E-FILED
Friday, 30 October, 2009 05:19:31 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

BARBARA J. LUEDERS, PAUL DANNELS, MARK HEPPNER, LINDA HERRON, LUTZ MEYER, JOHN PIERSOL, WILLIAM SWANSON, ROBERT WELLS, STEVEN WRIGHT and BETH ZUIDEMA, individually and on behalf of a class of similarly situated persons, Plaintiffs, v. **3M COMPANY,** a Delaware corporation**,** Defendant.	No. 08-CV-4047 Judge Michael Mihm Magistrate Judge Gorman

AMENDED JOINT MOTION FOR PRELIMINARY APPROVAL OF PROVISIONAL AMENDED SETTLEMENT OF CLASS ACTION AND SUPPORTING MEMORANDUM

Plaintiffs Barbara J. Lueders, Paul Dannels, Mark Heppner, Linda Herron, Lutz Meyer, John Piersol, William Swanson, Robert Wells, Stephen Wright and Beth Zuidema, (collectively "Plaintiffs" or "Named Plaintiffs") and Defendant, 3M Company ("3M" or "Defendant"), (collectively "the Parties") hereby submit their Amended Joint Motion for Preliminary Approval of Provisional Amended Settlement of Class Action.

The Parties move this Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure to give preliminary approval to the terms of the provisional amended settlement that have been agreed to by the Parties and to advise to court of the one remaining dispute that remains between the parties concerning the " Endowment/Trusteeship (scholarship fund).

The Provisional Amended Settlement Agreement attached hereto has not yet been signed by the Parties. Parties are at an impasse with respect to the terms of the Endowment/Trusteeship (scholarship fund). In order, to comply with the Court's directive of October 29, the Parties have agreed to submit their provisional amended agreement containing the modifications Parties have agreed on as requested by the Court at the September 24 hearing. Parties will also take this opportunity to present their respective positions on the Endowment/Trusteeship (scholarship fund)so that, in the event the Parties cannot agree on the issue prior to the November 12, 2009 hearing date, the Court will be in a position to address the issue at that time. In support of this Motion, the Parties state as follows:

INTRODUCTION

Once the Scholarship/Endowment Fund issue is resolved, the Amended Settlement Agreement will resolve all wage-related claims of Plaintiffs and all putative class members who do not opt-out of the Settlement against 3M. The Plaintiffs and putative class are collectively referred to as the "Settlement Class" or "Settlement Class Members." Beginning on May 4, 2009 and continuing thereafter, the Parties engaged in settlement negotiations before experienced mediator, Hunter Hughes. The Parties reached an agreement that the Parties and their counsel believe is fair, reasonable, and equitable for the Settlement Class. On August 26, 2009 the Parties filed under seal with the Court a proposed Confidential Settlement Agreement and Joint Motion For Preliminary Approval. On September 24, 2009, during a telephonic hearing with counsel for the parties, the Court ordered that the Settlement Agreement (Docket #73) be unsealed; that the Parties re-file this Joint Motion as a public document and modify parts

of the original Motion and Settlement Agreement. This Amended Joint Motion For Preliminary Approval of the Class Action Settlement and Amended Settlement Agreement are now submitted to the Court for its review and approval.

The proposed Amended Settlement Agreement resolves all claims of the Settlement Class against 3M from December 1, 1997 through the date of entry of a Preliminary Approval Order for all allegedly due unpaid wages, and all related alleged damages, including but not limited to all alleged penalties, and all other related claims, known or unknown, including the alleged failure to pay for: time spent donning and doffing protective clothing and other personal protective equipment on 3M premises; time showering on 3M premises; walking to and from locker rooms and work stations in protective clothing; time spent reporting to work stations prior to the official start of the shift and/or remaining at the work station after the official end of the shift and performing off the clock work; any alleged failure to pay for all time worked and at the proper rate of pay, and all alleged derivative claims and/or related demands, rights, liabilities, and causes of action related under federal, state or common law including claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq.*, the Illinois Minimum Wage law ("IMWL"), 820 ILCS 105/1 *et. seq.*, the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS 115/1 *et. seq.* and any common law breach of contract theory.

With this Motion, the Parties request that the Court: (1) preliminarily approve the proposed Amended Settlement Agreement; (2) provisionally certify the Settlement Class proposed in the Amended Settlement Agreement; (2) approve the form, content and distribution of the Notice to Plaintiff Class ("Notice"), attached to the Amended Settlement Agreement as Exhibit A; (4) approve the form and content of the Formula for

Settlement Award, prepared by Class Counsel; (5) approve appointment of Settlement Administrator; (6) designate Barbara Lueders, Paul Dannels, Mark Heppner, Linda Herron, Lutz Meyer, John Piersol, William Swanson, Robert Wells, Steven Wright and Beth Zuidema as Settlement Class Representatives and approve the Enhancement payments to Settlement Class Representatives set forth in the Agreement; (7) appoint Plaintiffs' Counsel as Class Counsel and provisionally approve Class Counsel's request for attorneys' fees and costs; and (8) schedule a Fairness Hearing. The following schedule sets forth the proposed sequence:

- Within 10 calendar days after filing the Amended Joint Motion for Preliminary Approval of Amended Settlement Agreement, pursuant to the Class Action Fairness Act, 3M will notify the United States Attorney General and the Illinois and Iowa Attorney General of the Amended Settlement Agreement;

- Within 14 calendar days after preliminary approval of the Amended Settlement Agreement, the Notice will be mailed to putative class members;

- 45 calendar days after mailing the Notice is the last day for putative class members to submit written objections to the Amended Settlement Agreement or to "opt-out";

- 60 days from mailing the Notice, the Parties must submit the Joint Motion for Final Approval of the Amended Settlement Agreement and Dismissal of the Lawsuit;

