

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

Plaintiffs,

vs.

3M Company,

Defendant.

Court File No. 62-C4-04-012239

[T. Warner]

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION TO COMPEL AND MODIFY
PHASE ONE SCHEDULING ORDER**

[Class Action]

INTRODUCTION

There comes a point where patience and accommodation no longer serve the judicial process. That point has arrived with regard to defendant 3M Company's failures to produce documents in response to Plaintiffs' Second Set of Document Production Requests. Accordingly, plaintiffs respectfully ask the Court to grant its motion and

- compel 3M's production of all hard-copy documents by March 31, 2006;
- compel 3M's service of past due privilege and redaction logs within seven working days of its order, and production of privilege and redaction logs within two weeks of each subsequent production;
- compel production of electronic documents by February 28, 2006; and
- modify the Phase One Scheduling Order in a manner that minimizes the delay of the class certification hearing in this case.

3M's responses were due ten months ago, on March 21, 2005. Defendant has explained to the Court in prior filings that it has chosen to respond to document requests by producing documents collected from approximately 200 3M employees deemed most likely to have

responsive documents. Defendant represented in June 2005 that it anticipated completing its collection of those documents that same month.

Yet, despite plaintiffs' expressions of concern at the pace of discovery, seven months later, 3M has failed to produce *any* documents in electronic form and has produced only hard copy documents from fewer than half of the 200 targeted employees. 3M now speculates that it can complete production of hard-copy documents by the end of February. Plaintiffs ask the Court to order 3M to produce all documents existing only in hard copy by March 31, 2006, to assure production of those documents by a date certain, and to allow for expedited production of electronic documents, as requested below.

The parties agreed in May 2005 that privilege and redaction logs would be produced on a rolling basis, within a reasonable period after each production. To date, 3M produced only this month a single log for its first production on July 11, 2005. 3M stated it "expected" to provide logs for productions over the intervening months on January 20, 2006. January 20th has passed and 3M has failed to deliver. 3M has further stated that from here on it "expected" to produce privilege and redaction logs within two weeks of the underlying production. Plaintiffs seek an Order to assure that 3M meets those expectations, and promptly produces the long overdue logs.

Plaintiffs' discovery requests defined "document" as including electronic documents in their native format, and requested that 3M produce documents electronically if they existed in that format and only produce in hard copy documents not existing in electronic format. Despite plaintiffs' inquiries, 3M has failed to produce any documents in electronic format. Only recently plaintiffs have learned that defendant intended to produce very large electronic documents in hard copy rather than electronic form, to delay production of any electronic documents until after production of all hard-copy documents, and that defendant has excluded e-mail from the

electronic documents it has collected from its employees for production. In response to plaintiffs' request for production of certain electronic documents, defendant proposes to produce only non-e-mail electronic documents and through a process that would further delay production and limit plaintiffs to documents responsive to unspecified search terms. Plaintiffs seek an Order requiring 3M to produce all electronic documents, including the e-mails, of the 200 employees by February 28, 2006. 3M has the demonstrated capacity, and technology exists to facilitate electronic production well within this timeframe.

Finally, defendant's failure to timely respond to plaintiffs' discovery requests make it impossible for plaintiffs to complete discovery by the current deadline of May 26, 2006. This leaves plaintiffs with no choice but to seek a modification of the Phase One Scheduling Order. Plaintiffs seek a modified schedule that minimizes, as much as possible, the delay that defendant's failures to produce discovery have caused on the progress of this case toward class certification.

3M no doubt will attempt to excuse its failure timely to provide discovery and seek the Court's sympathy with complaints about the extent of plaintiffs' discovery requests and the time and cost it has expended in reviewing hundreds of thousands of hard-copy documents. But 3M deliberately has delayed the more efficient and economical production of electronic documents and instead chosen even to produce or prepare for production in hard-copy form documents that exist only in electronic form. By these tactics, 3M has not only needlessly made document production more difficult and delayed the progress of discovery, but unnecessarily has increased the time and expense of discovery to plaintiffs and itself. Substantial and complex litigation of this type is a routine fact of business for a corporation of 3M's size and its counsel, and 3M has the capacity, sophistication, technology and experience to perform efficient electronic production

of documents. Plaintiffs' efforts to secure prompt, efficient and economical discovery have been unavailing. Only the Court can ensure that 3M's wasteful practices are abandoned and that discovery is expeditiously completed.

In compliance with Rule 115.10, the parties have attempted to resolve their differences over these issues through telephone conferences and correspondence and plaintiffs will continue their efforts prior to the February 6, 2006 hearing. Affidavit of Susan M. Coler in Support of Motion to Compel and Modify Phase One Scheduling Order, ¶ 2. If any of these matters are resolved, the parties will notify the Court.

