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November 11, 2019

Via E-filing and hand deliveryThe Honorable John H. Guthmann
Ramsey County District Court
1470 Ramsey County Courthouse
15 Kellogg Boulevard West
St. Paul, MN 55102**Re: *In the Matter of ... Proposed Northmet Project St. Louis County Hoyt Lakes and Babbitt Minnesota, Ramsey County Court File No. 62-cv-19-4626***

Dear Judge Guthmann:

Pursuant to Minn. R. Gen. Prac. 115.04(d), Relators request the Court order MPCA produce the following: (1) two documents Michael Schmidt created on the ground that Relators are substantially justified and hardship would result if the documents are withheld; (2) documents MPCA withheld on attorney-client privilege and/or attorney work product grounds where the documents lack the indicia of privilege or were provided to third parties.¹ In addition, Relators request the Court require a forensic search for Assistant Commissioner Shannon Lotthammer, Commissioner John Linc Stine, and Mining Sector Director Ann Foss's electronic documents during the PolyMet NPDES permitting process.

Relators conferred with MPCA counsel and resolved a number of discovery issues.² The documents Relators request are needed for "full disclosure of the relevant information" to determine alleged procedural irregularities. (Rule 16 Hr'g ("Hr'g") Tr. 56:15-17, Aug. 7, 2019). As the Court explained, "[t]he concern here isn't with what was made public. It's what wasn't made public." (*Id.* at 56:23-24).

¹ The parties continue to discuss these privilege claims. (*See Ex. A*). Relators provided MPCA with a spreadsheet identifying challenges to claimed privilege in MPCA's privilege log. These issues are briefly summarized, since the parties may yet need the Court's direction to compel production of documents.

² Relators' and MPCA counsel conferred pursuant to Minn. R. Gen. Prac. 115.10, on November 11, 2019 and resolved several questions as reflected in Relators' November 11, 2019 letter to MPCA Counsel. (*See Ex. A*).

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1. Relators have substantial need and justification for production of two 2018 documents withheld by MPCA.

Relators have substantial need and justification for production of two 2018 documents MPCA seeks to withhold under attorney-client and attorney-work-product privilege, and undue hardship would result without production, since equivalent materials are not otherwise available. Minn. R. Civ. P. 26.02(d); *State ex rel. Humphrey v. Phillip Morris*, 606 N.W.2d 676 (Minn. App. 2000). Mr. Schmidt wrote MPCA privilege log Doc. No. 301 on April 17, 2018 to memorialize the April 5, 2018 call when EPA comments were read to MPCA. It is undisputed that both Mr. Schmidt and Stephanie Handeland discarded their handwritten notes from the April 5, 2018 call with EPA, and that if Richard Clark took any such notes, he no longer has them.³ MPCA claims that there was nothing new in the comments EPA read,⁴ but there are no documents other than Mr. Schmidt's withheld summary that memorializes what MPCA heard and understood when EPA's comments on the draft PolyMet NPDES permit were read to MPCA on the phone April 5, 2018.

Mr. Schmidt wrote Doc. No. 302 on September 27, 2018, which appears to memorialize the September 25-26, 2018 meetings with EPA, the content of which is disputed. Although handwritten notes from Ms. Handeland reflect that EPA remained concerned about the lack of water quality-based effluent limits ("WQBELs") after the September 2018 meetings,⁵ Jeff Udd categorically denied that EPA had concerns about WQBELs after September 26, 2018.⁶ Mr. Schmidt's April and September 2018 contemporaneous written summaries are needed to determine alleged procedural irregularities, and Relators would suffer hardship were they not produced.

2. Relators request a forensic search of MPCA electronic files.

Relators specifically sought information that had been electronically stored "at any time" and regardless of whether the information had been "erased." (Relators Req. Produc. Docs. MPCA ¶ H, Aug. 21, 2019 (Ex. E)). Such production is permitted under Minn. R. Civ. P. 34.01(1)(A). *Id.* (allowing production of "any designated documents or electronically stored information [which can be obtained] *through detection devices* into reasonably usable form" (emphasis added)).

MPCA has since testified that some of this information was deleted, or that MPCA no longer "possesses" it. Documents produced or identified for former Assistant Commissioner Shannon Lotthammer, Commissioner John Linc Stine, and Mining Sector Director Ann Foss from July 11, 2016 through December 20, 2018 are incomplete. Ms. Lotthammer "regularly managed [her]

³ Declaration of Michael Schmidt ("Schmidt Decl.") ¶¶ 19-21, June 12, 2019 (RELATORS _0063880); Stephanie Handeland Dep. Tr. 15:6-8, 13-21 (Ex. B); Richard Clark Dep. Tr. 15:12-19 (Ex. C).

⁴ *See, e.g.*, Schmidt Decl. ¶ 10; Declaration of Jeff Udd ("Udd Decl") ¶ 10, June 12, 2019 (RELATORS _0063895).

⁵ *See, e.g.*, RELATORS _0062786-93.

⁶ Jeff Udd Dep. Tr. 13:13-14:10 (Ex. D).

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emails and [the March 13, 2018 email to EPA] was deleted.”⁷ MPCA has produced few documents involving Ms. Lotthammer prior to 2019 and even fewer involving Mr. Stine. Files from EPA under the Freedom of Information Act include documents still missing from MPCA’s production for both Ms. Lotthammer and Mr. Stine.⁸ MPCA has also stated it has not retained any responsive documents prepared or kept by Ms. Foss.⁹ Such documents must be retained under Chapters 13 and 15, of the Minnesota Statutes and when litigation is anticipated.

MPCA has the capacity to store information on and retrieve information from servers. MPCA has not done such a search, and therefore has not complied with Relators’ request to search for electronically stored information, including information deleted by any individual user. It is a “well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable.” *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) (granting motion to compel production of “computer equipment for purposes of investigation, copying, imaging, and interrogation, by a Court-appointed computer forensics expert”); *see also Deluxe Fin. Servs., LLC v. Shaw*, No. 16-CV-3065, 2017 WL 10505352, at *1 (D. Minn. Feb. 9, 2017) (granting motion to compel forensic inspection of work computer for files that may have been accessed and/or deleted despite earlier search conducted by company).¹⁰ The Court should order MPCA to perform a thorough search of not only of computers used by Ms. Lotthammer, Mr. Stine, and Ms. Foss from July 2016 through December 2018 but also of MPCA servers.

