

STATE OF MINNESOTA

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Ramsey County  
District Court

DISTRICT COURT

COUNTY OF RAMSEY

MAR 18 2011

SECOND JUDICIAL DISTRICT

By \_\_\_\_\_ Deputy

CASE TYPE: Employment

Clifford L. Whitaker, Michael Mucci, Mark  
Swanson, Thomas Bulen, and Robert Coats,

Court File No. C4-04-12239  
(The Honorable Gregg E. Johnson)

on behalf of themselves and all others similarly  
situated,

**PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF  
PRELIMINARY APPROVAL OF THE  
CLASS SETTLEMENT**

Plaintiffs,

vs.

3M Company,

Defendant.

Plaintiffs Clifford L. Whitaker, Michael Mucci, Mark Swanson, Thomas Bulen, and Robert Coats, by and through their counsel, respectfully request the Court to preliminarily approve the parties' proposed class action settlement. In support of their motion, plaintiffs submit this memorandum for the Court's consideration.

## **I. INTRODUCTION**

This action arises out of plaintiffs' allegations that defendant 3M Company ("3M") discriminated against them and other similarly situated employees on the basis of their age with respect to promotion, compensation, performance evaluation, training selection, and termination decisions. After over six years of litigation and arms-length settlement negotiations spanning nearly three years, the parties have now reached a settlement resolving all claims.

Together, the parties now move this Court for the entry of: (1) an order provisionally certifying the class for purposes of settlement, and appointing class representatives and class counsel; (2) an order preliminarily approving the settlement agreement; and (3) an order approving the provision of notice of the settlement to the class members and setting a date for a fairness hearing.

## **II. HISTORY OF THE CASE**

On December 21, 2004, plaintiffs Clifford Whitaker and Michael Mucci filed a class action complaint initiating this action in Ramsey County District Court alleging class-wide age discrimination in violation of the Minnesota Human Rights Act ("MHRA"). (Settlement Affidavit of Steven Sprenger ("Sprenger Aff."), ¶ 9.) Prior to filing this action, plaintiffs Whitaker and Mucci filed administrative charges with the Minnesota Department of Human Rights. (*Id.*) On January 3, 2006, plaintiffs filed their

Second Amended Complaint and added Mark Swanson, Thomas Bulen and Robert Coats as plaintiffs. (*Id.*; Settlement Affidavit of Daniel Kohrman (“Kohrman Aff.”), ¶ 11.)

On July 7, 2005, the Court denied 3M’s motion to dismiss and the parties embarked on a 17-month period of fact discovery. (Sprenger Aff. ¶ 10.) The discovery process included numerous disputes resulting in motions practice, the production of over 240,000 hard copy and electronic documents as well as statewide company employee data, scores of interrogatories, and more than 46 depositions. (*Id.* at ¶¶ 10-12; Kohrman Aff. ¶ 12.) After the conclusion of fact discovery, the parties engaged in expert discovery, which included numerous expert reports and depositions. (Sprenger Aff. ¶¶ 11-12; Kohrman Aff. ¶ 12.)

This discovery culminated in plaintiffs’ filing of a motion for class certification on September 11, 2007. (Sprenger Aff. ¶ 15; Kohrman Aff. ¶ 14.) The Court held a hearing on class certification on December 12, 2007, and granted plaintiffs’ motion on April 11, 2008. (Sprenger Aff. ¶ 17.) 3M successfully petitioned for discretionary review of the class certification order by the Minnesota Court of Appeals. (*Id.* at ¶ 18.) On April 28, 2009, the Minnesota Court of Appeals reversed the class certification order and remanded the case back to this Court for further proceedings. (*Id.*)

In March and April 2010, the parties submitted supplemental briefing on the issue of class certification to address the issues raised by the Court of Appeals. (*Id.* at ¶ 21.) On May 5 and 6, 2010, this Court held an evidentiary hearing during which it heard nearly eight hours of expert testimony. (*Id.*) The parties appeared back before the Court for final oral argument on August 25, 2010, and the motion has been under advisement since that date. (*Id.*)

After the filing of plaintiffs' motion for class certification, the parties engaged the private mediation services of Hunter R. Hughes, Esq. of Rogers & Hardin to facilitate settlement discussions. (Sprenger Aff. ¶ 16; Kohrman Aff. ¶ 15.) The parties had their first mediation session with Mr. Hughes in February 2008. (Sprenger Aff. ¶ 16.) This was followed by two more mediation sessions with Mr. Hughes in November 2009, and finally two more in July 2010. (*Id.* at ¶¶ 16, 20, 22.) After the mediation sessions in July 2010, the parties continued settlement discussions without the assistance of Mr. Hughes and ultimately agreed on the material terms of a settlement in January 2011. On March 14, 2011, the parties executed the proposed Settlement Agreement. (Sprenger Aff. ¶ 24; Kohrman Aff. ¶ 16.)

