

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CONSOLIDATED GARBAGE DISTRICT NO. 1
OF THE PARISH OF JEFFERSON AND THE
PARISH OF JEFFERSON THROUGH THE
JEFFERSON PARISH COUNCIL

Plaintiffs

VERSUS

WASTE MANAGEMENT OF LOUISIANA, L.L.C.
D/B/A WASTE MANAGEMENT OF N.O.,
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA, AND EVERGREEN
NATIONAL INDEMNITY COMPANY

Defendants

* CIVIL ACTION NO. 09-6270
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* SECTION "B"
*
* JUDGE IVAN L.R. LEMELLE
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* MAGISTRATE "4"
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* MAG. KAREN WELLS ROBY
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WASTE MANAGEMENT'S OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW INTO COURT comes defendant, Waste Management of Louisiana, L.L.C. d/b/a Waste Management of New Orleans ("Waste Management"), which respectfully submits this opposition to the motion for partial summary judgment filed by Plaintiffs, Consolidated Garbage District No. 1 of the Parish of Jefferson and the Parish of Jefferson through the Jefferson Parish Council ("Plaintiffs"). Plaintiffs' motion for partial summary judgment was filed at the same time Waste management filed its own motion for partial summary judgment and both seek judgment regarding Plaintiffs' claim that it may terminate the Landfill Contract between the

parties pursuant to the “annual appropriation dependency clause” contained therein. The pertinent background of the case and of this claim, as well as the grounds for granting summary judgment in Waste Management’s favor as to this claim, are fully briefed in Waste Management’s recently-filed memorandum in support of its motion for summary judgment. Therefore, Waste Management herein addresses only the arguments made by Plaintiffs’ in their motion for summary judgment.

ARGUMENT

- 1. These cross-motions are only intended to address whether Plaintiffs may exercise the annual appropriations dependency clause. The issue of who would bear financial responsibility for placing final cover over Phases 3A and 3B should Plaintiffs be permitted to exercise the annual appropriations dependency clause is disputed and is not before the Court at this time.**

Plaintiffs’ motion for partial summary judgment requests that the Court not only rule that Jefferson Parish may invoke the annual appropriation dependency clause to prematurely terminate the Landfill Contract but also rule that Waste Management must bear the cost of placing final cover over the landfill. However, which party should bear the cost of placing final cover over the landfill in the event that the Parish is permitted to invoke the annual appropriation dependency contract to prematurely terminate the contract is a separate and distinct question from whether the Parish may invoke the provision in these circumstances in the first place. In fact, who would bear this cost is nowhere addressed in the Landfill Contract and is a separately disputed issue. Waste Management has not addressed this issue in its own motion for summary judgment because it was not an issue in Waste Management’s Rule 12 motions, which were converted into these cross-motions for summary judgment.

Furthermore, Plaintiffs have offered no legal or factual argument as to why Waste Management would bear the financial responsibility of covering the landfill should the Parish

terminate the contract early, except to say that Waste Management would bear that cost if the contract were not terminated early. Although Plaintiffs cite to an affidavit of the Parish's Landfill Engineer, Rick Buller, as purported support for this argument, Mr. Buller's affidavit makes absolutely no mention of who should bear this cost in the event that the contract is prematurely terminated pursuant to the annual appropriation dependency clause.¹ To the contrary, evidence in the form of a January 14, 2009 e-mail from Mr. Buller to the former Parish Attorney, Tom Wilkinson, shows that Mr. Buller believes that this cost would be shared between the Parish and Waste Management in the even of early termination of the contract.² In fact, Mr. Buller recently confirmed this in his deposition testimony.³

Q. What did you mean when you said, if we end their contract early, we'll have to negotiate some shared closure cost?

A. Well, the way our contract is structured, there was an initial – way back when in 1996, whenever the contract was first signed, additional payment of some \$2.3 million. And after that, all of the cell construction, operations, and closure cost was paid by the parish through the tipping fee. So I reasoned that, well, if we don't allow Waste Management to fill up the area that was originally contracted, then they're obviously not collecting, you know, the money they expected, and so maybe they wouldn't have made enough o pay for the final cover.