- 75 days after mailing the Notice, the Final Settlement Approval Hearing is held;

- The court retains jurisdiction over the case for purposes of enforcement;

- Not more than 30 calendar days after 3M receives notice of the Court's entry of an Order granting final approval of the Amended Settlement Agreement and dismissal of the Lawsuit with prejudice, and the Release of Claims from the Settlement Class Representatives as required by the Amended Settlement Agreement, 3M will send the Settlement Award checks to the Settlement Administrator to mail to all Settlement Class Representatives who executed the appropriate agreements or otherwise did not revoke the agreements, and Settlement Class Members who did not opt-out; and

- Likewise, not more than 30 calendar days after 3M receives notice of the Court's entry of an Order granting final approval of the Amended Settlement Agreement

and dismissal of the Lawsuit with prejudice, 3M will also deliver to the Settlement Administrator checks for all remaining settlement funds for distribution as set forth in the Amended Settlement Agreement, including distribution to Class Counsel for payment of attorneys' fees and costs.

I. STATEMENT OF FACTS

A. Factual and Procedural Background

On December 7, 2007, Putative Class Representative Barbara Lueders filed a Complaint against 3M on behalf of herself and all other similarly situated former and current, non-exempt, hourly employees who worked at the Cordova, Illinois 3M plant at any time between November 2002 and continuing through the present, who allegedly are/were required to don and doff uniforms and other personal protective equipment on 3M premises, and/or who allegedly are/were required to report to their workstations approximately 20 minutes prior to the official start of their shift, and who were allegedly not paid either their regular or promised overtime pay for engaging in these activities. Settlement Class Representative Lueders asserted an individual claim seeking unpaid wages under the FLSA, as well as individual and class claims under the IMWL and IWPCA.

On April 30, 2009 Settlement Class Representative Lueders amended her Complaint to add ten additional Putative Class Representatives alleging class claims under the IMWL and IWPCA, to claim a damages period beginning in December 1997; and to add a claim for breach of contract.[1] The amended complaint also added individual FLSA claims for the additional Class Representatives. 3M timely filed its Answer to the Amended Complaint denying all allegations of wrongdoing and denying Plaintiffs'

[1] Plaintiffs subsequently filed a motion to withdraw one of the proposed Plaintiffs, leaving nine additional putative class representatives.

entitlement to class certification or to any damages. This settlement encompasses all matters raised in the Amended Complaint styled as *Barbara J. Lueders, Paul Dannels, Mark Heppner, Linda Herron, Lutz Meyer, John Piersol, William Swanson, Robert Wells, Steven Wright, and Beth Zuidema, individually and on behalf of a class of similarly situated persons v. 3M Company*, Case No. 08 CV 4047, hereinafter referred to as the "Litigation".

Because both Plaintiffs and 3M recognize the risk accompanying the questions of whether a class would be certified and whether Plaintiffs or 3M would ultimately prevail in the case, a compromise of the Settlement Class Members' claims is warranted.

B. The Parties Thoroughly Investigated the Case

At each step of the Lawsuit, the Parties aggressively investigated and litigated the case. After filing their Complaint, Plaintiffs made multiple mailings to putative Class Members, held a Town Hall informational meeting and extensively interviewed and obtained declarations from putative Class Members. 3M also conducted employee and management witness interviews and obtained declarations of putative class members.

The parties exchanged written discovery. In total, Plaintiffs issued one set of Requests for Admissions and Genuineness of Documents, two Sets of Interrogatories and three Requests for Production of Documents to 3M. 3M issued Interrogatories and Requests for Production of Documents to Plaintiffs. 3M produced tens of thousands of documents and time reporting and payroll records. Along with their consulting and computer expert, Plaintiffs' counsel reviewed and analyzed thousands of pages of documents and time reporting and payroll records produced by 3M. Plaintiffs took three combined fact and Rule 30(b)(6) depositions and defended seven additional depositions

of Settlement Class Representatives, some that were taken over the course of two or more days. 3M produced three separate corporate representatives for depositions pursuant to Rule 30(b)(6) and deposed seven Settlement Class Representatives.

The Parties also filed and briefed several motions. 3M vigorously defended the case including successfully transferring venue to the United States District Court for the Central District of Illinois (Docket # 8), hosting a site inspection for Settlement Class Representative Lueders and her counsel, and moving to strike Plaintiffs' Amended Complaint (Docket # 65).

No class or collective action has been certified by the Court to date in this case. A Motion for Class Certification was filed at the time this lawsuit was initially filed on December 7, 2007, in the Circuit Court of Cook County but the motion has not been briefed or ruled upon. Instead, on June 5, 2009, after approximately 18 months of extensive litigation, with the assistance of experienced class action mediator, Hunter Hughes, 3M and Plaintiffs, through their Counsel and on behalf of the Settlement Class, reached an agreement in principle to settle the Lawsuit subject to the Court's preliminary and final approval. As described in further detail in the attached proposed Amended Settlement Agreement, settlement awards will be distributed to all Settlement Class Members who were employed from December 1, 1997 through the date of the Court's preliminary approval of this Amended Settlement Agreement.

C. The Amended Settlement Agreement

As part of the settlement, the Parties agreed to certain confidentiality provisions including, but not limited to, that the Settlement and the terms of the Agreement would remain confidential until such time as the motion for preliminary approval was filed with

the Court and that the Parties would seek leave to file that Motion and the Confidential Settlement Agreement under seal all subject to the Court's approval and/or modification. The Court denied the Parties' Motion for Leave to File Under Seal and ordered the Motion and the Settlement Agreement unsealed. The Court then allowed the Parties to submit briefs on the confidentiality and non-disclosure provisions, which they did but were subsequently withdrawn when the Parties came to an Agreement on the wording of the confidentially provision contained in the Settlement Agreement.