### **III. SUMMARY OF THE SETTLEMENT AGREEMENT PROVISIONS<sup>1</sup>**

#### **A. Settlement Class Definition**

To effectuate their proposed settlement, the parties seek provisional certification of a class defined as follows:

All persons who were 46 years old or older when employed by 3M in Minnesota in a salaried exempt position below job grade 18 any time on or after May 20, 2003, through December 31, 2010, and who did not sign a document on or about their last day of employment purporting to release claims arising out of their employment with 3M.

The parties seek certification pursuant to Minnesota Rule of Civil Procedure 23.02(c).

#### **B. Schedule for Notice and Fairness Hearing**

The parties have negotiated and agreed upon a schedule for the issuance of notice, submission of objections, the fairness hearing, their petition for entry of final judgment and dismissal, and distribution of the settlement fund monies. A synopsis of the proposed

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<sup>1</sup> The Settlement Agreement is attached as Exhibit 1 to the Parties' Joint Motion for Preliminary Approval.

schedule is as follows:

- a. Within sixty-five (65) days after preliminary approval of the Settlement Agreement defendant will identify all class members and will provide to the claims administrator sufficient information from which to issue notice and calculate settlement awards.
- b. On the ninetieth (90) day after preliminary approval of the Settlement Agreement the claims administrator will issue the Court approved Notice to class members and Class Member Declaration.<sup>2</sup>
- c. Within seventy-five (75) days after the mailing of notice, class members must return their Class Member Declaration.
- d. Within one hundred (100) days after mailing of the notice class member objections must be submitted in writing to the Court, with copies served on counsel for both parties.
- e. Within one hundred (100) days after mailing of the notice class members who wish to opt-out of the settlement must mail to the claims administrator a written, signed statement indicating their desire to opt-out.
- f. A briefing schedule and final approval hearing date will be set at the Court's convenience. However, the motion for final approval and certification of the settlement class will be ready to be heard on or after December 15, 2011.

**C. Programmatic Relief**

The parties negotiated and agreed that meaningful programmatic relief will be implemented by defendant, and will remain in place for a period of three years. The programmatic relief includes:

**1. EEO Communications and Training.**

- (a) 3M will distribute its Equal Employment Opportunity (EEO) and Affirmative Action (AA) policy statement to all new hires and will re-issue the statement to employees annually and post it on a company intranet site that is accessible to all employees. The EEO/AA policy statement will be signed by 3M's Chief Executive Officer and will confirm 3M's commitment to prohibiting unlawful

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<sup>2</sup> The proposed Notice and Class Member Declaration are attached as Exhibits B and C to the Settlement Agreement.

discrimination, including but not limited to discrimination based on age, in all terms and conditions of employment.

- (b) 3M will include in the Company's existing Employment Law for Leaders course content focused on age discrimination and will deliver the course to the eligible population of managers and supervisors every two years.
- (c) 3M will review the company's leadership, supervisory development, and diversity training programs for content on equal employment opportunity and non-discrimination and, to the extent there is no such content or where 3M determines that additional content would clarify the company's commitments, revise the course content to include information regarding 3M's EEO and non-discrimination commitments.

**2. Performance Appraisals.**

- (a) 3M will not use rating distribution guidelines or quotas in connection with its performance appraisal processes.
- (b) 3M will provide additional guidance to supervisors to clarify criteria for placement recommendations and high potential designations used in connection with the performance appraisal process.
- (c) 3M will support a review and appeal process for employee EC&DP ratings, through which employees can challenge contribution codes, leadership attribute ratings, high potential designations and/or placement recommendations.

