

STATE OF MINNESOTA
COUNTY OF RAMSEY

EMPLOYMENT
DISTRICT COURT
SECOND JUDICIAL DISTRICT

Clifford L. Whitaker, et al., on behalf of)
themselves and all others similarly)
situated,)

Court File No. 62-C4-04-012239
[G. Johnson]

RECEIVED
Ramsey County
District Court

Plaintiffs,

MAR 18 2011

AFFIDAVIT OF DANIEL B. KOHRMAN

vs.)

3M Company,)

By _____ Deputy

[Class Action]

Defendant.)

I, Daniel B. Kohrman, hereby affirm and state, as follow:

Introduction

1. I am over the age of eighteen years. I have personal knowledge of the facts set forth herein, and am competent to testify thereto.
2. I am one of the counsel for the plaintiffs and the settlement class in the above-referenced action.
3. I am making this affidavit in connection with the parties' joint motion for preliminary approval of the proposed class settlement, and class counsel's motion for an award of attorneys' fees and expenses.

Qualifications of Class Co-Counsel, Attorneys with AARP Foundation Litigation

4. Since July 2001, I have been a Senior Attorney with AARP Foundation Litigation ("AFL"). AARP Foundation ("Foundation"), of which AFL is a part, is AARP's affiliated charity. AARP is a non-partisan, non-profit organization dedicated to addressing the needs and interests of people age 50+ throughout the United States.

5. I graduated from Columbia Law School in 1984, where I was a Stone Scholar and a member of the Human Rights Law Review. From 1984 to 1985, I served as a judicial law clerk for the Hon. Stanley S. Brotman, U.S. District Court for the District of New Jersey. From 1985 to 1993, I was a litigation associate with the law firm of Hogan & Hartson, LLP, in Washington DC. From 1993 to 1995, I held the position of counsel with that firm. My practice at the Hogan firm primarily consisted of complex civil rights litigation on behalf of urban school systems attempting to implement court-ordered school desegregation obligations by securing contributions to effective remedial measures from state governmental entities. I also represented plaintiffs in several class action civil rights cases, including employment discrimination matters, on a pro bono basis. From 1996 to 1998, I served as Supervising Attorney for National Litigation with the national office of the Lawyers' Committee for Civil Rights Under Law, in Washington, DC. From 1998 to 2001, I worked as a Trial Attorney in the Civil Rights Division of the U.S. Department of Justice, also in Washington, DC. In both of these positions, I worked almost exclusively on complex civil rights litigation on behalf of plaintiffs (private and governmental), including numerous class action cases.

6. Throughout my career, I have had extensive experience in class actions and other complex civil litigation, most of it affirmative civil rights litigation against large corporate and governmental defendants. In the course of such work, I have served as lead or co-lead counsel in numerous civil rights class action cases in the fields of education and employment, and I have participated as first or second chair in eight federal trials of a week or more in length. In the past nine-plus years, the bulk of my practice has consisted of employment discrimination litigation, and in particular age discrimination cases, on behalf of plaintiffs. This work has included *amicus* briefs submitted at all levels of the U.S. courts, and a jury trial in an individual employment discrimination case. Since 2007, I have served on the national executive board of the National Employment Lawyers Association (the nation's largest organization of plaintiffs' employment attorneys). In

January of this year, I stepped down after three years as volunteer chair of the Legal Advocacy Subcommittee of the American Diabetes Association.