....

Q. And so this is just your interpretation of the contract based on the obligations of both parties at a certain point in time?

A. Correct.

Q. And if it's terminated before the landfill is filled or the permitted areas are filled, then the parish bears some responsibility for the closure costs?

A. That's what I thought.

Waste Management does not dispute that it has the obligation to provide for final cover should the contract reach its natural term. However, the quid pro quo of this obligation is the

¹ (Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, Exhibit 2.)

² (See Exhibit A, January 14, 2009 e-mail from Rick Buller to Tom Wilkinson, attached herein.)

³ (See Exhibit B, Deposition of Joseph Rick Buller, pp. 144-45, attached herein)

completion of the contract through its term, which ensures that Waste Management will have the necessary revenues to pay for the final cover. If the contract is terminated prematurely, Waste Management is deprived of these revenues, and the question of who has to provide final cover in that situation would clearly be disputed and contested. Therefore, this is a separate question, one that is not properly before the Court following Waste Management's converted Rule 12 motions and, in any event, one that is clearly disputed and therefore not appropriate for summary judgment as this time.

- 2. Plaintiffs cite no authority to support the proposition that a municipality may abandon a valid, existing contract for essential services which it clearly has the financial ability to pay for simply because it claims it could save money by contracting with a direct competitor.**

Plaintiffs' argument is best summarized by the following statement from the memorandum in support of their motion:

“The law is clear that the Parish must have the unfettered discretion to terminate the Landfill Contract on an annual basis as otherwise this contract constitutes a debt which was not approved by the State Bond Commission as required by law.”⁴

As explained below, cases and other authority which deal with the implication of a municipality not including an appropriation dependency clause in a contract such as the Landfill Contract are entirely irrelevant because the Landfill Contract, the contract at issue here does include an appropriation dependency clause. Furthermore, the statement above, which relies on authority cited by Plaintiffs making reference to a municipality's “discretion” in invoking an annual appropriation dependency clause, completely omits the crucial additional phrase which appears in all of these authorities - that this discretion exists when a municipality actually fails to appropriate funds for the continuation of its contract.

⁴ (Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, p. 7.)

- a. **Cases and Attorney General Opinions which deal with the implications of not including an appropriation dependency clause in a long-term municipal services contract are irrelevant.**

Despite the fact that these cross-motions for summary judgment are intended to seek judgment regarding the proper application of the annual appropriation dependency clause in the Landfill Contract, Plaintiffs' argument and the vast majority of authority cited in support thereof deal with the implications of not including an appropriation dependency clause in a long-term municipal contract. Plaintiffs primarily cite to a number of cases and Attorney General Opinions, namely, *Coleman v. Bossier City*, 305 So.2d 444 (La. 1975); *Schwab v. City of Kenner*, 97-287 (La.App. 5 Cir. 3/11/98), 709 So.2d 320, and La. Att'y Gen. Ops. 98-258, 95-342, 83-1045, to support the proposition that a contract such as the Landfill Contract would be considered a "debt" requiring State Bond Commission approval if it did not contain a non-appropriations clause. Plaintiffs, citing this authority, go on to assert that a contract pursuant to which a municipality incurs such a "debt" is void *ab initio* if it does not contain such a clause.

However, these authorities are irrelevant to the issue at hand because it is not disputed that the Landfill Contract in this case does contain a non-appropriations clause. The issue now before the Court is not what happens when a municipal contract for long-term services does not contain an appropriation clause but, instead, whether a non-appropriation clause may be invoked simply because the municipality wishes to switch a service contract to a direct competitor ostensibly to "save money."⁵ Plaintiffs cite absolutely no authority which suggests a non-appropriations clause may be used in good faith in such a manner.

