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December 30, 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 Orders of this Court and the Minnesota Court of Appeals, and Minn. Gen. R. Prac. 111 and 115, Relators request this Court strike and refuse to hear Respondent Minnesota Pollution Control Agency's ("MPCA") December 27, 2019 Motion for Partial Summary Judgment ("PSJ Motion").¹ Relators ask the Court to strike and refuse to hear² the PSJ Motion on the following grounds: 1) the PSJ Motion is inconsistent with the Minnesota Court of Appeals' Transfer Order; 2) this Court's pre-trial Orders do not authorize the PSJ Motion; 3) the PSJ Motion fails to comply with the timeline for dispositive motions in Rule 115; 4) allowing a PSJ Motion in this proceeding would violate due process; and 5) Relators would suffer severe prejudice in responding to the PSJ Motion.

1. The PSJ Motion Is Inconsistent with the Court of Appeals' Transfer Order.

The PSJ Motion is inconsistent with the Court of Appeals' transfer order. The Court of Appeals transferred this matter "to reopen an otherwise closed appellate record so extra record materials may be developed solely on the question of whether there actually were procedural irregularities." (Rule 16 Conf. Tr. 94:8-12 (Aug. 7, 2019)). This Court's task is "to issue an order that includes findings of fact on the alleged irregularities." (*Id.* at 94:1-3; *see also* Transfer Order at 4, Nos. A19-0112 et al., (Minn. App. June 25, 2019) (transferring this matter "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure")). MPCA now

¹ Relators emailed MPCA on December 29, 2019 asking MPCA to withdraw the PSJ Motion because it is improper. On December 30, 2019, MPCA declined to withdraw the PSJ Motion.

² When a dispositive motion is improperly filed, this Court has broad discretion to refuse to hear it, allow attorneys' fees, or take other appropriate action, including striking a motion. Minn. Gen. R. Prac. 115.06 & 1997 advisory comm. note.

December 30, 2019

Page 2

asks this Court to issue judgment as a matter of law on some of Relators' alleged irregularities, denying Relators the opportunity to develop the record to support their claims. Most egregiously, MPCA seeks judgment on claims the Court of Appeals rejected in transferring this matter.³ The Minnesota Court of Appeals transferred this matter to determine procedural irregularities despite MPCA's arguments and the Court of Appeals in no way contemplated dispositive motions for the evidentiary hearing.

2. The Court's Pre-Trial Orders Do Not Authorize the PSJ Motion.

The Court's pre-trial Orders do not authorize the PSJ Motion. The Court's October 11, 2019 Order ("October Order") setting a prehearing conference for November 13, 2019 did not contemplate dispositive motions. (*See* Order Setting Pre-Hr'g Conf. at 1-3 (Minn. Dist. Ct. Oct. 11, 2019)). However, the October Order instructed the parties to be prepared at the pre-trial conference to discuss pre-trial motion practice "and any other issue they wish[ed] to raise . . ." (*Id.*) No party asked the Court to set a date for dispositive motions either at the pretrial conference or at any time since.⁴ The Court's November 19, 2019 Order limited the evidentiary hearing to the "alleged procedural irregularities listed in [R]elators' September 14, 2019 list" and scheduled other motion practice. (Am. Order Setting Evidentiary Hr'g ¶¶ 2, 11 (Minn. Dist. Ct. Nov. 19, 2019)).

The Court never authorized or contemplated dispositive motions. Rather, this Court indicated that the place for MPCA to "highlight the things that are most important for [the Court] to know factually and legally" is in the pretrial brief. (Mot. Hr'g Tr. 118:10-119:3 (Minn. Dist. Court Nov. 13, 2019)). Further, MPCA cites no authority in their PSJ Motion that would allow MPCA to submit a dispositive motion where the Court has not provided for such motions. Under these circumstances, a dispositive motion is wholly improper. *Cf. Stevens v. Santander Holdings USA, Inc. Self-Insured Short Term Disability Plan*, No. 11-7473, 2013 WL 1503902, at *2 (D.N.J. Apr. 10, 2013) (denying a motion for leave to file a second amended complaint and finding the motion procedurally improper where the parties did not contemplate the motion in any request to the court and the moving party cited no authority showing the motion was appropriate).

3. The PSJ Motion Fails to Comply with the Minnesota Rules of General Practice.

MPCA also failed to follow the Minnesota Rules of General Practice. This Court has broad discretion to enforce the provisions in the Minnesota General Rules of Practice. Minn. R. Gen.