7. I currently serve as co-counsel for plaintiffs in two certified age discrimination collective actions: *Merritt, et al. v. Wellpoint, Inc., et al.*, No. 08-272 (E.D. Va., pending) (ADEA collective action on behalf of former employees terminated in RIF); and *Peterson, et al. v. Seagate U.S. LLC, et al.*, No. 07-2502 (D. Minn., pending) (same). I previously served as co-counsel for plaintiffs in certified age discrimination collective actions in *Williams v. Sprint/United Management Co.*, No. 03-2200 (D. Kan); and *Feltman, et al. v. Capital One Services, Inc.*, No. C.A. 3:02CV894 (E.D. Va.) (same). I also previously served as class co-counsel for plaintiffs in certified class actions including *Californians for Disability Rights, Inc., v. California Department of Transportation*, No. C-06-5125 SBA (N.D. Ca.) (Americans with Disabilities Act and Rehabilitation Act case concerning discrimination against mobility and vision-impaired plaintiffs in regards to rights-of-way along state highways in California) (settled in 2010 for \$1.1 billion in equitable relief to be applied to sidewalk improvements over the next 30 years), *Hoots v. Commonwealth of Pennsylvania*, Civ. No. 71-538 (1995-98) (W.D. Pa.) (school desegregation), and *Vaughns v. Board of Education of Prince George's County*, Civ. Nos. PJM 72-325, PJM 81-2597 (D. Md.) (1992-98) (same).

8. Age discrimination cases in which I have authored or co-authored *amicus curiae* briefs include: *Gomez-Perez v. Potter*, No. 06-1321 (U.S.); *Sprint/United Mgmt. Co. v. Mendelsohn*, No. 06-1221 (U.S.); *Meacham v. Knolls Atomic Power Lab.*, 06-1505 (U.S.); *Smith v. City of Jackson*, No. 03-1160 (U.S.); *General Dynamics Land Sys. v. Cline*, No. 02-1080 (U.S.); *Adams v. Florida Power Corp.*, No. 01-584 (U.S.); *EEOC v. TIN, Inc.*, No. 08-16749 (9th Cir.); *Inman v. Klockner*, 08-1882 (4th Cir.); *Sisk v. Falcon Prods.*, Nos. 04-5407, 5876 (6th Cir.); and *Flannery v. Recording Indus. Ass'n of America*, No. 03-1591 (7th Cir.).

9. Two colleagues at AARP Foundation Litigation, Thomas Osborne and Laurie McCann, also performed significant work on behalf of the plaintiffs in this case.

a. Mr. Osborne has been a trial and appellate lawyer for 35 years. He has been an employment attorney exclusively, and for AARP Foundation Litigation (AFL), since 1992. Mr. Osborne graduated from the University of Maryland Law School in 1976. In addition to serving as plaintiffs' co-counsel in the *Merritt, Peterson, Williams* and *Feltman* cases summarized above, he has served as plaintiffs' co-counsel in class action age discrimination litigation in state court in Ohio against Goodyear Tire & Rubber Co., in state court in Michigan against the Ford Motor Co., in federal court in Illinois against the John Deere Co., and in federal court in Pennsylvania against the Allstate Insurance Co. For a major portion of this career prior to his work for AFL, Mr. Osborne served as a trial attorney with the U.S. Department of Justice. He has served as lead trial counsel in more than 15 civil cases, including three jury trials. From 2003-08, he served as an adjunct professor of law at the George Washington Law Center, where he taught Elder Law. During his time at AFL, Mr. Osborne also has been the author or co-author of numerous *amicus curiae* briefs in the U.S. Supreme Court, the U.S. Courts of Appeals and U.S. District Courts concerning age discrimination issues and interpretation of the Age Discrimination in Employment Act.

b. Ms. McCann graduated cum laude from Georgetown University Law Center in 1992, after receiving an undergraduate degree from the College of William and Mary. Since 1992, Ms. McCann has worked for AARP Foundation Litigation (AFL) handling trial and appellate age discrimination matters. In addition to serving as plaintiffs' co-counsel in the *Merritt, Peterson* and *Feltman* cases summarized above, she has served as plaintiffs' co-counsel in class action age discrimination litigation in state court in Ohio against Goodyear Tire & Rubber Co., in state court in Michigan against the Ford Motor Co., in federal court in Kansas against Sprint/United Management Co., and in federal court in Illinois against the John Deere Co. During her tenure at AFL, Ms.

