

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

3M Company,

Court File No. _____

Plaintiff,

COMPLAINT

v.

(JURY TRIAL DEMANDED)

Covington & Burling LLP,

Defendant.

Plaintiff 3M Company (“3M”) files this Complaint and Demand for Jury Trial (the “Complaint”) against defendant Covington & Burling LLP (“Covington”), based on personal knowledge as to its own acts and on information and belief as to all other matters, as follows:

I.

PRELIMINARY STATEMENT

1. Our legal system is founded upon the necessity that the public be able to rely on lawyers to act honestly and with scrupulous adherence to the duties that arise from their relationships with their clients. Those duties are fundamental to the “rule of law” that is the bedrock of the system of government in our country.

2. Essential to the attorney-client relationship are the duties of loyalty and confidentiality. Indeed, lawyers are bound to uphold a trust of confidentiality with their clients as part of their ethical and fiduciary duties. To this end, “[l]awyers know that no other group or profession sets higher ethical standards,” as former American Bar Association President David Brink once acknowledged. In addition to ethical duties,

lawyers also owe fiduciary duties to their clients. Fiduciary duties are the highest and most strict obligations recognized by our legal system. As former Minnesota Supreme Court Justice James C. Otis explained, “the underlying policy” requiring lawyers’ strict adherence to fiduciary principles “recognizes that insuring *absolute fidelity* to the principal’s . . . interests is fundamental to establishing the trust necessary to the proper functioning of these relationships.” *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (emphasis added). Indeed, the fiduciary duties that a lawyer owes to his or her client, including loyalty, candor, confidentiality, and full disclosure, are the hallmarks of the legal profession.

3. The Covington law firm holds itself out as the type of firm on which clients can rely to preserve and protect their most sensitive confidences.¹ That was the law firm 3M thought it had retained for parts of three decades. Beginning in the 1980s, and continuing until December 2010, more than 165 Covington attorneys billed 3M millions of dollars to represent 3M in connection with more than a dozen legal matters. In the natural course of that long-standing relationship, 3M trusted Covington with its highly confidential and privileged information based on an expectation of fidelity and

¹ Just earlier this year, Covington partners wrote that “the attorney-client privilege [is] the oldest . . . the most venerated, and the most sacred of the common-law privileges for confidential communications.” John M. Vine, “The Fiduciary Exception,” *Tax Management Compensation Planning Journal*, 40 CPJ 31 (Feb. 3, 2012). According to Vine, the attorney-client privilege “protects clients from the risk that what they tell their lawyers or what their lawyers tell them will . . . not be voluntarily . . . disclosed.” *Id.* Ironically, Vine credits the assistance of fellow Covington partners Seth Safra and Jeffrey Huvelle in writing the article. Yet Safra is among the partners directly responsible for Covington’s breaches of its fiduciary duties to 3M and Huvelle has been central to Covington’s efforts to portray Covington’s conduct as innocent.

confidentiality. However, Covington breached its duties to 3M, by abandoning 3M, switching sides and now representing the State of Minnesota (“State”) against 3M on *exactly the same issues* about which Covington had earlier advised 3M.

4. Although Covington had been 3M’s counsel for more than a decade in connection with issues arising out of 3M’s fluorochemical (“FC”) business, Covington elected to drop its representation of 3M on an unrelated matter for the express purpose of suing 3M on behalf of the State in connection with that FC business. That lawsuit is currently pending in the Fourth Judicial District Court for the State of Minnesota, Hennepin County, and is styled, *State of Minnesota, et al. v. 3M Company*, Court File No. 27-CV-10-28862 (“NRD Action”). Covington switched its position from arguing (truthfully) on 3M’s behalf that environmental exposure to FCs *do not* pose a risk to humans, to now arguing on behalf of the State that environmental exposure to those very same FCs *are* toxic. The breach of loyalty could not be more sharply drawn.

