

STATE OF MINNESOTA  
COUNTY OF RAMSEY

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DISTRICT COURT  
SECOND JUDICIAL DISTRICT

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

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Case Type: Civil Other  
File No.: 62-CV-19-4626  
Judge: John H. Guthmann

**RULE 115.04(d) ORDER**

On December 18, 2019 the above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, for an informal motion conference pursuant to Minn. R. Gen. Prac. 115.04(d). At issue were the following motions made by relators: to require use of their proposed search terms for the court-ordered forensic search; to address the separate engagement of Xact by the MPCA; and, to compel production of certain documents listed in the MPCA privilege log.

The matter was heard informally but on the record by the consent of the parties. Appearances were noted on the record. The parties also waived their right to formal motion practice on the submitted issues and agreed that the court could issue the following Order based upon all of the files, records, submissions, and arguments of counsel herein:

**ORDER**

1. **Separate Engagement of Exact and Search Terms for the Forensic Search:**
  - a. The court-ordered forensic search shall be conducted with the list of proposed search terms submitted by relators to the MPCA on December 10, 2019. The list was also identified as Exhibit 6 to relators December 12, 2019 letter to the court.

- b. Any previous unilateral forensic search conducted by Xact at the request of the MPCA is void and the search shall be redone using the court-ordered search terms.
- c. Due to a conflict of interest created by the MPCA's violation of the court's order requiring use of a neutral forensic search firm, Xact is disqualified from acting as an agent or contractor for any one party to the case. That means Xact is disqualified from acting as MPCA's counsel and it may not conduct a review of documents retrieved in the court-ordered forensic search to determine what documents need to be produced or what documents may be withheld on the basis of privilege.
- d. Xact shall act as the neutral document retrieval firm in this case. In other words, Xact shall act as a de-facto extension of the court's authority. Xact's sole function as the neutral contractor shall be to conduct the court-ordered document retrieval using the court-ordered search terms. The purpose of the search is to find existing and previously deleted documents in the hard drives and servers subject to the forensic search ordered by the court on November 19, 2019.
- e. The parties shall sign Xact's engagement agreement and the parties shall split (50/50) the cost of Xact's services from and after December 18, 2019. Due to the MPCA violation referenced in paragraph 1(c), the MPCA shall pay the entire cost of Xact's services to date. Of course, the MPCA shall pay for the cost of its document review once documents are retrieved.
- f. To ensure neutrality in the court-ordered forensic search process, all future communications with Xact must include all parties to the case whether the communication is in person, by telephone, by email or by other electronic means. Everyone must be copied. Unilateral communications are prohibited.
- g. No later than December 27, 2019, the MPCA shall produce to relators all unilateral communications between it and Xact to date, including but not limited to letters, emails, or other documentation of unilateral communications with Xact relating to the development of search terms, conducting any document searches, retention for

conducting the document review, and its actual document review. There is no privilege that applies to these communications due to the court's directive that the forensic search firm be neutral.

- h. Once documents are retrieved by Xact, the MPCA shall conduct a document review. All responsive documents shall be produced regardless of whether they were previously produced in discovery. All documents withheld due to the assertion of a valid privilege shall be added to the MPCA privilege log. All documents produced shall be separately identified as either "never deleted" documents or documents that were "deleted but recovered" through the forensic search. If available, the deletion date of deleted but recovered documents shall be provided at the time of production.
  - i. The document recovery phase of the forensic search using the court-ordered search terms shall be completed by **December 31, 2019**.
  - j. Responsive documents recovered through the forensic search shall be produced by the MPCA along with the revised privilege log by **January 7, 2020**.
  - k. Any motions in limine arising out of the forensic search and related document production issues shall be filed with a courtesy copy delivered to chambers no later than **January 10, 2020**.
  - l. Any response to a motion in limine arising out of the forensic search and related document production issues shall be filed with a courtesy copy delivered to chambers no later than **January 17, 2020**.
2. **Dispute over the MPCA's Assertion of Privilege:**
- a. The court shall take under advisement relators' current motion related to document privilege issues following the submission of briefs by the parties. Relators' brief shall be filed with a courtesy copy delivered to chambers no later than **December 23, 2019**.

- b. Relators' brief shall: include a discussion of their legal theories, including but not limited the assertion of partial waiver of privilege; attach as exhibits the key documents that trigger the applicability of their legal theories; and, describe what process relators believe the court should use to determine what is privileged and what is not privileged.<sup>1</sup> Relators shall, with specificity, identify any documents on the MPCA privilege log they believe warrant immediate disclosure and any documents the court should consider for disclosure following an in-camera review.
  - c. MPCA's and PolyMet's response to relators' submission shall be filed with a courtesy copy delivered to chambers no later than **December 30, 2019**. No reply briefs by relators are permitted.
3. Unless expressly stated herein, all other dates set by the court in previous orders remain unchanged.
  4. Failure to comply with this Order may result in the imposition of sanctions.

Dated: December 19, 2019

BY THE COURT:

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John H. Guthmann  
Judge of District Court

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<sup>1</sup> As used in this Order, the term "privilege" includes any assertion of work product privilege by the MPCA or any other similar basis to withhold a document from production to relators.