3. Claims of privilege under discussion with MPCA

MPCA has claimed attorney work product and attorney-client privilege for documents neither shown to be written nor received by counsel, documents shared with third parties EPA and PolyMet, MPCA staff communications merely copying Mr. Schmidt, and documents including Mr. Schmidt when he was no longer employed by MPCA and was the only attorney on the document. These documents are not subject to privilege. *Kobluk v. Univ. of Minnesota*, 574 N.W.2d 436, 441 (Minn. 1998). Relators’ counsel and counsel for MPCA have negotiated in good faith thus far, and Relators expect to continue discussions on documents that Relators have identified that lack the indicia for attorney work product or attorney-client privilege. Relators do not waive their objections to MPCA discovery deficiencies and will be prepared at the November 13, 2019 conference to support our request for an order compelling production if the parties are still unable to resolve their differences.

Based on the foregoing, Relators ask the Court to order that MPCA produce Mr. Schmidt’s April 17, 2018 and September 27, 2018 summaries and documents not properly covered by privilege, and require that MPCA search its servers and individual computers for PolyMet NPDES permit documents involving Ms. Lotthammer, Mr. Stine and Ms. Foss from July 2016 through December 2018.

⁷ MPCA Dep. Tr. 11:9-11 (Ex. E).

⁸ RELATORS_0064191-203.

⁹ MPCA Dep. at 19:23-20:3.

¹⁰ A courtesy copy of this case is attached as Exhibit F.

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Respectfully Submitted,

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

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November 11, 2019

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**Re: November 11, 2019 Meet and Confer, *In re Proposed Northmet Project*
Court File No. 62-cv-19-4626**

Counsel:

Thank you for the productive meet and confer this morning. Below, we memorialize our discussion regarding the discovery issues Relators raised in their Nov. 5, 2019 email and clarified on Nov. 8.

1. MPCA's identification of documents produced in response to RFPs

MPCA agreed that it will provide Relators a document identifying by Bates number for each RFP the documents MPCA has produced. MPCA expects to complete this task by Nov.15. Relators will let MPCA know if any delay in completing this categorization is problematic.

2. Omission of Keetac documents

MPCA cited Keetac in response to MPCA Written Deposition Question ("Question") 5 and Depo. Exhibit 4, yet produced no documents showing EPA had commented on the Keetac proposed final NPDES permit. Relators requested relevant documents or clarification that Keetac is not responsive. MPCA will determine if there are responsive documents and inform Relators.

3. Omission of documents responsive to Written Deposition Question 14

MPCA clarified that it produced all documents responsive to Written Deposition Question ("Question") 14 and that its identification of responses to RFPs by Bates number would include documents responsive to Question 14.

4. Deliberative privilege

MPCA agreed to forego a claim of deliberative process for its responses to Relators' RFPs, including supplementation. When asked whether MPCA would claim deliberative privilege if documents were released due to a forensic search, MPCA responded that if future documents are discovered related to Relators' set of RFPs, MPCA will not claim deliberative process privilege.

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EXHIBIT A

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5. AWP/ACP—no identified attorney

Relators identified documents where MPCA has claimed attorney work product (“AWP”) or attorney-client privilege (“ACP”) where no attorney is identified. MPCA said it would be inclined to produce documents if no attorney was identified or directed the preparation. Relators agreed that, based on the information they have, some documents may need to be produced and others may require a more detailed privilege log. Relators agreed to identify disputed documents, and MPCA stated it does not intend to claim attorney work product in a way that doesn’t apply.

6. AWP/ACP—third parties

Relators explained that there are documents where MPCA claims AWP or ACP where third parties were included in the communication, including: (1) Doc. Nos. 595 and 596 authored by EPA attorney Barbara Wester; (2) Doc. No. 160 authored by Richard Clark and sent to EPA attorney Mark Ackerman; and (3) Doc. Nos. 614 and 618 sent to PolyMet lawyers. Relators agreed to identify disputed documents, and MPCA agreed to take a look at these documents.

7. AWP/ACP—Mike Schmidt

Relators explained that there are two categories of documents regarding Mr. Schmidt that Relators believe must be disclosed: (1) documents between MPCA staff members where Mr. Schmidt is merely cc’d; and (2) emails between Schmidt and non-attorney MPCA staff after Mr. Schmidt left MPCA on February 1, 2019. Relators agreed to identify disputed documents, and MPCA agreed to take a look at these documents.

8. Substantial need for two documents

Relators agreed that Doc. Nos. 301 and 302 on MPCA’s privilege log were Mr. Schmidt’s AWP and stated that they believed there is a substantial need and justification for their disclosure. The parties agreed on the scope of the argument, but disagreed on its resolution. MPCA agreed that, upon seeing Relators’ letter, it would seriously consider whether MPCA is obligated to produce the documents.

9. Forensic search for documents

Relators clarified their request that MPCA conduct a forensic search of servers as well as computers for documents involving Ms. Lotthammer, Mr. Stine and Ms. Foss. MPCA opposed the request and stated that MPCA had done a “reasonable” search of Ms. Lotthammer’s computer. MPCA didn’t answer Relators’ question about whether MPCA had placed a litigation hold on documents. The parties did not reach agreement on this issue and agreed that it would be submitted to the Court.

In conclusion, Relators request that MPCA inform us by close of business on Tuesday on the issues where MPCA was either going to search for documents (#2) or review documents and issues (#5 through #8). The most efficient way to proceed would be if MPCA would identify which documents it agrees to produce, which documents MPCA has decided it will not produce absent Court direction, and which documents require further discussion or delineation of privilege. Thank you again for a productive meeting.

November 11, 2019

EXHIBIT A

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Best regards,

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cc: Counsel of record

EXHIBIT B

Deposition of Stephanie Handeland - 10/15/2019
In the Matter of the Denial of Contested Case Hearing Requests, et al.

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1 STATE OF MINNESOTA DISTRICT COURT
 2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
 3 Court File No. 62-CV-19-4626
 Case Type: Civil Other/Misc.