The Court further requested the Parties modify the Motion and Agreement to provide more specific information as to class member subgroups, the distribution formulas used, the scholarship fund, the settlement administrator, costs/expenses of litigation to date, opt out procedure and left-over funds. The details of the modified Settlement are contained in the Amended Settlement Agreement signed by the Parties, a copy of which is attached as Exhibit A. For purposes of preliminary approval, the following briefly summarizes the Amended Agreement's terms.

1. The Settlement Class and Class Period

The Settlement Class as set forth in the attached Amended Settlement Agreement is created and defined for the sole purposes of settlement as the Settlement Class Representatives and all current and former, non-exempt, hourly plant employees who work, or have worked, at the Cordova, Illinois 3M facility at any time from December 1, 1997 and to the date of the Court's preliminary approval of this Amended Settlement Agreement, who claim that they were not paid either their regular or overtime pay for engaging in any of the following activities: (1) donning and doffing on 3M premises protective clothing and other Personal Protective Equipment required by 3M or the nature

of the work; (2) showering on 3M premises; (3) walking to and from their locker rooms and work stations in protective clothing; and (4) reporting to work stations prior to the official start of their shift and/or remaining at their work stations after the official end of their shifts and performing off the clock work.

2. The Settlement Fund

The Amended Settlement Agreement provides that within 30 calendar days of the Effective Date of Settlement, 3M will establish a "Settlement Fund" from which all payments will be made. The Maximum Gross Settlement Amount is $4.95 million plus interest at the rate of 2.5% per annum that accrues from 10 days after the Court grants preliminary approval of the Settlement Agreement to the date of 3M's payment to the Settlement Administrator.

3. Payment of Settlement Awards to Class Members

Settlement Awards subject to W-2 withholdings to all Settlement Class Members will be made from the Settlement Fund. Each Settlement Class Member's *pro rata* Settlement Award share will be calculated as set forth in Exhibit D to the Amended Settlement Agreement.

For purposes of calculating Settlement Awards to Settlement Class Members, the gross compensation paid to each Settlement Class Member will be determined by Class Counsel from 3M's work history records from December 1997 to June 2009 and payroll records from December 2002 to April 30, 2009. As set forth below in section II (B)(5), for purposes of calculating Settlement Awards only, the Settlement Class will be divided into two subclasses; employees who worked at 3M Cordova at any time since December 7, 2002 to June 7, 2009 and employees who worked at 3M Cordova at any time from December 7, 1997 to December 6, 2002. Employees who worked for some time during

both time periods will receive an Award based only on the formula which results in the greater sum. The Settlement Class Member will have an opportunity to object to or opt-out of the Amended Settlement Agreement. Any un-cashed checks or left over funds will be given to the Scholarship Fund for distribution in accordance with the terms set forth below.

4. Scholarship Fund Distribution

At the first Preliminary Approval Hearing, the Court ordered, with respect to the "cholarship und" provision [words were quoted from dkt. # 73 – 9/25/09 order and not capitalized therein], that it "needs more specific information as to what the money will be used for and who will be responsible for administrating it. Court would like to see more structure/parameters (ex: what is the purpose for the disbursement)." *Docket #73*. The Parties have reached an impasse with respect to this issue and hereby submit their respective positions.

a. Plaintiffs' Position:

On June 2, 2009, Mediator Hunter Hughes issued his Final Mediator's Proposal ("the Proposal") to the Parties and on June 5, 2009, both Parties accepted the terms of the Proposal. 6/2/09 & 6/5/09 emails from Hughes. The Proposal specifically states:

> (1) $400,000 of the amount will be paid to an **endowment/trusteeship (scholarship fund)** for (sic) an employee scholarships. The directors/trustees of the endowment shall be selected by plaintiffs and ***3M shall have no rights obligations, or responsibilities concerning this scholarship fund*** nor will its name contain/refer to "3M."

6/2/09 & 6/5/09 emails from Hughes

Plaintiffs and defendant are in agreement that the inclusion of an Endowment/Trusteeship (Scholarship Fund) is a material term of the Settlement

Agreement, but disagree as to what constitutes an appropriate allocation of this fund or what role Defendant has, if any, in the creation and/or method of allocation concerning the fund. As a threshold matter, Plaintiffs contend that Defendant has bargained away any right to dictate the substance of the terms of the Fund. The Mediator's Proposal is explicit and unambiguous on this point, "***3M shall have no rights obligations, or responsibilities concerning this scholarship fund."*** As a result, beyond ensuring that a provision regarding the Endowment/Trusteeship (Scholarship Fund) is included in the Final Settlement Agreement, Defendant does not have a horse in this race. Rather, it is for the Court to decide if Plaintiff's proposal is appropriate.

After investigation of various options with outside counsel, skilled and experienced in the practice of corporate/business law and estates and trusts, Plaintiffs proposed to set up a not-for- profit corporation which would then distribute the Endowment/Trusteeship (Scholarship Fund) to all Class Members on a pro-rata basis, regardless of position, title or length of service, for their pursuit of a scholarly, education, intellectual endeavor of his/her choice. Plaintiffs believe this proposal meets with the letter and spirit of the Mediator's Proposal and direction of the Court. This provision represents the most effective, fair and economical method of distribution of the Endowment/Trusteeship (Scholarship Fund). It provides a neutral and meaningful way to fairly administer the endowment, trust or scholarship to the Class Members and their families and thus advances the goals articulated by the parties, the mediator and the Court for the use of this $400,000.

