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January 6, 2020

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:

On behalf of the Minnesota Pollution Control Agency (“MPCA”), we write to request an order from this Court directing WaterLegacy to withdraw its subpoena to take the pre-trial deposition of Michael Schmidt, a former MPCA employee who is willing to testify during trial.

On January 2, 2020, WaterLegacy served on all parties a notice to take the deposition of Mr. Schmidt, who is no longer employed by MPCA and who now lives in Iowa. WaterLegacy also circulated a subpoena, dated December 31, 2019, to be issued from the Iowa District Court for Polk County, commanding Mr. Schmidt to testify at a deposition in Des Moines, Iowa, on January 14.

WaterLegacy’s subpoena is plainly contrary to this Court’s ruling at the August 7, 2019 hearing and following Order issued on September 9, 2019. Specifically, the Court authorized Relators to take limited discovery consisting of 25 requests for production to MPCA and PolyMet, as well as depositions on written questions of a PolyMet designee, an MPCA designee, and three current MPCA officials—Jeff Udd, Richard Clark, and Stephanie Handeland. Sept. 9, 2019 Order at ¶¶ 3-5. The Court denied Relators’ requests to depose individuals who are no longer employed by MPCA. Aug. 7, 2019 Hr’g Tr. at 101:10-24. Indeed, the Court specifically listed the following former MPCA employees for whom there would be no depositions: Rebecca Flood, Ann Foss, Shannon Lotthammer, John Linc Stine, and Michael Schmidt. *Id.*

Despite the Court’s clear instructions, WaterLegacy now seeks to take an oral pre-trial deposition of Mr. Schmidt. Notably, Relators have already asked this Court to reconsider its ruling disallowing the depositions of Mr. Stine, Ms. Lotthammer, and Ms. Foss. Relators’ Ltr. to Court (Oct. 28, 2019). As this Court well knows, that request was denied, as the Court concluded that its prior ruling was not “palpably wrong” and reiterated that former MPCA employees may be called at trial but are not to be deposed. Nov. 13, 2019 Hr’g Tr. at 42:22-44:11.



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Perhaps anticipating that such a request would be as unsuccessful as the request regarding Mr. Stine, Ms. Lotthammer, and Ms. Foss, WaterLegacy has not taken the trouble to request that this Court reconsider its previous ruling as pertains to Mr. Schmidt. Instead, WaterLegacy has simply ignored this Court's rulings by issuing a subpoena for his deposition from an Iowa court. This Court should not allow these eleventh-hour tactics that plainly contradict the Court's repeated instructions disallowing the deposition testimony of former MPCA employees.

Not only is WaterLegacy's subpoena at odds with this Court's prior rulings; it is unnecessary given that Mr. Schmidt is willing to testify during the evidentiary hearing.<sup>1</sup> Moreover, such a deposition would create logistical difficulties for counsel given its temporal proximity to the commencement of the evidentiary hearing.

In light of this Court's prior rulings and Mr. Schmidt's willingness to testify during trial, MPCA respectfully requests that this Court issue an order directing WaterLegacy to withdraw its subpoena to Mr. Schmidt and directing the parties to take the testimony of Mr. Schmidt during the evidentiary hearing.<sup>2</sup>

MPCA plans to file a motion in the Iowa District Court for Polk County to hold WaterLegacy's subpoena in abeyance pending this Court's ruling on the instant request.

Sincerely,

/s/ John C. Martin

John C. Martin  
Bryson C. Smith  
Holland & Hart LLP

/s/ Richard E. Schwartz

Richard E. Schwartz  
Crowell & Moring LLP

cc: All Attorneys of Record

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<sup>1</sup> Indeed, MPCA has listed Mr. Schmidt on its list of witnesses.

<sup>2</sup> MPCA reserves the right to seek Mr. Schmidt's testimony via video feed from Des Moines, instead of requiring Mr. Schmidt to appear in person.