trial. As set forth in *SDCL § 15-6-34(a),* Fish must produce those documents in their possession, custody, or control. Given the Court's previous ruling, Fish no longer disputes that the requested documents are in Fish's possession, custody, or control.

The authority of the Courts to grant or deny a Motion for a Protective Order is set forth in SDCL § 15-6-26(c). Pursuant to SDCL § 15-6-26(c):

> Upon motion…by the person from whom discovery is sought…and *for good cause shown*, the court in which the action is pending, on matters relating to a deposition…may make any order which justice requires *to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense*[.]

(emphasis added). For a protective order to be issued, Fish must establish both good cause and that a protective order is necessary to protect Fish from annoyance, embarrassment, oppression, or undue burden or expense. "Good cause is established on a showing that disclosure will work a clearly defined and serious injury. The injury must be shown with specificity. Broad allegations of harm will not suffice." *Bertelsen v. Allstate Ins. Co.,* 2011 SD 13, ¶ 57, 796 N.W.2d 685, 704. Stated similarly by the 8th Circuit Court of Appeals, in order to establish good cause, the movant must state particular and specific facts; mere conclusory statements are insufficient for a Protective Order to be granted. *Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2,* 197 F.3d 922, 925-26 (8th Cir. 1999). Initially, it must be noted that Fish's Motion for Protective Order (WAM) does not allege any "clearly defined and serious injury." While it is not stated in Fish's motion, it is presumed that Fish will allege the financial burden, either in its responsive brief or at the time of the hearing. However, as set forth in the testimony of Marcos Glass, "[WAM] took me step by step and explained to me as to what type of files, what was the name of the data that we needed to find, and the actual files that pertained to drivers, dates, and types of vehicles...the program automatically creates a spreadsheet[.]" *See Testimony of Marcos Glass, pp. 274-275.* According to the testimony of Marcos Glass, there will not be a substantial financial burden experienced by Fish in selecting the proper files and allowing the WAM system to create a spreadsheet of the same. Neither is good cause established by the fact that the City has some information in its possession by virtue of the information produced by Marcos Glass.

The information sought constitutes the business records of Fish. Fish input the data into the WAM system, Fish alone is responsible for the accuracy of the data, and Fish is the only party in this litigation which continues to have access to the data. Where Fish has "control" over the documents and information requested by the City, the City does not have an obligation to retrieve or rely upon a third party for the production of the same. *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 516 (D.Kan. 2007).

Because Fish cannot establish good cause for the entry of a protective order, and because there is no undue burden or expense placed upon Fish in producing the requested information, Fish's Motion for Protective Order (WAM) should be denied. Because Fish does not dispute the relevancy of the information requested and Fish has failed to comply with the Court's Memorandum Decision, dated April 4, 2012, the City's Motion to Compel should be granted.

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court order the Defendants, Fish Garbage Service, Inc., George Fish, and Clifford Fish comply with this Court's previous Memorandum Decision and provide the City with the requested WAM information in "useable form." City further requests that the Court award the Plaintiff its fees and costs incurred in bringing this motion pursuant to SDCL § 15-6-37(a)(4).

Dated this 14th day of June, 2012.

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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:

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this 14th day of June 2012.

For JOHN K. NOONEY