To that end, Plaintiffs propose to that the following language be added to the Settlement Agreement:

> Each Final Settlement Class Member shall be entitled equal access to a portion of the Endowment/Trusteeship (Scholarship Fund) regardless of his or her length of service, position, or rate of pay, for the pursuit of a scholarly, educational, or intellectual endeavor of his or her choice. A not-for-profit corporation will be established for the sole purpose of distributing scholarship funds to the Final Settlement Class Members. The corporation will be established under the direction of an experienced corporate and business transactions attorney. The costs and expenses associated with the administration of the Endowment/Trusteeship (Scholarship Fund) will be deducted and paid before any allocation or distribution to the class. After accounting for administrative expenses, the residual funds received from 3M, and any additional interest earned on the funds, the Endowment/Trusteeship (Scholarship Fund) will be distributed through the Settlement Administrator to each Final Settlement Class Member on a *pro rata* basis approximately 240 days from the date the Settlement Award checks are first mailed by the Settlement Administrator. The estimated distribution to each Final Settlement Class Member is approximately $750.00. The estimated cost to establish this corporation to comply with all state regulations is $1,500.00 and the administrative costs will be a one-time approximate additional expense of $3,000.00 - $5,000.00.

While Class Counsel believe the pro-rata Endowment/Trusteeship (Scholarship Fund) to be the most appropriate option, after further consideration, they determined if this proposal was not exactly what the Court had envisioned, then to expedite the process, alternative positions should be presented. In addition, Class members may object to either option for various reasons. Class Counsel believes the Court's opinion will be persuasive to the Class. This constitutes yet another reason why Plaintiffs' counsel requests the Court's intervention on this issue. Class Counsel have trepidations with respect to the second option as it potentially excludes a significant portion of class membership from participation. Many individual class members and their relations do not intend to further traditional educational pursuits. In addition, due to IRS regulations, only 25% of those members who apply can be awarded any portion of the fund on an annual

basis. This only operates to add further restriction to Class Member Access to the fund. Nevertheless, in the event that the Court seeks the inclusion of a more traditional fund, Plaintiff's propose the following:

> The Cordova Plant Hourly Employee Fair Pay Scholarship Fund (Fund) will be established under the auspices of The Community Foundation of the Great River Bend (Foundation), a 501 (c) (3) corporation that supports charitable organizations and provides charitable assistance in a 17 county area that includes Cordova, Illinois. The Fund will be subject to the Foundation's Articles of Incorporation and Bylaws and the Foundation will have complete control over the investment and reinvestment of the Fund. The Foundation's existing scholarship committee will administer The Cordova Plant Hourly Employee Fair Pay Scholarship in accordance with the general criteria set forth in herein and in accordance with the Fund's Scholarship Endowed Fund Donation and Acceptance Agreement and all applicable IRS regulations which will limit the scholarships provided to no more than 25% of the applicants. In addition, to maintain the principal, the Foundation typically has a policy of 4 ½% pay out a year. Thus, under this plan, each year's scholarships will be limited to a total of not more than approximately $18,000.00.
>
> Scholarships will be made available to Class Members, their children, grandchildren and dependents for the pursuit of a scholarly, educational, or intellectual endeavor of his or her choice (provided it falls within the IRS's guidelines) through the Foundations' application process. In the event no applications are received from a Class Member or his/her children, grandchildren or dependents, the scholarship application process will be opened up to other current 3M Cordova hourly plant employees, their children, grandchildren and dependents. Distributions will be made annually directly to the educational facility chosen by the recipient.
>
> Alternatively, in the event no applications are received from a Class Member or his/her children, grandchildren or dependents, or funds remain available after the process is opened up to non-Class Member recipients, the Foundation may provide matching donations to the charity of choice for any hourly plant employee who so applies, again giving priority to applications of Class Members. In the event the 3M Cordova Plant ceases operation, the Fund shall be redistributed to the Friends of the Foundation Fund as an endowment to support the work of the Foundation.

> The Foundation charges 2% per year as an administrative fee, which would amount to an approximate $8,000.00 annually. In addition, there is an investment management fee of .05%, which would amount to another $200.00 annual expense. Thus, estimated annual costs to administer a scholarship fund through this Foundation, which has an existing infrastructure to handle the administration of the scholarship would be approximately $8,500.

It is Plaintiffs' understanding that Defendant is of the opinion that it must agree to the content and terms of the fund in order to include it in the final agreement. It has articulated that it is in agreement with the second option and has refused to submit the first option to the Court in the context of the settlement agreement. Furthermore, it is Plaintiffs' understanding that Defendant holds the position that this decision is not within the province of the Court. It is Plaintiffs' position that, under the Mediator's Proposal agreed to by both parties, Defendant is not entitled to reject Plaintiffs' proposal because it has "*no rights obligations, or responsibilities concerning this scholarship fund*." *Id*. As such, it is not Defendant's place to dictate the contents or substance of the fund. Parties are only obligated to include an endowment/ trusteeship (scholarship fund) provision. Beyond that Defendant's have "no rights" with respect to the fund. Plaintiffs believe that the first option is the most appropriate under the circumstances, but are willing to follow the direction of the Court if it finds otherwise.

b. 3M's Position:

At the September 24, 2009 telephonic hearing the Court made clear that it required more detailed information for certain portions of the Settlement Agreement, specifically, the Scholarship Fund. When the Parties discussed the Scholarship Fund, 3M explained that the Fund is intended not as simply another cash payment , but instead to provide for the educational benefit of the Settlement Class Members, their families and

heirs. As a result, the Court directed the Parties to set out specific and fair parameters for the administration, structure and disbursement of the Scholarship Fund. Indeed, the Court demanded that the Parties clearly delineate how the money would be administered and to ensure that money would be distributed fairly.

