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November 29, 2019

Via E-filing and hand deliveredThe 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 10(f) of the Court's Amended Order Setting Evidentiary Hearing, Relators provide this written submission regarding the "desktops/laptops and servers to be searched, all search terms, whether to make a forensic copy of the devices to be searched, and a procedure to identify and protect privileged documents" Counsel for Relators and Minnesota Pollution Control Agency ("MPCA") have conferred and agreed on most of the above issues. Namely, Relators and MPCA agree that the independent, jointly-retained forensic search expert, XACT Data Discovery ("XACT") shall make an independent determination as to "desktop/laptops and servers to be searched [and] whether to make a forensic copy of the devices to be searched" Further, the parties agree that we obtain and consider XACT's proposal regarding how best to identify and protect privileged documents. The parties, however, have not been able to come to an agreement as to the search terms to be used.¹

Relators first served requests for production of documents ("RFPs") on August 21, 2019. (Relators' Requests for Production of Documents to MPCA (Aug. 21, 2019).) The RFPs contained a request for a forensic search of "erased, fragmented or damaged data." (*Id.* at Definition H.) Indeed, MPCA has testified that certain documents have been deleted. As the Court noted at the November 13, 2019 Pre-Hearing Conference, MPCA was obligated to do a forensic search upon receipt of the RFPs. (Pre-Hr'g Conference Tr. 92:23-93:3.) In fact, the Court found that, in spite of Relators' clear request, MPCA had not previously performed an adequate forensic search. (*Id.* at 107:12-22.) Therefore, the Court ordered the parties to retain an expert to conduct a forensic search, to discover "documents [that] may have been erased, even inadvertently, that are

¹ Counsel for both Relators and MPCA attempted to resolve their differences on this issue. Minn. R. Gen. Prac. 115.10. Counsel also agreed to continue attempts to agree on this issue. That said, given the expedited timeline, Relators respectfully request an order from the Court.

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responsive to the issues in this case.” (*Id.* at 107:1-3.) To meet this purpose, the search terms must be broad enough to include persons involved in the permitting process and issues related to the permit, including concerns raised by the U.S. Environmental Protection Agency (“EPA”). Any burden this search causes MPCA is due to its failure to perform an adequate forensic search in a timely fashion. MPCA’s objection that the search burdens them now is not persuasive.

On November 22, 2019, Relators received a letter from MPCA’s counsel which detailed MPCA’s prior searches. (*See* Am. Order Setting Evidentiary Hr’g ¶ 10(e).) MPCA claimed it had downloaded Shannon Lotthammer’s Outlook mailbox file and “forensically imaged a 74GB Dell Tablet . . . associated with Shannon Lotthammer.” (Letter from John Martin, Counsel for MPCA, to Relators’ Counsel (Nov. 22, 2019) (attached as **Ex. A**.) MPCA included a list of search terms it had previously used to search Lotthammer’s Outlook file and Tablet. (*Id.*) Further, MPCA claimed that a “Hard Drive . . . associated with Ann Foss” had been forensically imaged and was in a secured forensics lab. (*Id.*) No searches had been made of this hard drive. (*Id.*)

On November 27, 2019, MPCA and Relators exchanged proposed search terms. (*See* MPCA, *Proposed Search Terms for Forensic Examination* (Nov. 27, 2019) (attached as **Ex. B**.) MPCA’s proposed search terms were **narrower** than the terms they had previously used. For example, MPCA indicated it had previously used “John Cherry” as a search term, but that term is not included in MPCA’s proposed terms for XACT’s forensic search. (*Compare* Ex. A, with Ex. B.) Jon Cherry is the President and CEO of Poly Met; any documents that contain his name are very likely to be related to permitting the NorthMet Project. As another example, MPCA had previously searched for “Poly Met or Polymet,” but now proposes to only search for “Poly Met or Polymet” in conjunction with other search terms. (*Compare* Ex. A, with Ex. B.) The former would capture *any* document containing a mention of Poly Met, while the latest proposal would exclude many documents generated by Lotthammer, Foss, or John Linc Stine during the relevant time period² even before determining whether they were relevant to any of the issues in these proceedings.