5. What makes matters worse is that Covington choreographed its scheme to breach its duties to 3M. Knowing that its fee agreement with the State required it to warrant that it had no outstanding matters for 3M—yet concerned about alerting 3M to its plan to represent the State against it, lest 3M object—Covington developed a plan to drop 3M as a client (like a hot potato) shortly before the NRD Action would be filed. Thus, instead of declining the adverse representation, as it should have, or at least making full disclosure of its desire to represent the State against 3M in connection with 3M’s FC business and seeking 3M’s written consent, Covington instead sold 3M out for what it mistakenly believed would be a more lucrative contingency agreement with the State—

one that Covington thought would net it many millions of dollars at its own (now former) client's expense.

6. As a public company, 3M owes fiduciary duties to its shareholders to take all actions necessary to protect their interests—duties that 3M takes seriously. 3M, therefore, is compelled to file this action. By this Complaint, 3M seeks to: (i) protect its confidential information; (ii) uncover the true extent of the damage done by Covington's betrayal; (iii) recover damages for the harm it has suffered; (iv) obtain injunctive relief prohibiting Covington from continuing to breach its fiduciary duties; and (v) require Covington to disgorge all of its ill-gotten gains.

II.

PARTIES

7. Plaintiff 3M is a corporation incorporated in the State of Delaware and has its principal place of business in Maplewood, Minnesota. Its principal mailing address is 3M Company, c/o 3M Office of General Counsel, 3M Center, St. Paul, Minnesota 55133-3428.

8. Defendant Covington is a law firm that is structured as a foreign limited liability company and registered to do business in Washington, D.C. Covington's principal mailing address is 1201 Pennsylvania Avenue NW, Washington, D.C. 20004-2401.

III.

JURISDICTION AND VENUE

9. The Court has personal jurisdiction over Covington because it transacts business within the State of Minnesota. Among other things, from 1992 through 2010, Covington provided legal services to 3M. Further, in February 2011, Covington was admitted *pro hac vice* to practice law in the State of Minnesota in the NRD Action. Covington is currently serving as Special Attorney on behalf of the State in the NRD Action.

10. Pursuant to 28 U.S.C. § 1332, the Court has subject matter jurisdiction over this action because complete diversity of citizenship exists between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

11. Pursuant to 28 U.S.C. § 1391, venue exists because substantial parts of the events or omissions giving rise to the claims stated herein occurred in the State of Minnesota.

IV.

FACTUAL BACKGROUND

A. 3M, Its Business, and FC Products

12. 3M was founded in 1902 in Two Harbors, Minnesota, by five businessmen who began manufacturing sandpaper in 1905. The company moved to the St. Paul area in 1910.

13. Today, 3M is a company renowned for its development of technologies to meet a wide array of consumer needs. To that end, the company produces thousands of

products and is a leader in numerous markets. In particular, 3M competes in such varied fields as health care, highway safety, office products, abrasives, and adhesives. Among 3M's best known products are Scotch® Tape, Post-it® Note Pads, and Nexcare™ Adhesive Bandages.

14. The engine that drives 3M's long-term success is its commitment to innovation. In the early 1920s, 3M introduced the world's first waterproof sandpaper. In 1925, 3M invented masking tape—the first of many Scotch® brand pressure-sensitive tapes. In the early 1940s, 3M dove into the production of defense materials for World War II. Thereafter, 3M released new products such as Scotchlite™ Reflective Sheeting for highway markings, magnetic sound recording tape, filament adhesive tape, and offset printing plates. In the 1950s, 3M introduced the Thermo-Fax™ copying process and Scotch-Brite® Cleaning Pads. In the 1960s, 3M developed photographic products, carbonless papers, overhead projection systems, and a number of medical and dental products. In the 1970s and 1980s, 3M expanded into pharmaceuticals, radiology, and energy control. In 1980, 3M introduced Post-it® Notes, which changed people's communication and organization behavior forever. In the 1990s, 3M developed an array of new and innovative products, including immune response modifier pharmaceuticals; brightness enhancement films for electronic displays; and flexible circuits used in inkjet printers, cell phones, and other electronic devices.