**3. Promotions/Transfers/Development/Training Opportunities.**

- (a) 3M will post Black Belt positions internally and will accept applications for those positions.
- (b) 3M will post on an intranet site accessible to employees program descriptions and the selection criteria and process for the ALDP I, ALDP II, and Leadership Development for Growth ("LDG") leadership development programs.
- (c) 3M will publish job posting guidelines on an intranet site accessible by employees. Pursuant to the published posting guidelines, 3M will increase the minimum posting period for positions required to be posted to five days and will agree to post all open positions below the L3 job grade with limited exceptions where there is an important business need.

- (d) 3M will not preclude employees who receive a 2 level of contribution rating through the EC&DP process from applying for open positions in the company. 3M will make available to hiring managers and/or recruiters the past three years of EC&DP ratings for internal candidates applying for open positions.

**4. Job Eliminations/Terminations of Employment/Releases.**

- (a) 3M will use a form of release in connection with its severance plans and/or any group reductions in force which includes terms that are not materially different from those set forth in Exhibit G ("Approved Release Terms"), except as necessary to comply with changes in law, including but not limited to changes in the OWBPA or judicial opinions interpreting legal requirements, or otherwise as necessary to comply with 3M's legal obligations. As of the Execution Date, and subject to changes in the OWBPA, the parties acknowledge that the Approved Release Terms comply with OWBPA. 3M also will describe the decisional unit on any eligible/ineligible lists in a manner that will allow employees affected by a group reduction to understand the contours of the affected group.
- (b) 3M will maintain a termination review process that requires approval of all terminations of employment, including those due to job elimination, by designated levels of business and human resources management. Part of the approval process will include confirmation that the selection process and resulting job elimination decisions were implemented in a manner consistent with principles of non-discrimination.
- (c) 3M will comply fully with the OWBPA, including with its requirements regarding releases of claims, and will train human resources personnel on the construction of eligible/ineligible lists under the OWBPA.

**5. Implementation.**

- (a) 3M's human resources function will be responsible for implementing the programmatic relief set forth in this Section 8 and for ensuring that 3M's policies regarding equal employment opportunity and non-discrimination are enforced. 3M's Senior Vice President, Human Resources, will be ultimately responsible for implementation of Section 8 of this Agreement.
- (b) 3M will continue to maintain the company's internal grievance process through which employees have multiple channels to raise concerns and complaints, including concerns or complaints

regarding unlawful discrimination, retaliation, or alleged noncompliance with this decree. 3M will increase communications to employees concerning its grievance process. 3M's grievance process will not preclude or discourage employees from complaints or expressing concerns directly to the EEOC or class counsel.

- (c) 3M's Counsel shall report to Class Counsel every twelve (12) months for a period of three (3) years from the Execution Date as to steps taken by 3M to comply with these injunctive provisions, which reports shall be maintained on a Confidential basis as defined in the stipulated protective order in the Action, which is incorporated as if set forth fully herein. Unless a different person is otherwise designated by Class Counsel, in writing, the reports set forth in this section shall be deemed duly given if addressed to Steven M. Sprenger and personally delivered, sent by U.S. Mail, or sent by confirmed facsimile or other agreed upon method. Class Counsel shall provide written notice to 3M's Counsel of any noncompliance by 3M with the terms of this Section, and 3M and Class Counsel shall attempt to informally resolve any allegation of noncompliance prior to any effort by Class Counsel to enforce the terms of this Section. Only Class Counsel shall have standing to seek relief from the Court for alleged violations of this section.
- (d) 3M shall not retaliate against any Settlement Class Member for appealing any EC&DP rating or complaining about 3M's alleged failure to comply with the terms of the Decree.

**D. The Settlement Fund**

The parties negotiated and agreed that defendant will deposit up to \$12 million into a Qualified Settlement Fund. The Qualified Settlement Fund will:

- a. Cover all amounts to be paid to class members, including plaintiffs;
- b. Cover all of Class Counsel's fees and costs, including those in connection with securing court approval of the settlement, the claims process and implementing programmatic relief in the settlement agreement; and
- c. Cover all costs in connection with the settlement fund including, but not limited to, those related to notice, claims processing, legal advice relating to the establishment of the qualified settlement fund and tax treatment and tax reporting of awards to claimants, preparation of tax returns (and the taxes associated with such tax returns as defined below), and other fees

and expenses.<sup>3</sup>

Rust Consulting, Inc. ("Rust") of Minneapolis, Minnesota will serve as the Claims Administrator and serve as the trustee of the Qualified Settlement Fund. Rust has substantial experience and expertise carrying out these duties. It will supervise all aspects of the claims administration process including, but not limited to: the distribution of Notice and Class Member Declarations to class members; the calculation of Settlement Awards; the distribution of Claim Sheets; the issuance and distribution of settlement checks to class members returning claim sheets; and, compliance with all applicable tax reporting, withholding and/or remitting requirements.