Relators propose broader search terms based on the requests for production (“RFPs”) propounded to MPCA on August 21, 2019. (Relators, *Proposed Search Terms for Forensic Examination* (Nov. 29, 2019) (attached as **Ex. C**.)³ Relators’ search terms are designed to find “documents [that] may have been erased, even inadvertently, that are responsive to the issues in this case.” (Pre-Hr’g Conference Tr. 107:1-3.) While some of Relators’ search terms are included in MPCA’s search terms, Relators’ search terms more accurately capture both the broad nature of this search and the scope of Relators’ RFPs. Considering that the Court ordered a search to retrieve deleted data, if the search terms are narrow there is a strong possibility that responsive documents will never be

² The Court ordered search would be limited the period starting with July 11, 2016 to the date when each individual was no longer employed by MPCA. (Pre-Hr’g Conference Tr. 108:18-23.)

³ Relators shared these proposed search terms with MPCA’s counsel on November 27, 2019, and discussed these terms with MPCA’s counsel during a November 29, 2019 meet and confer.

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found. Therefore, Relators would intentionally cast a wide net to capture documents relating to interactions of the custodians with MPCA or EPA staff involved with the NPDES permitting processes, the Memorandum of Agreement with EPA, Data Practices Act requests and the PolyMet NorthMet Project. If this wide net catches documents that are not responsive, MPCA would have the opportunity to review the collected documents before producing them to Relators.

In the interest of brevity, Relators will not separately justify each of their proposed terms. Three examples, however, suffice to show the Court that Relators' proposed terms are linked to the issues of this case. First, Relators propose search terms based on the fact that the NorthMet Project would be constructed in and around an inactive taconite processing facility, formerly owned by LTV and Cliffs Erie, near the towns of Babbitt and Hoyt Lakes, Minnesota. (Ex. C, Nos. 3, 10, 42, 43.) While MPCA had previously searched for "LTV" and "Babbitt," its November 27 proposed terms do not include any reference to the location of the mine project. (*Compare* Ex. A, *with* Ex. B). EPA's comments on the draft NPDES permit raised concerns about the transfer of the LTV permit to PolyMet and confusion as to responsibility for continuing seep discharges from taconite mining waste. (RELATORS_0060959.) Second, Relators propose terms based on the fact that MPCA knew, as shown in comments from EPA written in March 2018 and read to MPCA staff on April 5, 2018, that EPA was concerned that the "permit does not include WQBELs for key parameters and appears to authorize discharges that could exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc." (RELATORS_0060956.) Therefore, Relators propose terms such as "EPA and mercury," "EPA and WQBEL," and "'Water Quality' and permit." (Ex. C, Nos. 25, 30, 73.) MPCA proposes no such terms. (*See* Ex. B.) Third, Relators propose terms including MPCA and EPA staff that were included in email and meeting discussions relevant to this matter, where MPCA would limit the search to only eight people. (*Compare* Ex. B, *with* Ex. C.)

During a November 29, 2019 conference on this issue, MPCA proposed that each search term be further limited by an identifier directly linking the search term to the PolyMet project. This qualifier would exclude many documents responsive to Relators' RFPs to the MPCA. Indeed, documents have been produced that do not mention the NorthMet Project, but are nevertheless responsive and within the scope of discovery directed against MPCA. MPCA's proposal suggests that MPCA would like search terms to take the place of an attorney's review for relevance to reduce its burden. No matter the breadth of this forensic search, MPCA will need to review the retrieved documents for relevance, as well as for privilege. MPCA could have conducted a more rigorous search and review when Relators' RFPs were first served in August. To the extent that an appropriately broad forensic search at this time would create a burden on MPCA, the Agency has created that burden itself.

MPCA's proposed search terms are narrower than the terms it used for a search that the Court has already found inadequate. Relators' proposed search terms are reasonable and accurately capture the broad purpose of this forensic search. For these reasons, Relators request that the Court order that XACT use the search terms in Exhibit C.

