

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Case Type: Employment

Court File No. C4-04-12239

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Clifford L. Whitaker and  
Michael V. Mucci,  
on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

3M Company,

Defendant.

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**MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFFS' MOTION  
TO COMPEL PRODUCTION OF 3M'S  
DOCUMENT DESTRUCTION AND  
RETENTION POLICIES AND FOR A  
DOCUMENT PRESERVATION ORDER**

**INTRODUCTION**

3M is a sophisticated, global technology company with operations in over 60 countries and over 67,000 employees worldwide. It is well aware of its obligations to protect and preserve relevant evidence, including that maintained electronically and in other alternative formats. 3M has complied with its obligations under the Minnesota Rules of Civil Procedure and controlling decisional law with respect to its duty to preserve relevant information in this litigation. 3M has described its efforts in detail for Plaintiffs, and has agreed to provide Plaintiffs with a copy of its relevant document retention policies. Yet Plaintiffs, despite alleging no impropriety or shortcoming on 3M's part and despite showing no actual risk to document preservation that this Court must act to prevent, ask this Court to sign off on an extremely broad and far-reaching form order copied almost verbatim from the Annotated Manual for Complex Litigation (Fourth). Plaintiffs' request is not based on any applicable law or fact, and is neither necessary nor

appropriate here, in light of 3M's extensive and ongoing efforts to ensure preservation of all relevant evidence. 3M, therefore, respectfully requests that the Court deny Plaintiffs' motion.

## **FACTUAL BACKGROUND**

### **I. 3M HAS UNDERTAKEN EXTENSIVE EFFORTS TO ENSURE PRESERVATION OF ALL EVIDENCE RELEVANT TO THIS LITIGATION.**

#### **A. The Parties' Limited Communications Regarding 3M's Preservation Efforts**

On January 6, 2005, Plaintiffs "indicate[d their] willingness to meet and confer" regarding the preservation and production of information, including electronic information. See Coler Aff., Ex. 3.<sup>1</sup> 3M responded on January 11, 2005, assuring Plaintiffs that "3M has taken and continues to take the necessary steps to preserve documents and databases in this matter." See Coler Aff., Ex. 4. Plaintiffs made no further request that the parties meet to discuss this issue, even though on April 5, 2005, they purportedly received a letter from "Joe 3M," who alleged that certain unnamed supervisory employees in an unnamed 3M organization were not directed to preserve data and suggested that data may have been deleted. See Coler Aff., Ex. 7. Indeed, Plaintiffs appeared content to merely receive additional written information from 3M about its document preservation efforts. Specifically, in their May 6, 2005 letter response to 3M's objections to Document Request Nos. 95 and 96 of Plaintiffs' Second Set of Document Requests, Plaintiffs only requested that they be provided additional information beyond what 3M already agreed to provide. See Coler Aff., Ex. 6. On May 23, 2005, 3M responded to Plaintiffs' May 6 request for additional information, describing in detail the procedures it has followed and

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<sup>1</sup> All references to "Coler Aff." refer to the Affidavit of Susan M. Coler in Support of Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order, dated May 23, 2005.

efforts it has undertaken to ensure preservation of evidence relevant to this litigation. See Jerde Aff., Ex. A.<sup>2</sup>

3M's May 23, 2005 disclosure of its extensive document preservation efforts not only demonstrates that the meet and confer order Plaintiffs request here is unnecessary, but it also appropriately and adequately addresses Plaintiffs' request for further information responsive to Plaintiffs' Second Set of Document Requests, Request No. 96. Accordingly, there is no need for this Court to grant Plaintiffs' motion to compel 3M to respond to Request No. 96. Cf. Bd. of Educ. of Evanston Township High School Dist. No. 202 v. Admiral Heating and Ventilating, Inc., 104 F.R.D. 23, 28 fn.8 (N.D. Ill. 1984) (noting that it was reasonable to ask the defendant to describe its document retention and destruction policy); Muhl v. Tiber Holding Corp., 1997 WL 13680, at \*4 (E.D. Pa. Jan. 9, 1997) (ordering the defendant to provide a written description of its document retention policy). Nonetheless, 3M provides the further detailed information and documentation set forth below to further demonstrate to Plaintiffs and this Court that Plaintiffs' motion is without merit.