³ MPCA argued to the Court of Appeals, as it argues in the PSJ Motion, that compliance with the 1974 Memorandum of Agreement precludes an irregular procedure finding. (MPCA's Resp. to WaterLegacy's Mot. for Transfer at 14-15, *In re Proposed NorthMet Project*, Nos. A19-0112 et al. (Minn. App. May 31, 2019)). MPCA also argued that discarding notes did not violate the Data Practices Act. (MPCA's Sur-reply to WaterLegacy's Mot. for Transfer at 6, 14, Nos. A19-0112 et al. *In re Proposed NorthMet Project* (Minn. App. June 6, 2019)).

⁴ The Court has modified the Amended Order on two occasions; on neither occasion did MPCA ask the Court to allow for the submission of dispositive motions. (Telephone Conf. Tr. 32:18-34:11 (Minn. Dist. Ct. Dec. 6, 2019) (extending deadline for exhibit list); Rule 115.04(d) Order at 1-4 (Minn. Dist. Ct. Dec. 19, 2019) (modifying additional deadlines)).

December 30, 2019

Page 3

Prac. 115.06; *see also McGuire v Bowlin*, No. 82-CV-15-6030, 2017 WL 11454943, at *18 (Minn. Dist. Ct. Dec. 1, 2017). As relevant here, Rule 115.03(a) provides that no dispositive motion “shall be heard” unless the moving party “files the documents with the court administrator at least 28 days prior to the hearing.” For summary judgment motions, MPCA must also include the relevant “authorities” allowing the Court to grant the PSJ Motion. Minn. R. Gen. P. 115.03(d).

Here, MPCA failed to cite any authority under which it asserts the Court can grant the PSJ Motion. *See* Minn. R. Gen. Prac. 115.03(d)(4). Assuming MPCA seeks to apply Rule 115, MPCA submitted the PSJ Motion 25 days prior to the hearing date in MPCA’s Notice. MPCA’s motion is plainly untimely. The trial is set to begin on January 21, 2019 and this Court has indicated it will not move the hearing date. (*See, e.g.*, Telephone Conf. Tr. 47:17-18 (Dec. 18, 2019)). As such, the Court cannot remedy MPCA’s untimeliness by moving back the hearing date to provide Relators with the full amount of time to consider and respond to MPCA’s motion.

4. The PSJ Motion Fails to Comport with Due Process

In these proceedings, the Court has ruled that the Minnesota Rules of Civil Procedure do not apply. (Rule 16 Conf. Tr. 93:11-14). However, even if they did, Minnesota law prohibits the granting of summary judgment when an opposing party has been allowed only minimal discovery and the information the party needs to defend against summary judgment is in the moving party’s sole possession. *U.S. Bank Nat’l Ass’n v. Angeion Corp.*, 615 N.W.2d 425, 433-34 (Minn. App. 2000). Relators have not been allowed to serve interrogatories, conduct oral depositions, or secure any pre-hearing inquiry from several key MPCA witnesses, including Shannon Lotthammer, Ann Foss, John Linc Stine, Michael Schmidt, and Rebecca Flood. Relators’ access to information has been further constrained by MPCA’s destruction and deletion of records and discovery is not yet complete in this case due to conflicts of interest MPCA created with regard to the forensic search. In these proceedings where the Court seeks to “create a due process for the parties to have the matter fully and fairly heard,” (Rule 16 Conf. Tr. 97:11-12), the Court must reject the PSJ Motion.

5. The PSJ Motion Prejudices Relators

MPCA’s PSJ Motion prejudices Relators. This Court should not consider an untimely summary judgment motion that “raises new arguments, catches the other side off-guard, or denies the opposing party time to prepare.” *Kimmel v. Twp. of Ravenna*, No. A05-362, 2005 WL 3372716, at *6 (Minn. App. Dec. 13, 2005). Relators learned about the PSJ Motion when it received the electronic submission on December 27, 2019. (Decl. of Elise Larson (“Larson Decl.”) ¶ 4 (Dec. 30, 2019)). Under the current schedule, MPCA’s untimeliness and failure to disclose its intent to file a dispositive motion denied Relators the appropriate time to prepare. (*Id.* ¶¶ 5-6). In addition to responding to a PSJ Motion, Relators must respond to Respondents motions *in limine* and objections, review documents and amend their exhibit after resolution of the forensic search and other discovery disputes, submit and respond to motions *in limine* relating to the forensic search, submit pre-trial briefing, premark exhibits and prepare witnesses for trial, and otherwise finalize their trial plan in the 22 days before the evidentiary hearing begins. (*Id.* ¶ 6).

For the foregoing reasons, Relators ask the Court to strike and refuse to hear MPCA’s PSJ Motion as improper, untimely, and prejudicial in these proceedings.

December 30, 2019

Page 4

Respectfully submitted,

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Enclosure

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