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January 10, 2020

VIA ODYSSEY AND COURIER

The Honorable John H. Guthmann
Ramsey County District Court
15 W. Kellogg Blvd.
St. Paul, MN 55102
(2ndJudgeGuthmannChambers@courts.state.mn.us)

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

Dear Chief Judge Guthmann:

PolyMet respectfully submits this letter in response to Relators' informal motion to amend Relators' Exhibit List. Relators seek to add two categories of documents to their exhibit list. First, Relators seek to add documents that were available to Relators at the time of filing—but omitted from—their original exhibit list. Second, Relators seek to add documents that they received after filing their exhibit list. Relators did not move this Court for leave to add any of these documents to their exhibit list until December 27, 2019 and December 31, 2019, after PolyMet filed its Motion in Limine to Exclude Certain Documents for Which No Witness Has Foundation to Testify.

With respect to the first category of documents, PolyMet opposes the addition of the documents that were "inadvertently not included" in Relators' 23-page exhibit list.¹ With respect to the second category, PolyMet moves to add some of the proposed exhibits to its Motion in Limine to Exclude Certain Exhibits for Which No Witness Has Foundation to Testify ("Motion") and to exclude the majority of the documents on that basis.² PolyMet did not have the opportunity to address these documents in its Motion because they were not included in Relators' original exhibit list, and Relators did not move this Court for leave to add the documents to their exhibit list until after PolyMet filed its Motion. For the same reasons identified in PolyMet's Motion, however, the documents should be excluded.

¹ Relators' letter regarding Informal Motion to Amend Exhibit List at 1 (Dec. 27, 2019).

² PolyMet is using the same informal-motion procedure as Relators. PolyMet is doing so both to be consistent with the procedural mechanism that Relators use and to decrease the probability of Relators' objecting to PolyMet's Motion on procedural grounds.

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Inadvertently omitted exhibits

Relators move to add documents to their exhibit list that they “inadvertently left off.”³ This Court’s Amended Order Setting Evidentiary Hearing, as amended by the Court’s December 6, 2019 teleconference, provides:

The parties shall serve and file a complete and final list of exhibits they intend to actually use no later than December [16], 2019 . . . [T]he parties shall comply with Minn. Gen. R. Prac. Part H, § 12 Unlisted exhibits shall not be admitted unless the court determines that good cause existed for failing to disclose the exhibit.⁴

On December 16, 2019, Relators filed a 23-page exhibit list with 760 exhibits. The exhibit list did not conform with this Court’s Amended Order Setting Evidentiary Hearing because it failed to “briefly describe each exhibit on the list,”⁵ as required by Minnesota Rule of General Practice Part H, § 12(a).

Relators now seek to add to their exhibit list attachments to an email that Relators “inadvertently left off the Exhibit List.”⁶ When determining whether to excuse a party’s failure to comply with a court deadline, courts consider, among other things, whether there is a “reasonable excuse for not complying with the . . . time limits.” *Mercer v. Anderson*, 715 N.W.2d 114, 123 (Minn. Ct. App. 2006). Here, Relators provide no excuse, let alone a reasonable one, for their failure to include the attachments in their initial exhibit list. Indeed, Relators fail to cite a single case that explains or applies the good-cause standard.⁷ Relators instead chalk the error up to mere inadvertence. Such inadvertence is not good cause.

³ Relators’ letter regarding Informal Motion to Amend Exhibit List at 2 (Dec. 27, 2019).

⁴ Amended Order Setting Evidentiary Hearing at 2 (Nov. 19, 2019) (emphasis omitted and underline added); *see also* December 6, 2019 Teleconference Tr. at 35:1-10.

⁵ Amended Order Setting Evidentiary Hearing at 2 (Nov. 19, 2019).

⁶ Relators’ letter regarding Informal Motion to Amend Exhibit List at 2 (Dec. 27, 2019); *see also* Declaration of Paula G. Maccabee in support of Relators’ Informal Motion to Amend Exhibit List (“Maccabee Decl.”) ¶ 12 (Dec. 27, 2019) (explaining that the documents “were inadvertently left off Relators’ Exhibit List”).

⁷ *See* Relators’ letter regarding Informal Motion to Amend Exhibit List at 3 (Dec. 27, 2019) (citing *Cotroneo v. Pilney*, 343 N.W.2d 645 (Minn. 1984)). *Cotroneo* analyzed in which circumstances a court should modify a “pretrial order to prevent manifest injustice,” in a case in which a party “ask[ed] to be relieved of the pretrial order because of unforeseen circumstances.”

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Further, Relators' may not have made that inadvertent omission had Relators actually followed this Court's order to "briefly describe each exhibit on the list."⁸ Relators' Exhibit List contains no document descriptions, meaning that PolyMet, the Court, and even Relators cannot look at the list and easily determine the relationship between exhibits, such as whether a given document is an attachment to an email. Had Relators complied with this Court's order to include document descriptions (as both PolyMet and MPCA did), then perhaps Relators would have caught their inadvertent omission before filing their exhibit list in the first place. This Court should not find good cause for an error that was likely caused in large part by Relators' failure to follow this Court's orders in the first place.