McCann also represented AARP in litigation challenging EEOC's exemption from the ADEA of employers' decisions to reduce or eliminate retiree health benefits at age 65. She has been author or co-author of numerous *amicus curiae* briefs in the U.S. Supreme Court, the U.S. Courts of Appeals and U.S. District Courts concerning issues of age discrimination and interpretation of the Age Discrimination in Employment Act. Her publications include *The ADEA and the Eleventh Amendment*, 2 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 241 (1998). Prior to her work for AFL, Ms. McCann was employed from 1986-92 as a senior program specialist in AARP's Worker Equity Department. In 1985 she worked as a member of the staff of the Select Committee on Aging in the U.S. House of Representatives. Finally, she earned a M.S. degree in Gerontology (with emphases in industrial gerontology and public policy) from the University of Southern California in 1986.

History of AARP Foundation Litigation Participation as Co-counsel for Plaintiffs

10. Attorneys from Sprenger + Lang, PLLC (S+L), contacted attorneys from AARP Foundation Litigation (AFL) about joining the *Whitaker* case as co-counsel for Plaintiffs in 2005. AFL and S+L attorneys (all of whom are listed in the AFL and S+L fee request) met several times over a period of weeks to discuss in detail the possibility of joining together as co-counsel in the *Whitaker* case. Topics addressed in depth included the nature of the claims in the case, the nature of evidence S+L had uncovered thus far supporting these claims, S+L's plans for developing further evidence and strategies for prosecuting the case, and the roles S+L envisioned for AFL attorneys to play in the case. AFL attorneys reviewed the complaint, other case documents, as well as legal memoranda prepared by S+L, and satisfied themselves with the soundness of the claims and the promising nature of evidence secured thus far. AFL attorneys were familiar with S+L attorneys – their excellent reputation, high level of knowledge, competence and diligence, and record of success

from work together on other cases. AFL attorneys presented the idea of proceeding as co-counsel through several internal levels of review, and secured approval to proceed.

11. AFL attorneys joined the *Whitaker* case as co-counsel for Plaintiffs after S+L's initial investigation, filing of administrative charges, filing of the (initial and first amended) complaints and initial discovery. AFL attorneys began participating in regular meetings of co-counsel to map out strategy and distribute assignments. AFL attorneys began participating in review of factual materials, including discovery documents, legal research with the assistance of law student law clerks, and review and revision of discovery pleadings. AFL attorneys also assisted in developing the Second Amended Complaint, filed in January 2006.

12. AFL attorneys participated in researching, drafting and editing briefs in connection with initial motions to dismiss, and also played a role in the discovery process that followed over the next (nearly) year and a half. AFL attorneys reviewed thousands of discovery documents, prepared outlines of proof, helped draft and edit discovery pleadings, commented on efforts to secure adequate e-discovery, prepared for and took several discovery depositions of defendants' representatives (including Margaret Alldredge, Clydie Douglass and Tim Richmond). AFL attorneys also helped prepare for the taking and defending of expert depositions (including of plaintiffs' expert David Neumark and defense experts Robert Topel and Frank Landy) by gathering, analyzing and summarizing numerous articles, reported decisions, expert reports, transcripts of trial and deposition testimony addressing the work of these experts. AFL attorneys, assisted by law student law clerks, also contact numerous plaintiffs and gathered information from them necessary to respond to defense discovery requests. AFL attorneys had full access to all discovery documents and played a significant role in reviewing them and gathering evidence from them.

13. During the course of the *Whitaker* litigation, AFL attorneys coordinated with AARP publications and public relations staff, as well as S+L attorneys and a public relations firm engaged by S+L, Infinite PR, in order to gain coverage of the *Whitaker* case in the media, for the purposes of encouraging potential favorable witnesses to come forward and to put public pressure on 3M.

14. AFL attorneys assisted S+L attorneys to prepare and file Plaintiffs' motion for class certification on September 11, 2007. In addition, AFL attorneys advised S+L attorneys and assisted with major tasks as the class certification issue went up on appeal and came back to the trial court for a hearing and additional briefing.

15. AFL attorneys also assisted S+L attorneys in settlement discussions with 3M which were conducted with the aid of mediator Hunter R. Hughes, Esq., of Rogers & Hardin. AFL attorneys assisted in the formulation of the programmatic relief and the structure of the monetary relief.