**B. 3M's Extensive Efforts to Preserve and Collect Relevant Evidence**

3M provided detailed document and email preservation instructions to those 3M employees likely to possess information relevant to the charges of discrimination respectively filed by the Plaintiffs almost immediately after receiving notice of those charges of discrimination in May, and again in September, 2004. See Peplinski Aff., ¶¶ 3-4, Exs. A-B.<sup>3</sup> With respect to this litigation, 3M undertook a comprehensive document preservation effort as

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<sup>2</sup> All references to "Jerde Aff." refer to the Affidavit of Shari L. Jerde in Opposition to Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order, dated May 31, 2005.

<sup>3</sup> All references to "Peplinski Aff." refer to the Affidavit of Tami L. Peplinski in Opposition to Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order, dated May 31, 2005.

soon as practicable after receiving due notice of Plaintiffs' Complaint and initial discovery requests setting forth the nature and scope of Plaintiffs' claims. Plaintiffs served their Complaint on December 21, 2004, just days before a major holiday season when managers and other key decisions makers were scheduled to be out of the office. Nonetheless, 3M immediately began analyzing the Complaint and allegations contained therein to determine what evidence would most likely be covered by Plaintiffs' Complaint, as well as which employees would likely be in possession of potentially relevant evidence. Ultimately, 3M identified more than three thousand (3,000) executive, management, supervisory, and Human Resources employees who could possess potentially relevant documents and information, based on 3M's understanding of the claims, allegations, and scope of discovery. See Valitchka Aff., ¶ 3, Ex. 1.<sup>4</sup> On January 11, 2005, 3M sent each of those individuals detailed document and email preservation instructions. See id., ¶ 4, Exs. 2-24. Additionally, 3M took steps to preserve certain email and other back-up tapes encompassing the St. Paul-based group of these employees for specific periods of time following service of the Complaint and preceding distribution of the January 11 preservation notice. See id., ¶ 5, Ex. 29.

On February 3, 2005, 3M conducted a training discussion with attorneys in its Office of General Counsel regarding this litigation and 3M's document preservation obligations. Attorneys who were assigned as counsel to the Operating Committee (or similarly named committee) for 3M's various U.S. Business, division, or staff organizations, each of which committee is headed by an executive-level employee and has one or more non-executive level management employees, were instructed to meet with their respective operating committees and conduct a similar training discussion regarding 3M's document retention obligations with respect

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<sup>4</sup> All references to "Valitchka Aff." refer to the Affidavit of Barbara D. Valitchka in Opposition to Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order, dated May 31, 2005.

to this litigation. See id., ¶ 6, Exs. 30-31. The vast majority of these training discussions have already been completed. See id.

In addition to the initial group of approximately 3,000 employees, 3M identified approximately one hundred and eighty (180) executive-level employees, Human Resources Operations Directors and Managers who support these executives, Human Resources operational personnel, and other employees most likely to have potentially relevant documents and information. With respect to this group, 3M provided additional instruction regarding document and email preservation. See id., ¶ 7, Exs. 32-35. 3M attorneys have also conducted in-person training discussions with dozens of these Human Resources Directors and Managers, other Human Resources employees, and administrative assistants of 3M executives to reinforce the information contained in the preservation notices. See id., ¶ 8. Additionally, 3M sent an email reinforcing the significance of the document retention obligation to the previously mentioned approximately 3,000 employees on March 17, 2005. See id., ¶ 9, Ex. 36. Thus, the employees most likely to have potentially relevant information have received multiple reinforcing messages in just the first few months of this litigation. In addition, 3M has created a separate email archive for those approximately 3,000 employees by downloading the contents of their email accounts directly from the relevant email servers at 3M, which although lengthy and time consuming, is a process 3M intends to repeat on a periodic basis throughout this litigation. See id., ¶ 10.

3M has also undertaken extensive document collection efforts to obtain (which also preserves) potentially relevant hard copy and electronic documents that are maintained outside of 3M's email system. 3M has assembled and trained approximately 15 attorneys, paralegals, and experienced Human Resources personnel to conduct in-person interviews with approximately one hundred and eighty (180) St. Paul-based employees (and/or their assistants). See id., ¶ 11.