Relators' exhibits for which no witness has foundation to testify

Many of the other documents that Relators seek to add to their exhibit list are subject to the same foundation objection that PolyMet has already made with respect to over 100 of Relators' 760 trial exhibits. PolyMet hereby moves to add these documents to its Motion in Limine to Exclude Certain Exhibits for Which No Witness Has Foundation to Testify, and to exclude the majority of proposed exhibits on that basis. Because these documents were not included in Relators' original exhibit list and Relators did not seek leave to add them to their exhibit list until December 27 and 31, 2019 (after PolyMet filed its Motion), PolyMet was deprived of the opportunity to discuss the documents in its Motion. These proposed exhibits include:

Declaration Exhibit⁹	Bates Beg Number	Bates End Number
Maccabee Decl. Ex. F	RELATORS_0064181	RELATORS_0064185
Larson Decl. Ex. C	RELATORS_0065950	RELATORS_0065951
Larson Decl. Ex. B	RELATORS_0065952	RELATORS_0065954
Larson Decl. Ex. A	RELATORS_0065955	RELATORS_0065955
Maccabee Decl. Ex. D	RELATORS_0065956	RELATORS_0065957
Maccabee Decl. Ex. D	RELATORS_0065958	RELATORS_0065958
Maccabee Decl. Ex. D	RELATORS_0065959	RELATORS_0065959

Cotroneo, 343 N.W.2d at 649. It did not concern whether "good cause" existed to excuse a party's failure to comply with a court-ordered deadline.

⁸ Minn. Gen. R. Prac. Part H, § 12.

⁹ "Maccabee Decl." refers to the Declaration of Paula G. Maccabee in support of Relators' Informal Motion to Amend Exhibit List, filed on December 27, 2019. "Larson Decl." refers to the Declaration of Elise L. Larson in Support of Informal Motion to Amend Relators' Exhibit List, filed on December 27, 2019. "Second Maccabee Decl." refers to the Declaration of Paul G. Maccabee submitted in support of Relators' request to supplement Relators' Informal Motion to Amend Exhibit List, filed on December 31, 2019.

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Maccabee Decl. Ex. D	RELATORS_0065960	RELATORS_0065960
Maccabee Decl. Ex. D	RELATORS_0065961	RELATORS_0065980
Maccabee Decl. Ex. D	RELATORS_0065989	RELATORS_0065992
Maccabee Decl. Ex. D	RELATORS_0065993	RELATORS_0066002
Second Maccabee Decl. Ex. A	RELATORS_0066003	RELATORS_0066003
Second Maccabee Decl. Ex. A	RELATORS_0066004	RELATORS_0066006
Second Maccabee Decl. Ex. A	RELATORS_0066007	RELATORS_0066008
Second Maccabee Decl. Ex. A	RELATORS_0066009	RELATORS_0066009
Second Maccabee Decl. Ex. A	RELATORS_0066010	RELATORS_0066010
Second Maccabee Decl. Ex. A	RELATORS_0066011	RELATORS_0066011

Relators should not be permitted to add exhibits to their exhibit list for which no witness has foundation to testify. As PolyMet explained in its Motion in Limine to Exclude Certain Exhibits for Which No Witness has Foundation to Testify, it is a bedrock principle of evidentiary law that witnesses only testify from their “personal knowledge.” Minn. R. Evid. 6.02. It is a similarly foundational principle that for an exhibit to be admissible, there must be sufficient evidence that the item is what the proponent claims it is. Minn. R. Evid. 901. Relators’ proposed additions to their Exhibit List contain numerous exhibits written by or sent to individuals that do not appear on any witness list, and as to which no witness will have adequate foundation to testify.

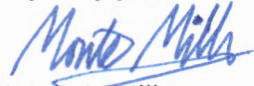
Once again, Relators appear to be substituting remote documents for testimony subject to cross examination at the evidentiary hearing. To take one example, one proposed exhibit appears to be notes authored by EPA employee Mark Ackerman.¹⁰ Mr. Ackerman is not a witness at the upcoming hearing. PolyMet will be unable to cross-examine Mr. Ackerman regarding the contents and meaning of the notes. Relators’ should not be permitted to substitute those notes for the testimony of others who participated in the alleged meeting—testimony that will be subject to exploration through cross examination. Mr. Ackerman’s notes, like the other exhibits for which no witness has foundation to testify, should be excluded.

The Court should deny Relators’ request to add First Maccabee Declaration Exhibit E to Relators’ Exhibit List, because Relators lack good cause for their failure to include the documents in Exhibit E in their initial exhibit list. The Court should also preclude Relators from adding to their exhibit list the exhibits identified above for which no witness has foundation to testify.

¹⁰ See Second Maccabee Decl. Ex. A, at RELATORS_0066011.

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Very truly yours,



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c: All counsel of record (via Odyssey)