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In the Matter of the Denial of Contested
 6 Case Hearing Requests and Issuance of
 National Pollutant Discharge Elimination
 7 System/State Disposal System Permit No.
 MN0071013 for the Proposed NorthMet
 8 Project St. Louis county Hoyt Lakes and
 Babbitt Minnesota.

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 DEPOSITION OF
 STEPHANIE HANDELAND
 BY WRITTEN QUESTIONS

25 Taken: October 15, 2019 By Mary Piehl, B.S.Ed, RPR

EXHIBIT B

**Deposition of Stephanie Handeland - 10/15/2019
In the Matter of the Denial of Contested Case Hearing Requests, et al.**

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1 couldn't keep up.
2 (b) State whether the initial notes you took on
3 April 5, 2018 were in the same spiral notebook
4 from which the other notes in Handeland Exhibit 3
5 were copied.
6 THE WITNESS: Yes, they were in the same
7 notebook.
8 7. Your declaration of June 12, 2019 (Paragraph 10)
9 states that, during the April 5, 2018 call with
10 EPA regarding the PolyMet NPDES Permit, "I noticed
11 that Mike Schmidt was also taking notes, so I
12 stopped."
13 (a) Did you ever observe another MPCA staff
14 person taking notes during any other call or
15 meeting with EPA regarding the PolyMet NPDES
16 Permit?
17 THE WITNESS: Yes.
18 (b) Did you ever stop taking notes of a call or
19 meeting with EPA regarding the PolyMet NPDES
20 Permit based on the fact that another person was
21 also taking notes?
22 THE WITNESS: Not just for that reason.
23 The reason I stopped taking notes on April 5th was
24 because I couldn't keep up. That was the main
25 reason.

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1 THE WITNESS: I don't recall any other
2 time when that would have occurred.
3 9. Your declaration of May 28, 2019 (Paragraph 7)
4 states regarding the April 5, 2018 call with EPA in
5 which EPA read its comments on the PolyMet NPDES
6 Permit, "There was nothing new or surprising in
7 EPA's comments, all of which had been covered and
8 discussed in previous meetings or conference calls,
9 except for one small concern about domestic
10 wastewater, which MPCA summarized and addressed in
11 the fact sheet."
12 (a) Describe in detail all of the concerns
13 regarding the PolyMet NPDES Permit raised by EPA's
14 comments read to MPCA on April 5, 2018;
15 THE WITNESS: The EPA's comments all
16 appear in Handeland 4, and I don't recall any
17 other items mentioned during that call that are
18 outside of that letter that's in Handeland
19 Exhibit 4.
20 (b) Identify every document that reflects that
21 EPA's concerns regarding the PolyMet NPDES Permit
22 in the comments read aloud by EPA on April 5, 2018
23 had been discussed in previous meetings or
24 conference calls with MPCA.
25 THE WITNESS: I'm going to hand over to

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1 8. Your declaration of June 12, 2019 (Paragraph 10)
2 states that you discarded your notes from the
3 April 5, 2018 call with EPA regarding the PolyMet
4 NPDES Permit "because [your] note taking was
5 worthless."
6 (a) On what date did you discard these notes?
7 THE WITNESS: I recycled those notes on
8 the same date, April 5, 2018.
9 (b) Describe every communication you had with
10 anyone else at MPCA regarding the notes you took
11 of the EPA call on April 5, 2018.
12 THE WITNESS: None.
13 (c) Do you agree that your notes from April
14 5, 2018 would have memorialized the fact that a
15 call between MPCA and EPA pertaining to the
16 PolyMet NPDES Permit occurred on April 5, 2018?
17 THE WITNESS: Well, I would have written
18 "EPA call" on the top left of the page and the
19 date on the right side of the page, just like any
20 other time I took notes, and then that would have
21 shown that call took place on April 5th.
22 (d) Identify every other call or meeting with
23 EPA regarding the PolyMet NPDES Permit where you
24 took handwritten notes and subsequently discarded
25 them.

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1 you, the court reporter, documentation that
2 responds to Question 9(b). It's notes from those
3 calls, agendas, documentation, draft documents,
4 part of this exhibit, I guess.
5 MR. SCHWARTZ: And it has a sticky on it
6 that's just labeled Question 9(b). We have copies
7 for Relators.
8 (Exhibit No. 6 was marked for
9 identification.)
10 10. The annotated copy of EPA's comments on the draft
11 PolyMet NPDES Permit that Kevin Pierard read aloud
12 to MPCA is attached as Handeland Exhibit 4.
13 Referring to Mr. Pierard's statement that the
14 underlined portions of this document were read word
15 for word to you on April 5, 2018, state with
16 specificity any disagreements you have with Mr.
17 Pierard's statement and the basis for your
18 disagreement.
19 THE WITNESS: I don't disagree with any of
20 the underlined statements on this Handeland
21 Exhibit 4, but I can't confirm from memory that
22 everything was read word for word. I can't
23 remember exactly word for word what was read.
24 11. Your declaration of June 12, 2019 (Paragraph 14)
25 stated that once EPA "did send a letter stating that

EXHIBIT C

Deposition of Richard Clark - 10/16/2019
In the Matter of the Denial of Contested Case Hearing Requests, et al.

1 STATE OF MINNESOTA DISTRICT COURT
 2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
 3 Court File No. 62-CV-19-4626
 Case Type: Civil Other/Misc.

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 DEPOSITION OF
 RICHARD CLARK
 BY WRITTEN QUESTIONS

25 Taken: October 16, 2019 By Mary Piehl, B.S.Ed, RPR

EXHIBIT C

Deposition of Richard Clark - 10/16/2019
In the Matter of the Denial of Contested Case Hearing Requests, et al.

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1 pertaining to the PolyMet NPDES permit?

2 THE WITNESS: I don't believe the mining

3 sector ever thought it was mandatory that EPA and

4 MPCA agree on issues before EPA could comment.

5 Our goal was to try to resolve as many issues as

6 possible with EPA informally, such that if EPA

7 opted to send in comments, that the comments they

8 did could be -- would be minimal in number and

9 content.

10 I fully expected at some point in PolyMet's

11 permitting process that EPA would be submitting

12 written comments. I just hoped that they would be

13 based on a complete and thorough understanding of

14 the project and of the content of the permit

15 application, as well as on MPCA's consideration of

16 the various issues.

