

EXHIBIT “7”

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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 MONIQUE Da SILVA MOORE, et
3 al.,

4 Plaintiffs,

5 v.

11 CV 1279 (RJS)

6 PUBLICIS GROUPE, et al.,

7 Defendants.

8 -----x

New York, N.Y.
January 4, 2011
10:58 a.m.

11 Before:

12 HON. ANDREW J. PECK,

13 Magistrate Judge

14 APPEARANCES

15 SANFORD WITTELS & HEISLER LLP
15 Attorneys for Plaintiffs

16 JANETTE WIPPER
16 DEEPIKA BAINS

17 JACKSON LEWIS LLP
18 Attorneys for Defendant MSL Group

18 BRETT M. ANDERS
19 VICTORIA WOODIN CHAVEY

20 ALSO PRESENT:

21 PAUL J. NEALE, DOAR Litigation Consulting
21 GENE KILMOV, DOAR Litigation Consulting
22 ERIC SEGGEBRUCH, Recommind
22 CRAIG CARPENTER, Recommind

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1 (In open court)

2 THE COURT: Having read, to at least a certain extent,
3 all the things you were kind enough to fax me, including the
4 51-page fax that came in overnight twice -- so somebody owes us
5 a ream of paper, which I won't collect, but let's try not to
6 fax in that much -- here are my thoughts, to start:

7 We either need to revisit the issue of bifurcation of
8 class action discovery and full merits discovery and/or, even
9 treating it as such, it is clear to me that there is a
10 difference between the discovery that would go on in a class
11 action and the discovery treating every possible class
12 plaintiff as an actual plaintiff, which defeats the whole
13 purpose of having a class.

14 In addition, I don't think we have scheduled the
15 motion for class certification, which should be handled sooner
16 rather than later. So maybe we should start with that
17 question: When will plaintiffs be ready to move for class
18 certification? And I read the transcripts before Judge
19 Sullivan dealing with bifurcation where both of you in essence
20 promised Judge Sullivan that, no, no, no, that's not going to
21 lead to all sorts of fights. And, frankly, I've seen nothing
22 but fights since this case has been referred to me and,
23 frankly, no progress.

24 So that's the first question: When are you planning
25 to move for class certification? Who am I going to hear from

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1 on the plaintiffs' side? Ms. Wipper?

2 MS. WIPPER: Yes, for the plaintiffs in the class.

3 Your Honor, the current schedule entered by Judge
4 Sullivan has a close for fact discovery, I believe, of
5 June 30th.

6 THE COURT: But it's too late to do class
7 certification after the close of discovery. That's not what
8 Rule 23 anticipates.

9 MS. WIPPER: Understood. We requested a bifurcated
10 schedule, your Honor, to Judge Sullivan. We wanted class
11 discovery first so we could address and target discovery for
12 the class issues and also minimize potentially some of the
13 disputes going on. However, defendant MSL opposed that.

14 THE COURT: I read all of that.

15 MS. WIPPER: OK.

16 THE COURT: And at the time, everyone thought it would
17 be a smooth road and would be faster. It's not smooth and it's
18 probably not faster. So maybe I'll do it this way: Do you
19 both at this point, seeing where you've gotten yourselves --
20 and this I guess is somewhat of a question to both of you, so
21 it will be a single yes-or-no question -- do you want to
22 bifurcate?

23 MS. WIPPER: Plaintiffs would be willing to bifurcate
24 if we did not change the current schedule, because we've lost
25 so much time with the current schedule with all of these

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1 discovery disputes. At this point we haven't taken one
2 deposition of defendant witnesses. We've gotten a couple of
3 thousands of documents, a lot of them are policy documents that
4 are repetitive. We haven't gotten a lot of the information we
5 have requested.

6 THE COURT: Is bifurcation -- and by bifurcation, I
7 mean the only discovery that will go on -- is that aimed at
8 deciding whether this should be a class action? Is that going
9 to eliminate most of these fights, from plaintiffs' point of
10 view, or if we agree to bifurcation, are you then going to say,
11 but, Judge, we still want everything or 90 percent of
12 everything set forth in our current letters about what the
13 disputes are?

14 MS. WIPPER: Well, if I could just respond about some
15 of the disputes, as an example --

16 THE COURT: No, no, no. In your view -- let me do it
17 this way: OK, so you're potentially willing to bifurcate, let
18 me leave it at that.