In response, Plaintiffs presented 3M with two options. In the first option ("Option 1") Plaintiffs proposed to set up a not-for-profit corporation to distribute the Fund to the Settlement Class Members on a pro rata basis, for which recipients ostensibly, although with no clear controls, would use the funds for scholarly endeavors. *Supra* at p. 12. In the second option, ("Option 2"), Plaintiffs proposed a fund to be managed by a local community not-for-profit foundation, The Community Foundation of the Great River Bend, whose goal is to support charitable organizations and provide charitable assistance in the area surrounding and including Cordova, Illinois. Option 2 provides that the Scholarship Fund would be subject to the Community Foundation's Articles of Incorporation and Bylaws and that the Foundation would control the investment, reinvestment and distribution of the fund directly to the educational facility selected by the recipient and maintain oversight of a scholarship committee. (Copes of the Articles of Incorporation and Bylaws are attached as Exhibit B.) Option 2 specifically sets forth that Scholarships will be made available for the pursuit of the scholarly, educational or intellectual endeavor of the recipient's choice. *Supra* at pp. 13-14.

As soon as Plaintiffs tendered Option 2, 3M promptly accepted it as the Option which best satisfies both the Court's criteria and the intent of the Scholarship Fund. Option 2 is the appropriate alternative because it sets forth the detail and structure required by the Court, and importantly ensures that the funds will be used for educational

purposes. This option does not bar any Settlement Class Member from applying for and ultimately receiving funds for their own or their families' scholarly, educational or intellectual endeavors. As Plaintiffs' counsel surely tendered Option 2 in good faith, 3M believes that its acceptance of Option 2 and willingness to submit this option to the Court for its approval, cements the Parties' agreement. Indeed, tendering both options to the Court only burdens the Court by asking it to step into the Parties' shoes to perform their job of selecting the best option. This is unnecessary as 3M has already agreed to the well-researched and thoughtful option presented by Plaintiffs.

To be sure, a one-time pro rata distribution of the Scholarship Fund is not what 3M intended when this provision was first proposed. Logic dictates that if 3M wanted to simply issue a pro-rata distribution of the funds to Settlement Class Members, it would have done so. Instead, 3M's goal was to ensure that a portion of the Settlement Fund would continue to benefit Settlement Class Members, their families and heirs into the future, beyond a one-time settlement award. Plaintiffs' Option 2 satisfies both the original intent of the Scholarship Fund and the Court's desire to ensure that the administration and disbursement of the Scholarship Fund is fair. Thus the consideration of other options or the need to ask the Court to tell the Parties how to proceed is mooted. 3M's agreement is therefore tendered to the Court and satisfies what the Court required the Parties to do Settlement Class Representative Enhancement Payments

The Amended Settlement Agreement also anticipates Enhancement Payments in a total amount of $105,000.00, which will be divided amongst the ten (10) Settlement Class Representatives. The Enhancement Payments to the Class Representatives have been proportioned based on the level of their individual participation and involvement in the

processing of the case, discovery, the proceedings as a whole and, where applicable, their obligation to release additional potential claims against 3M as set forth more fully in the Amended Settlement Agreement.

Such Enhancement Payments are appropriate. *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985)(stating "the propriety of allowing modest compensation to class representatives seems obvious," and awarding $20,000 to two named class representatives). Unlike unnamed Settlement Class Members, who are the passive beneficiaries of the representatives' efforts on their behalf, named Settlement Class Representatives agree to be the subject of discovery, including making themselves available as witnesses at deposition and trial, and subjecting themselves to other obligations of named Parties. *See Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (courts routinely approve enhancement payments to compensate named plaintiffs for services they provide); *see also* Manual for Complex Litigation (Fourth) § 21.62 n. 971 (2004) ("Manual for Compl. Lit.") (enhancement payments may be "warranted for time spent meeting with class members, monitoring cases, or responding to discovery").

5. Attorneys' Fees and Costs

The Amended Settlement Agreement provides that Class Counsel will receive from the Settlement Fund, one-third of the Maximum Gross Payment as attorneys' fees plus their costs and expenses. The amount of the attorneys' fees and costs are agreed to and are considered reasonable and customary in Class Action proceedings. Per the Court's request, Plaintiffs' counsels' estimated costs and expenses of the litigation will be filed for the Court's consideration under a separate notice.

6. Settlement Administration and Notice

Plaintiffs have proposed the appointment of Administar Services Group, Inc., a neutral third-party that is experienced in class action administration and with whom neither the parties nor any class counsel has any affiliation, to perform the duties of Settlement Administrator. These duties include:

- preparing, monitoring and maintaining a toll-free number to be accessible to the Settlement Class Members;
- ascertaining current address and addressee information for each Class Notice Form returned as undeliverable and the mailing of Class Notice Forms to the current address;
- preparing, printing and disseminating by first class mail the Class Notice to members of the Settlement Class.
- providing notice to Settlement Class Members of their right to Opt-Out of the Settlement Class and keeping track of requests for exclusion, including maintaining the original mailing envelope in which the request was mailed;
- promptly furnishing to counsel for the Parties, copies of any requests for exclusion, objections or other written or electronic communications from members of the Settlement Class which the Settlement Administrator receives;
- providing 3M's counsel with an updated address list for Settlement Class Members, reflecting any updated addresses discovered by the Settlement Administrator over the course of administering the Class Notice;
- to the extent the Settlement Administrator is unable to locate a Settlement Class Member, the Settlement Administrator may perform one skip trace to locate such Settlement Class Member, or otherwise use reasonable efforts to locate and re-serve Notice upon such Settlement Class Member within 30 days of the first Notice mailing;
- maintaining adequate records of its activities, including the dates of the mailing of Settlement Class Notices, returned mail and other communications, and attempted written or electronic communications with Settlement Class Members;
- confirming in writing the substance of its activities and its completion of the administration of the settlement;
- receiving from 3M, the Settlement Award and Enhancement checks for each Settlement Class Representative and the Settlement Award checks for each Final

Settlement Class Member and mailing the checks to the appropriate individuals;

- receiving from 3M the remaining Settlement Funds for distribution to Class Counsel, the Scholarship Fund and the Administrator for fees and costs;
- timely responding to reasonable and non-excessive communications from the Parties or their counsel.