17 Throughout the entire PolyMet permitting

18 process, we were always aware that EPA, with their

19 objection authority on the final permit, they kind

20 of had the last word. They had the authority to

21 proceed as they saw fit, including submitting

22 comments if they chose to. We're always aware too

23 that they had the final approval authority on the

24 permit before the PCA could issue it.

25 7. Your declaration of June 12, 2019 (Paragraph 10)

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1 that information to memory. Since I had no intent

2 to go back and refer to those notes later, I

3 discarded the notes shortly after the meetings.

4 (c) For any notes from calls or meetings with

5 EPA regarding the PolyMet NPDES Permit that you

6 discarded, identify any other documents in which

7 the content of your notes was reflected or

8 retained.

9 THE WITNESS: I'm not aware of any.

10 8. Your declaration of May 28, 2019 (Paragraph 10)

11 states that by the August 2017 time frame "MPCA

12 and EPA had discussed together all of the major

13 issues that EPA had with the pre-proposed permit

14 and MPCA fully understood and considered EPA's

15 positions." Please explain in detail all of

16 "EPA's positions" that MPCA fully understood and

17 considered by August 2017.

18 THE WITNESS: My answer to this question

19 is reflected in a list that I would like to

20 provide to the court, or to you. I'm not sure of

21 the process of...

22 MR. SCHWARTZ: Just hand her the list and

23 then hand one to the Relators.

24 MR. NELSON: And this would be Exhibit

25 No. 4.

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1 states, "At meetings, I would sometimes take basic

2 notes in my own shorthand to help me remember what

3 had come up in the meeting" and "to help commit

4 the issues to memory." Clark Exhibit 2 contains

5 agendas, emails, and notes prepared by Stephanie

6 Handeland pertaining to approximately three dozen

7 calls or meetings between MPCA and EPA regarding

8 the PolyMet NPDES Permit since August 2016.

9 (a) Referring to Clark Exhibit 2 as needed,

10 identify all calls or meetings with EPA regarding

11 the PolyMet NPDES Permit at which you took notes.

12 THE WITNESS: I'm not exactly sure at which

13 specific meetings I may have taken notes at. I

14 believe I wrote at least something down at more

15 than half, but certainly not all of the meetings.

16 And I really have no way of going back to check on

17 that to ascertain that. Since I never intended to

18 refer back to those notes, I discarded them

19 shortly after the meeting.

20 (b) For any notes from calls or meetings with

21 EPA regarding the PolyMet NPDES Permit that you

22 discarded, state why you discarded your notes if

23 they helped you commit the issues to memory;

24 THE WITNESS: For me, the physical act of

25 writing something down is what helps me commit

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1 (Exhibit No. 4 was marked for

2 identification.)

3 9. Your declaration of May 28, 2019 (Paragraph 15)

4 states that "On April 5, 2018, MPCA and EPA had a

5 conference call in which EPA told us that it would

6 read from its draft written comments." How and

7 when did you first learn that EPA had prepared

8 written comments on the draft PolyMet NPDES

9 Permit?

10 THE WITNESS: Via an email I got from Jeff

11 Udd on March 16, 2018.

12 10. Your declaration of May 28, 2019 (Paragraph 15)

13 states with respect to the April 5, 2018 call with

14 EPA regarding the PolyMet NPDES Permit, "EPA

15 treated the call as a summary or compendium of all

16 of its previous concerns about the public comment

17 draft permit." Do you agree that one of EPA's

18 primary concerns in EPA comments read to MPCA on

19 April 5, 2018 was the lack of WQBELs in the

20 PolyMet NPDES Permit?

21 THE WITNESS: Yes.

22 11. Your declaration of May 28, 2019 (Paragraph 17)

23 states that a number of the issues raised in the

24 April 5, 2018 call with EPA regarding the PolyMet

25 NPDES Permit "were not finally resolved, however,

EXHIBIT D

Deposition of Jeff Udd - 10/15/2019
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 DEPOSITION OF
 JEFF UDD
 BY WRITTEN QUESTIONS

Taken: October 15, 2019 By Mary Piehl, B.S.Ed, RPR

EXHIBIT D

**Deposition of Jeff Udd - 10/15/2019
In the Matter of the Denial of Contested Case Hearing Requests, et al.**

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1 was pretty limited. I spoke to Ann Foss, F-O-S-S,
2 previous Mining Director at the MPCA, occasionally
3 to get status updates on the permit. I really
4 started attending routine check-in meetings in
5 December of 2017.

6 2. Based on your experience working at MPCA since
7 2002, identify every NPDES permit other than the
8 PolyMet NPDES Permit for which EPA prepared
9 written comments on the draft NPDES permit, did
10 not send the written comments and, instead, read
11 EPA's comments aloud to MPCA.

12 THE WITNESS: From my experience, I'm not
13 aware of any other MPCA permits.

14 3. Based on your experience working at MPCA since
15 2002, identify every NPDES permit for which EPA
16 sent written comments on the draft NPDES permit
17 during the public comment period.

18 THE WITNESS: In my experience, I'm aware
19 of one, which is the US Steel MinnTac Tailings
20 Base permit which was issued on December 1, 2018.

21 4. Your declaration of May 28, 2019 (Paragraph 5)
22 states that in reading EPA's comments on the draft
23 PolyMet NPDES Permit to MPCA on April 5, 2018, EPA
24 was "alerting" MPCA to the issues it would be
25 looking at most carefully and that "As of April 5,

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1 states that at the conclusion of the two-day
2 in-person meeting between EPA and MPCA on
3 September 25 and 26, 2018 "I believed that no
4 unmanageable issues remained, and we were in a
5 position to finalize the draft permit."

6 (a) State on what you based this opinion.

7 THE WITNESS: My opinion was based on the
8 discussions at the September 26 meeting with the
9 EPA. The participants from EPA at that meeting
10 included Linda Holst, H-O-L-S-T, Kevin Pierard,
11 P-I-E-R-A-R-D, Candace Bauer, B-A-U-E-R, Barbara
12 Wester, W-E-S-T-E-R, Krista McKim, M-C-K-I-M, and
13 Mark Ackerman, A-C-K-E-R-M-A-N.