**E. Named Plaintiff and Class Member Monetary Awards**

For each class member, the Claims Administrator will calculate/allocate a settlement award pursuant to a formula described in Section 7.1(d) of the Settlement Agreement. In order to claim his or her settlement award, a class member must return the Class Member Declaration affirming a belief that he or she has been subjected to age discrimination in connection with compensation, promotion/demotion, and/or termination. After a class member returns the Class Member Declaration, he or she will also need to return the Claims Sheet to receive payment.

The settlement award formula considers factors that have been identified by Class Counsel as significant to assessing the value of each class member's potential claims. The settlement funds were divided between the three types of claims (compensation, promotions/demotion/selection for training, and termination claims) according to Class Counsel's evaluation of the strength and value of each claim from the report prepared by

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<sup>3</sup> Defendant will be responsible for its share (i.e., the employer's portion) of payroll taxes and will pay the same separate and apart from the settlement fund.

the plaintiffs' expert. Awards for compensation claims are dependent upon each individual's salary and the difference between their salary and the average salary for employees in their grade level. Awards for promotion, demotion and selection for training claims are dependent upon each individual's salary and whether they were promoted or selected for special training during the class period. If an employee obtained a promotion or was selected for training, then their awards will be given less value than those employees who were not promoted or selected for training or were demoted. Awards for termination claims are dependent upon the offer of compromise made by 3M in the form of a severance payment for members of the class who had a termination award.<sup>4</sup> Further, class members who took a step toward asserting their legal rights by either filing an administrative charge or this lawsuit were given priority.

In addition to their settlement award, each named plaintiff will receive a \$25,000.00 enhancement award. The enhancement award is in consideration of the substantial contribution of the named plaintiffs in pursuing this action on behalf of the class.<sup>5</sup> (See Sprenger Aff. ¶ 13.) These awards will not diminish the amount of money available for determining each class member's settlement award.

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<sup>4</sup> Very few members of the class have a termination claim since the overwhelming majority of 3M employees accepted a severance payment and signed a release, thereby being excluded from the class.

<sup>5</sup> The contributions of the named plaintiffs to the case were evaluated in light of "actions plaintiff took to protect class's interest, [the] degree to which the class has benefitted from those actions, and the amount of time and effort plaintiff expended in pursuing litigation." *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp.2d 1075, 1085 (D. Minn. 2009) (citations omitted).

**F. Attorneys' Fees & Expenses**

The parties negotiated and agreed that Class Counsel may petition the Court for an award of attorneys' fees of up to a maximum of \$3.5 million, plus the actual costs incurred in litigating this Action, up to a maximum \$2.9 million, with the combined total attorneys' fees and costs not to exceed \$6.4 million.

**IV. LEGAL ARGUMENT**

**A. The Proposed Class Should Be Certified For Settlement Purposes**

This Settlement Class is defined as

All persons who were 46 or older when employed by 3M in Minnesota in a salaried exempt position below job grade 18 at any time on or after May 10, 2003 through December 31, 2010, and who did not sign a document on or about their last day of employment purporting to release claims arising out of their employment with 3M.

For settlement purposes, the Class satisfies the requirements of Rule 23.01, and should be certified under Rule 23.02(c). The proposed settlement class is the same class that has been certified once by this Court and, following remand by the Court of Appeals, the subject of supplemental briefing and an evidentiary hearing. Although confident that the Court has received ample evidence and argument to certify a settlement class, plaintiffs briefly summarize their arguments why class certification is appropriate below.