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Respectfully submitted,

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Enclosures

cc: Counsel of Record (via Odyssey)

EXHIBIT A



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Re: Forensic search and imaging of MPCA hard drives

Dear Counsel:

Consistent with section 10(e) of the Ramsey County Second Judicial District Court's November 11, 2019, Amended Order Setting Evidentiary Hearing (the "Order"), I write to inform you of the terms of MNIT's forensic searches and imaging performed on devices associated with Ann Foss and Shannon Lotthammer, including "the scope of the forensic search, how it was done, what software tools were used to do it, what hard drives and servers were the subject of that search, what the search terms were, and whether there is an existing forensic image of the hard drives and servers searched."

On June 27, 2019, MNIT downloaded Shannon Lotthammer's PST (Outlook mailbox) file (the "PST File") from the Office365 Compliance Center. MNIT has twice forensically imaged a 74GB Dell Tablet (model #7275) associated with Shannon Lotthammer (the "Tablet"). First, On July 1, 2019, MNIT forensically imaged the Tablet using a Tableau TX1 forensic-imaging device. The forensic image for this iteration is in E01 format. MNIT forensically imaged the Tablet a second time on November 12, 2019, using the FTK Imager software tool. The Tablet is currently in MNIT's secured forensics lab. MNIT is in possession of the forensic image and chain-of-custody forms.

MNIT ran the following search terms against the PST File and the Tablet:

- Poly Met or Polymet
- Northmet
- LTV
- Mining and copper
- MOA or MOU
- Memorandum of Agreement
- Babbit
- Kurt Thiede or Thiede
- John Cherry
- John Stine and Polymet, Poly Met or EPA
- Michelle Beeman
- Richard Clark
- Jeff Udd
- Cathy Stepp or Stepp
- EPA and permit
- Adonis Neblett
- Mike or Michael Schmidt



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- John Martin
- Rebecca Flood

MNIT used the NUIX Workstation software to perform the searches.

We have learned that on November 12, 2019, MNIT forensically imaged a Samsung 320GB SATA Hard Drive (model # HD322GJ) associated with Ann Foss (the “Hard Drive”). MNIT is in possession of the forensic image and chain-of-custody forms. The Hard Drive is currently in MNIT’s secured forensics lab. MNIT imaged the Hard Drive with the FTK Imager software tool. To date, MNIT has not performed any searches on the Hard Drive. We learned of the existence of this hard drive in the last week.

If the XACT recommends to the parties that it make its own copies of these hard drives rather than use MPCA’s copies, MPCA will not oppose making these hard drives available to XACT for the purpose of conducting a forensic search in accordance with the Order. If XACT instead recommends using the forensic copies created by MNIT, MPCA will make those available to XACT for the purpose of conducting a forensic search in accordance with the Order.

Please do not hesitate to contact me with any questions you may have about the contents of this letter.

Very truly yours,

/s/ John C. Martin

John C. Martin
Counsel to MPCA

JCM

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EXHIBIT B

MPCA Proposed Search Terms for Forensic Examination

November 27, 2019

All searches shall be limited to the following time periods:

For searches of Ann Foss's files: from July 11, 2016 to the date that she left MPCA employment.

For searches of John Linc Stine's files: from July 11, 2016, to the date that he left MPCA employment.

For searches of Shannon Lotthammer's files: from July 11, 2016, to the date that she left MPCA employment.