Many of these 180 employees are the executives and Human Resources Operations Directors and Managers who received one or more of the previously described retention notices; the remaining employees are dozens of employees working in various departments within 3M's Human Resources function. See id., ¶ 11, Exs. 37-38. During these interviews, which average approximately 90 minutes each, these trained professionals explore issues relating to the interviewee's general document maintenance practices; review the general categories of potentially relevant materials identified in the original preservation notice and in subsequent discovery requests; and physically collect relevant hard copy documents in that interviewee's possession, as well as arrange for the collection of electronically stored documents. See id. This training, interviewing, and collection process has been ongoing since March 2005. To date, 3M has completed almost 170 interviews and expects to complete this process by early June 2005. See id.

Finally, 3M sends an email containing document and email preservation instructions, which is identical in all relevant respect to the instructions provided to the group of approximately 3,000 employees, on a regular basis to all newly hired or promoted salary grade 11 or above supervisors or managers who have direct reports. See id., ¶ 12. 3M has been providing this notification on a weekly basis since May 1, 2005, and prior to that it was provided on a periodic, but regular, basis. See id. Also, when an employee who has received any of the retention notices leaves 3M for any reason, 3M verifies that the employee's email account is preserved in connection with the Whitaker v. 3M Company litigation. See id.

## ARGUMENT

### I. 3M's EXTENSIVE PRESERVATION AND COLLECTION UNDERTAKING IS SUFFICIENT AND PLAINTIFFS HAVE FAILED TO DEMONSTRATE A NEED FOR ANYTHING MORE.

Lacking any citation to case law in which courts have entered broad orders regarding document preservation in the absence of a good reason for the court to be concerned about whether a party would act properly to preserve relevant evidence, Plaintiffs seek just such an order by virtually wholesale cutting and pasting from the Annotated Manual for Complex Litigation (4th) (2004) ("Manual"). However, such an order is not required or even recommended by the Minnesota rules, and Plaintiffs' selective reliance on incomplete snippets from the Manual is inappropriate. Even the Manual makes clear that such an order should only be made *when needed*:

Before discovery starts . . . the court should consider whether to enter an order requiring the parties to preserve and retain documents, files, data, and records that may be relevant to the litigation. Because such an order may interfere with the normal operations of the parties and impose unforeseen burdens, *it is advisable to discuss with counsel at the first opportunity the need for a preservation order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant matter without imposing undue burdens.*

See Manual § 11.442 (2004) (emphasis added). 3M's extensive document preservation efforts, as set forth in 3M's correspondence to Plaintiffs on May 23, 2005, and as further described above, conclusively show that no such order is needed.

Initially, Plaintiffs contend that 3M has "stonewalled" their efforts to learn about 3M's efforts to preserve documents, but the record reveals that 3M did respond, and did so reasonably, to each of the instances in which Plaintiffs requested information – its response to Plaintiffs' January 6, 2005 letter, its Response to Plaintiff's vague Document Request No. 96, and its response to Plaintiffs' May 6, 2005 letter. That 3M did not agree to a meeting and interposed a

reasonable objection to discovery is no basis for Plaintiffs to be concerned that 3M was not adequately preserving evidence. They likewise have no reasonable basis for “concern” based on the “Joe 3M” correspondence. Not only is a vague, anonymous letter a thin reed on which to base a concern, but Plaintiffs’ concern is belied by the fact that they waited six weeks before even notifying 3M of the letter. Even then, they did so via their present motion.<sup>5</sup> See Mem. of Law in Supp. of Pls.’ Mot to Compel Produc. of 3M’s Doc. Destruction and Retention Policies, at 12. If Plaintiffs were truly concerned 3M was not complying with its legal obligation to preserve evidence, they would not have waited such a long time to notify 3M of the “Joe 3M” letter. In truth, Plaintiffs have surfaced that letter now solely to create an illusion of potential impropriety they hope will spur the Court to reflexively impose burdens on 3M that are not warranted by the facts or law.