**B. The Proposed Settlement Class Satisfies Rule 23.01**

Under Minn. R. Civ. P. 23.01, a class may be certified when (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the class; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) the representative parties will fairly and adequately protect the interests of the class.." Minn. R. Civ. P. 23.01. The proposed

settlement class meets each of these requirements.

**1. Numerosity is Satisfied.**

Based on the data produced by defendant and updated representations during the settlement negotiations, the parties agree that the class consists of over 6,000 current and former 3M employees. A class satisfies the numerosity requirement when it is so large that joinder of all members is impracticable. *Glen Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445, 452 (Minn. Ct. App. 2002). Given the size of the class, joinder is impracticable.

**2. There are Questions of Law and Fact Common to the Class.**

A class satisfies the commonality requirement when “there are questions of law or fact common to the class.” “The threshold for commonality is *not high* and requires only that the resolution of the common questions affect all or a substantial number of class members.” *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 214 (Minn. Ct. App. 1987) (emphasis added). “[F]actual variations” among plaintiffs do not defeat commonality. *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 561 (8th Cir. 1982).

Whether defendant adopted and maintained a policy or practice of discrimination in the terms and conditions of employment for its older employees is a question of fact and law that is common across the class. The resolution of this question would affect all or a significant number of class members. Accordingly, commonality is established.

**3. Plaintiffs’ Claims are Typical of the Class Claims.**

The claims asserted by the named plaintiffs are “typical of the claims or defenses of the class.” Rule 23.01(c). “The ‘typicality’ requirement is met when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the

claims of the class members.... A ‘strong similarity of legal theories’ satisfies the typicality requirement even if substantial factual differences exist.” *Glen Lewy*, 650 N.W.2d at 453 (citations omitted).

Typicality is satisfied because the plaintiffs and class together allege that they have been subjected to the same company-wide policies and practices of age discrimination in employment. Further, the plaintiffs and class each claim they have been adversely affected by the same policies and practices of age discrimination which have resulted in their younger counterparts receiving more favorable treatment in the terms and conditions of their employment. Finally, the named plaintiffs’ and class’ claims are based on the same legal theories of liability and recovery.

#### **4. Adequacy of Representation is Satisfied.**

The adequacy requirement of Rule 23.01(d) means that “plaintiffs’ interests must coincide with the interests of other class members and that plaintiffs and their counsel will competently and vigorously prosecute the lawsuit.” *Ario v. Metropolitan Airports Comm’n*, 367 N.W.2d 509, 513 (Minn. 1985). These factors are present here. By satisfying the typicality requirement, plaintiffs have shown that their interests coincide with those of the absent class members. They have no unique claims and are not subject to any counterclaims or unique defenses that might create “any interests that conflict with the objective of the class they represent.” *Glen Lewy*, 650 N.W.2d at 454. Class counsel are experienced class employment discrimination litigators who have litigated and successfully resolved numerous employment discrimination class actions. (See *Sprenger Aff.* ¶¶ 4-7; *Kohrman* ¶¶ 4-9.) Accordingly, class counsel satisfy the adequacy requirement.

The interests of the plaintiffs do not conflict with those of the class. The plaintiffs' allegations with respect to discrimination in the terms and conditions of their employment are nearly identical to the class. Plaintiffs have diligently advanced the interests of the entire class and have competently aided class counsel in prosecuting their claims. Accordingly, plaintiffs are adequate representatives for the class.

**C. The Proposed Settlement Class Satisfies 23.02(c)**

A class action is properly maintained pursuant to Minn. R. Civ. P. 23.02(c) if the Court finds that questions of law or fact common to class members predominate over questions affecting only individual members and the class action is the superior method of adjudicating the controversy. Although the plaintiffs have individual claims which are separate and apart from the class claims, the common questions of law and fact – 3M's alleged discriminatory practices toward older employees in connection with promotions, compensation, performance evaluations, training selections, and terminations – predominate. The parties' negotiations and resulting settlement and programmatic relief are related to the questions law and fact which are common to the class.

Because the proposed settlement class satisfies the requirements of Minn. R. Civ. P. 23.01 and 23.02, the Court should certify the proposed class for settlement purposes.

**V. THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED SETTLEMENT**

**A. Standard for Preliminary Approval of a Class Settlement**

Approval of a class action settlement is governed Minn. R. Civ. P. 23.05. Rule 23.05 provides, in relevant part, that:

- (1) A settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class is effective only if approved by the court.

