

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.

new. . . . Accordingly, we did not list the sixty-some names from that supplement in our service letter.” *Id.* None of this, of course, shed any light on whether any of the seven people named in the service letter were the secret clients at issue.

In fact, the only thing that was clear from Plaintiffs’ counsel’s letter of November 28, 2005, was that they acknowledged 3M could not identify the secret clients based on the information they had provided and that they “d[id] not intend to identify any of the anonymous clients beyond what we already have done to meet our discovery obligations.” *Id.*

On December 30, 2005, Plaintiffs again refused to identify the individuals previously identified to the Court as Anonymous Clients A through G and finally and definitively denied that the seven individuals named in their prior service letter were these secret clients. *See* Plaintiffs’ Answers to Defendant’s Second Set of Interrogatories, Response to Interrogatory No. 22 (Dec. 30, 2005); Plaintiffs’ Response to Defendant’s First Set of Requests for Admissions, Response to Request for Admission No. 1 (Dec. 30, 2005) (both attached as Ex. F to Eng Aff.). Such a denial, however, still provides no confirmation that the secret clients have been identified or who they might be. 3M has tried through various other means to narrow down the list of at least 67 new names Plaintiffs provided in their supplemental responses (the 7 identified in the service letter and the 60 in the supplement to Appendix C) to a group that might conceivably include the secret clients, but without success.

On January 20, 2005, counsel for 3M engaged Plaintiffs’ counsel in a meet and confer discussion, reiterating that Plaintiffs’ disclosures had not enabled 3M to discover

the identities of the secret clients, which this Court had ruled 3M was entitled to know. *See Eng Aff.* ¶ 7. In hopes of avoiding the present motion, 3M simply requested that Plaintiffs comply fully with the Court's Order of September 16, 2005. *See id.* Plaintiffs' counsel once again refused to provide any more details, arguing, in part, that 3M in any event should be able to identify the secret clients from the information already provided.<sup>2</sup> *See id.*

More to the point, however, Plaintiffs' counsel persisted in their belief that this Court's explicit recognition of "Defendant's entitlement to discovery of the identities of these individuals" is somehow open to interpretation. 3M, of course, believes that this Court carefully chose its words and that the emphasis on "Defendant's entitlement" and the "discovery of the identities" is significant and meaningful. The Court did not, for example, rule simply that "Plaintiffs are required to disclose the names of the secret clients," and the Court most certainly did not rule that "Plaintiff is entitled to bury the names of the secret clients indiscriminately in a list of 60 other individuals." Rather, the Court elected to focus on 3M's knowledge and not Plaintiffs' actions with respect to the identities of these secret clients, and in this regard Plaintiffs have complied with neither the letter nor the spirit of the Court's September 16, 2005, Order.

In fact, Plaintiffs' obstinate efforts to conceal the identities of the secret clients leaves little reason to believe, even now, that they are included among the names of the 67 new individuals listed in Plaintiffs' supplemental discovery responses. Whatever their

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<sup>2</sup> Such a response, of course, hardly justifies Plaintiffs' refusal of 3M's request. If Plaintiffs' counsel either intended or believes its disclosure should allow 3M to identify the seven, secret clients, then there is simply no reason not to confirm their identities.

motives, Plaintiffs and their counsel have gone to great lengths to conceal the identities of the secret clients, including seeking discretionary review from the Court of Appeals, allowing (if not causing) 3M to believe that the seven names in the service letter were those of the secret clients, and refusing to provide in their supplemental response any of the individually distinguishing details about the secret clients originally provided to the Court. At a minimum, Plaintiffs and their counsel have gone out of their way to make it very hard, if not impossible, for 3M to identify the secret clients and, thus, to confirm that Plaintiffs have complied with the Court's Order. Indeed, the extraordinary lengths to which Plaintiffs' and their counsel have gone to avoid disclosing these names does nothing but call into question the very representations made to 3M and the Court regarding the allegedly limited relevance of the knowledge these individuals possess or their alleged reluctance to being identified by name in the first place. For whatever reason, it is clear that their identities have far more significance than originally represented and that their identities alone may lead to the discovery of admissible evidence.

To be clear, the present dispute should under no circumstances offer an occasion for revisiting the various legal and factual issues already decided by this Court regarding the confidentiality of client identity. The wisdom of that carefully considered decision is not at all being challenged. Ultimately, 3M asks only for enforcement of the plain language of the Court's Order. Respectfully, if the Court intended that 3M should discover the identities of the secret clients, whether because 3M had an "entitlement" to such information or merely as a means to insure that Plaintiffs actually disclosed the

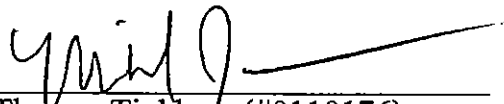
identities, then Plaintiffs should be compelled definitively and separately to disclose these identities. Otherwise, the parties are largely back where they started, with 3M still concerned about the possibility of engaging in improper communications with or disclosing protected, confidential, and privileged information to current or former clients of Sprenger & Lang, Plaintiffs offering empty assurances, and neither the Court nor 3M knowing whether the secret clients have been identified or not. 3M submits that this is not the result the Court intended when it issued its Order of September 16, 2005, but, of course, only the Court can say for sure.

### CONCLUSION

For the foregoing reasons, 3M respectfully urges the Court to grant its Motion to Compel Compliance by Plaintiffs with the Court's Order of September 16, 2005.

Dated: January 23, 2006

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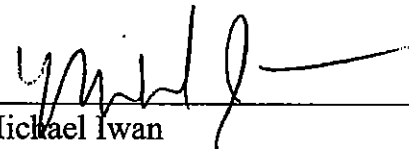
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**ACKNOWLEDGMENT**

The undersigned hereby acknowledges that sanctions may be imposed under  
Minn. Stat. § 549.211.

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