19 For the Jackson Lewis folks, who am I going to hear
20 from?

21 MS. CHAVEY: Victoria Chavey.

22 THE COURT: Having opposed bifurcation the first time,
23 what's your view on it now?

24 MS. CHAVEY: Your Honor, we would have two concerns
25 with bifurcation at this point. One is, we would like to

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1 proceed with discovery on the merits of the individual named
2 plaintiffs' claims. So if there were a bifurcated discovery
3 order at this point, we would still like to pursue merits
4 discovery as to the individual claims.

5 THE COURT: But that means they're going to want
6 merits discovery as to the individual claims against you, which
7 is probably going to put us back in the quicksand that I'm
8 trying to get you all out of.

9 MS. CHAVEY: The second concern, your Honor, that we
10 have is related to that, and, that is, that we understand
11 plaintiffs' position to be that to prove their
12 pattern-or-practice claim, they do need to take discovery, in
13 their view, on every single decision made at MSL over the last
14 ten-plus years. So if their view of the pattern-and-practice
15 claim is such that they need discovery on every single decision
16 made, as opposed to focusing instead on what should be the
17 common questions, then I don't know that bifurcating the
18 discovery at this point is going to accomplish the goal that we
19 all had back in the summer, which was efficiency.

20 I'd also like to say, your Honor, just at the outset,
21 I conferred with counsel for the parent company, Publicis
22 Groupe yesterday with regard to whether they needed to appear.
23 It didn't appear to be necessary, given what the Court was
24 going to take up but George Stoehner, who was here on
25 December 2nd, is available by phone if that becomes necessary.

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1 THE COURT: All right.

2 MS. WIPPER: Your Honor, if I can respond, some of the
3 existing disputes are related to class issues. For example,
4 we're requesting personnel action notices because of the errors
5 that were found in the data, the HR data, that was produced.
6 Essentially, the coding --

7 THE COURT: Why is that relevant to class
8 certification?

9 MS. WIPPER: For our expert to do a statistical
10 analysis and render regression analysis, they need accurate
11 data, including payroll data, which we don't have, which is
12 also in dispute.

13 THE COURT: Wait. Are you seriously telling me that
14 for the something like 700 to 1,000 employees of MSL who are at
15 issue here, you need the payroll data as to every single one of
16 them for ten years or some lesser number?

17 MS. WIPPER: Yes, your Honor. To run a compensation
18 analysis for regression, we often use payroll data to
19 essentially compare what people are paid during the class
20 period. So, yes.

21 THE COURT: All right, Ms. Chavey?

22 MS. CHAVEY: Your Honor, we have provided the payroll
23 data and other electronic data but what we haven't provided,
24 because it wasn't requested, was paper copies of the personnel
25 action notices. And we advised plaintiffs' counsel that the

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1 Box 5 data from the W-2s were not available electronically. We
2 have of course records of the W-2s that were issued, but that
3 is not electronically-held data. That is what was requested,
4 was electronic-held data, and we have provided it.

5 THE COURT: All right.

6 MS. WIPPER: Your Honor, if I might, they haven't
7 provided the data.

8 THE COURT: We're either going to do this in some
9 organized fashion -- we have no more than an hour -- or you can
10 come back this afternoon for the rest of this.

11 Instead of telling me what you need of this, is there
12 a substantial part of what the letters in front of me have you
13 each fighting about that will not need to occur if there is
14 bifurcation, or not? Because, frankly, if you're going to say
15 I want it all anyway, then I'm not going to bifurcate, the two
16 of you are going to keep beating your heads against the wall
17 with each other, and you'll do what you're going to do within
18 the six months you have for fact discovery that are left.

19 MS. WIPPER: Your Honor, the HR complaints go to
20 merits in order to show intentional discrimination, so those
21 would not be at issue if there was a bifurcated schedule.

22 Also, in terms of the personnel action notices, that
23 would be a part of it but not every personnel decision for
24 every class member and every comparator. So it would limit the
25 personnel records we would be requesting and it would also

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1 limit the HR complaints, discrimination complaints.