(2) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(3) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

Court approval of a class settlement typically follows a two-stage process. *Armstrong v. Bd. of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980). The first step is a preliminary review by the Court to determine whether the proposed settlement is "within the range of possible approval." *Id.* (internal citations omitted). Through the preliminary evaluation, the Court must ascertain whether there is reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Id.* (citing *Manual for Complex Litigation* § 1.46, at 53-55 (West 1977)); *Manual for Complex Litigation, Fourth*, § 13.14 (Fed. Jud. Ctr. 2004) ("*Manual Fourth*"). At the second stage, the Court directs counsel to issue notice of the settlement to all class members and schedules a fairness hearing where all interested parties, including all class members, are afforded the opportunity to be heard on the proposed settlement. The ultimate purpose of the fairness hearing is for the Court to make a final determination that the proposed settlement is "fair, reasonable, and adequate" as required by Minn. R. Civ. P. 23.05(3).

In determining whether a proposed class settlement satisfies the "fair, adequate and reasonable" standard, the Court should consider a number of factors, including (1) the strength of the class claims on the merits balanced against the benefits offered in settlement; (2) the complexity, length, and expense of further litigation; (3) the extent of discovery completed and the stage of the proceedings; and, (4) the opinions of the

participants, including class counsel, class representatives and class members. *See, e.g., EEOC v. McDonnell Douglas Corp.*, 894 F. Supp. 1329, 1333 (E.D. Mo. 1995) (citations omitted); *White v. NFL*, 822 F. Supp. 1389, 1417 (D. Minn. 1993) (citations omitted); *In re Employee Benefit Plans Sec. Litigation.*, Case No. 92-708, 1993 WL 330595, \*3-5 (D. Minn. June 2, 1993) (citations omitted). Moreover, these factors should be analyzed in light of the strong general policy favoring settlement of class actions. *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1407 (D. Minn. 1987).

**B. The Settlement is Fair, Reasonable and Adequate**

**1. The Strength of the Class Claims When Balanced Against the Benefits Provided by the Injunctive Relief Favors Approval of the Proposed Settlement.**

The balance between the strength of the case for a plaintiff class on the merits and the value of benefits offered in a proposed settlement is the single most important factor in evaluating whether a class settlement should be approved. *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975). The amount offered in settlement includes a total of up to \$12 million cash plus considerable programmatic relief.

Balanced against the substantial benefits of the proposed settlement, including the substantial programmatic relief, is the strength of the various class claims with respect to both liability and damages. Plaintiffs believe they have a strong case for liability, but recognize that their claims are far from perfect. Further, plaintiffs have many litigation hurdles that remain to be cleared, such as certification of the class and protecting such certification on appeal, and prevailing at trial. Further, if their statistical analyses were to be rejected, which was hotly contested during the class certification evidentiary hearing, they would be almost certain to lose.

**2. The Complexity, Length and Expense of Continued Litigation Favor Approval of the Proposed Settlement.**

In the absence of an approved settlement, the parties would face a long litigation course, including further motions and appeals related to class certification, further discovery on the merits, more motions for summary judgment, trial and potential appellate proceedings that would consume time and resources and present each of them with ongoing litigation risks and uncertainties. (Sprenger Aff. ¶ 25; Kohrman Aff. ¶ 17.) It is desirable to avoid these risks and uncertainties, as well as the consumption of time and resources, and ultimately determine that an amicable settlement pursuant to the terms and conditions of the attached Settlement Agreement would be more beneficial to parties than continued litigation. (Sprenger Aff. ¶ 25; Kohrman Aff. ¶ 17.) Class counsel believe that the terms of the Settlement Agreement are in the best interests of the class and are fair, reasonable, and adequate. (Sprenger Aff. ¶ 32; Kohrman Aff. ¶ 23.)