16. On March 14, 2011, the parties executed the proposed Settlement Agreement.

17. I believe all parties and their counsel recognize that, in the absence of an approved settlement, they would face a long litigation course, including further motions and appeals related to class certification, formal discovery on the merits, summary judgment, and trial that would consume time and resources and present each of them with ongoing litigation risks and uncertainties. I further believe that the parties recognize the risk associated with evolving case law, and desire to avoid these risks and uncertainties, as well as the consumption of time and resources, in favor of an amicable settlement pursuant to the terms and conditions of the Settlement Agreement which would be more beneficial to them than continued litigation.

Settlement is Fair, Reasonable and Adequate

18. Under the terms of the Settlement Agreement, defendant 3M Company has agreed to pay up to a total of \$12 million (plus the employer portion of FICA and Medicare on distributions to

members of the settlement class) to a settlement class consisting of approximately 6,000 employees age 46 and older, the vast majority of whom are currently employed by 3M.

19. As a result of the parties' participation in six years of litigation and fully understanding their adversary's statistical analyses with respect to liability and damages, they were well positioned to evaluate each other's respective positions as well as the costs and risks of continued litigation. During the course of all negotiations, counsel bargained vigorously on behalf of their respective clients. All negotiations were conducted in good faith.

20. In evaluating the fairness, reasonableness, and adequacy of the monetary relief, plaintiffs' counsel determined damages for the class promotion and compensation claims, relying on the statistical analyses of plaintiffs' experts. We calculated these class damages to be in the range of \$11.4 million (a conservative approach using time-in-grade and performance controls) to \$47.1 million (an extremely aggressive approach eliminating potentially tainted variables and assuming the establishment of a "continuing violation"). After applying appropriate discounts for litigation risk associated with class certification and a liability trial, plaintiffs' counsel believe that the proposed monetary relief is well within the range of reasonableness.

21. Meaningful programmatic relief is a significant component of the parties' settlement agreement. As described more fully in the Settlement Agreement, 3M has agreed to take very significant steps (which are specifically recited in paragraph 29 of the Affidavit of Steven Sprenger) during the three-year term of the agreement. These steps cover the following areas of programmatic relief: (1) EEO Communications and Training; (2) Performance Appraisals; (3) Promotions, Transfers, Development, Training Opportunities; (4) Job Eliminations/Terminations of Employment/Releases; and (5) Implementation.

22. Along with all other class counsel, I am confident that these programmatic changes will enhance equal opportunity for all Minnesota-based 3M employees, but particularly those who are in their 40s, 50s, 60s or 70s.

23. It is my opinion, shared by all counsel of record for Plaintiffs, that the Settlement Agreement is fair, reasonable and adequate in light of all of the facts and circumstances.

Calculation of AFL Lodestar Attorneys' Fees & Expenses Through February 28, 2011

24. As of February 28, 2011, AARP Foundation Litigation's attorneys, temp attorney, and law clerks had devoted 1,103.71 hours to the representation of the Plaintiffs and proposed plaintiff settlement class. As reflected in the table below, at our regular hourly billing rates, our firm's aggregate lodestar as of February 28, 2011 was \$606,314.62.¹

Timekeeper/Position	Current Hourly Rate	3M Minnesota	3M General	Lodestar ²
Daniel B. Kohrman, Senior Attorney, admitted to bar in 1985	\$ 625.00	439.70	67.95	296,046.87
Thomas Osborne, Senior Attorney, admitted to bar in 1976	\$ 625.00	289.99	13.08	185,331.25
Laurie McCann, Senior Attorney, admitted to bar in 1992	\$ 625.00	110.85		\$69,281.25
Vanessa Van Struensee, Temp Attorney	\$ 325.00	8.17		\$2,655.25
Mary Barna, law student law clerk	\$ 200.00	75.00		\$15,000.00
Elissa Bretz, law student law clerk	\$ 200.00	58.00		\$11,600.00
Daniel Kane, law student law clerk	\$ 200.00	50.00		\$10,000.00
Charlotte Lanvers, law student law clerk	\$ 200.00	41.00		\$8,200.00
Daenia Peart, law student law clerk	\$ 200.00	41.00		\$8,200.00
TOTAL		1103.71	81.03	\$606,314.62