15. Today, 3M employs more than 80,000 persons globally, has operations in more than 65 countries, and sells its products in nearly 200 countries. 3M presently

employs more than 7,000 researchers worldwide. In 2011, 3M reported global sales of \$29.6 billion.

16. Fluorochemicals (“FCs”) were the backbone of a significant segment of 3M’s business. In the 1950s, 3M began commercial production of organic chemicals that include the element fluorine and are generally referred to as FCs. A subset of these compounds are “fully-fluorinated” chemicals called perfluorochemicals (“PFCs”). 3M successfully developed its PFC compounds—most of which were sold to manufacturing customers who used them in a variety of product applications like food packaging, non-stick cookware, and textile products.

B. Covington

17. Covington was founded in 1919 by Judge J. Harris Covington and Edward B. Burling. On its website, Covington says the founders’ goal was “to create a firm in the nation’s capital that could advise and represent corporations located anywhere in the nation or the world on a wide range of legal issues.” Covington boasts, “[t]oday our Washington office has over 300 lawyers representing clients according to the highest standards . . .” (emphasis added). Nothing could be further from the truth.

18. For decades Covington expressed pride in the belief that it was on a short list of law firms that corporations hired for sophisticated legal work. Yet Covington has not been immune to changes in the legal market. Indeed, in connection with the upheaval that has occurred in the legal markets since 2008, Covington has experienced declining revenues, profits, and prestige. Indeed, faced with the daunting new reality of a more

knowledgeable and sophisticated market, Covington has been forced to make significant changes in order to stay relevant.

19. To that end, Covington has ventured into a world it would not have in better days—the world of plaintiff-side contingency fee litigation. Contingency fee litigation has become attractive to firms like Covington with lagging profits because of the financial rewards possible in such cases. To Covington, contingency work for governments like the State of Minnesota is now seen as desirable; after all, the sovereign heft of a state government can sometimes induce quick settlements from defendants.

C. Covington’s Work For 3M

20. Beginning in the 1980s, 3M relied on Covington to provide legal services in connection with numerous assignments. Over that time, dozens of Covington attorneys represented 3M in connection with a wide array of corporate, insurance and litigation matters.

1. The early 1990s: 3M hires Covington to provide legal advice and advocacy in connection with its FC business.

21. In the early 1990s, 3M submitted petitions to the Food and Drug Administration (“FDA”) in connection with the use of two FC products—namely, Scotchban® FC-807 and Scotchban® FC-845—in high temperature food packaging applications. 3M sold Scotchban® products to customers who used those products in such applications as food packaging to prevent grease and oil from permeating the package and destroying it. It was ideal for hamburger wrappers, pizza boxes, microwave popcorn bags, and the like. However, with the increasing popularity of microwave

cooking, 3M sought FDA recognition that its Scotchban® products were safely used in food packaging when exposed to foods at high temperatures.

22. In December 1992, 3M retained Covington for its expertise in federal governmental regulatory matters, and specifically that of Covington partner, Peter Hutt (“Hutt”), who held himself out as an expert on food packaging additive regulation by the FDA. 3M relied on Covington’s legal advice and guidance concerning 3M’s FDA petitions for FC-807 and FC-845, responding to the FDA’s requests for information, and other matters relating to its FC compounds. In order to facilitate Covington’s work, 3M shared virtually all of its confidential information regarding its FC products with Hutt and other Covington attorneys.

2. The Mid-1990s: Covington continues to advise and advocate for 3M in connection with FC-related issues.

23. Given its unwavering commitment to the safety of its products, in or around 1998, 3M was engaged in evaluating its product lines in order to understand their potential health and environmental implications. In the course of these investigations, 3M assembled a team of lawyers, scientists, and executives to consider the scientific, regulatory, legal, and business issues posed by the company’s manufacture of FCs and PFCs. Covington acted as 3M’s primary advocate before the FDA in connection with issues relating to its FC business, and, along with others, also advised 3M in connection with issues involving the EPA, and other state, federal, and international regulatory agencies.

