

materials attached to its affidavits, responsive information regarding electronic and paper documents maintained in its information systems, which of those documents have been destroyed and preserved, and the form, format and accessibility of those documents.

Although 3M has now effectively abandoned its objections to plaintiffs' document production requests 95 and 96 (albeit withholding without explanation certain responsive documents), it continues to argue that the Court should not enter a document preservation order. In light of 3M's continuing failure to produce critical information and its mistaken view that document preservation decisions are matters left to its unilateral judgment, this Court should enter the document preservation order that plaintiffs proposed.

BACKGROUND

1. Commencement of Class-wide Document Preservation Measures

3M's filings confirm what the "Joe 3M" letter suggested – that 3M did not initiate document preservation efforts when first put on notice of the class-wide claims. It appears that 3M did not act to preserve documents potentially relevant to the class-wide charges of age discrimination in response to the Whitaker and Mucci charges in May and September of 2004. In response to each charge, 3M notified only five persons (excluding cc's to the author and a representative of the Legal Department) of the need to preserve only "all potentially relevant documents ... in any way relating to Mr. Whitaker [and Mr. Mucci] and his 3M employment." (Peplinski Aff., Ex. A at 1, Ex. B at 1 (emphasis in original).) These communications to a small number of persons to preserve only documents individual to each employee stand in stark contrast to the measures directed to all supervisors of salaried employees to preserve eleven categories of documents relating

to “3M employment-related systems or processes” in response to the litigation. (*See, e.g., Valitchka Aff., Ex. 32.*)

3M provides no information as to documents that may have been destroyed or converted into different formats between May 2004 and January 2005. Various exhibits to 3M’s Valitchka Affidavit do suggest, however, that electronic documents are deleted on “Scrappy Days.” (Valitchka Aff., Ex. 31 at 4.) They also indicate that the archiving of e-mail, or “Lotus Notes,” and other electronic documents, including through “automatic archive feature on your Lotus Notes system or other system[,] ... can complicate our ability to reliably identify and gather documents.” (*See, e.g., Valitchka Aff., Ex. 31 at 4, 7; Ex. 30 at p. 3.*)¹ The extent to which documents potentially relevant to the class claims were lost or made more difficult or expensive to access as a result of 3M’s failure to preserve class-wide documents between May 2004 and January 2005 will be known at the earliest only when 3M produces its document destruction and retention policies.

2. Measures to Have Individual Employees Preserve Their Documents

The numerous exhibits to 3M’s Valitchka Affidavit demonstrate that, in January and March, 3M sent several e-mail messages to a substantial number of individual employees instructing them to preserve a range of documents in their possession. (*See, e.g., Valitchka Aff. Exs. 2, 32, 36.*) They also demonstrate that 3M is providing training to employees on document preservation (*see id.*, Exs. 30, 31), and, in April, informed certain employees that they would be interviewed and documents collected from them.

¹ In fact, the Valitchka Affidavit suggests the possibility that potentially relevant electronic documents have been made less accessible after January 2005. The initial notices informed employees only not to delete such documents (Valitchka Aff. Exs. 2, 32), while the training materials ask that employees “not archive any documents.” (Valitchka Aff. Exs. 30, 31.) The Valitchka Affidavit, at ¶ 6, indicates that this training of all relevant employees has not yet been completed.

(Exs. 37, 38.) Thus, 3M has produced documents showing its efforts to have various individual employees preserve documents they possess.

However, the March message also informs employees that they need not preserve documents “stored within a 3M system or database,” as “3M will retain the system/database on which the document is stored.” (Valitchka Aff. Ex. 36 at 2, 3.) Similarly, the training materials indicate that individual employees need not preserve documents retained in 3M systems. (*Id.*, Ex. 30 at 4, Ex. 31 at 5, 6.) Other than informing employees that they need not preserve them, these messages sent to individual employees do not provide information about documents 3M has preserved in its “systems or databases.”

3. Documents in 3M’s Systems or Databases

3M produced only one document that it describes as taking “steps to preserve certain email and other back-up tapes ... for specific periods of time following service of the Complaint.” (Valitchka Aff., ¶ 5 and Ex. 29.) Exhibit 29 is a January 27, 2005, memo from James Zappa, Counsel for 3M and “Of Counsel” for 3M in this Court, to a Dean Norberg of 3M Corporate, alluding to a previous e-mail in which Zappa instructed Norberg to “preserve back-up tapes for both (1) the US Lotus Notes servers, and (2) the file and print servers that are maintained by the Data Center.” (Valitchka Aff., Ex. 29.) Zappa instructs Norberg to “[c]ontinue to preserve on an ongoing basis the U.S. Lotus Notes server [and “Data Center file and print server”] back-up tapes for the week ending December 24, 2004 and the day of January 9, 205 [sic],” but that “[t]here is no further need to preserve the other U.S. Lotus Notes server [and “file and print server”] back-up tapes you were preserving based on my prior request.” (*Id.*)

This memo illustrates that 3M is acting unilaterally to determine what documents it is and is not preserving. Indeed, 3M's Memorandum of Law makes explicit its mistaken view that it is free to act unilaterally regarding document preservation matters, in stating that it "did not need to confer with Plaintiffs to determine appropriate preservation efforts." (3M Mem. at 9.) Because 3M has, thus far, failed to produce *any* document destruction and retention policies, the Court and plaintiffs have no idea what documents are being preserved, on back-up tapes or by archiving or otherwise, and for what periods of time.