2 THE COURT: What else? I've got several hundred pages
3 of letters before we even get to the dueling ESI protocols.

4 MS. WIPPER: Well, in terms of the motion to compel
5 letters, I think that was the only two issues that -- oh, there
6 was one other issue, the personnel file of the president, and
7 that would be a part of the class discovery, because as part of
8 the common issue --

9 THE COURT: Well, it doesn't sound like we're gaining
10 much by bifurcating. So you all are going to swim or sink with
11 this, but I am going to enforce 26(b)(2)(C) proportionality.
12 So let's go through the letters in detail.

13 I'm starting in chronological order with the
14 December 27 letter, page 4, documents regarding complaints of
15 discrimination. How are those kept, Ms. Chavey, in the HR
16 department?

17 MS. CHAVEY: Your Honor, to the extent there are
18 complaints of discrimination, yes, those would be held by the
19 HR department. The requests are much broader than that, as we
20 have described in our letter.

21 THE COURT: All right, so let's now deal as to subject
22 matter, gender discrimination by females and sexual harassment
23 complaint by females. That's the Court's ruling. Anyone want
24 to argue against that?

25 MS. WIPPER: No, your Honor.

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1 MS. CHAVEY: Your Honor, as to the sexual harassment
2 piece of that, there is no claim of sexual harassment here, and
3 that's why we have objected.

4 THE COURT: It's similar enough. That's the Court's
5 ruling.

6 Time period?

7 MS. WIPPER: If I may make a comment: Plaintiffs
8 would be willing to limit the time period to 2005 to the
9 present, which is the longest statutory period applicable in a
10 case under the New York Equal Pay Act. It is also consistent
11 with --

12 THE COURT: But what has this got to do with the Equal
13 Pay Act?

14 MS. WIPPER: If there were complaints made about pay
15 discrimination --

16 THE COURT: OK, but that's a different discrimination;
17 we haven't even talked about that. If you want to do it in two
18 periods, pay discrimination '05 to whatever gets us back into
19 the Title 7 time period and other gender and sexual harassment
20 in a more limited time period, that sounds more reasonable.

21 MS. WIPPER: OK, and I would also direct the Court
22 to -- there is case law allowing plaintiffs to get --

23 THE COURT: I understand, but you're also getting many
24 years' worth of information. Any problem with -- what's our
25 Title 7 or state parallel statute of limitations?

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1 MS. WIPPER: February 2008 to the present.
2 THE COURT: So February 2008 to the present, does that
3 work for the defendants?
4 MS. CHAVEY: Yes.
5 THE COURT: And what's the first date in '05?
6 MS. WIPPER: It would be February 2005.
7 THE COURT: All right. And February 2005 only for
8 complaints that deal with pay discrimination.
9 MR. ANDERS: Your Honor, if I may, the one concern I
10 would have about 2005 -- and this was shifting a little bit in
11 the ESI realm -- is the emails that --
12 THE COURT: Wait. How are complaints to HR kept?
13 Let's start with that. That's what we're talking about.
14 MS. CHAVEY: They're kept in different ways. There
15 may well be emails relating to complaints or relating to the
16 company's responses --
17 THE COURT: Do you know how this is done, or are we
18 doing a law school exam?
19 MS. CHAVEY: Yes, no, we have investigated this.
20 THE COURT: Are there paper files?
21 MS. CHAVEY: Yes.
22 THE COURT: And in what form may the emails take? An
23 email to HR from an employee?
24 MS. CHAVEY: Or between HR people.
25 THE COURT: Fine, that seems like it's easy enough to
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1 search. OK, that's the Court's ruling.

2 Pay discrimination, February 2005 to date -- well, to
3 date? Let's cut it off at the date the complaint was filed,
4 which is what?

5 MS. WIPPER: February 24th, 2011.

6 THE COURT: OK, so through February 24, 2011. And
7 gender and sexual harassment discrimination by females February
8 '08 to the date of the complaint.

9 MS. CHAVEY: Your Honor, just to clarify to pay
10 discrimination, is it your order that the complaints at issue
11 would be pay discrimination based on gender or any complaint
12 about pay?

13 THE COURT: No, pay discrimination based on gender.
14 I think that takes care of all of the complaints of
15 discrimination, yes?

16 MS. CHAVEY: Yes.

17 MS. WIPPER: If I could just have one point of
18 clarification: The defendants wanted to limit it to complaints
19 against presidents and managing directors.

20 THE COURT: No, complaints.

21 OK, next: Personnel decisions -- and this gets back
22 to -- I'm not exact sure what it is want. So tell me what you
23 want.

