

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

CASE TYPE: EMPLOYMENT

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

Court File No. C4-04-12239

Plaintiffs,

**MEMORANDUM IN SUPPORT OF  
MOTION TO COMPEL COMPLIANCE  
WITH THE COURT'S ORDER OF  
SEPTEMBER 16, 2005**

v.

3M Company,

Defendant.

**INTRODUCTION**

Although necessary, 3M nonetheless finds it disappointing to have to bring this Motion to Compel Compliance with the Court's Order of September 16, 2005. Notwithstanding the clarity of the Court's instructions, Plaintiffs and their counsel have avoided their obligations under the Court's Order and, essentially, have continued to conceal the identities of the seven, so-called, "secret clients." Court orders are not optional, nor are they merely obstacles to be circumvented through obfuscation or strained interpretation. Once the Court resolves a disputed matter, advocacy on behalf of clients must yield to the duty to abide by both the spirit and letter of the Court's ruling. With respect to the Court's recognition of "Defendant's entitlement to discovery of the identities of these [secret clients]," Plaintiffs and their counsel have done neither.

## ARGUMENT

On September 16, 2005, this Court ruled that Defendant 3M had an “entitlement to discovery of the identities of” seven individuals that Plaintiffs and their counsel had refused to identify, despite acknowledging that each of them may have relevant information regarding age-related employment issues at 3M. *See* Order of September 16, 2005, at 4. On November 10, 2005, after unsuccessfully lobbying the Minnesota Court of Appeals to overturn this Court’s ruling, Plaintiffs provided supplemental discovery responses identifying these seven secret clients – or so 3M thought.

In the service letter accompanying these supplemental discovery responses, Plaintiffs’ counsel listed *exactly seven individuals* they had added to several different lists of names previously disclosed – Mike Mercer, Steve Boyd, Scott Culler, Ronald Green, Michael Teetzel, Larry Lapi, and Michael Moulsoff. *See* Letter from Susan M. Coler to Holly S.A. Eng (Nov. 10, 2005) (attached as Ex. A to the accompanying Affidavit of Holly S.A. Eng). Because there seemed to be no reason for Plaintiffs’ counsel to draw 3M’s attention to any other set of seven names in the supplemental responses, 3M reasonably inferred that the seven individuals listed were the seven “secret clients” this Court had ordered Plaintiffs to identify. The service letter, however, left enough uncertainty to warrant confirmation, and counsel for 3M promptly followed up with Plaintiffs’ counsel by telephone. *See* Eng Aff. ¶ 3.

In this telephone conversation, Plaintiffs’ counsel did nothing to discourage 3M’s counsel’s supposition that the seven names belonged to the seven secret clients. *See id.* ¶ 4. Out of an abundance of caution, however, 3M undertook a thorough comparison of

Plaintiffs' original and supplemental discovery responses and discovered that not only had Plaintiffs' included far more than seven new names, but they also had omitted from their supplemental responses any of the individualized details about the secret clients originally provided to the Court, which would have allowed 3M to identify them from among the dozens of new people listed.<sup>1</sup>

Unable to identify the seven secret clients by any apparent means, counsel for 3M wrote counsel for Plaintiffs on November 23, 2005, inquiring directly whether the seven individuals named in the service letter to Plaintiffs' supplemental discovery responses were the seven secret clients. *See* Letter from Holly S.A. Eng to Susan M. Coler (Nov. 23, 2005) (attached as Ex. B to Eng Aff.). On November 28, 2005, counsel for Plaintiffs' provided yet another ambiguous response, apologizing for any confusion and explaining that the prior cover letter "identified the new entries in appendixes A, B, D, and F, because we folded those new names in to the appendixes and reproduced the entirety of each appendix." Letter from Susan M. Coler to Holly S.A. Eng (Nov. 28, 2005) (attached as Ex. C to Eng Aff.). Plaintiffs' counsel further explained that "[t]he supplement to Appendix C is different because all of the names in the supplement are

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<sup>1</sup> For example, Plaintiffs originally had informed the Court of precise dates when several of the secret clients had contact with Plaintiffs' counsel and the nature of their communications. *See* Affidavit of Susan M. Coler in Support of Plaintiffs' Motion for a Protective Order preserving Anonymity of Certain Clients ¶¶ 6-10 (June 28, 2005) (previously filed with the Court but attached as Ex. D to Eng Aff.). This information has been omitted from Plaintiffs' supplemental responses: both the dates and nature of such contacts have been generalized beyond recognition to make them indistinguishable from any of the other people listed. *See, e.g.*, Plaintiffs' Answers to Defendant's First Set of Interrogatories (Supplement 2), Appendix C (attached as Ex. E to Eng Aff.). Such unexplained revisions made it impossible for 3M to use the information Plaintiffs previously had disclosed about Anonymous Clients A through G, such as the dates they first or last had contact with Sprenger & Lang and the general subject of their communications, to determine whether they even might be included in the lists, let alone to discover their identities, as 3M was entitled to do.

