

The logo for MASLON, consisting of the word "MASLON" in a bold, sans-serif font. The letters "A" and "S" are slightly larger than the others. A thin yellow horizontal line is positioned directly beneath the text.

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January 13, 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:

Relators briefly respond to filings made by the Respondents Minnesota Pollution Control Agency (“MPCA”) and PolyMet Mining, Inc. (“PolyMet”) on January 10, 2020 asking this Court to deny Relators’ Motion to Amend Relators’ Exhibit List (“Exhibit List”)<sup>1</sup> and preclude use of documents for which Relators have shown good cause in letters and declarations filed with the Court on December 27, 2019 and December 31, 2019. Although styled as “responses” to Relators’ informal motion, Respondents have made evidentiary objections, in effect making another motion *in limine*, which requires a brief response. Relators request the Court allow Relators to amend the Exhibit List, adding documents previously submitted and as summarized in **Attachment A** to this letter. (See Decl. of Paula Maccabee (“Maccabee Decl. 3”) ¶ 3 & Attach. A (Jan. 13, 2020)).

## **1. DPA Documents**

Respondents object to Relators’ addition of documents MPCA disclosed to Relators after the exhibit list deadline in response to a November 14, 2019 Data Practices Act Request (“DPA Request”). The documents include MPCA’s version of the DPA Request,<sup>2</sup> MPCA’s June 2019 litigation hold, and MPCA’s November 2019 litigation hold (collectively, “DPA Documents”). (Declaration of Elise L. Larson (“Larson Decl”) ¶¶ 6, 10-11 & Exs. A-C (Dec. 27, 2019); Maccabee Decl. 3, Attach. A (proposed exhibits 764-66)). Respondents claim Relators failed to show good cause because of timing. But, MPCA elected to respond to the DPA Request after the

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<sup>1</sup> Relators inadvertently requested the Court include RELATORS\_ 0064183-85. This document appears at **Relators Ex. 541** and Relators’ withdraw their motion as to this document.

<sup>2</sup> The Court should disregard Respondents evidentiary objections to Larson Decl. Ex. A as untimely. Larson Decl. Ex. A is the copy of **Relators Ex. 760** under MPCA’s possession. (Larson Decl. ¶ 6). Neither PolyMet nor MPCA timely objected to **Relators Ex. 760**. (See PolyMet’s Mem. Supp. Mot. to Exclude 3-6 (Dec. 27, 2019); MPCA Mot. *In Limine* 11-12 (Dec. 27, 2019)).

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exhibit list deadline, in the middle of the holidays, with Relators facing numerous deadlines. (*See* Larson Decl. ¶ 10 & Ex. B). Despite the timing, Relators submitted their request ten days later. (*Id.* ¶ 12). Relators did not engage in willful neglect. *See Cotroneo v. Pilney*, 343 N.W.2d 645, 649 (Minn. 1984). MPCA is also not prejudiced because it has always possessed the DPA Documents.

Respondents also move *in limine* to exclude the DPA Documents. MPCA argues this Court should exclude the DPA Documents as “irrelevant.” The DPA documents are relevant to Relators’ claims. *See State v. Henderson*, 620 N.W.2d 688, 699 (Minn. 2001). In particular, the litigation holds show MPCA’s failure to appropriately place a litigation hold on relevant records; tending to prove, or supporting a reasonable inference that, MPCA intended to allow employees to discard public records reflecting communications with the Environmental Protection Agency (“EPA”). (*See* Larson Decl., Exs. B & C; Maccabee Decl. 3, Attach. A (proposed exhibits 764-65)).

PolyMet also argues the litigation holds lack foundation.<sup>3</sup> Relators witness list includes numerous MPCA employees, who all received the June litigation hold. (Relators’ Witness List 2-3 (Dec. 9, 2019). Minnesota Information Technology (“MNIT”) received the November litigation hold, and Relators have listed the MNIT employee responsible for this matter. (*Id.* at 2). Relators have also included MPCA’s custodian responsible for DPA requests. (*Id.* at 3). Thus, Relators have included numerous witnesses with personal knowledge of the documents. Further, the DPA Documents 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 DPA Documents are public records setting forth MPCA’s activities. Minn. R. Evid. 803(8). The DPA Documents are both relevant and do not lack foundation; there is no basis for their exclusion.