24. At that time, Covington took a proactive approach in evaluating the scientific evidence that FCs in general, and PFCs in particular, are not toxic and do not cause adverse health effects in humans. On behalf of 3M, Covington forcefully advocated that, as both 3M-funded and independently-conducted science shows, PFCs are not unsafe for humans as a result of environmental exposure.

3. The 2000s: Covington advises 3M in connection with 3M's decision to stop manufacturing C-8 PFC products.

25. In May 2000, 3M decided to phase out the production of certain PFCs and to discontinue selling those compounds to food packagers altogether. 3M looked to Covington for legal advice in connection with making this decision. In fact, Hutt presented 3M's phase-out plan to the FDA in May 2000, and emphasized that there were no health risks associated with 3M's FCs through product exposure.

26. Thereafter, Covington advised 3M in connection with communicating the phase-out decision to 3M's customers. Furthermore, Covington helped to ensure that the confidential FC-related business information 3M had provided to regulatory authorities remained confidential. Indeed, Covington was intimately involved throughout 3M's FC decision-making process through at least 2006.

4. Covington also assists 3M with an employee benefits matter in 2010.

27. Among the many other matters for which 3M engaged Covington over the decades, in May 2010, 3M engaged Covington to provide legal advice regarding the company's employee benefits program. While the parties were negotiating the terms of an engagement letter for that matter, 3M Assistant General Counsel, David Overstreet

(“Overstreet”) requested that Covington partner, Amy Moore (“Moore”) add the following language to the letter: “in the event that we [Covington] represent a party adverse to 3M, we will establish an ethical wall between our lawyers representing 3M and our lawyers representing such parties adverse to 3M.” The final engagement letter, which was executed by both parties on May 21, 2010, included that language. Further, the parties incorporated into the engagement letter the terms of 3M’s Outside Counsel Procedures, which required Covington to advise 3M immediately of any actual or potential representation that might be adverse to the interests of 3M.

D. Covington Switches Sides.

1. Covington’s betrayal begins: undisclosed meetings with the State about suing 3M

28. In 2010, while still representing 3M, Covington communicated with the State about the possibility of serving as Special Attorney and filing a lawsuit against 3M relating to its FC business. On November 19, 2010, Covington partner, William F. Greaney (“Greaney”) received a call from former Assistant Attorney General, Alan Williams (“Williams”), who asked if Covington was interested in being considered to represent the State as Special Attorney in the NRD Action. On November 23, 2010, Greaney met with Williams and Minnesota Attorney General, Lori Swanson to discuss the Special Attorney Appointment. Greaney has admitted that, sometime during the second week of December 2010 (while 3M was still a client), the Attorney General informed Greaney that she wanted to appoint Covington as Special Attorney in the NRD case.

2. **Covington closes the book on 3M's employee benefits matter, and misleads 3M in order to obtain its assent.**

29. While Covington was secretly speaking with the State, Covington partner, Seth Safra ("Safra") contacted Overstreet to request a written confirmation that Covington's engagement on the employee benefits matter was over. This contact followed a letter dated December 7, 2010, wherein Safra told Overstreet that Covington had unilaterally determined that its work on the employee benefit matter was complete.

30. This was not the normal course of dealing between the parties, nor had it been contemplated by them when they executed their engagement agreements. In fact, Covington had never before requested written confirmation that it had completed a legal matter for 3M. When Overstreet said that 3M might need Covington to provide additional analysis of the employee benefits matter or work on related issues, Safra explained that the parties could simply open a new matter. Neither Safra nor any other Covington attorney disclosed the truth: that Covington had been interviewed by the State to serve as Special Attorney on the State's behalf against 3M and that Covington was even then already conducting considerable research into the State's claims against 3M. Unaware of the reasons underlying Covington's uncharacteristic request, and thinking that Covington was simply addressing internal administrative issues, on December 22, 2010, Overstreet sent an e-mail to Safra confirming that the employee benefits engagement was closed.