**3. The Completion of Discovery and All Final Pretrial Preparations Favor Approval of the Proposed Settlement.**

Prior to reaching the settlement, class counsel had conducted a full and complete investigation of the class claims. Initially, class counsel investigated the merits of the claims informally by interviewing numerous witnesses before filing suit. (Sprenger Aff. ¶ 9; Kohrman Aff. ¶ 11.) Thereafter, class counsel conducted an enormous amount of formal discovery. Class counsel took or defended more than 46 depositions of 3M decision-makers and experts, reviewed over 240,000 documents, analyzed numerous electronic data sets produced by 3M, and consulted with two experts. (Sprenger Aff. ¶¶ 10-12; Kohrman Aff. ¶ 11.) Class counsel's participation in a two-day evidentiary hearing and numerous mediation sessions also aided their understanding of the relative

strengths and weaknesses of parties' positions. In sum, class counsel is well positioned to balance the benefits of the settlement against the strengths and weakness of the class claims.

**4. The Opinions of Class Counsel and the Class Representatives Favor Approval of the Proposed Settlement.**

Class counsel is well experienced in the area of employment discrimination class actions. (Sprenger Aff. ¶ 4-6; Kohrman Aff. ¶¶ 4-9.) Indeed, there are only a handful of attorneys and firms in the country that possess comparable experience and expertise in such cases. Therefore, the Court should give considerable weight to class counsel's evaluation of the merits of the settlement. *White v. National Football League*, 822 F. Supp. 1389, 1420 (D. Minn. 1993). Class counsel strongly believes that the settlement is fair, reasonable and in the best interests of the class. (Sprenger Aff. ¶ 32 Kohrman Aff. ¶ 23.) The class representatives believe likewise. (Statements of Support from Named Plaintiffs, Sprenger Aff. ¶ 33 and Exs. A-E.) This support and the lack of any fraud or collusion strongly favor approval of the settlement.

**5. The Fee Award and Litigation Expense Reimbursement Provisions of the Settlement Agreement are Fair and Reasonable.**

The allocation of the Settlement Fund between members of the class, named plaintiffs, and class counsel is fair and reasonable. Class counsel will request past and anticipated future attorneys' fees in the amount of \$3.5 million; and (2) reimbursement class counsel for advanced "out of pocket" litigation expenses in the amount of \$2.9 million. Class counsel will file their motion for attorneys' fees and litigation expenses contemporaneously with the Motion for Final Approval.

(a) *The Attorneys' Fee Provision of the Settlement Agreement Is Fair and Reasonable Under Either the Lodestar or Common Fund Methodology.*

District courts within the Eighth Circuit have utilized either the “lodestar” or “common fund” (sometimes referred to as the “percentage of the benefit”) methodology for analyzing a request for attorneys’ fees in connection with a class action settlement. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244-46 (8th Cir. 1996). Each methodology has its own merits. The advantage of the common fund approach is that “it is thought to equate the interest of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner.” *In re Xcel Energy, Inc. Securities, Derivative & “ERISA” Litigation*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005). The advantage of the lodestar method is that “it is reasonably objective, neutral, and does not require making monetary assessments of intangible rights.” *Id.* at 245 (citing Third Circuit Task Force Report, 108 F.R.D. 237, 255). Although not required, some courts that utilize the common fund method cross-check its result against the result produced under the lodestar method. *Id.* at 998.

(1) *Common Fund*

Under the common fund methodology, the Court must first value the total benefit of the settlement obtained by the class, including the programmatic relief. If the value of such programmatic relief is not given some consideration in determining an attorneys’ fee award, then attorneys will have little incentive to negotiate such provisions in employment discrimination class action settlements, even though they are arguably more important in creating an equal opportunity work environment than are monetary awards. Of course, there is no uniformly accepted methodology for valuing the type of

programmatic relief obtained here. How one values the programmatic relief depends on one's perspective. Class members who are currently employed by 3M may well view the programmatic relief as having equal or greater value than monetary relief. Class members who are no longer employed by 3M may view the programmatic relief as having significantly less value than the monetary relief. And 3M likely views the programmatic relief as having a value equal to its costs to implement and maintain its various component parts over the three year period of the injunctive relief provided in the settlement. Accordingly, the total benefit of the settlement exceeds \$12 million, but it is not possible to determine by how much.