24 MS. WIPPER: If I could direct the Court to page 7,
25 there are some examples of what we are looking for. For

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1 example, the first bullet point addresses the personnel action
2 notices that I have already referenced. So we're interested in
3 those for two reasons; one, to correct the data, two,
4 because --

5 THE COURT: Let me just stop. Are those paper?

6 MS. CHAVEY: Yes. They're in the personnel files.

7 THE COURT: Any problem with producing them?

8 MS. CHAVEY: Yes. There are a thousand employees as
9 well as former employees, and to pull all -- these are the
10 forms that are signed by authorized people to submit to payroll
11 to approve a pay increase, for example, or a change of address
12 or what have you. So these are not held in an electronic
13 database; these are documents that are made part of the
14 personnel files.

15 THE COURT: Assuming you had to do it for every one of
16 the thousand employees and former employees, how much bulk are
17 we talking about?

18 MS. CHAVEY: There could be a few a year. The request
19 is -- these haven't been requested, by the way, to my
20 knowledge. We did not interpret any of the requests to seek,
21 other than the requests for the plaintiffs' personal files.

22 THE COURT: I'm now doing it this way because that's
23 the way you both presented it. If you need 30 days because
24 it's a quote-unquote new request, we'll talk about deadlines at
25 the end.

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1 MS. CHAVEY: But the request as it's stated in the
2 letter is for any personnel action notice, which they call a
3 PAN, relating to pay, job title or status. So sometimes there
4 are personnel action notices that show that somebody goes from
5 one department to another. Whether that's a status change, I
6 don't know.

7 THE COURT: Is that what you want?

8 MS. WIPPER: For purposes of the errors in the data,
9 we found errors in people's departments and their job codes and
10 their status is terminated or active, full time or part time,
11 so if they do reflect that, so for that purpose we would want
12 it, but for purposes of this, within personnel files, we would
13 only want --

14 THE COURT: But if you're getting it for some reason,
15 you might as well get it through this. So that's what you
16 want, a department change?

17 MS. WIPPER: Yes, your Honor.

18 THE COURT: So pay, job title, status, meaning
19 department change. What else? Obviously --

20 MS. WIPPER: Promotions, terminations.

21 THE COURT: Well, that's pay or job title. Can you do
22 this on a sample basis?

23 MS. WIPPER: Our understanding is that everything is
24 maintained in HR headquarters in New York, all personnel files.
25 We had a plaintiff --

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1 THE COURT: But to have to go through it for thousands
2 of employees for a long period of time, unless you're telling
3 me that that's what your experts demand in order to do the
4 regression analysis, that's not the way it should be done in
5 discovery. What is it you need this for?

6 MS. WIPPER: To correct the data, your Honor. And
7 there's case law supporting the fact that if there are errors
8 in the data, it shouldn't be held against a plaintiff or the
9 other party and they shouldn't be denied discovery --

10 THE COURT: Are you willing to pay for this? We're
11 going to start turning this into a pay-for-play if you can't be
12 more reasonable.

13 MS. WIPPER: We would be willing to discuss sampling
14 as long as it's a significant sample, statistically significant
15 sampling, and random.

16 THE COURT: Statistical significant sample is probably
17 10 percent of the employees or something like that. Is that
18 what we're talking about?

19 MS. WIPPER: And we would also like to ask for
20 additional notices; if we find errors while we're doing the
21 analysis of the data, we would like to have the opportunity to
22 get additional notices as well.

23 MS. CHAVEY: Your Honor, that's actually the other way
24 that we would propose to do this. And we had talked with
25 plaintiffs' counsel before, about identifying the errors, to

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1 see if we could then confirm whatever the supposed conflict was
2 in the data that was provided. It didn't sound, from our
3 discussions, like it was more than a handful of alleged errors.
4 And if that would be a way of doing it, then we could work with
5 just whatever the errors were that came up.