3M’s undertaking to date has been comprehensive, thoughtful, and reasonably directed to the goal of preserving relevant evidence. The claims in this lawsuit relate to a putative class of employees working in Minnesota on or after May 2003, yet 3M provided document retention notices to employees located throughout the United States, just in case employees within the putative class had worked at a non-Minnesota facility any time since 1998. 3M provided document retention notices to a broad population of supervisors, managers, and executives, as well as Human Resources staff, even though Plaintiffs’ core allegations relate to decisions many of these employees are not involved in. 3M has retained back-up tapes, copied thousands of email files, and provided multiple communications reinforcing the preservation notices, including involving many of its in-house lawyers in training discussions with hundreds of

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<sup>5</sup> Notably, Plaintiffs failed to identify the “Joe 3M” letter in their correspondence of May 6, 2005, even though that correspondence was sent a month after they had received the “Joe 3M” letter and dealt specifically with 3M’s position on providing information about its document preservation efforts. See Coler Aff., Ex. 6.

employees. Finally, 3M has been conducting a document collection effort that has gathered a stunningly large body of electronic and paper documents. 3M did not wait for the type of conference the Manual describes, and it did not need to confer with Plaintiffs to determine appropriate preservation efforts. Rather, it undertook all of these activities in a good faith effort to meet its legal obligations to preserve relevant evidence. In the face of this broad and consistent effort, Plaintiffs offer only a single anonymous letter. Plaintiffs' showing falls far short of providing any basis for this Court to conclude that affirmative relief is necessary and Plaintiffs' motion for a document preservation order should therefore be denied.

## **II. 3M HAS AGREED TO PRODUCE ITS DOCUMENT RETENTION POLICIES RELEVANT TO THIS LITIGATION.**

Despite Plaintiffs' vague and ambiguous request for "all documents concerning 3M's electronic and paper document destruction and document retention policies, practices, procedures and guidelines,"<sup>6</sup> see Coler Aff., Ex. 5, Request No. 95, 3M agreed to produce the relevant policies in effect at the point this litigation became reasonably foreseeable – i.e., any policies in place in 2004 and thereafter that were applicable to Human Resources documents and generally applicable to salaried, exempt employees in Minnesota. Plaintiffs, however, seek 3M's document retention policies from prior years, evidently on the belief that earlier policies will provide "information on the existence, form and format of documents created during the liability period. . . ." See Mem. of Law in Supp. of Pls.' Mot to Compel Produc. of 3M's Doc. Destruction and Retention Policies, at 7. This contention, however, is incorrect. Document retention policies from prior years have been replaced and superceded by current policies, and

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<sup>6</sup> See Toronto Stock Exch. v. Quotron Sys., Inc., 1991 WL 243383, at \*1 (S.D.N.Y. Nov. 14, 1991) (holding that "[p]laintiffs' request for documents relating to '[defendant's] document retention and storage policies' is unduly broad and defendant need not respond to the request in its present form); In re Mercury Fin. Co. of Ill., 1999 WL 495903, at \*5 (N.D. Ill. July 12, 1999) (finding that the plaintiffs' request for the defendant's document retention policy was reasonable where the plaintiffs' request specifically identified the relevant time period and issues for the responsive documents).

any reliance by Plaintiffs on an outdated, superceded policy would be inappropriate and ill-advised. As 3M appropriately noted in its objections, outdated policies are irrelevant to the purpose for which they are sought. Nonetheless, with this understanding made clear, 3M will agree to produce the document retention policies applicable to Human Resources documents and generally applicable to salaried, exempt employees in Minnesota from 2001 through 2003, to the extent they still exist.

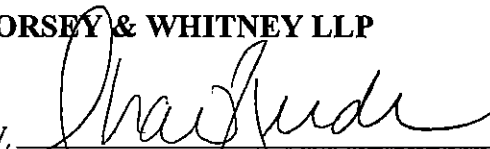
### CONCLUSION

Plaintiffs have proffered no legal or factual basis to justify the imposition of an order requiring 3M to meet and confer and preserve evidence, and such an order is unnecessary given 3M's extensive and ongoing document preservation efforts. Moreover, given 3M's agreement to produce its document retention policies as described above and its production of additional facts and documents further detailing its document preservation efforts, Plaintiffs' motion to compel this evidence in response to Plaintiffs' Second Set of Document Requests, Requests Nos. 95 and 96 should be denied as moot.

Dated: June 2, 2005

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