Setting aside the value of programmatic relief, class counsel's fee request of \$3.5 million is the equivalent of slightly more than 29% of the total settlement benefit. In *Hawkins v. Thorp Loan and Thrift Co.*, a Hennepin County District Court Judge found that the benchmark for attorneys fees in common fund cases is between 20-30%. Case No. 85-6074, 1992 WL 589727, \*4 (Hennepin Cty, Minn.) (Feb. 21, 1992). The Eighth Circuit has previously approved higher percentage fee awards in cases involving monetary and non-monetary relief. *See, e.g., In re U.S. Bancorp Litigation*, 291 F.3d 1035 (8th Cir. 2002) (affirming fee award of 36% in privacy rights class action); *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225 (8th Cir. 1982) (affirming fee award equal to 36% of monetary component of settlement in Title VII class action). A recent decision by Judge Kyle of the United States District Court for the District of Minnesota approving a common fund fee award of 33% supports class counsel requested fee in this case. *Yarrington v. Solvay Pharmaceuticals, Inc.*, 697 F.Supp.2d 1057, 1061-62 (D. Minn. 2010) (approving a award of 33% of the common fund while noting that "courts [of the

Eighth Circuit] have routinely awarded attorneys fees ranging from 25% to 36% of a common fund.”).

(2) *The Lodestar Methodology*

Under the lodestar approach, the hours expended by an attorney (or other timekeeper) are multiplied by an hourly rate so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action. In the context of cases brought under fee shifting statutes such as this one, the United States Supreme Court has held that the lodestar calculation provides a presumptively reasonable attorneys’ fee award. *Blum v. Stenson*, 465 U.S. 886, 901 (1984) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983)); *Milner v. Farmer Ins. Exch.*, 748 N.W.2d 608, 620-21 (Minn. 2008) (Minnesota follows the procedure set forth in *Hensley* when determining a reasonable rate under the lodestar methodology). Although the Court has rejected the position that an upward adjustment of the lodestar fee is never permissible, it has stated that such enhancements should be limited to cases of “exceptional success.” *Blum*, 465 U.S. at 901. The Court has specifically ruled out the possibility that “contingency risk” alone may support a lodestar enhancement, finding that an attorney’s hourly billing rate should sufficiently account for that risk. See *City of Burlington v. Dague*, 505 U.S. 557, 565 (1992) (“An attorney operating on a contingency-fee basis pools the risk presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not.”); *Blum*, 465 U.S. at 902 (“the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates”; “‘quality of representation,’ however, generally is reflected in the reasonable hourly rate.”).

Class counsel expended 27,655 hours investigating and prosecuting this action over an eight year period. (Sprenger Aff. ¶ 34; Kohrman Aff. ¶ 24.) At its current hourly rates which are consistent with the rates charged by the handful of law firms that engage in a contingent national employment class action practice and other law firms in Washington, D.C., these hours have a lodestar value of \$10,893,415.57. (Sprenger Aff. ¶ 34; Kohrman Aff. ¶ 24.) Class counsel's attorney fees under the settlement agreement represent less than 35% of its lodestar fee. Accordingly, the attorneys' fee provision in the settlement agreement is fair, adequate, and reasonable.

(b) *The Litigation Expense Provision of the Settlement Agreement Is Fair and Reasonable.*

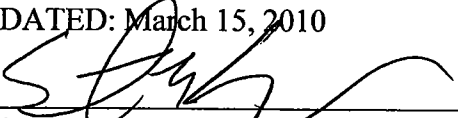
The Settlement Agreement provides for class counsel to request up to \$2.9 million as reimbursement for the "out of pocket" litigation expenses it reasonably incurred and paid in connection with investigating, prosecuting and settling this action. These expenses for experts, consultants and mediation, court and witness fees, court reporters, travel and lodging, and numerous other costs ordinarily paid for by clients were reasonably necessary to prosecute successfully this action. (Sprenger Aff. ¶ 35; Kohrman Aff. ¶ 25.) Accordingly, the litigation expense provision is fair, adequate, and reasonable.

## VI. CONCLUSION

Because the entire Settlement Agreement is fair, reasonable and adequate, the Court should grant preliminary approval and order that notice of a formal fairness hearing be given pursuant to Minn. R. Civ. P. 23.05. For the foregoing reasons, plaintiffs respectfully request that the Court enter the following: (1) an order provisionally certifying the class for purposes of settlement, and appointing class

representatives and class counsel; (2) an order preliminarily approving the settlement agreement; and (3) an order approving the provision of notice of the settlement to the class members and setting a date for a fairness hearing.

DATED: March 15, 2010



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