⁵ To the extent that Plaintiffs may be going as far as suggesting that, should this Court find that the annual appropriation dependency clause cannot be invoked in this case under these facts, then the contract should be treated as though it does not contain such a clause, Plaintiffs cite absolutely no support for such a theory and, obviously, that is not the case.

Moreover, the courts in *Coleman* and *Schwab* never discussed non-appropriation clauses, their meanings, or their proper uses. In those cases, the courts found nothing more than that a municipal contract can be voided if a municipality contracts to pay uncollected/unappropriated money over a period of years (incurs a debt) and does not include a non-appropriations provision in the contract. For instance, in *Schwab*, the court found that a contract between the City of Kenner and a private citizen constituted a “future debt” under La. R.S. 39:1410.60, the statute which requires such debts be approved by the State Bond Commission in order to be valid. As the debt in that case was not approved by the State Bond Commission, the debt and contract were void under La. R.S. 39:1410.60. Although Plaintiffs seem to cite *Schwab* for the proposition that a municipality can terminate a long-term contract at its whim, that court held nothing more than that the contract was void *ab initio* as it constituted a long-term debt, did not contain a non-appropriations clause, and had not been approved by the State Bond Commission as required by La. R.S. 39:1410.60. These cases do not, however, stand for the proposition that utilization of the annual appropriation dependency clause to terminate a contract where the municipality has the financial ability to pay for the contract would be in good faith.

Likewise, the Attorney General Opinions cited by Plaintiffs simply address the validity of long-term debt-incurring municipal contracts where the contract does not include a non-appropriation provision. These Opinions nowhere suggest that a non-appropriation clause may be invoked by a municipality simply because the municipality wishes to switch a service contract to a direct competitor ostensibly to “save money.” Plaintiffs cite language from these opinions which states that a municipality should be allowed to terminate a contract pursuant to a non-appropriations clause if the municipality fails to appropriate money “for any reason” and that Bond Commission approval is not required as long as the public entity has “unfettered

discretion” not to fund the contract. However, these Opinions explicitly state that a municipality should have wide discretion to terminate a contract when the municipality has failed to appropriate sufficient funds for the contract’s continuation. These opinions do not state, or even suggest, that choosing to appropriate money for a contract with a direct competitor constitutes a “failure” to appropriate money.

To the contrary, these Opinions suggest the same principle explained by the jurisprudence cited by Waste Management in its motion for partial summary judgment – that appropriation dependency clauses are designed for emergency situations where the municipality is truly unable to appropriate sufficient funds despite its good faith effort to do so. In this regard, Waste Management does not dispute that an appropriation dependency clause is designed to provide municipalities with an “out” in emergency situations such that the municipalities are not unconstitutionally tied to long-term debts where the money to pay for those debts truly does not exist or cannot be appropriated despite a good faith attempt. Instead, Waste Management disputes that such clauses may be utilized by a municipality in order to abandon a valid, existing contract for essential services which it can financially afford simply because it claims it could save money by contracting with a direct competitor. Such would not be a good faith use of the appropriation dependency clause. Neither these Attorney General Opinions nor the cases cited by Plaintiffs suggest that such clauses may be utilized in these circumstances.

b. *SFS Consultation Group* does not support Plaintiffs’ attempted invocation of the annual appropriation dependency clause.

Plaintiffs also cite *Parish of Jefferson v. SFS Consultation Group*, an unreported decision, as purported support for its invocation of the appropriation dependency clause in the Landfill Contract. However, that case is factually comparable to *All American Assurance Co. v. State*, relied upon by Waste Management in its own motion for summary judgment, and therefore

supports Waste Management's rather than Plaintiffs' interpretation of permissible, good faith use of the non-appropriations clause.