14 So the September 26 meeting began with
15 continued discussion regarding several issues,
16 including the treatment technology proposed by the
17 company, the appropriateness of WQBELs, and the
18 federal enforceability of the permit as, as
19 drafted. At one point during that September 26
20 meeting we took a break and EPA had a private
21 discussion. After resuming the meeting, EPA
22 presented recommendations to MPCA staff that EPA
23 indicated would resolve their concerns regarding
24 their two main issues, WQBELs and federal
25 enforceability. Those recommendations presented

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1 2018, most of these issues had been discussed, but
2 some had not been finally resolved." Your
3 declaration of June 12, 2019 (Paragraph 7) states
4 that the April 5, 2018 call was about "what EPA
5 would be looking for in evaluating the adequacy of
6 the pre-proposed draft."

7 (a) Explain whether you agree that one of the
8 primary issues that EPA was alerting MPCA would be
9 looked at by EPA to evaluate the adequacy of the
10 PolyMet NPDES Permit was whether the Permit
11 contained the WQBELs EPA believed were required.

12 THE WITNESS: After the April 5, 2018 phone
13 call I did believe that one of the primary issues
14 that EPA and MPCA would continue to discuss was
15 WQBELs.

16 (b) Explain whether you agree that as of April
17 5, 2018 the issues of whether the PolyMet NPDES
18 Permit would contain WQBELs had not been fully
19 resolved.

20 THE WITNESS: So as of April 5, 2018,
21 further discussion regarding WQBELs was needed,
22 but I also believed that developing responses to
23 the comments that we received during the public
24 notice period would help in that discussion.

25 5. Your declaration of May 28, 2019 (Paragraphs 7-8)

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1 by EPA were primarily presented by Kevin Pierard.

2 Regarding the WQBELs issue, it was agreed
3 that the PCA would add additional operating limits
4 for mercury, arsenic, cobalt, lead and nickel, to
5 ensure that the proposed treatment technology was
6 complying with water quality standards.

7 Regarding the federal enforceability of the
8 permit, it was agreed that the MPCA would add
9 permit language prohibiting the violation of water
10 quality standards. This prohibition would ensure
11 that EPA was able to take enforcement action on
12 any water quality violations if and as needed.

13 (b) Explain whether you agree that as of
14 September 26, 2018, the issue of whether the
15 PolyMet NPDES Permit would contain WQBELs remained
16 unresolved.

17 THE WITNESS: I don't agree that as of
18 September 26, 2018 that that was unresolved.

19 (c) Explain whether you agree that, as of the
20 October 22, 2018 call between MPCA and EPA
21 regarding the PolyMet NPDES Permit, EPA stated
22 they would focus their review on final draft
23 permit language on WQBELs.

24 THE WITNESS: I disagree that the EPA
25 review would focus on the final draft permit

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<p>1 language on WQBELs, because there were no WQBELs</p> <p>2 proposed and EPA knew that. The EPA review would</p> <p>3 focus on how MPCA incorporated the recommendations</p> <p>4 from the September 26, 2018 meeting regarding</p> <p>5 WQBEL discussion and federal enforceability.</p> <p>6 Those incorporations in the permit included the</p> <p>7 additional operating limits I mentioned previously</p> <p>8 and permit language prohibiting any violation of</p> <p>9 water quality standards, both of which provided</p> <p>10 additional water quality protection.</p> <p>11 6. Your declaration of May 28, 2019 (Paragraph 9)</p> <p>12 cites the Memorandum of Agreement ("MOA") between</p> <p>13 MPCA and EPA. Describe the substance of any</p> <p>14 discussions between MPCA and EPA in 2018 in which</p> <p>15 you participated or about which you were informed</p> <p>16 regarding the potential to amend the MOA in</p> <p>17 connection with the PolyMet NPDES Permit.</p> <p>18 THE WITNESS: I'm not aware of any such</p> <p>19 discussions.</p> <p>20 7. Your declaration of May 28, 2019 (Paragraph 10)</p> <p>21 states that the pre-proposed version of the</p> <p>22 PolyMet NPDES Permit sent to EPA on October 25,</p> <p>23 2018 "reflected all of the discussion points from</p> <p>24 the two-day, in-person meeting in September 2018."</p> <p>25 Do you agree that this pre-proposed version of the</p>	<p>1 question because it goes directly to the alleged</p> <p>2 procedural irregularities in this matter, but we</p> <p>3 agree that the judge has ruled the witness does</p> <p>4 not need to answer.</p> <p>5 9. Your declaration of June 12, 2019 (Paragraph 5)</p> <p>6 states that you have "no knowledge of whether</p> <p>7 Regional Administrator Stepp prevented</p> <p>8 professional staff from sending written comments"</p> <p>9 and "no knowledge of any communications between</p> <p>10 MPCA Commissioner John Linc Stine and EPA</p> <p>11 Administrator Cathy Stepp about alleged complaints</p> <p>12 with EPA's written comments."</p> <p>13 (a) How did you first learn that Shannon</p> <p>14 Lotthammer had requested that EPA not send its</p> <p>15 written comment letter on the draft PolyMet NPDES</p> <p>16 Permit during the public comment period?</p> <p>17 THE WITNESS: Well, I was aware during the</p> <p>18 week of March 12th, 2018 that Shannon Lotthammer</p> <p>19 was having discussions with EPA regarding the EPA</p> <p>20 permit review period. At that time I did not know</p> <p>21 that EPA had proposed a comment or prepared a</p> <p>22 comment letter. During that week Shannon had</p> <p>23 asked me if I was okay with extending EPA's review</p> <p>24 period of the proposed permit beyond what was</p> <p>25 outlined in the Memorandum of Agreement between</p>
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<p>1 PolyMet NPDES Permit did not provide WQBELs?</p> <p>2 THE WITNESS: Yes.</p> <p>3 8. (a) In the September 25, 2018 meeting between</p> <p>4 MPCA, EPA and PolyMet, did PolyMet oppose putting</p> <p>5 WQBELs in the PolyMet NPDES Permit due to concerns</p> <p>6 that "anti-backsliding" would prevent removing</p> <p>7 WQBELs even if water quality standards changed?</p> <p>8 MR. SCHWARTZ: I object to this question,</p> <p>9 instruct the witness not to answer it, based on</p> <p>10 Judge Guthmann's September 26th ruling -- sorry,</p> <p>11 September 16th ruling.</p> <p>12 MS. MACCABEE: Relators agree that that</p> <p>13 was Judge Guthmann's ruling, and Relators believe</p> <p>14 that the witness should be required to answer this</p> <p>15 question because it goes directly to some of the</p> <p>16 alleged procedural irregularities that Relators</p> <p>17 have cited.</p> <p>18 (b) Identify all other communications of which</p> <p>19 you are aware where PolyMet expressed opposition</p> <p>20 to including WQBELs in the PolyMet NPDES Permit.</p> <p>21 MR. SCHWARTZ: I object to this question and</p> <p>22 instruct the witness not to answer it, again based</p> <p>23 on Judge Guthmann's September 16th ruling.</p> <p>24 MS. MACCABEE: Relators again say we</p> <p>25 believe that the witness should answer this</p>	<p>1 MPCA and EPA. I told Shannon I was okay with</p> <p>2 extending the review time.</p> <p>3 (b) How did you first see a copy of Shannon</p> <p>4 Lotthammer's March 13, 2018 email to Kurt Thiede</p> <p>5 asking that EPA not send its written comment</p> <p>6 letter on the draft NPDES Permit during the public</p> <p>7 comment period?</p> <p>8 THE WITNESS: I first saw a copy of the</p> <p>9 March 13, 2018 email at a release by the EPA</p> <p>10 union, which was in June of 2019.</p> <p>11 10. Stephanie Handeland's notes of March 5, 2018,</p> <p>12 attached as Udd Exhibit 1, state that "EPA will</p> <p>13 submit comments during PN [public notice] period,"</p> <p>14 that Kevin Pierard said, "EPA will discuss draft</p> <p>15 comments," and that MPCA and EPA would "[s]et up</p> <p>16 call early next week" at 9:00, 10:00 or 11:00 on</p> <p>17 Monday.</p> <p>18 (a) Did you speak by phone with Mr. Pierard</p> <p>19 on or about Monday, March 12, 2018 about EPA's</p> <p>20 draft comments on the draft PolyMet NPDES Permit?</p> <p>21 THE WITNESS: I don't recall speaking with</p> <p>22 Mr. Pierard on or about March 12 of the 2018.</p> <p>23 (b) In the discussion with Mr. Pierard on or</p> <p>24 about Monday March 12, 2018, did he provide</p> <p>25 details about what would be contained in EPA's</p>