1. (Poly Met or Polymet) and (permit or comment)
2. Northmet and (permit or comment)
3. (MOA or MOU) and EPA
4. "Memorandum of Agreement" and EPA
5. Kurt Thiede or Thiede
6. John Stine and Polymet, Poly Met or EPA
7. Richard Clark and Polymet, Poly Met or EPA
8. Jeff Udd and Polymet, Poly Met or EPA
9. Rebecca Flood and Polymet, Poly Met or EPA
10. Shannon Lotthammer and Polymet, Poly Met or EPA
11. Ann Foss and Polymet, Poly Met or EPA
12. Cathy Stepp or Stepp
13. EPA and permit and comment
14. EPA and Poly Met or Polymet

EXHIBIT C

Relators' Proposed Search Terms for Forensic Examination

November 29, 2019

1. "Adonis Neblett" or Adonis or Neblett
2. "Ann Foss" or Ann or Foss
3. Babbit or "Hoyt Lakes"
4. "Barbara Wester" or Barbara or Wester
5. "Barr Engineering" or Barr
6. "Brian Schweiss" or Brian or Schweiss
7. "Cathy Stepp" or Stepp
8. "Candice Bauer" or Candice or Bauer
9. "Christopher Korleski" or Korleski
10. "Cliffs Erie" or "Cliff's Erie"
11. "Data Practices" and EPA
12. "Data Practices" and (Poly! or Poly Met)
13. "Dennis Donohue" or Donohue
14. "Don Richards" or Richards
15. DPA and EPA
16. DPA and (Poly! or Poly Met)
17. "EPA Region 5" or Region 5 or R5
18. EPA.gov
19. EPA and ("public comment" or "public notice")
20. EPA and "water quality standard"
21. EPA and comment
22. EPA and concern
23. EPA and draft
24. EPA and enforce!
25. EPA and mercury
26. EPA and object!
27. EPA and permit
28. EPA and (pre-proposed or proposed)
29. EPA and TBEL
30. EPA and WQBEL
31. EPA and WQS
32. "Jeff Smith" or "Jeffrey Smith" or "Jeffery Smith" or "Jeffry Smith" or Smith
33. "Jeff Udd" or "Jeffrey Udd" or Udd
34. "Jillian Roundtree" or Jillian or Roundtree
35. "John Martin" or Martin
36. "Jon Cherry" or Cherry
37. ("John Stine" or "Stine" or "John Linc Stine")
38. "Kevin Pierard" or Kevin or Pierard
39. "Kurt Thiede" or Thiede or Kurt
40. "Krista McKim" or Krista or McKim
41. "Linda Holst" or Linda or Holst
42. LTV and (Cliffs or Cliff's)

EXHIBIT C

43. LTV or LTVSMC
44. “Mark Ackerman” or Ackerman
45. “Mark Compton” or Mark or Compton
46. “Memorandum of Agreement”
47. “Memorandum of Understanding”
48. “Michael Schmidt” or “Mike Schmidt” or Schmidt
49. “Michelle Beeman” or Beeman
50. Mining and (copper or sulfide or PGE)
51. MOA or MOU
52. Northmet or North met or NorthMet or North Met
53. NPDES or NPDES/SDS
54. “Permit modification”
55. PM permit!
56. (Poly Met or Poly! or PM) and (“draft permit” or “draft NPDES”)
57. Poly Met or Polymet or PM or PMet or Poly!
58. (Poly! or PolyMet or Poly Met or NorthMet) and “Clean Water Act”
59. (Poly! or PolyMet or Poly Met or NorthMet) and enforce!
60. “Rebecca Flood” or Flood
61. “Richard Clark” or “Rich Clark” or Clark
62. “Richard Schwartz” or “Rich Schwartz” or Schwartz
63. “Robert Kaplan” or Robert or Kaplan
64. RP or “reasonable potential”
65. “Scott Ireland” or Ireland
66. “Scott Kyser” or Kyser
67. “Shannon Lotthammer” or Shannon or Lotthammer and (Poly! or EPA)
68. “Stephanie Handeland” or Steph or Stephanie or Handeland
69. (Stine or John or Commissioner) and (EPA.gov or EPA or Stepp or Thiede)
70. (Stine or John or Commissioner) and (PolyMet or Brad Moore or Brad or Moore)
71. (Stine or John or Commissioner) and (PolyMet or Christie Kearney or Christie or Kearney)
72. “T. Leverett Nelson” or Leverett or Rett or Nelson
73. “Water Quality” and permit
74. “Water Quality Permit”
75. WQ Permit