First, in *SFS Consultation Group*, the Parish's desire to terminate its contract with SFS, under which SFS operated the parish Fire Training Center, was based on the Parish's decision to operate the Training Center itself rather than pay an outside company to do so. Similarly, in *All American Assurance Co.*, the municipality utilized the non-appropriations clause so that it could use state-owned space to house the Department of Civil Service rather than pay to lease space from an outside company. In *SFS Consultation Group*, as in *All American Assurance Co.*, the Parish sought to utilize the non-appropriations clause in its contract due to the good faith unavailability of funds for the continuation of the agreement. Specifically, the Parish President testified that the budgetary fund from which the funding for the SFS contract was drawn, the General Fund, also included stated mandated costs of the judicial system, the District Attorney's office and Sheriff's Office, as well as costs of the new jail and other obligations. That is to say, the need for the funding of items unrelated to the services provided under the SFS contract rendered the funds for the continuation of the SFS contract truly unavailable. Finally, the court in *SFS Consultation Group* noted that the services provided by SFS under the SFS contract were not being utilized.

SFS Consultation Group, like *All American Assurance Co.*, demonstrates the numerous ways that Plaintiffs' attempted use of the annual appropriation dependency clause is not proper or in good faith. First, as acknowledged by Plaintiffs, the only reason the Parish "doesn't have the money" is because it claims it can get a better deal with a direct competitor. Therefore, the services being provided by Waste Management under the Landfill Contract – the operation of the Parish-owned landfill – are absolutely essential and are of course being "utilized" under the

strictest sense of that word. Furthermore, and of great significance, the Parish does not seek to terminate its contract with Waste Management in order to operate the landfill itself. Instead, the Parish seeks to shift the contract to a direct competitor of Waste Management. In fact, the attempted contract change runs directly counter to the principals of *SFS Consultation Group* and *All American Assurance Co.*, as the Parish seeks to decrease the utilization of Parish resources by abandoning the Jefferson Parish Landfill and turning to a privately-owned landfill. As with the Attorney General Opinions and the *Coleman* and *Schwab* cases cited by Plaintiffs, the *SFS Consultation Group* case does not support the Parish's proposed use of the appropriations dependency clause in the Landfill Contract under the circumstances present in this case.

c. In the long run, Plaintiffs' proposed interpretation of the annual appropriation dependency clause will never save tax payer money.

Finally, Plaintiffs seem to seek the sympathy of the Court by asserting that "there is no more compelling reason to exercise a non-appropriation clause than to save taxpayer money." However, as exemplified in *BFI, Inc. v. Town of Swansea*, 670 N.E.2d 20, 206-07 (Mass. App. Ct. 1996), cited by Waste Management in its own motion for summary judgment, allowing a municipality to use a non-appropriations clause in the manner suggested by Plaintiffs would never save taxpayer money in the long run. In that case, the court explained that a consequence of allowing a municipality to use non-appropriation to escape its obligations under a valid contract would be an inflation of contract prices as service providers attempt to gain compensation up front for anticipated tail-end payment deficiencies. *Id.* The *BFI* court noted that providers may even be discouraged from participating in such an arbitrary and unfair market and that these effects would result in a disservice to the public. *Id.* Therefore, even if the Parish would save money by contracting with River Birch in this instance, which all signs indicate it would not, in the long run, allowing Jefferson Parish to terminate its long-term contracts at its

whim would only be of greater cost to Jefferson Parish and its citizens and will not be in their best interest.

Moreover, even if this were to be a valid good faith reason to utilize the annual appropriation dependency clause, which it is not, Plaintiffs have no evidence whatsoever of any alleged cost savings. As explained in Waste Management's memorandum in support of its motion for summary judgment, the testimony of the highest officials of Jefferson Parish's Environmental Affairs Department has revealed that the Parish has no information at this time to suggest that it would save money by terminating its current contract with Waste Management and entering the 25-year contract with River Birch. Thus, there is no basis or proof for Plaintiffs' position that the Parish will save "substantial money" as they have alleged, or any money at all with the River Birch contract at this stage. Certainly, Plaintiffs would need to prove this allegation by a preponderance of the evidence as a necessary predicate to having a summary judgment rendered on this claim, which clearly they cannot do so at this stage.