## 2. FOIA Documents

Relators’ prior letter and declarations set forth good cause for Relators’ informal motion to add the Freedom of Information Act (“FOIA”) documents. (Declaration of Paula Maccabee (“Maccabee Decl. 1”) ¶ 9 & Ex. D (Dec. 27, 2019); Declaration of Paula Maccabee (“Maccabee Decl. 2”) ¶ 5 & Attach. A (Dec. 31, 2019); Maccabee Decl. 3, Attach. A (proposed exhibits 767-71, 772-76)). These documents were under EPA’s control until after the deadline for disclosing exhibits, despite due diligence and persistent efforts by Relators to secure these documents sooner. (Maccabee Decl. 1 ¶¶ 10-11; Maccabee Decl. 2 ¶ 7). Respondents were not prejudiced by the timing of Relators’ motion. Relators provided the December 27, 2019 FOIA documents within five days of downloading them, despite a weekend and holidays, and provided the December 31, 2019 FOIA documents within four days of receiving them, despite an intervening weekend. (Maccabee Decl. 3 ¶ 4).

Respondents also argue that the public government records released by EPA under FOIA should not be accepted by the Court since they lack foundation. EPA documents released under FOIA are appropriately accepted in these proceedings as they possess probative value and are “the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their

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<sup>3</sup> Relators incorporate their complete response to Respondents’ foundation objections by reference. (*See* Relators’ Response to Motions *In Limine* to Exclude Certain Evidence 20-25 (Jan. 10, 2020)).

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serious affairs.” Minn. R.1400.7300, subp. 1. Even were the Minnesota Rules of Evidence to apply, the FOIA documents are public records setting forth the activities of the EPA in its process of oversight of the PolyMet Permit which is at issue in this case. Minn. R. Evid. 803(8).

Respondents do not dispute that the documents produced by Relators are true and accurate copies. They assert that the documents should be excluded since no one is able to testify as to their contents, apparently arguing they contain hearsay. The disposition documents and privilege logs are clearly official public records. (Maccabee Decl. 1, Ex. D at 65956-60, Maccabee Decl. 2, Attach. A at 66003-08; Maccabee Decl. 3, Attach. A (proposed exhibits 767, 772-73)).

As for the notes, Kevin Pierard, EPA Region 5 NPDES Branch Chief, was present at the meetings and participated in all of the phone calls reflected in the notes produced under the FOIA. (Maccabee Decl. 1, Ex. D at 65961-6002; Maccabee Decl. 2, Attach. A at 66009-11; Maccabee Decl. 3 at ¶ 5 & Attach. A (proposed exhibits 768-71 and 774-76)). Indeed, one of the sets of notes are his own. (Maccabee Decl. 1, Ex. D at 65981-88; Maccabee Decl. 3 ¶ 5 & Attach. A (proposed exhibit 769)). Relators expect Mr. Pierard will testify as to these meetings and phone calls between EPA and MPCA. The FOIA notes are needed both to refresh Mr. Pierard’s recollection and to demonstrate that the matters he will discuss are in the public record and that, if EPA had any applicable privilege that privilege has been waived by the FOIA release.<sup>4</sup> The FOIA documents are critical to Relators’ alleged procedural irregularities, do not lack foundation, and there is no basis for their exclusion.

### 3. Additional Documents

Respondents are correct that Relators have not made excuses for inadvertently leaving two agendas off the Exhibit List. (Maccabee Decl. 1, Ex. D at 64227-28; Maccabee Decl. 3, Attach. A (proposed exhibits 761-62)). The Court can take judicial notice of the demanding schedule set in this case and the fact that, despite concerted efforts, errors may occur.

The letter from the Fond du Lac Band of Lake Superior Chippewa (the “Band”) was not inadvertently omitted, but only became relevant when MPCA listed among its exhibits a letter from the EPA Region 5 Administrator that mischaracterized the release of EPA comments on the draft PolyMet Permit to the Band. (Maccabee Decl. 1, Ex. D at 64181-82; *see also* Maccabee Decl. 3 ¶ 7 & Attach. C)). MPCA has now disclosed that it intends to use the letter to show Relators have not been prejudiced. Relators have had limited opportunity to discover the nature of MPCA’s defenses due to the narrow discovery available in this proceeding. Respondents have not shown prejudice if the Band’s letter is added to Relators’ Exhibit List, nor could they since the letter was produced to Respondents during discovery. Good cause exists under the Court’s broad discretion to allow Relators to include this letter to counter MPCA’s recently disclosed defense. *See, e.g., Cotroneo*, 343 N.W.2d at 648.

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<sup>4</sup> *See* Maccabee Decl. 3 ¶¶ 5-6 & Attach. B (Letter from Benjamin Grillot, U.S. Department of Justice, to Judge Guthmann (Jan. 10, 2020)).

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For these reasons, Relators respectfully request this Court find Relators have shown good cause to add the documents requested in their December 27, 2019 informal letter and December 31, 2019 supplement to Relators' Exhibit List so that they may be used as hearing exhibits.

Respectfully submitted,

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Enclosure

cc: Counsel of Record (via Odyssey)