6 MS. WIPPER: But, your Honor, we have seven
7 plaintiffs, and pretty much every single one of them has an
8 error in the data. So it's hard for us to know how
9 widespread --

10 THE COURT: An error about what?

11 MS. WIPPER: One plaintiff is listed as full time,
12 when she's part time; one is listed as current when she's no
13 longer working there, another is listed as has resigned but she
14 was terminated, her job was eliminated; two were listed as
15 taking severance when they didn't; one her job code was
16 incorrect. So --

17 THE COURT: All right, you're going to do the
18 personnel action notices.

19 Now, what time period are you talking about?

20 MS. WIPPER: The same time period as the employment
21 data?

22 THE COURT: Well, we're not doing the pay
23 discrimination, period, for this. So February 2008 to the
24 complaint on a statistical sampling basis.

25 MS. WIPPER: Your Honor, will we also be able to ask
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1 for additional notices if we find other errors in the data
2 beyond the sample?

3 THE COURT: The whole purpose of this statistical
4 sample is to avoid having to do it for all 5,000 employees or
5 whatever it is.

6 MS. WIPPER: I'm not anticipating a thousand. I don't
7 want a dispute later if there's like five people.

8 THE COURT: If it's a limited number, I'm sure both
9 sides are going to be reasonable.

10 OK, the second bullet, promotion recommendation forms,
11 what's the purpose of that?

12 MS. WIPPER: The purpose of the promotion
13 recommendation forms is to show who approves the promotions.
14 And our theory in this case is that there's a centralized
15 decision-making process, kind of the opposite of Wal-Mart
16 versus Dukes where a core group of managers, leadership team,
17 makes the decisions.

18 THE COURT: Is there a dispute as to that? Now,
19 whatever you all can stipulate to, you can save a lot of time
20 and money on discovery.

21 But before you answer that, let me just interrupt for
22 a minute off the record.

23 (Discussion off the record)

24 THE COURT: Back on the record. Continue.

25 MS. CHAVEY: So the promotion recommendation forms are
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1 also -- well, let me say, they were introduced in 2008, they
2 are used with regard to promotions of individuals to the vice
3 president or senior vice president level, and these are also
4 forms that aren't held in any centralized place; they are
5 individualized forms and they are transmitted, as far as we
6 have seen, by email. And they are also at times, although I
7 don't think consistently, appearing in the personnel files of
8 individuals. They're routed to human resources.

9 THE COURT: So assuming it's on email, is it then
10 something that is saved in HR in a record, it's a business
11 record, as opposed to just it's an email, hey, Joe, somebody
12 just got a promotion?

13 MS. CHAVEY: No, it is a form that would be sent as an
14 attachment to an email.

15 THE COURT: And that's easy to find via the email
16 system?

17 MS. CHAVEY: No, I don't think it would be easy to
18 find.

19 THE COURT: Then how does your company do business?

20 MS. CHAVEY: They use a lot of email.

21 THE COURT: I know, but this sounds like it's
22 something that in the good old-fashioned, pre-electronic days
23 would have been in the employee's personnel file. For the
24 company to say, we don't do that anymore, we send it by email
25 and then it's in an email system in a way we can't find it,

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1 you're going to have to search. So it seems to me -- or who
2 approves all of these?

3 MS. CHAVEY: Human resources.

4 THE COURT: So is the only approval signature on it
5 going to be HR or is it going to show who in the business side
6 management approved the promotion?

7 MS. CHAVEY: For this particular form, that changed
8 over the years from 2008 forward, so there isn't one answer to
9 that question.

10 THE COURT: Well, at what point does it show who
11 approved it?

12 MS. CHAVEY: In HR, Rita Masini was a consistent
13 recipient or signatory on these documents through the years.

14 THE COURT: If that is stipulated to? Is that
15 sufficient for class purposes?

16 MS. WIPPER: With respect to HR, yes.

17 THE COURT: And what else do you need it for?

18 MS. WIPPER: I believe it also has to be approved by
19 corporate, if it's a VP or an SVP, so it's not just --

20 THE COURT: Then can you stipulate that all of these
21 were approved -- I don't even know what "approved by corporate"
22 means.

23 MS. WIPPER: It means a businessperson, so a
24 businessperson, someone outside of HR, the CFO or the
25 president.

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1 MS. CHAVEY: I don't think that's accurate. Again,
2 this wasn't requested in the document requests. I don't have
3 it in front of me.

4 THE COURT: You all manage to spend your Christmas
5 vacation writing me huge letters, so I would assume that by the
6 time you knew there was a conference on this, you'd know the
7 information. You're either going to stipulate to what level of
8 senior management had to sign these -- obviously if these are
9 promotions to VP or senior VP, I would assume that the
10 signature has got to be at a fairly high level.