3. Plaintiffs' motion for summary judgment ignores the requirement that use of the annual appropriation dependency clause be in good faith.

As explained in Waste Management's own motion for summary judgment, the law clearly requires that appropriation dependency clauses be utilized in good faith. See *City of Golden v. Parker*, 138 F.3d 285, 293-96 (Colo. 2006) (holding that covenant of good faith and fair dealing existed in contract between company and municipality containing an appropriation dependency clause and that company had right to reasonable expectation that the municipality would exercise its budgetary discretion in good faith); *All American Assurance Co. v. State Through Dept. of Civil Service and Div. of Admin.*, 621 So.2d 1129, 1130 (La. App. 1 Cir. 1993) (demonstrating appropriate use of appropriation dependency clause where a municipality is suffering a financial crisis and turns to state-owned rather than privately-owned resources); *BFI*,

Inc. v. Town of Swansea, 670 N.E.2d 20, 206-07 (Mass. App. Ct. 1996) (citing policy reasons for not allowing municipality to use non-appropriation argument at its whim to escape contractual obligations). Jefferson Parish has provided no authority that utilizing the appropriation dependency clause in the Landfill Contract in the manner it suggests would be in good faith. To the contrary, such use would clearly be in bad faith.

In fact, when asked whether they believe that the Parish's suggested invocation of the appropriation dependency clause when the Parish does in fact have the money to fund the contract would be in good faith, both of the highest officials of Jefferson Parish's own Environmental Affairs Department said clearly and unequivocally, "No."⁶ In addition, since filings its motion for summary judgment, Waste Management has now deposed the former Parish Chief Administrative Assistant, Deano Bonano, who presided over the Environmental Affairs Department for many years, and he also unequivocally agreed that such a use of the provision would not be in good faith.⁷ Clearly, Plaintiffs cannot demonstrate under the law or by their testimony that their proposed use of the appropriation dependency clause would be in good faith and, accordingly, their motion for summary judgment must be denied.

CONCLUSION

In an attempt to avoid the clear language of the contract and its obvious meaning, Plaintiffs have primarily turned to irrelevant arguments regarding the implications of a municipality not including an appropriation dependency clause in its long-term service contracts.

⁶ (Deposition of Rick Buller, Exhibit B, p, 94.; Deposition of Margaret Winter, Exhibit C, pp. 59-60., attached herein.)

⁷ Mr. Bonano's deposition was taken only three days ago and the transcript is not yet available. Waste Management will supplement the record and this footnote with the transcript citation when it is available. Furthermore, upon information and belief, the Parish' own former attorney, Tom Wilkinson, who was the Parish attorney at the time the Parish first sought to invoke the appropriation dependency clause, also rendered an opinion consistent with this testimony and the "good faith" requirement, but the subject letter, dated October 11, 2004, is being withheld from production by Plaintiffs on the basis of alleged privilege. Waste Management intends to file a motion to compel to obtain this letter and the record will be supplemented if production is allowed by the Court.

However, for the reasons above, neither this nor any other argument supports the implausible interpretation of the provision advanced by Plaintiffs. Furthermore, and for the reasons also stated above, no ruling can be made at this time with regard to the disputed issue of which party would bear the cost of placing final cover over the landfill in the event that the Parish is permitted to invoke the annual appropriation dependency clause. Instead, for the reasons explained by Waste Management in its memorandum in support of its motion for partial summary judgment, summary judgment should be granted in favor of Waste Management and Plaintiffs' claim for early termination of the Landfill Contract should be dismissed.