¹ Consistent with S+L billing practices in this case, AFL created three billing categories for purposes of recording time and expenses for the *Whitaker* and *Garcia* cases: 3M Minnesota, used to record time and expenses that benefitted only the *Whitaker* case; 3M Federal, used to record time and expenses that benefitted only the *Garcia* case; and, 3M General, used to record time and expenses that benefitted both cases. For purposes of the above lodestar fee and case expense calculations, I have allocated equally between 3M Minnesota and 3M Federal the time and expenses billed to 3M General.

² Lodestar = Current Hourly Rate (3M Minnesota + (3M General/2)). For purposes of our lodestar calculation, we have excluded approximately 10 timekeepers (all student or law graduate law clerks) who recorded less than 20 hours.

Combined with the lodestar from Sprenger + Lang, the attorney fee request in this case represents less than 40% of our collective lodestar.

25. As of February 28, 2011, AFL had advanced case expenses of at least \$250,000 in connection with their representation of plaintiffs and the proposed settlement class. These expenses are included in the table that appears in paragraph 35 of the affidavit of Steven Sprenger. The expenses presented incurred by S+L, including funds paid from funds advanced by AFL, account for more than \$3 million, and thus exceed the cap on expenses which may be awarded in this case. In addition, AFL incurred approximately \$15,000.00 in travel expenses (principally airfare, lodgings, meals and ground transportation) in connection with their work as co-counsel in the Whitaker case.³ These AFL travel expenses are not included in the table that appears in paragraph 35 of the affidavit of Steven Sprenger.

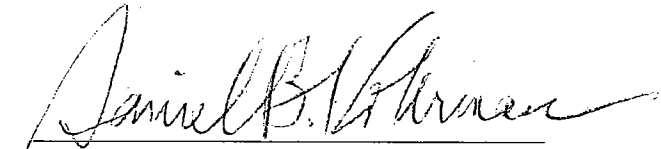
In my opinion, the expenses incurred by S&L attorneys as well as those incurred by AFL attorneys were reasonably necessary to adequately represent the plaintiffs and the putative class in this case.

Estimate of Future Lodestar Attorneys' Fees & Expenses

26. I anticipate that AFL attorneys will perform substantial additional legal work in connection with the settlement – most notably, assisting S+L co-counsel in preparing for and participating in the final approval hearing, and responding to settlement class member inquiries regarding the settlement. I further anticipate that AFL attorneys will perform limited additional work assisting S+L co-counsel in monitoring the implementation of and enforcing compliance with the settlement throughout the three year term of the settlement agreement.

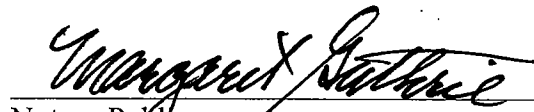
³ AFL attorneys have not incurred any court or witness or court reporter fees, nor any expert or consultant fees, nor any interest accrual fees, long distance telephone charges, fax charges or postage charges. We have not included in our expenses claimed in this case any expenses incurred for: electronic/computer research fees (which I estimate amounted at least to tens of thousands of dollars over the last six years); express mail/messenger fees; or external or internal photocopying fees (which I also estimate amounted to at least tens of thousands of dollars over the past six years).

27. I anticipate that class counsel will advance additional expenses in connection with the settlement. These expenses will include costs related to the fairness hearing, settlement class member communications (i.e., long distance and postage charges) and monitoring the settlement (i.e., travel costs) over a three year period.


Daniel B. Khrman

Sworn and subscribed before me this 15 day of March, 2011. My commission expires

Margaret Guthrie
Notary Public, District of Columbia
My Commission Expires 11/14/2013


Notary Public