3M has agreed to cooperate with the Settlement Administrator to ensure that it has all of the information it needs to perform these tasks. Administar is to be paid from the Settlement Fund and before any distribution or allocation to the class. The estimated cost of the Settlement Administrator is approximately $20,000, which is less than .05% of the anticipated Maximum Gross Settlement Amount.

The Settlement Administrator shall send the Settlement Class Notice to all Settlement Class Members by first class mail within 14 days after preliminary approval of the Settlement. The Amended Settlement Agreement will not be distributed. Settlement Class Members may request a copy of the Amended Settlement Agreement from either Class Counsel or the Clerk of the District Court as directed in the Class Notice.

II. THE COURT SHOULD GRANT PRELIMINARY APPROVAL AND PROVISIONALLY CERTIFY THE CLASS ACTION

A. Settlement and Class Action Approval Process

As a matter of "express public policy," federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting that "strong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned"); *see also* 2

Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11.41 (3d ed. 1992) (gathering cases). The traditional means for handling claims like those at issue here — individual litigation — would unduly tax the court system, require a massive expenditure of public and private resources, and, given the relatively small value of the claims of the individual Settlement Class Members, would be impracticable.

The Manual for Complex Litigation describes a three-step procedure for approval of class action settlements:

> (1) Preliminary approval of the proposed settlement at an informal hearing;
>
> (2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and
>
> (3) A "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

Manual for Compl. Lit., at § 21.632–34. This procedure, used by courts in this Circuit and endorsed by class action commentator Prof. Herbert Newberg, safeguards class members' due process rights and enables the court to fulfill its role as the guardian of class interests. *See* 2 Newberg & Conte, at § 11.22, et seq.

With this motion, the Parties request that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed settlement. The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness," and thus whether notice to the class of the settlement's terms and the scheduling of a formal fairness hearing is worthwhile. *Id*. at § 11.25 at 11.36, 11 37. The decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *See Moore v.*

Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1106 (D.C. Cir. 1985) ("Rule 23 places the determination [to approve or reject a proposed settlement] within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation"); *City of Seattle*, 955 F.2d at 1276 (in context of class action settlement, appellate court cannot "substitute [its] notions of fairness for those of the [trial] judge and the parties to the agreement," and will reverse only upon strong showing of abuse of discretion).

The Court's grant of preliminary approval will allow all Settlement Class Members to receive notice of the proposed settlement and the date and time of the "formal fairness hearing," or final Settlement approval hearing, at which Settlement Class Members may be heard regarding the Settlement, and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented. *See* Manual for Compl. Lit., at §§ 13.14, 21.632.

B. The Criteria for Preliminary Settlement Approval are Satisfied

1. The proposed settlement offers a beneficial resolution to this litigation

Settlement of class action litigation is favored by the federal courts. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). In deciding whether a class action should be approved, courts must determine whether the proposed settlement is fair, reasonable, and adequate. *Id*. Courts in this Circuit consider the following factors in evaluating the fairness of a class action settlement:

> [T]he strength of plaintiffs' case compared to the amount of the settlement; settling defendants' ability to pay; complexity, length and expense of further litigation; the amount of opposition to the settlement; evidence of collusion; opinions of counsel; and, the stage of the proceedings and amount of discovery completed.

Id.; *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980). Moreover, the

settlement must be viewed in its entirety rather than focusing on any individual component. *Armstrong*, 616 F.2d at 315. It must also be considered in the light most favorable to the settlement. *Id.* The proceedings to approve a settlement should not be transformed into an abbreviated trial on the merits. *See, e.g., Mars Steel Corp. v. Cont. Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987). As the Seventh Circuit has written:

> Because settlement of a class action, like any litigation, is basically a bargained for exchange between litigants, the judiciary's role is properly limited to the minimum necessary to protect the interest of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.

Armstrong, 616 F.2d at 315. A strong presumption of fairness exists when the settlement is the result of extensive arm's length negotiations. *Great Neck Capital Appreciation Inv. P'Ship, L.P. v. Pricewaterhouse Coopers*, 212 F.R.D. 400, 410 (E.D. Wis. 2002).

2. The proposed settlement is the product of serious, informed, arm's length negotiations

Arm's length negotiations conducted by competent counsel constitute prima facie evidence of fair settlements. *Berenson v. Faneuil Hall Marketplace*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("where . . . a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation by capable counsel, it is presumptively fair.").

The settlement here is the result of intensive, arm's length negotiations between experienced attorneys who are familiar with employment class action litigation in general and with the legal and factual issues of this case in particular. Counsel for all parties are particularly experienced in the litigation, certification, trial, and settlement of wage and

hour cases. In negotiating this settlement, both Class Counsel and Counsel for 3M had the benefit of years of experience combined with their familiarity with the facts of this case.

Settlement negotiations in this case began with a day-long mediation before Mediator Hunter Hughes on May 4, 2009. Negotiations, mediated by Mr. Hughes, continued for weeks thereafter. Those settlement discussions culminated on June 5, 2009 in an agreement. Class Counsel supports the resulting settlement as fair and as providing reasonable relief to the Settlement Class Members.

Here, the parties have reached a non-collusive settlement after sufficient formal and informal discovery enabled counsel for both parties to form educated assessments about the strength of Settlement Class Representatives claims, the validity of 3M's defenses, and the value of the case. Because both parties have engaged in a vigorous defense/prosecution which has presented substantial procedural and substantive hurdles for both parties in obtaining/defending against class certification and establishing/defending against liability, the compromise of these claims is justified; the settlement falls well within the range of reasonable outcomes and merits approval under Rule 23(e).