Respectfully submitted,

/s/ Patrick A. Talley, Jr. _____

Patrick A. Talley, Jr. (#1616)

Miles P. Clements (#4184)

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Counsel for Defendant,

Waste Management of Louisiana L.L.C. d/b/a

Waste Management of New Orleans

CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day January, 2011, served a copy of the foregoing on all counsel of record by filing same with this Court's e-filing (ECF) system or by placing same in the United States mail, postage prepaid and properly addressed to the following:

Michael D. Peytavin Daniel A. Ranson GUIDRY, RANSON, HIGGINS & GREMILLION, L.L.C. 401 Whitney Avenue, Suite 500 Gretna, LA 70056

Peggy O. Barton 200 Derbigny Street Suite 5200 Gretna, LA 70053
--

/s/ Patrick A. Talley, Jr.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

**CONSOLIDATED GARBAGE DISTRICT NO. 1
OF THE PARISH OF JEFFERSON AND THE
PARISH OF JEFFERSON THROUGH THE
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Plaintiffs

VERSUS

**WASTE MANAGEMENT OF LOUISIANA, L.L.C.
D/B/A WASTE MANAGEMENT OF N.O.,
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STATEMENT OF UNCONTESTED / CONTESTED MATERIAL FACTS

Defendant, Waste Management of Louisiana, L.L.C. d/b/a Waste Management of New Orleans ("Waste Management"), responds to the Statement of Material Facts as to Which There is No Genuine Issue to be Tried filed by Plaintiffs, Consolidated Garbage District No. 1 of the Parish of Jefferson and the Parish of Jefferson through the Jefferson Parish Council ("Plaintiffs"), as follows:

1. Admitted.
2. Admitted.

3. Admitted to the extent that this statement limits Waste Management's contractual responsibilities to the situation in which the Landfill Contract reaches its stated, term. i.e. when Phases IIIA and IIIB have reached final elevations.
4. Admitted.
5. Admitted to the extent that this statement limits Waste Management's contractual responsibilities to the situation in which the Landfill Contract reaches its stated, term. i.e. when Phases IIIA and IIIB have reached final elevations.
6. Admitted.
7. Admitted.
8. Denied as written. The Parish, by way of its Amended Complaint, has only requested a declaratory judgment as to its rights if it exercises the non-appropriations clause to terminate its contract with Waste Management **specifically in a situation where the Parish Council does not appropriate funds for its continuation in 2011.**
9. Admitted.
10. Admitted only to the extent that it is understood that the Parish, by way of its Amended Complaint, has only requested a declaratory judgment as to its rights if it exercises the non-appropriations clause to terminate its contract with Waste Management **specifically in a situation where the Parish Council does not appropriate funds for its continuation in 2011.**
11. Admitted (although not relevant).

Respectfully submitted,

/s/ Patrick A. Talley, Jr.

Patrick A. Talley, Jr. (#1616)

Miles P. Clements (#4184)

Benjamin M. Castoriano (#31093)

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Counsel for Defendant,

Waste Management of Louisiana L.L.C. d/b/a

Waste Management of New Orleans

CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of January, 2011, served a copy of the foregoing on all counsel of record by filing same with this Court's e-filing (ECF) system or by placing same in the United States mail, postage prepaid and properly addressed to the following:

Michael D. Peytavin Daniel A. Ranson GAUDRY, RANSON, HIGGINS & GREMILLION, L.L.C. 401 Whitney Avenue, Suite 500 Gretna, LA 70056

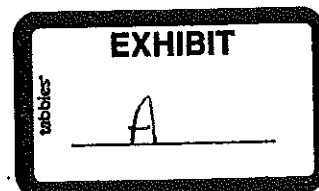
Peggy O. Barton 200 Derbigny Street Suite 5200 Gretna, LA 70053
--

/s/ Patrick A. Talley, Jr.