EXHIBIT E

**Deposition of MPCA Designee Jeff Udd - 10/15/2019
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1 STATE OF MINNESOTA DISTRICT COURT
 2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
 3 Court File No. 62-CV-19-4626
 Case Type: Civil Other/Misc.

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In the Matter of the Denial of Contested
 6 Case Hearing Requests and Issuance of
 National Pollutant Discharge Elimination
 7 System/State Disposal System Permit No.
 MN0071013 for the Proposed NorthMet
 8 Project St. Louis county Hoyt Lakes and
 Babbitt Minnesota.

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 DEPOSITION OF
 MPCA DESIGNEE JEFF UDD
 BY WRITTEN QUESTIONS

Taken: October 15, 2019 By Mary Piehl, B.S.Ed, RPR

EXHIBIT E

**Deposition of MPCA Designee Jeff Udd - 10/15/2019
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1 implementing regulations; and
2 V. "You" or "your" refers to the Minnesota
3 Pollution Control Agency ("MPCA"), and its employees,
4 agents, and representatives, including, but not limited
5 to, counsel.

6 (The following written questions were
7 read to the witness by the court reporter.)

WRITTEN DEPOSITION QUESTIONS

10
11 1. The June 18, 2019 media release from the EPA union
12 leaking a portion of an email on March 13, 2018
13 from Shannon Lotthammer to Curt Thiede is attached
14 as MPCA Exhibit 1. Ms. Lotthammer's email in MPCA
15 Exhibit 1 is entitled "FW: Minnesota Speaker's
16 Office." The email reads, in part, "We have asked
17 that EPA Region 5 not send a written comment
18 letter during the public comment period and
19 instead follow the steps outlined in the MOA, and
20 wait until we have reviewed and responded to
21 public comments and made associated changes before
22 sending comments from EPA." The email also refers
23 to additional notes below from MPCA Commissioner
24 John Linc Stine.

25 MR. NELSON: Just want to take a moment.

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1 conversation with the Speaker's Office about
2 sulfate legislation. Cathy Stepp at EPA forwarded
3 that on to John Linc Stine at MPCA. John Stine
4 replied to EPA and added Shannon Lotthammer as cc
5 to that email string. Shannon Lotthammer then
6 used that same email string to discuss the
7 application of the Memorandum of Agreement to the
8 PolyMet project, and the subject of the email was
9 never changed.

10 2. Michael Schmidt's declaration of June 12, 2019
11 (Paragraph 20) states with respect to the April 5,
12 2018 call between MPCA and EPA regarding the
13 PolyMet NPDES Permit, "I do not remember
14 specifically what I did with my handwritten notes"
15 and that Mr. Schmidt customarily would not retain
16 handwritten notes because he would integrate those
17 notes in a typed document.

18 (a) Has MPCA retained either Mr. Schmidt's
19 original handwritten notes of April 5, 2018 or his
20 typed document regarding the substance of that
21 call?

22 MR. SCHWARTZ: The witness may answer the
23 question, but at this point just want to register
24 an objection to lack of foundation for part of the
25 question. Having done that, the witness may

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1 Shannon Lotthammer was referred to as Sharon
2 Lotthammer.

3 (a) Please explain why Ms. Lotthammer's March
4 13, 2018 email was not produced in response to
5 WaterLegacy's five Data Practices Act requests
6 beginning on March 26, 2018 or Minnesota Center
7 for Environmental Advocacy's June 19, 2019 Data
8 Practices Act request.

9 THE WITNESS: Shannon Lotthammer regularly
10 managed her emails and it was deleted prior to any
11 outstanding EPA requests.

12 (b) If MPCA claims that Ms. Lotthammer's March
13 13, 2018 email has been discarded, state from
14 which paper files and computers it was discarded,
15 by whom and on what date.

16 THE WITNESS: Shannon did not print a copy
17 of the email she had deleted from the system, and
18 she doesn't recall the date that she deleted the
19 email.