3. Just eight days later, Covington executes the Special Attorney Appointment, and the State files the NRD Action against 3M.

31. On December 30, 2010, the State and Covington executed the Special Attorney Appointment, which officially appointed Covington as the Special Attorney to “examine, investigate, recommend, and litigate . . . the State’s statutory and common-law claims against” 3M related to “perfluorochemicals and other contaminants.” Covington was careful to state in the Special Appointment that it did not have any “outstanding” representations for another client on a substantially related matter. Of course, Covington could not have made that statement even eight days earlier, before it extracted the written confirmation from Overstreet. And Covington specifically omitted any statement at all about its eighteen-year attorney-client relationship with 3M—fourteen of which were spent working as one of 3M’s most closely trusted “core legal team” advisors with respect to 3M’s FC business.

32. The State’s allegations in the NRD Action—articulated by Covington—are directly counter to the (correct) positions advocated by Covington while it was representing 3M. At that time, Covington truthfully told the FDA and others that PFCs were not toxic, and did not cause adverse health effects in humans. Yet now, on behalf of the State and with the allure of a large contingency fee for winning (to say nothing of the eight-figure loss if it loses), Covington has reversed itself to attack 3M’s FC business and argue that PFCs are toxic and that the tiny concentrations of PFCs found in the Minnesota environment pose risks to human health. Covington’s greed-motivated side-switching is a quintessential example of a breach of fiduciary duties.

E. The Damage Done

33. Some of the most respected national and local experts on legal ethics—among them, Charles Wolfram (author of the treatise, MODERN LEGAL ETHICS, and other scholarly articles examining lawyers’ professional responsibilities), Richard Painter (Professor, University of Minnesota Law School), Roy Simon (former Professor, Hofstra University School of Law, and author of SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED), Richard Flamm (author of LAWYER DISQUALIFICATION, CONFLICTS OF INTEREST AND OTHER BASES), and Eric Cooperstein (legal ethics practitioner and former Senior Assistant Director of the Minnesota Office of Lawyers Professional Responsibility)—have concluded that Covington breached its fiduciary obligations to 3M. They agree that 3M’s attorney-client relationship with Covington was premised on 3M’s reasonable expectation that Covington would remain loyal, act in good faith, be candid, and protect 3M’s confidences. As Richard Flamm puts it, “[t]he fact that C&B [Covington] appears to have been planning to sue 3M at a time when it was still representing 3M is troubling . . . because such conduct would appear to manifest a flagrant breach of the duty of loyalty that all attorneys owe to their current clients[.]” In particular, 3M was entitled to expect that Covington would report to 3M all material information that could affect the representation or jeopardize 3M’s confidences. Based on the facts set forth in this Complaint, each of those experts have concluded that Covington breached its fiduciary duties to 3M by switching sides and dropping 3M like a “hot potato” the minute a representation it (mistakenly) thought to be more lucrative came along. Roy Simon concurs that Covington breached its duties to 3M because it

“began plotting a legal attack against its own long-time client 3M while it still had a relationship of trust and confidence with 3M and still owed 3M a fiduciary duty of loyalty.” That legal scholars concur on these points should not be surprising given the clear disregard with which Covington treated its duties to 3M.

34. In the NRD Action, 3M is confident it will demonstrate that the State’s claims lack merit. Nonetheless, those issues are irrelevant to this action because Covington is liable to 3M for having breached its duties of candor, loyalty, good faith, and full disclosure irrespective of the merits of the parties’ positions in the NRD Action. 3M has moved to disqualify Covington in that action; however, even a denial of that motion would be irrelevant to the claims set forth in this matter.

V.

CLAIMS FOR RELIEF

A. Count I: Breach Of Fiduciary Duty

35. 3M repeats the allegations set forth in the preceding paragraphs.

36. From 1992 through 2006, Covington had an attorney-client relationship with 3M and stood arm-in-arm with 3M to assist 3M with its FC business. In its engagement letters with 3M, Covington specifically acknowledged that it could not, without prior consent, undertake any adverse representation against 3M that was substantially related to any matter on which Covington represented 3M.