BACKGROUND

This case commenced on December 21, 2004. Plaintiffs allege pattern or practice and disparate impact age discrimination claims on behalf of themselves and a class of approximately 7,000 current and former 3M employees, consisting of all persons who were 46 or older when employed by 3M in Minnesota in a salaried position below the level of director, or salary grade 18, at any time after May 10, 2003. Plaintiffs allege that since former CEO James McNerney arrived at 3M in 2001, if not earlier, the company has engaged in an interwoven set of personnel practices designed to benefit younger employees and to marginalize and then discard older employees. Plaintiffs further assert that the discrimination occurred with respect to performance evaluations, promotions, compensation, training and termination. *See Amended Complaint.*¹

On February 17, 2005, plaintiffs served their Second Set of Document Production Requests on 3M. Coler Aff., Ex. 1.² As would be expected in this type of litigation, plaintiffs sought various types of documents that could indicate age bias in general. They further

¹ The parties have stipulated to and the plaintiffs have filed a Second Amended Complaint adding four plaintiffs.

² All exhibits are attached to the Coler Affidavit and will be referenced hereafter as "Ex. ___."

requested documents pertaining to policies, procedures, analyses and monitoring, as well as overall decisions made by 3M, with respect to the multiple issues in this case. Almost a year has passed and 3M still cannot project a date when it will have produced all of the responsive documents including documents in electronic formats.

To avoid repetition, plaintiffs will set forth additional relevant background facts in the context of each of their arguments.

ARGUMENT

This Court has ample authority to grant plaintiffs' motion. Pursuant to Minnesota Rules of Civil Procedure 16.01, courts may, in their discretion, make orders "for such purposes as":

- (a) expediting the disposition of the action;
- (b) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (c) discouraging wasteful pretrial activities

This includes authority under Rule 16.02 to limit the time for discovery and address "any other matters appropriate in the circumstances of the case." Rule 23.04 further gives the Court authority to make "appropriate orders: (a) determining the course of proceedings . . . or (e) dealing with similar procedural matters." Such orders "may be combined with an order pursuant to Rule 16, and may be altered or amended whenever necessary." *Id.* Finally, Rule 1 directs the Court to construe the rules "to secure the just, speedy, and inexpensive determination of every action." Exercise of this authority is necessary here to keep this case reasonably moving toward class certification.

I. THE COURT SHOULD ORDER 3M TO PRODUCE THE HARD-COPY DOCUMENTS RESPONSIVE TO PLAINTIFFS' SECOND DOCUMENT REQUEST BY MARCH 31, 2006.

Defendant's response to Plaintiffs Second Set of Document Production Requests was due ten months ago, on March 21, 2005. In prior filings, 3M explained that it has chosen to respond to this obligation by collecting, reviewing and producing documents from approximately 200 3M employees it deemed most likely to have responsive documents. *See* Affidavit of Barbara Valitchka in Opposition to Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order, Ex. 2 at ¶ 11. 3M predicted that the production could include some 500,000 pages of documents. Ex. 3 at 1. Through the Valitchka Affidavit, dated June 2, 2005, 3M further represented to the Court and the plaintiffs that it anticipated completing its process of interviewing and collecting documents from the targeted employees by early June 2005. Ex. 2 at ¶ 11.

Two months later, in mid-August 2005, 3M had produced only about 5,000 pages of documents to plaintiffs or 1% of the anticipated production. Ex. 3. Plaintiffs sent a letter to 3M expressing grave concern at the slow pace of production and the impact of that pace on their ability to begin taking depositions. *Id.* at 1. 3M did not respond directly to this letter, but the production pace for hard-copy documents increased somewhat for a few months. *Coler Aff.* at ¶ 3. Beginning in November, the pace slowed again and plaintiffs again expressed concern about the completion of this production in a telephone conversation with 3M on December 13, 2005 and a December 22, 2005 letter. *Id.*; Ex. 4. In the telephone contact 3M indicated it had some 60,000 pages close to production. *Coler Aff.* at ¶ 4. A subsequent letter stated that 3M expected to produce the 60,000 pages on or before the end of January, but provided no information about the remaining productions. Ex. 5. By letter dated January 17, 2006, plaintiffs asked 3M for a

schedule and a date certain by which production of all electronic and hard-copy documents will be completed. Ex. 6.

To date, 3M has produced 79,059 pages of documents, or only 16% of the originally estimated 500,000 documents. Coler Aff. at ¶ 3. 3M now has stated that it believes it can produce approximately 50,000 pages of documents by the end of January and complete production of hard-copy documents by the end of February. Ex. 7.