20 (c) Explain why Ms. Lotthammer's March 13, 2018
21 email is entitled "FW: Minnesota Speaker's
22 Office."

23 THE WITNESS: The email string started as
24 an email generated by Kurt Thiede at EPA on an
25 unrelated subject. That subject was his

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1 answer.

2 THE WITNESS: No.

3 (b) If MPCA claims that Mr. Schmidt's typed
4 document regarding the substance of the April 5,
5 2018 call has been discarded, state from which
6 paper files and computers it was discarded, by
7 whom and on what date.

8 MR. SCHWARTZ: Again the witness may
9 answer the question, but I want to register an
10 objection to the lack of foundation.

11 THE WITNESS: The MPCA does not claim such
12 a typed document has been discarded.

13 3. The Memorandum of Agreement ("MOA") between MPCA
14 and EPA signed in 1974 and amended in 2000 to
15 reflect the Great Lakes Initiative, is attached as
16 MPCA Exhibit 2.

17 (a) Given MPA provisions pertaining to Section
18 124.22, including paragraph (8) on page 4, after
19 MPCA received EPA's November 3, 2016 letter
20 stating deficiencies in PolyMet's NPDES Permit
21 application, on what basis did MPCA conclude it
22 was entitled to proceed with the PolyMet NPDES
23 Permit?

24 THE WITNESS: The November EPA letter was
25 based on the initial permit application, which the

2017 WL 10505352

Only the Westlaw citation is currently available.

United States District Court, D. Minnesota.

DELUXE FINANCIAL SERVICES, LLC, Plaintiff,

v.

Brian S. SHAW, and Harland
Clarke Corp., Defendants.

Civil No. 16-cv-3065 (JRT/HB)

Signed 02/09/2017

Attorneys and Law Firms

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David K. Montgomery, Pro Hac Vice, Jackson Lewis P.C., Cincinnati, OH, Jillian M. Flower, Lee A. Lastovich, Jackson Lewis PC, Minneapolis, MN, for Defendants.

ORDER

HILDY BOWBEER, United States Magistrate Judge

*1 This matter is before the Court on Plaintiff's Motion to Compel Rule 34 Request for Inspection [Doc. No. 72]. The Court held a hearing on this motion on January 27, 2017. (Minutes [Doc. No. 85].)¹

I. Background

On September 14, 2016, Plaintiff Deluxe Financial Services, LLC ("Deluxe") brought claims against former employee Brian S. Shaw ("Shaw") and Deluxe's competitor Harland Clarke Corp. ("Harland Clarke") for misappropriating trade secrets and tortiously interfering with Deluxe's business. (Compl. [Doc. No. 1].) According to the Amended Complaint dated November 7, 2016, the allegations stem from Shaw's alleged improper retention of Deluxe documents after he was terminated by Deluxe as part of a workforce reduction and later joined Harland Clarke. (Am. Compl. ¶¶ 10, 39, 48 [Doc. No. 14].) Specifically, Deluxe alleges Shaw brought multiple USB devices containing over 7,000 Deluxe business files to his employment at Harland Clarke. (*Id.* ¶¶ 41, 64.) Shaw

then used this confidential information to respond to a request for proposal for a new multiyear contract, and stole one of Deluxe's former clients, costing Deluxe millions of dollars of lost revenue in the coming years. (*Id.* ¶¶ 53-54.)

Deluxe sought information from Harland Clarke after it discovered Shaw's alleged misconduct. Harland Clarke informed Deluxe that its investigation revealed Shaw had inserted at least two USB devices containing Deluxe files into his Harland Clarke work computer. (Sottile Decl. ¶ 6 [Doc. No. 80].) Harland Clarke eventually provided these USBs to Deluxe's forensic expert, Stroz Friedberg. (*Id.* ¶ 9.) Harland Clarke also reported to Deluxe that it had performed a search of Shaw's Harland Clarke work laptop computer and had found no Deluxe files from the two USB devices on the laptop. (*Id.* ¶ 12.)

On November 23, 2016, Deluxe served a request pursuant to Fed. R. Civ. P. 34 on Harland Clarke, asking to inspect Shaw's work computer to obtain a forensic image from which it could determine whether any Deluxe or Deluxe-originated document resides, or once resided, on such device.² (Mosvick Decl. Ex. A [Doc. No. 76].) Harland Clarke objected on the grounds that it suffered from "technical or procedural deficiencies," was overly broad, intrusive, and disproportionate, and that Harland Clarke would conduct a search and produce responsive documents in lieu of allowing the requested inspection. (Mosvick Decl. Ex. B [Doc. No. 76].) Deluxe now asks the Court for an order permitting Deluxe's forensic computer expert to conduct the requested inspection.

II. Discussion

Federal Rule of Civil Procedure 34(a)(1)(A) allows a party to serve on another party a request "within the scope of Rule 26(b)" to permit inspection of "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained"

*2 Rule 26(b)(1) provides:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs

of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The 2015 amendments to Rule 26 “restore[d] the proportionality factors to their original place in defining the scope of discovery.” Fed. R. Civ. P. 26 advisory committee’s note to 2015 amendment. The phrase “reasonably calculated to lead to the discovery of admissible evidence” was deleted because the phrase had been used incorrectly to expand the scope of discovery. *Id.* As amended, the rule still allows for “[d]iscovery of nonprivileged information not admissible in evidence ... so long as it is otherwise within the scope of discovery.” *Id.*

Deluxe argues a forensic inspection of the laptop computer used by Shaw at Harland Clarke is necessary so that it can determine what Deluxe files Shaw accessed on that computer, including any that may subsequently have been deleted.

Courts start from the position that granting a forensic inspection of an opponent’s electronic storage device “is highly intrusive.” *A.M. Castle & Co. v. Byrne*, 123 F. Supp. 3d 895, 900 (S.D. Tex. 2015). However, such inspections are sometimes justified, especially in cases where the device itself and the electronic data about its use that may be revealed by the electronic inspection is relevant to the claims and defenses in the suit. *Id.* A case involving the alleged misappropriation of trade secrets is such a cause of action. *Id.* at 901. Additionally, where “there are discrepancies or inconsistencies in the responding party’s discovery responses, a court may allow an expert to examine a mirror image of the party’s hard drives.” *Id.*

During the hearing, Defendants argued that to prevail on its motion for a forensic inspection, Deluxe must show both factors, both that the device itself and the information sought to be gained through the inspection is relevant to the claims at issue *and* that there has been discovery misconduct.