37. Covington breached its duty of loyalty. In November 2010, while 3M was a current client, Covington betrayed the trust and loyalty that it owed to 3M by switching sides, participating in negotiations with the State, and ultimately serving as Special

Attorney in the NRD Action. During the time it represented 3M, Covington vigorously advocated that FCs are not harmful to humans, but Covington now argues on behalf of the State that 3M should be liable for hundreds of millions of dollars because FCs are toxic. By switching sides to take positions materially adverse to 3M, Covington breached its fiduciary duties of loyalty to 3M.

38. Covington has also breached its duties of candor and full disclosure. Under Minnesota law, an attorney's duty of candor requires that the attorney communicate to his client any and all information he obtains that may affect the interests of his client in respect to matters entrusted to him. In 2010, while 3M was a Covington client, Covington did not disclose to 3M the State's approach to Covington, Covington's investigation of claims against 3M or Covington's intention to represent the State in an action adverse to 3M.

39. Covington's failure to disclose these important facts was not a product of Covington's mere oversight. To the contrary, Covington knowingly and intentionally withheld these facts from 3M when Covington sought 3M's agreement to terminate 3M's engagement. Covington deliberately deceived 3M in order to gain a potentially-lucrative contingency engagement from the State.

40. Covington's conduct also establishes that it failed to meet its duty to preserve 3M's confidences. An attorney's duty to preserve a client's confidences is an affirmative one, which requires the attorney to take actions necessary to protect his or her client's confidential and privileged information from disclosure to third parties.

41. 3M has suffered damages as a direct and proximate result of Covington's breaches of the fiduciary duties that it owed to 3M. 3M requests all compensatory and consequential damages that it is entitled to receive from Covington.

42. Under Minnesota law, the remedy for an attorney's breach of fiduciary duty includes forfeiture of client compensation. Based on Covington's breaches of fiduciary duties, 3M is entitled to disgorgement of all amounts it paid to Covington.

43. Finally, 3M seeks preliminary and permanent injunctive relief preventing Covington from further unauthorized disclosures of 3M's confidential information. Preliminary and permanent injunctive relief is necessary to safeguard 3M's confidential information.

B. Count II: Breach of Contract

44. 3M repeats the allegations set forth in the preceding paragraphs.

45. On May 21, 2010, Covington and 3M entered into an agreement for Covington to provide legal services to 3M regarding an employee benefits matter (the "2010 Agreement"). In exchange for 3M compensating Covington for its legal services, Covington agreed it would not represent a client adverse to 3M without first establishing an ethical wall between the Covington lawyers representing 3M and the Covington lawyers representing parties adverse to 3M.

46. Over the course of Covington's work for 3M pursuant to the 2010 Agreement, 3M paid Covington significant legal fees and other expenses, and fully performed all of its obligations under the 2010 Agreement.

47. Covington breached the 2010 Agreement. On or about November 19, 2010, Covington switched sides and agreed to represent the State in an action adverse to 3M. Indeed, Covington has admitted to 3M that it failed to establish an ethical wall prior to accepting the State's representation, and for some time thereafter, in breach of the 2010 Agreement.

48. 3M has suffered damages as a direct and proximate result of Covington's breach of the 2010 Agreement.

VI.

JURY DEMAND

49. 3M demands a jury trial.

VII.

PRAYER FOR RELIEF

In light of the foregoing, 3M respectfully requests that this Court award 3M:

- (1) consequential and compensatory damages;
- (2) disgorgement of the legal fees that 3M paid Covington beginning in 1992, and forfeiture by Covington of all ill-gotten gains;
- (3) attorney's fees and costs incurred in this action;
- (4) pre-judgment and post-judgment interest at the highest lawful rates;
- (5) injunctive relief to enjoin Covington from further jeopardizing 3M's confidential information; and

(6) such further relief, at law or in equity, to which it may be entitled and which this Court deems just and proper.

Dated: July 24, 2012

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