Given these representations, the amount of time that has transpired between the collection of documents in June 2005 and the apparently much smaller universe of responsive documents than originally estimated, plaintiffs reasonably ask the Court to use its authority under Minn. R. Civ. P. 1, 16.02 and 23.04 to order completion of hard-copy document production by March 31, 2006. A time period of 12 months to produce hard-copy documents is certainly enough. Moreover, granting this motion will assure completion of that aspect of production by a date certain in the near future, and also will allow time for more immediate production of electronic documents as requested below.

II. THE COURT SHOULD ORDER 3M TO SERVE PAST DUE PRIVILEGE AND REDACTION LOGS BY A DATE CERTAIN AND PRIVILEGE AND REDACTION LOGS WITHIN TWO WEEKS OF EACH SUBSEQUENT PRODUCTION.

During initial discovery communications, the parties discussed when they would serve privilege and redaction logs. By letter dated May 6, 2005, plaintiffs proposed service of incremental privilege and redaction logs within a reasonable period after production of each batch of documents. Ex. 8 at 3. 3M agreed and communicated in a May 23, 2005 letter its “intent to prepare a rolling privilege log that will be produced, in subparts, either with a document production or very shortly thereafter.” Ex. 9 at 3.

No logs were produced in connection with 3M's early productions. Coler Aff. at ¶ 5. On August 17, 2005, plaintiffs asked 3M by letter to inform them when 3M would be producing its privilege logs. Ex. 3 at 2. 3M neither responded nor served any logs. Coler Aff. at ¶ 5. Plaintiffs again requested the logs on December 13, 2005 and made an additional letter demand on December 22, 2005, indicating that court intervention may be needed. Ex. 4 at 2. On January 6, 2006, 3M served a single privilege and redaction log for its July 11, 2005 production, with a letter stating that 3M would begin providing logs on a rolling basis and that, "[f]or the remainder of the documents produced to date, we expect to provide logs by January 20, 2005 [sic]." Ex. 5 at 1. January 20th has passed and 3M has not yet produced the overdue privilege and redaction logs. Coler Aff. at ¶ 5.

Plaintiffs ask the Court to order 3M to comply with its agreement and produce past due privilege and redaction logs within seven days of the Court's Order at the latest and ongoing logs within two weeks of each document production. Compliance with this agreement is important to allow plaintiffs time during the discovery period to analyze and, if necessary, challenge privilege claims and redactions.

III. THE COURT SHOULD ORDER 3M TO PRODUCE THE ELECTRONIC DOCUMENTS RESPONSIVE TO PLAINTIFFS' SECOND DOCUMENT REQUEST BY FEBRUARY 28, 2006.

In their discovery requests, plaintiffs defined "document" as including "computer-readable data," "computer media," "computer output of any kind," "electronically (or otherwise) recorded data compilations," "all forms of electronic mail," "computer tapes," "computer disks," and "computer cards." Ex. 1 at 2. Plaintiffs further specified in an "Instruction" that 3M should produce documents that existed in electronic format first and only produce in hard copy documents that do not exist electronically:

C. Electronic or computer-readable data should be produced where available in that form, however, in the event any data and/or document requested does not exist in electronic or computer-readable format, then paper documentation shall be produced.

Id. at 4. Plaintiffs specified this format because production of documents in their original electronic form is more efficient and cost effective for both parties, electronic documents contain greater information (metadata) than is contained in paper documents, and electronic documents are more easily searched, stored and organized. Production of documents in electronic form is accomplished by copying them to a CD or other storage device, and they are immediately capable of being inspected and searched via computers. By contrast, production in paper format requires that documents be printed, photocopied, computer-imaged, then scanned and processed by OCR (optical character recognition) software to make them computer-searchable. Hard-copy documents produced in this form do not provide such information as authors, editors, creation date, edits, and revisions. Moreover, OCR processing is seldom 100% accurate, limiting the ability to conduct complete computer searches. 3M never objected to the definition of “document” as including electronic documents or the specification requesting production of documents in their electronic format and has “recognize[d] that Plaintiffs have requested that electronic documents be produced in native format and [3M has] taken metadata into account in [its] review process” Ex. 16 at 5-6.