11 MS. CHAVEY: Rita Masini is the chief talent officer,
12 she's the top HR representative.

13 THE COURT: If a businessperson besides HR has to
14 approve all of this, you are going to either stipulate
15 sufficiently that it satisfies the class certification issue
16 and gets around the Wal-Mart issues or you're going to have to
17 go through, from 2008 to the date of the complaint, on a
18 sampling basis and produce these.

19 MS. CHAVEY: Because this form changed over time, your
20 Honor, I'm not in a position to stipulate today --

21 THE COURT: You don't have to do it today.

22 MS. CHAVEY: OK.

23 THE COURT: You have to either produce these or
24 stipulate, and by whatever the deadline is that I'm going to
25 set at the end of all of this.

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1 OK, request for raise exceptions?

2 MS. WIPPER: And I think this one also would -- the
3 stipulation we're proposing would work here. Essentially what
4 this request relates to is, there's a global salary freeze that
5 was implemented by the parent company, Publicis Groupe, for all
6 subsidiaries during the class period. There was also
7 exceptions to that salary freeze, there was also a promotion
8 freeze and a hiring freeze. And those exceptions were
9 essentially sent from MSL, the subsidiary, to the parent.

10 THE COURT: One second. Since you're getting the
11 personnel action notices, what do you need this for?

12 MS. WIPPER: This shows the approval process for pay
13 increases that we're also challenging. So it shows commonality
14 because not only is it nationwide, it's global, and there was
15 exceptions to the freeze that we believe had a disparate impact
16 on women.

17 THE COURT: So for what employees are you looking for
18 this?

19 MS. CHAVEY: Just the public relations employees in
20 the United States.

21 THE COURT: Then, I'm sorry, the personnel action
22 notice is going to show you when somebody got a pay raise.
23 What do you need this for?

24 MS. WIPPER: This shows the approval process --

25 THE COURT: Who cares?

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1 MS. WIPPER: -- for commonality purposes. For the
2 same reason as the promotion recommendation.

3 THE COURT: At this point you're going to move for
4 commonality, and when they say there isn't, we can revisit
5 this.

6 MS. WIPPER: OK, your Honor.

7 THE COURT: If they argue that the raise exceptions
8 were signed off on by different people, they're going to have
9 to say who.

10 So your fate, MSL, is in your hands. All of the
11 emails on all of this? No, enough is enough. So that's the
12 end of this one, as far as I'm concerned.

13 Anything else you want to argue for in this area
14 before we go to page 8 and item number 2 on pregnancy?

15 MS. WIPPER: No, your Honor.

16 THE COURT: Anything from the defense?

17 MS. CHAVEY: No.

18 THE COURT: OK, pregnancy, what's the fight here?

19 MS. WIPPER: During one of our meet-and-confer
20 conferences, we asked for a list of the employees who were
21 pregnant during the class period, which we believe would be
22 less than a hundred, probably 60, people. Defendants' response
23 was that that was captured in the employment data by the leave
24 that the employees took. But that's not completely true. We
25 have a plaintiff who was put on a probation letter after she

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1 announced her pregnancy and is claiming a pregnancy
2 discrimination claim as a result of that.

3 THE COURT: But where is it you believe that they have
4 records on pregnancy?

5 MS. WIPPER: It's our understanding that HR is
6 informed when there's an announcement of a pregnancy, and
7 that's based on anecdotal evidence we have heard from our
8 clients.

9 THE COURT: Ms. Chavey?

10 MS. CHAVEY: Your Honor, it may be that HR is informed
11 when an employee becomes pregnant. Certainly HR is informed
12 when an employee announces her intention to take a leave
13 related to pregnancy. But there isn't a centralized list or
14 any document that reflects this information that's being
15 requested. And the difference here is, I believe the
16 plaintiffs acknowledge that they have information about all of
17 those employees who took maternity leave; the only question
18 relates to employees who were pregnant but didn't take a leave
19 for some reason, so maybe they left before they had the child
20 or something like that.

21 So we don't know of a document that answers that
22 question.

23 MS. WIPPER: It's our understanding we have anecdotal
24 information that an employee in the L.A. office notified her
25 immediate supervisor that she was pregnant and she was called

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1 the next day by Tara Lilly and the HR director in New York
2 to --

3 THE COURT: Why don't you do this: Why don't you
4 depose the HR person. You've already got the information about
5 those who took leave, correct?