From: RBuller
Sent: Wednesday, January 14, 2009 8:03 AM
To: TWilkinson
Cc: DFos; TAWhitmer; MWinter
Subject: Landfill Closure Cost

Attachments: PH 3 Closure Cost.xls; Ph 3 Post Closure Cost.xls

I did these spreadsheets from my home computer so I hope we have the same version of excel. In summary, I have estimated the landfill closure costs at \$14,000,000. This is currently a responsibility of Waste Management under their contract. But if we end their contract early, we'll have to negotiate some shared closure cost. The post-closure costs, which is a 30-year period in which we have to maintain the landfill, collect and treat leachate, collect gas, monitor groundwater, and finally demolish equipment at the end is over \$28,000,000 (over 30 years). Contact me with questions.
Rick Buller



JP-PR 0157

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 09-6270 SECTION "B"
JUDGE IVAN L. R. LEMELLE MAGISTRATE "4"
MAGISTRATE KAREN WELLS ROBY

CONSOLIDATED GARBAGE DISTRICT NO. 1 OF THE
PARISH OF JEFFERSON AND THE PARISH OF
JEFFERSON THROUGH THE JEFFERSON PARISH COUNCIL
Plaintiff

VERSUS

WASTE MANAGEMENT OF LOUISIANA, L.L.C.
D/B/A WASTE MANAGEMENT OF N.O., TRAVELERS
CASUALTY AND SURETY COMPANY OF AMERICA, AND
EVERGREEN NATIONAL INDEMNITY COMPANY
Defendants

* * * * *

Deposition of JOSEPH RICHARD
BULLER, JR., taken on Friday, November 19,
2010, in the offices of GAUDRY, RANSON,
HIGGINS & GREMILLION, Attorneys at Law, 401
Whitney Avenue, Suite 500, Gretna, Louisiana
70056.

APPEARANCES:

Representing the Plaintiff:

Mr. Michael D. Peytavin
GAUDRY, RANSON, HIGGINS & GREMILLION
Attorneys at Law
401 Whitney Avenue, Suite 500
Gretna, Louisiana 70056

EXHIBIT

B

tabbies

1 BY MR. TALLEY:

2 Q. Yeah. My question is: Do you believe
3 that the parish would be in good faith in
4 negotiating with Waste Management in that
5 manner?

6 A. In the manner of?

7 Q. In the manner of using a non
8 appropriations clause to terminate the
9 contract at that period of time?

10 A. No.

11 Q. The parish would not be in good faith?

12 A. I wouldn't think so.

13 Q. Okay. And again, as far as you know
14 at this particular point in time, no one has
15 moved on your recommendation to the parish to
16 move forward with vertical expansion and try
17 to negotiate a better tipping fee deal?

18 A. I don't know if they did or they
19 didn't.

20 Q. Okay. You don't know that they did,
21 though?

22 A. I was assuming they did.

23 Q. December 2004.

24 A. I don't know that they did.

25 Q. All right. It's fair to say that this

1 just --

2 Q. The attached table?

3 A. Right. Those -- the big factor is
4 those unit costs. And there's a lot of
5 guesswork on my part there. I mean, so that's
6 where a lot of variability can come in when
7 you're trying to guess, you know, the actual
8 closure costs.

9 Q. What did you mean when you said, if we
10 end their contract early, we'll have to
11 negotiate some shared closure cost?

12 A. Well, the way our contract is
13 structured, there was an initial -- way back
14 when in 1996, whenever the contract was first
15 signed, additional payment of some \$2.3
16 million. And after that, all of the cell
17 construction, operations, and closure cost was
18 paid by the parish through the tipping fee.

19 So I reasoned that, well, if we don't
20 allow Waste Management to fill up the area
21 that was originally contracted, then they're
22 obviously not collecting, you know, the money
23 they expected, and so maybe they wouldn't have
24 made enough to pay for the final cover.

25 Q. Okay.

1 A. That's my layman's reasoning.

2 Q. All right. It would be fair to say,
3 though, that this is a situation of it is what
4 it is. It's not -- it's not in the nature of
5 a penalty that would be suffered by the parish
6 if there was a early termination of the
7 contract. In other words, there's nothing in
8 the contract that says if you terminate this
9 thing early, then you get this penalty, right?

10 A. Correct.

11 Q. And so this is just your
12 interpretation of the contract based on the
13 obligations of both parties at a certain point
14 in time?

15 A. Correct.

16 Q. And if it's terminated before the
17 landfill is filled or the permitted areas are
18 filled, then the parish bears some
19 responsibility for the closure costs?