On June 23, 2005, plaintiffs asked 3M to “inform us about the types and volume of electronic materials that 3M will be producing so that we can make appropriate preparations to store and access the materials.” Ex. 10. That letter further reminded 3M of the specification in the paragraph C instruction: “We anticipate the production of paper documents only where responsive discovery does not exist in electronic or computer-readable format.” *Id.* 3M never responded. *Coler Aff.* at ¶ 6. Plaintiffs’ August 17, 2005 letter about document production

asked 3M to inform plaintiffs *when* production of documents in their original or native electronic form would occur and repeated the request for information about types and volumes of electronic materials. Ex. 3 at 2. Again, 3M neither responded to the letter nor produced any documents in their original electronic format. Coler Aff. at ¶ 6.

Plaintiffs have obtained information regarding 3M's electronic documents only in response to a series of inquiries as part of the meet and confer process regarding document preservation. Through these inquiries, plaintiffs attempted to learn of the types of 3M electronic documents, how and where they were stored, and how they could be identified. During this process, 3M revealed that it had identified and extracted certain electronic documents for its own purposes, including e-mails of specified employees. Ex. 11. Plaintiffs expressed the hope that gathering this information would lead to agreed-upon production of electronic documents. Ex. 12. On November 30, 2005, plaintiffs again expressed concern to 3M as to when 3M planned to begin producing documents in their native electronic form. *Id.* It was not until December 2, 2005, that plaintiffs were able to learn that 3M had collected electronic documents identified as relevant by the 200 employees being interviewed. Ex. 13 at 4. With this information, plaintiffs again believed production of electronic documents could begin on an agreed-upon basis. Ex. 14.

Plaintiffs first learned that 3M would not produce the collected electronic documents until after it completed production of documents in hard copy during a December 22, 2005, meet and confer session on document preservation. Ex. 15. Plaintiffs immediately requested information regarding the identity, content, format and manner of collection of these electronic documents, and defendant's rationale for withholding their production. *Id.* In response, 3M refused to provide information regarding the electronic documents it collected and its processing of those documents, and offered no rationale for delaying production other than a decision to

proceed sequentially with production of hard-copy documents preceding electronic documents. Ex. 16.

Faced with 3M's refusal to produce electronic documents until some indeterminate time in the future following hard-copy production, and having identified a set of electronic documents 3M promptly could produce, plaintiffs requested immediate production of 3M's electronic human resources policy and practice materials, and all electronic documents collected from the 200 employees interviewed for document collection after an automated privilege search and subject to the protective order previously entered. Ex. 17. During a meet and confer the next day, 3M suggested it would comply with the requests and would provide technical details regarding the manner of production in a forthcoming letter. Ex. 18.

However, in two conversations and a letter received on January 20, 2006, 3M then refused to produce the requested electronic documents until after hard-copy production, and refused to use an electronic search to identify and withhold potentially privileged documents, insisting that it review each individual document. Ex. 19 at 4. In these conversations, plaintiffs also were shocked to learn that:

- 3M has excluded e-mails, including e-mails identified as potentially relevant, from the electronic documents it has collected from the approximately 200 employees interviewed for that purpose, and has no plans for the production of e-mails in electronic format;
- 3M did not intend to produce its Human Resources process, policy and practice materials (3M's Supervisors & Managers intranet website) in the electronic form in which they exist and, instead, has printed a hard-copy image of each page of the website for production as hard-copy documents in the future, although it could identify no reason

why they could not be produced simply by copying them to an electronic storage device without review;

- 3M proposed to produce only documents identified by an automated search using undetermined search terms from a limited set of certain electronic documents not including e-mail, and of those, only those documents it identifies as non-privileged and relevant after an individual document-by-document review;
- 3M estimated it could produce these limited electronic documents by the end of March, but could not estimate a time by which 3M could produce the electronic documents it has collected without such a process.

Ex. 7.

In short, 3M deliberately has refused to produce documents in their electronic format directly contrary to plaintiffs' specification for production and the enormous efficiencies that would result for both parties. Further, 3M deliberately has excluded electronic e-mail already determined to be relevant by its employees from the documents it has collected for production, has not otherwise taken steps to collect or extract such e-mail (Ex. 16 at 4), despite its statement as early as April, 2005, that "Lotus Notes documents will be gathered via ... electronic means." Ex. 2 [Valitchka Affidavit], Ex. 37 at 2. Moreover, 3M has no plans in place to produce electronic e-mail. Ex. 7. Thus, 3M apparently has failed to prepare for production of relevant e-mail in electronic form despite plaintiffs' specific requests, its instructions that employees identify and retain relevant e-mail, and while acknowledging that e-mail is one of the "electronic means by which personnel decisions are considered, decided, communicated, and tracked at 3M." Ex. 13 at 1. Instead, 3M has pursued the slowest, most expensive, most labor intensive and least informative course of hard-copy production, even of documents existing only in electronic

form. This deliberate course of conduct has sharply reduced the volume of material produced in discovery, needlessly slowed the pace of discovery and unjustifiably imposed greater burdens of cost and time in production and inspection on itself and plaintiffs.