This memo also reflects significant gaps in 3M's production response to request number 96. It refers to, but 3M has failed to produce, related documents that apparently contain precisely the type of information that must be shared with the Court and plaintiffs in order to ensure that potentially relevant documents are available, accessible and usable for discovery and trial:

- a) a January 20, 2005 e-mail from Zappa that provides "a more complete description of th[e] servers" for which back-up tapes were to be preserved;
- b) efforts by Norberg to "explor[e] ... alternatives for storing the above tapes to effectively preserve them" and "getting this information to [Zappa] as soon as [Norberg] can reasonably develop it;" and,
- c) Norberg's "creating and sending to [Zappa] a document that describes the process steps by which 3M IT preserved the above-described back-up tapes, including any transfer of those tapes to an alternative storage location/device."

Id.

4. 3M's Document Destruction and Retention Policies

Although responses were due on April 1, 2005, 3M has yet to produce any of its document destruction and retention policies. That includes the policies since May 2004, that it initially stated it would produce, and those since 2001, that it now states it will

produce. Without those policies and the descriptions of documents, formats, storage mechanisms and related information, the Court and plaintiffs are left without information as to what documents are available for discovery and trial and how accessible and usable they may be.

ARGUMENT

I. 3M SHOULD COMPLY WITH DOCUMENT REQUEST NO. 96.

Although 3M has not yet produced documents responsive to request number 95, it recognizes its obligation to do so. By contrast, it apparently believes that it has satisfied its obligations under request number 96 through the documents accompanying its responsive memorandum.

Exhibit 29 shows that 3M has withheld critical documents responsive to request number 96 from production. By withholding these and other materials that describe the servers and systems that contain various electronic documents that are or are not being preserved, and that discuss alternative approaches to preserving such documents, including through back-up tapes or by transferring them to other devices, 3M persists in its failure to comply fully with plaintiffs' document requests. 3M also persists in its refusal to share with the Court and plaintiffs this information necessary to the orderly preservation and efficient management of documents for use in discovery and at trial, as recommended in the Amendments to ABA Civil Discovery Standards (August 2004) <http://www.abanet.org/litigation/taskforces/electronic/home.html>, and the MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 11.12, 11.442, 40.25.

Because of 3M's failure to produce these types of documents, the Court and plaintiffs remain in the dark as to the types of documents in 3M information systems and

databases that are or are not being preserved and the time periods and formats of those documents. Plaintiffs remain without information to inform them of documents available for discovery and with which to respond to 3M's demands that they refine or sharpen their discovery requests.

3M has no basis for refusing to produce these documents or any other responsive documents that it has withheld. It has abandoned the privilege and relevance arguments it asserted in the past. It makes no other argument on which to base a refusal to produce; nor could it.

II. THE DOCUMENT PRESERVATION ORDER SHOULD BE ENTERED.

3M argues that a document preservation order is not necessary in this case, relying on its own general description of its document preservation efforts, the numerous copies of the several e-mails it sent to individual employees, and training materials it produced. 3M also quotes the Manual for Complex Litigation as guidance on when a preservation order is needed – a passage that advises the Court to discuss the need for such an order with counsel for all parties, not to accept the view only of counsel for one party. (3M Mem. at 7 (*quoting* §11.442).) As discussed in Plaintiffs' opening brief, the "need" for a document preservation order includes the fact that complex litigation, such as this, involves the production and handling of voluminous documents, including electronic documents that inadvertently can be destroyed or altered or that can be preserved, but in a form that renders them impossible or inefficient or costly to obtain or to search for responsive material. Such orders are needed for efficient management and planning during discovery and trial, and to avoid abuse, needless disputes and controversy and expense. (Memorandum of Law in Support of Plaintiffs' Motion to

Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order, at 10-11.) Finally, document preservation orders serve to ensure the integrity of the litigation process. (*Id.* at 7-8.)

The facts illustrate the need for a document preservation order in this case. 3M failed to take appropriate steps to preserve documents relevant to the claims beginning in May 2004. The instructions given to individual managers may have preserved any responsive documents from that period that were still in their possession, but it is unclear whether any steps beyond 3M's normal practices have yet been taken to preserve responsive documents that were in 3M's computer systems. 3M's refusal to produce information regarding the documents contained in its systems and databases and the means and methods by which they are being preserved starting in January 2005 further illustrates the need for and benefits to be gained from a document preservation order.

Plaintiffs proposed that this Court enter the model document preservation order from the Manual for Complex Litigation, adapted to Minnesota practice. 3M has criticized plaintiffs' choice, without offering any alternative. (3M Mem. at 1.) The form of this Order should be attractive to the Court and the parties for two reasons. First, the order was modeled on a form order prepared by an entity not clearly aligned with plaintiffs or defendants. Second, the proposed order contains provisions requiring that the parties meet and confer in an effort to reach agreement on an order and, in doing so, consider thoroughly all of the issues and potential problems presented by preservation and production of voluminous documents, including electronic documents. Of course, the Court is free to modify that proposed order or to fashion its own order.

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CONCLUSION

Plaintiffs respectfully request that this Court enter an order compelling 3M to produce immediately its document destruction and retention policies, and compelling 3M to produce all documents in addition to Exhibit 29 to its Valitchka Affidavit that evidence measures it took regarding the preservation or destruction of documents maintained in its information systems and databases in response to the litigation.

Plaintiffs further request that this Court enter a document preservation order, as provided to the Court in connection with their original motion.

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