20 A. That's what I thought.

21 Q. Okay. So again, that's not -- that's
22 not designated in your mind in terms of a
23 penalty or a liquidated damage or anything
24 like that?

25 A. No.

1 Q. Correct?

2 A. Correct.

3 Q. Okay. Next thing I want to direct
4 your attention to is under Tab 29, which is
5 the May 5th, 2009, landfill budget scenarios.
6 And again, this is directed to Tom Wilkinson.

7 And you say, I prepared the attached
8 2010-12 budget estimates for the Jefferson
9 Parish Landfill under two scenarios: Continue
10 with the landfill operation under the contract
11 with Waste Management, and closing the
12 landfill and accepting the proposal from River
13 Birch.

14 Were you asked to do this?

15 A. Yes.

16 Q. By whom?

17 A. By Tom Wilkinson.

18 Q. Okay. Would it be fair to say that
19 this would be the first actual analysis,
20 budgetary analysis, of comparing the River
21 Birch proposal to the current contract with
22 Waste Management?

23 A. I started doing -- this one is dated
24 in May. I think I went through a couple of
25 iterations starting in April.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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Plaintiff

VERSUS

WASTE MANAGEMENT OF LOUISIANA, L.L.C.
D/B/A WASTE MANAGEMENT OF N.O., TRAVELERS
CASUALTY AND SURETY COMPANY OF AMERICA, AND
EVERGREEN NATIONAL INDEMNITY COMPANY
Defendants

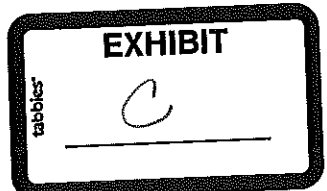
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Videotaped deposition of **MARGARET
MARY WINTER**, taken on Wednesday, November 29,
2010, at 1221 Elmwood Park Boulevard, Room
703, Harahan, Louisiana 70123.

APPEARANCES:

Representing the Plaintiff:

Mr. Michael D. Peytavin
GAUDRY, RANSON, HIGGINS & GREMILLION
Attorneys at Law
401 Whitney Avenue, Suite 500
Gretna, Louisiana 70056



1 A. No.

2 Q. All right. Okay. It goes on to say,
3 "to cancel the Waste Management contract
4 before it expires will almost certainly
5 provoke a lawsuit."

6 But then it goes on to discuss this
7 potential plan to, quote, unquote, give Waste
8 Management the early heave-hoe and parish
9 attorney Tom Wilkinson, has he even suggested
10 how they might go about it? And then it goes
11 on to talk about failing to appropriate the
12 money.

13 Did you have any knowledge of this,
14 whether it was in an official plan or an
15 unofficial discussion? Did you have any
16 knowledge about this?

17 A. No.

18 Q. At all?

19 A. No.

20 Q. Didn't hear anything about that?

21 A. I think I was surprised when I read
22 that.

23 Q. Okay. Would you agree that -- that a
24 plan of that nature or proceeding in that
25 nature would not be in good faith?

1 MR. PEYTAVIN:

2 Objection. It's calling for a
3 legal opinion from this witness.

4 BY MR. TALLEY:

5 Q. You can go ahead and answer.

6 A. No.

7 Q. It would not be?

8 A. (Witness shakes head negatively.)

9 Would not be in good faith.

10 Q. Okay. Did you hear anything else
11 about this plan after -- this was the end of
12 2004. Did you hear any discussion about this?

13 I know you said you didn't have any
14 discussion before, but after this newspaper
15 article came out, was this discussed in any
16 way, either officially or unofficially, in any
17 discussions you were involved in?

18 A. No.

19 Q. All right. In terms of documents
20 after the 2004 time period, I really don't
21 have any documents, quite frankly, having
22 anything to do with the landfill or this issue
23 of potentially terminating the contract with
24 Waste Management or discussions with River
25 Birch or anything like that throughout the