3. The risks inherent in continued litigation are great

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court must weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in continued litigation. *See In re General Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995) ("[T]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.") (citation omitted and internal

quotation marks); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

Here, this factor supports preliminary approval. The settlement affords the Settlement Class Members prompt and substantial relief, while avoiding the legal and factual obstacles that otherwise would have delayed or diminished their ultimate recovery and may have prevented the Settlement Class Members from obtaining any recovery at all. Indeed, the outcome of class certification, trial and any attendant appeals, are inherently uncertain. In this case, 3M maintains that a class would not have been certified absent this agreement and denies liability for any of the claims asserted by Settlement Class Representatives. Likewise, the Settlement Class believes they would prevail on class certification and on the merits.

4. Earlier payment supports preliminary approval

This Court also should consider that the settlement provides for payment to the Settlement Class Members now, rather than a speculative payment, which may not be made until years from now, if at all. If the litigation were to continue and if Settlement Class Representatives were to prevail, payment would occur at some indeterminate time in the future. Even though trial is not presently scheduled, if 3M were to fail, because 3M denies liability, 3M surely would have appealed any adverse ruling of issues decided against it in the trial court as would plaintiffs. An appeal, of course, might last another year or two, or even more. If the appellate court were to overturn the verdict, the case might be remanded to the trial court for further proceedings, which, again, could last indefinitely.

This delay and the risks inherent in continued litigation supported the Parties' conclusion that fighting the lawsuit to the bitter end was not the prudent course. If the

litigation continued, the class members might have received nothing or might have received a lesser or higher amount at some distant time in the future.

5. The Settlement provides relief for all Settlement Class Members and treats all Class Members fairly

Under the Amended Settlement Agreement, all Settlement Class Members are eligible to receive a settlement payment as set forth in the formulas, if they were employed during the applicable statute of limitations period. The division of the Class into sub-classes for settlement purposes is justified due to the legal defenses raised by 3M with respect to the 1997-2002 claims. There is a significant risk that those Class Members who worked from 1997-2002 would not receive any compensation at all absent this settlement. The Illinois Wage Payment and Collection Act applies to this earlier time period, but not the Illinois Minimum Wage Law. The Statute of Limitation for a claim under the IWPCA is typically 5 years for oral promises and 10 years for written promises or contracts. Thus, all claims prior to December 7, 1997 would typically be barred if the Court were to rule that there was no written promise to pay the wages sought. Plaintiffs have expanded the Class by asserting a 10 year Statute of Limitation under a breach of written contract theory but, since the legal issues concerning the viability of this claim are substantial, special handling and reduced Settlement Awards to these individuals is warranted.

The proposed Settlement provides a fair and equitable distribution of the funds to all Settlement Class Members. The formula for the calculation of the Settlement Award treats each member of the subclasses (those employed post December 2002 and those employees employed from December 1997 to December 2002) equally, based on the length of their employment by 3M, and regardless of different defenses 3M might assert

with respect to such individual persons.

6. The requested attorneys' fees are fair and reasonable

Pursuant to the Settlement, Plaintiffs' Counsel will receive one-third of the Settlement Fund as their attorneys' fees plus their costs and expenses from the Settlement Fund. In wage and hour and class cases attorneys' fees awards range from one third to 40% or higher, and as such a one-third award is fair and reasonable. The payment of attorneys' fees and costs will not result in the reduction of any individual Settlement Class Members' claim. The amount of attorneys' fees is agreed to in the Amended Settlement Agreement and is fair and reasonable.

C. For Settlement Purposes Only, Provisional Stipulation to a Settlement Class is Appropriate

Finally and for the purposes of effectuating this settlement, the Parties agree that the Court may and should provisionally certify their Class for settlement purposes, only. Because the Parties have reached agreement regarding Class certification in the context of this settlement, the Court may enter an order provisionally certifying the Class for settlement purposes, so notice of the proposed settlement can issue to the Class, and Settlement Class Members will be informed of the existence and terms of the proposed settlement, of their right to be heard on its fairness, of their right to opt-out, and of the date, time and place of the formal fairness hearing. *See Manual for Compl. Lit.*, at §§ 21.632, 21.633.

1. The Proposed Settlement Merits Class Treatment

In determining the propriety of class certification, a court shall not require Plaintiffs to make a preliminary proof of their claims. Instead, Plaintiffs need only show sufficient information to form a reasonable judgment. *Blackie v. Barrack*, 524 F.2d 891,

901 (9th Cir. 1975). Under this governing standard, the Settlement Class meets the requirements for certification under Rule 23(a) and Rule 23(b)(3) with respect to the settlement reached, for settlement purposes only.

a. Numerosity

The first requirement of Rule 23(a) is that the class be so numerous that joinder of all members would be "impracticable." FRCP 23(a)(1). Here, "'[i]f unpractical' does not mean 'impossible,' and a plaintiff only need establish the difficulty or inconvenience of joining all members of the class to meet the numerosity requirement." *Harris v. Palm Springs Alpine Estates, Inc*., 329 F.2d 909, 913-14 (9th Cir. 1964). This class is composed of approximately 517 employees, all of whom are identifiable from 3M's payroll records. Therefore, the numerosity requirement is satisfied.

b. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Here, the Settlement Class shares sufficient commonality in that each was a non-exempt employee at 3M's Cordova, Illinois plant during the class period and each is alleged to have engaged in donning and/or doffing protective clothing or personal protective equipment, performing shift handoff and/or showering at the end of his or her shifts on 3M premises.[2] According to the terms of the settlement, each post 2002 Settlement Class Member will receive a proportionate share of the class proceeds based on the shift (8 hour or 12 hour) they worked, and those Settlement Class Members who worked only from December 1997 to December 2002, will receive a Settlement Award based on the length of his or her employment with 3M during that period.

c. Typicality

[2] For purposes of settlement, 3M does not object to Class Counsels' calculations in this regard, but does not agree that these calculations are an accurate reflection of time spent in these activities for any other purpose.

