

The logo for MASLON, consisting of the word "MASLON" in a bold, sans-serif font, with a horizontal line underneath the letters.

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January 17, 2020

Via E-filing and hand delivered

The Honorable John H. Guthmann
Ramsey County District Court
1470 Ramsey County Courthouse
15 Kellogg Boulevard West
St. Paul, MN 55102

Re: Ramsey County Court File No. 62-cv-19-4626

Dear Judge Guthmann:

Pursuant to paragraph 7 of the Court's Amended Order Setting Evidentiary Hearing ("Amended Order"), Telephone Conference Tr. ("Conf. Tr.") 35:1-10 (Dec. 6, 2019), and the Order Granting in Part and Denying in Part Relators' Motion to Amend Exhibit List ("Exhibit List Order") (Jan. 17, 2020), Relators move the Court to amend Relators' Exhibit List to include handwritten notes recently provided to Relators by the U.S. Environmental Protection Agency ("EPA") in response to a Freedom of Information Act ("FOIA").

Relator WaterLegacy has sought EPA records, including notes from phone calls with the Minnesota Pollution Control Agency ("MPCA") since March 27, 2018. (*See* Decl. of Paula G. Maccabee ("Maccabee Decl.") ¶ 3 (Jan. 17, 2020)). On November 15, 2018, WaterLegacy filed FOIA request EPA-R5-2020-001126 seeking notes of phone conferences between MPCA and EPA believed to have occurred between March 12, 2018 and November 28, 2018. (*Id.* ¶ 4). EPA provided WaterLegacy with a supplemental disposition for this FOIA request on January 17, 2020. (*Id.* ¶¶ 5-6 & Ex. A). The supplemental disposition provided Kevin Pierard's handwritten notes regarding the above-captioned matter for conversations on March 12, 2018, April 30, 2018, October 22, 2018 ("Pierard Notes"). (*Id.* ¶ 7 & Ex. B (RELATORS_66012-21)). Relators had no access to the Pierard Notes before January 17, 2020 and the Pierard Notes directly address Mr. Pierard's conversations with EPA during a time period relevant to the evidentiary hearing. (*See id.* ¶ 5 & Ex. A).

In the Amended Order Setting Evidentiary Hearing, the Court scheduled an Exhibit List deadline for December 9, 2019. (Amended Order ¶ 7). The Court provided that "[u]nlisted exhibits shall not be admitted unless the court determines that good cause existed for failing to disclose the exhibit." (*Id.* (emphasis omitted)). At the December 6, 2019 conference, this Court moved the Exhibit List deadline to December 16, 2019. (Conf. Tr. 35:1-10). The Court specifically stated that good cause exists and post deadline use of a document justified, even if opposing counsel objected, where Relators had no control of a document in the possession of the government, sought to procure the document in a timely fashion, and received it for the first time after the December 16,

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2019 deadline. (Conf. Tr. 36:14-25).¹ Consistent with these decisions, on January 17, 2020, this Court granted Relators' Motion to Amend the Exhibit List to include EPA handwritten notes produced under FOIA after the Exhibit List deadline because "[t]he documents are highly probative and there is no prejudice to the MPCA, as the agency participated in the meetings." (Exhibit List Order at 3-4).

The Court's previous decisions establish that Relators have good cause to amend their Exhibit List to include the Pierard Notes. As explained above and in the attached declaration, the Pierard Notes WaterLegacy received in response to its FOIA request fall precisely into this exception the Court described. Relators would be prejudiced without the ability to use these documents at the hearing. (Maccabee Decl. ¶¶ 5-6, 8-9).

Anticipating a foundation objection from both MPCA and PolyMet, (*See* MPCA Response to Relators' Mot. To Amend Ex. List at 4 (Jan. 10, 2020); Letter from Monte Mills to Judge Guthmann at 3-4 (Jan. 10, 2020)), Relators witness list includes Mr. Pierard (the author of the handwritten notes), the Pierard Notes are "the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R.1400.7300, subp. 1, and the Pierard Notes are public records setting forth EPA's activities, Minn. R. Evid. 803(8). The Pierard Notes do not lack foundation; there is no basis for their exclusion.

For these reasons, Relators respectfully request this Court find Relators have shown good cause to add the Pierard Notes to Relators' Exhibit List so that they may be used as hearing exhibits. Relators propose that the Pierard Notes (RELATORS_66012-21) be marked as Relators' Exhibit 836.

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¹ Relators sent Counsel a meet-and-confer email on January 17, 2020, less than two hours after receiving the documents from the EPA. As of 3:30 pm, January 17, 2020, Respondents have not indicated that they do not oppose this motion.

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Respectfully submitted,

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Enclosure

cc: Counsel of Record (via Odyssey)