Although many of the cited cases do involve the presence of both factors, the Court has not found a case that explicitly requires both. Indeed, the Court has found several cases where courts have granted forensic inspections in the absence of any evidence of discovery misconduct or shortcomings. *See, e.g., Weatherford U.S., LP v. Innis*, No. 4:09-CV-061, 2011 WL 2174045 (D.N.D. June 2, 2011); *Calyon v. Mizuho Sec. USA Inc.*, No. 07CIV02241RODF, 2007 WL 1468889, at *3 (S.D.N.Y. May 18, 2007) (courts analyzing whether forensic inspection is appropriate “appear to consider the relationship between the plaintiff’s claims and the defendants’ computers and, *in some cases*, whether the defendant has fully complied with discovery requests, in determining how the requested electronic discovery should proceed (emphasis added)); *Frees, Inc. v. McMillian*, No. CIV.A.05 1979, 2007 WL 184889, at *2 (W.D. La. Jan. 22, 2007), *aff’d*, 2007 WL 1308388 (W.D. La. May 1, 2007); *Physicians Interactive v. Lathian Sys., Inc.*, No. CA 03-1193-A, 2003 WL 23018270, at *10 (E.D. Va. Dec. 5, 2003).

*3 Here, there is no question that the device itself – the laptop computer used by Shaw in his employment at Harland Clarke – is relevant to the claims and defenses in this case. Deluxe claims Shaw used that laptop to access confidential Deluxe files, and that it may contain evidence of the extent to which those files were used or referred to in the course of his work at Harland Clarke. Harland Clarke acknowledges that two USB drives that contained Deluxe files were attached to the laptop, but denies that there is any evidence that any confidential Deluxe files were accessed from the laptop. Thus, an inspection of the laptop is likely to yield information that would tend either to prove or disprove the parties’ respective positions as to Shaw’s alleged use of Deluxe confidential information in the course and scope of his work at Harland Clarke.

Harland Clarke contends, however, that even if Deluxe has made the necessary showing, the Court should not grant a forensic inspection because Harland Clarke has already searched Shaw’s computer. This argument has two sub-parts. First, Harland Clarke argues that its internal IT personnel have already searched Shaw’s computer, and that search showed that none of the Deluxe files from the two USB devices could be found on the laptop. (Sottile Decl. ¶ 12.) Next, Harland Clarke appears to argue that Deluxe is not entitled to use its own forensic expert but should accept the results of the investigation made by Harland Clarke’s internal expert.

Addressing Harland Clarke's second point first, other courts have ruled the party seeking the forensic inspection is entitled to its own forensic expert. *See, e.g., Multifeeder Tech., Inc. v. British Confectionery Co.*, No. 09-cv-1090 (JRT/TNL), 2012 WL 4135848, at *7 n.6 (D. Minn. Sept. 18, 2012) (recounting magistrate judge's opinion that appointed the plaintiff's proffered forensic expert where defendant argued only that it be allowed to conduct its own search); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 653 (D. Minn. 2002) (allowing plaintiff to choose its own expert in the field of computer forensics to conduct an inspection of the defendants' computer equipment). While the Court does not adopt a general rule that a party in Deluxe's position is automatically entitled to have its own forensic consultant conduct the inspection, it concludes that Deluxe has demonstrated good cause to do so here. First, while Harland Clarke states that it performed a search of Shaw's computer and found that only two of the USB drives containing Deluxe files had been attached at some point, and further found none of the Deluxe files from the two USB devices on the laptop, it has provided no affidavit, declaration, or other evidence showing, for example, by whom, how thoroughly, and pursuant to what protocol the search was conducted. Second, the results of that inspection, as reported by Harland Clarke's counsel, do not cover all of the information sought to be discovered by Deluxe, including, for example, whether there is evidence that the laptop had been used to open Deluxe files from one of the USB drives even if those files had not been saved or copied to the laptop.

Harland Clarke raises two additional concerns that should be addressed here. First, it argues the results of Deluxe's forensic examination should be shared with counsel for all parties. The Court agrees. Other courts have required forensic experts to provide their reports to counsel for both sides. *See, e.g., Weatherford U.S., LP*, No. 4:09-CV-061, 2011 WL 2174045, at *5 ("the expert shall provide the parties with a report describing the computers that defendants produced as well as his actions with respect to each computer"); *Ameriwood*

Indus., Inc. v. Liberman, No. 4:06CV524-DJS, 2007 WL 685623, at *1 (E.D. Mo. Feb. 23, 2007) ("As agreed to by the parties, the Court will also order the Expert to provide the parties with information concerning defendants' usage of their computer equipment."). And last but not least, Deluxe agrees the results should be distributed to counsel for both sides. (Pl.'s Mem. Supp. at 10 [Doc. No. 74] ("[T]he Court may order that Deluxe's expert create the forensic image, examine the forensic image for only evidence regarding files related to Deluxe or information originating with Deluxe and evidence of spoliation, and distribute the examination results to counsel for both sides.")).

*4 Second, Harland Clarke expresses concern about whether the proposed forensic protocol adequately protects the confidentiality of its own business information by clearly confining distribution of the results of the examination to counsel. This issue was not sufficiently briefed for the Court to make a ruling on specific language for the forensic protocol. The Court therefore directs the parties to meet and confer on an adequate forensic protocol based on this Order.

III. Conclusion

Accordingly, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to Compel Rule 34 Request for Inspection [Doc. No. 72] is **GRANTED**. The parties are directed to meet and confer on language for a forensic protocol that adequately addresses confidentiality concerns.

All Citations

Slip Copy, 2017 WL 10505352

Footnotes

- 1 The Court also heard Non-Party Mark Johnson's Motion to Quash Subpoena and for a Protective Order [Doc. No. 52] at that hearing. That motion will be addressed in a separate order.
- 2 Deluxe also asked for an inspection of other electronic devices, including a computer used by another Harland Clarke employee, Mark Johnson, but Deluxe subsequently narrowed its requests during the meet and confer process.