Accordingly, plaintiffs respectfully ask the Court to order 3M to produce all responsive documents in their electronic format by February 28, 2006, utilizing its demonstrated capacity to extract, collect and copy electronic files and available technology to speed and simplify electronic discovery.³

IV. THE COURT SHOULD MODIFY THE PHASE ONE SCHEDULING ORDER IN A MANNER THAT MINIMIZES THE DELAY OF THE CLASS CERTIFICATION HEARING IN THIS CASE.

3M's delays in discovery have prejudiced plaintiffs' ability effectively to conduct discovery within the existing schedule. The parties' initial Informational Statement Form proposed a discovery deadline of December 20, 2005. Coler Aff. at ¶ 7. On June 14, 2005, the Court entered its Phase One Scheduling Order extending the discovery deadline to May 26, 2006 based on 3M's representations that document production would take longer than originally anticipated. *Id.*; Ex. 20. Based on 3M's representation that it anticipated completion of the interviews and collection of documents from the targeted 200 employees in early June 2005, plaintiffs reasonably believed that 3M's agreement to that extended schedule included a commitment to complete its production to requests served in February 2005 well before the discovery deadline. Coler Aff. at ¶ 7.

³ For example, 3M has suggested that it cannot easily search its e-mail, Lotus Notes, through automated means. But both commercially available software and free software converts Lotus Notes e-mail into text files easily subject to automated searches. *See, e.g.*, <http://www.transend.com/companyinfo.asp>; <http://www.thebeatlesforever.com/processtext/abclotusnotes.html>; http://www.paraben-forensics.com/catalog/product_info.php?products_id=165&osCsid=b3bd5d26a3965ab6a21bac42e45ab345.

Obviously, plaintiffs must not only receive, but inspect, the thousands of pages of documents 3M produces to identify those documents probative of the issues in the case. Coler Aff. at ¶ 8. Plaintiffs must further digest the documents to understand 3M's policies, procedures and conduct sufficiently to prepare for meaningful depositions, and to identify those 30 or fewer witnesses whom plaintiffs will depose from among the approximately 200 significant witnesses and decision-makers 3M has identified. *Id.* Proceeding to take and defend up to 30 depositions per side will require additional time after all documents have been produced. *Id.* And plaintiffs must further analyze the results of both this document review and the depositions themselves to provide their expert with information necessary to perform appropriate analyses and prepare reports. *Id.* But 3M has not even committed to a date when all documents will be produced, including e-mails in electronic format. Even if 3M completes production of electronic and hard-copy documents by March 31, 2006, a period of only two months following *receipt* of all documents is not enough time to execute the tasks described above. Plaintiffs regretfully must ask the Court to find that 3M's delay in producing documents constitutes cause for extending the deadlines in the Phase One Scheduling Order.

Plaintiffs propose modification of the Phase One Scheduling Order to provide a five month period after production of all documents before the close of phase-one discovery. *Id.* They further propose eliminating five weeks from the post-discovery schedule by providing a five rather than ten week period between the discovery deadline and production of defendant's expert reports. *Id.* at ¶ 9. Certainly, given the extensions of time that have occurred, defendant's experts already have received greatly expanded time for their work. Moreover, any enlargement of time for plaintiffs' discovery should come at the expense of time afforded to 3M in the current schedule. Assuming all documents are produced by March 31, 2006, and allowing some

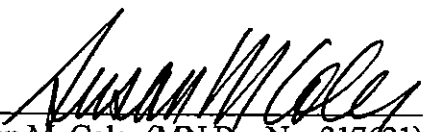
flexibility for scheduling around the holidays, the parties should be able to complete briefing on plaintiffs' motion for class certification for a hearing in late January or early February, 2007, thereby minimizing the delay of the class certification hearing to the extent possible.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request the Court to grant plaintiffs' motion to compel in its entirety and enter the accompanying Order.

DATED: January 23, 2006

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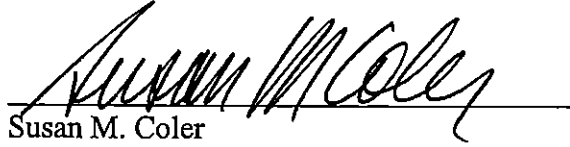
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ACKNOWLEDGMENT

Plaintiffs, by their attorneys, acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to Minn. Stat. §549.211.

DATED: January 23, 2006


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