Rule 23(a)(3) requires that the representative plaintiffs have claims "typical of the claims . . . of the class." Here, Settlement Class Representatives are ten of the approximately 517 non-exempt employees who worked at 3M's Cordova, Illinois facility during the class period as non-exempt employees each of whom allegedly either spent time donning and/or doffing protective clothing or personal protective equipment, performing shift handoff and/or showering at the end of their shifts on 3M premises.

d. Adequate Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "The adequacy of representation determination 'is composed of two parts: the adequacy of the named plaintiffs' counsel, and the adequacy of protecting the different, separate, and distinct interest of the class members.'" *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993).

For purposes of the proposed settlement, there are no conflicts of interest between or among the Settlement Class Representatives and the Settlement Class Members. In addition, there are no known conflicts with Plaintiffs' counsel. Moreover, Plaintiffs' counsel, who have represented numerous class members in numerous Class Actions, represents that they can and will adequately represent the Settlement Class. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (adequacy established by mere fact that counsel were experienced practitioners).

e. Predominance of Common Questions

Rule 23(b) requires that "class questions predominate and that a class action is a superior method to adjudicate this controversy." *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 188 (N.D. Ill. 1992). Here, the common questions are whether 3M had a

policy and/or practice of requiring employees to spend time donning and/or doffing protective clothing or personal protective equipment, performing shift handoff and/or showering at the end of their shifts on 3M premises without compensation

f. Superiority

Superiority is established when a class action would achieve "economies of time, effort, and expense," and promote uniformity of decisions without sacrificing procedural fairness." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615 (1997). The class action forum is "superior when efficiency and consistency are significantly promoted and there are no unusual manageability concerns arising from the size of the class or the nature of the claims or the damages sought to be recovered." *Chandler v. Southwest Jeep-Eagle, Inc.,* 162 F.R.D. 302, 310 (N.D. Ill. 1995). For purposes of the Class Settlement only, 3M does not dispute that the resolution of this case on a class basis is superior to individual lawsuits/settlements, because it allows the class members "to pool claims which would be uneconomical to litigate individually." S*ee Culinary/Bartender Trust Fund,* 244 F.3d at 1163; quoting *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985). In deciding whether to certify a settlement class action, a district court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem Prods. Inc.*, 521 U.S. at 620.

Here, the factors set forth in Rule 23(b)(3)(A), (B) and (C) all favor class certification: (1) Settlement Class Members who wish to pursue a separate action can opt out of the settlement; (2) the Parties are unaware of any competing litigation regarding the claims at issue, and (3) the Parties agree that it would be desirable to resolve the claims of the Plaintiffs and the Settlement Class in this forum.

D. The Proposed Class Notice

"Rule 23(e)(1)(B) requires the Court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." *Manual for Compl. Lit., supra,* at § 21.312. Many of the same considerations govern both certification and settlement notices. In order to protect the rights of absent Settlement Class Members, the Court must provide the best notice practicable to Settlement Class Members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12, 70 S. Ct. 652, 94 L. Ed. 865 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–175, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 2d 865 (1950). As the *Manual for Compl. Lit.* observes: "Rule 23 . . . requires that individual notice in [opt-out] actions be given to class members who can be identified through reasonable efforts. Those who cannot be readily identified must be given the 'best notice practicable under the circumstances.'" *Manual for Compl. Lit., supra,* at § 21.311. According to the *Manual for Complex Litigation, supra,* at § 21.312, the Settlement notice should:

- Define the Settlement Class;
- Describe clearly the option open to the Settlement Class Members to opt-out of the settlement and the deadlines for taking action;

- Describe the essential terms of the proposed settlement;
- Disclose any special benefits provided to the Settlement Class Representatives;
- Provide information regarding attorneys' fees;
- Indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to the settlement;
- Explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of Settlement Class Members, clearly set out those variations;
- Provide information that will enable Settlement Class Members to calculate or at least estimate their individual recoveries; and
- Prominently display the address and phone number of class counsel and the procedure for making inquiries.

Here, pursuant to the court's instruction, the Parties have agreed to a form for the Notice they believe will fairly inform the Class on all issues. The Parties submit a revised Class Notice attached to the Amended Settlement Agreement as Exhibit A for the Court's determination. The Parties have agreed that the Settlement Administrator should promptly send the Notice so that Settlement Class Members have plenty of time to decide whether to object or opt-out of the settlement.

E. Scheduling of a Final Approval Hearing is Appropriate

The last step in the Settlement approval process is a final fairness hearing at which the Court may hear all evidence and argument necessary to make its settlement evaluation. Proponents of the settlement may explain the terms and conditions of the settlement, and offer argument in support of final approval. In addition, Settlement Class Members, or their counsel, may be heard in support of or in opposition to the Amended Settlement Agreement. The Court will determine after the Final Approval Hearing whether the settlement should be approved, and whether to enter a Final Approval Order

and judgment under Rule 23(e). Plaintiffs request that the Court set a date for a hearing on final approval at the Court's convenience at least 75 days after the date of entry of the Preliminary Approval Order.

III. CONCLUSION

For all of the foregoing reasons, the Parties respectfully request that the Court grant preliminary approval of the Amended Settlement Agreement, appoint as Class Counsel, Law Offices of Colleen McLaughlin and Robin Potter & Associates, provisionally certify the proposed Settlement Class, and not less than 75 days after the mailing of notice, schedule a formal fairness hearing on final settlement approval as the Court's calendar permits.

Respectfully submitted,

3M COMPANY

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Dated: October 30, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, a copy of the ***Amended Joint Motion for Preliminary Approval of Amended Settlement of Class Action and Memorandum in Support Thereof***, was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic system.

s/John A. Ybarra
John A. Ybarra

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