6 MS. WIPPER: Yes.

7 THE COURT: OK. What else do you want at this point?
8 Otherwise, you're doing in essence a trial on a hundred
9 anecdotal stories, which doesn't make it satisfactory for class
10 certification anyway.

11 MS. WIPPER: Yes, your Honor. In order to look at
12 whether there's a pattern for women who were pregnant, whether
13 they did not receive promotions or pay increases or left the
14 company --

15 THE COURT: How about in addition to the statistical
16 sample we're doing of the personnel action, notices and the
17 promotion recommendation forms, if those get produced, you add
18 them to the statistics? In other words, if we're doing
19 15 percent of the thousand public relations people as your
20 statistical sample, in addition to that number, you get the
21 personnel action notes for the hundred people, if that's what
22 it is, who took a maternity leave.

23 MS. WIPPER: OK.

24 THE COURT: Yes?

25 MS. WIPPER: Or who announced their pregnancy?

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1 THE COURT: If you have any record of that, sure.
2 They don't apparently.

3 All right, that's it for pregnancy.

4 Comparators and key players?

5 MS. CHAVEY: Your Honor, on this request, we have
6 agreed to provide comparator data and we have provided
7 comparator data. The difference of opinion or the dispute here
8 appears to stem from some additional names that the plaintiffs
9 included on request 50. And we asked why these people were
10 included, and they didn't explain why they were included other
11 than saying some of them were women whom they believed to have
12 been discriminated against or other things, or maybe they were
13 comparators in 2004, but they aren't within the scope of
14 discovery, in our view.

15 THE COURT: All right. Ms. Wipper?

16 MS. WIPPER: The list included comparators, which
17 obviously there's a dispute with, who's an appropriate
18 comparator in every discrimination case. So I'm unclear about
19 whether or not defendants are willing to produce everything
20 that we say is a comparator, to --

21 THE COURT: How about you two not only listen to each
22 other outside of court but in. Ms. Chavey said there was a
23 list of names they gave you that they said we don't know why
24 you've put these people on a comparator list, and other than
25 that, they have no problem giving you your comparator list.

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1 So, I don't know who any of these folks are. Why
2 don't you educate me or drop the people that they object to for
3 now without prejudice to coming back to it later, or play the
4 old split-the-baby. Tell me what you want, educate me here.

5 MS. WIPPER: With respect to the women on the list,
6 they were women that we have information complained about
7 discrimination or --

8 THE COURT: Then why are they comparators?

9 MS. WIPPER: They are not comparators; they were in
10 addition to the comparators on the list.

11 THE COURT: Are you doing individual discovery for
12 absent class members?

13 MS. WIPPER: No. We're just interested in specific
14 instances of discrimination, because if we just --

15 THE COURT: If there isn't a pattern and practice,
16 there isn't class certification and what happened to these
17 other people is irrelevant. Right?

18 MS. WIPPER: Well, your Honor, at the class
19 certification stage, I'm sure defendants will argue that we
20 have to prove not only the statistical disparity but also
21 anecdotal evidence, including specific instances of
22 discrimination.

23 THE COURT: Well, the anecdotal will come from what
24 your clients tell you and what your clients point you to as to
25 other people to contact. So at the moment, those people are

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1 off the comparator list without prejudice to you coming back
2 for them before class certification.

3 MS. WIPPER: That's with respect to the women listed?

4 THE COURT: You two have to work this out --

5 MS. WIPPER: OK.

6 THE COURT: -- because nobody has given me a list in
7 any way that puts it in a way that I can deal with it.

8 That's the Court's ruling. You both understand it?

9 MS. WIPPER: Yes, your Honor.

10 MS. CHAVEY: Yes.

11 THE COURT: Off the record.

12 (Discussion off the record)

13 THE COURT: OK, President Tsokanos' personnel file?

14 MS. WIPPER: Yes, your Honor. Plaintiffs believe this
15 is very important because the president is at the center of a
16 lot of these claims.

17 THE COURT: As to comments he allegedly made, I have
18 no problem giving you that. Other than that, I'm not sure why
19 you should get anything else.

20 MS. WIPPER: Well, we're aware there were complaints
21 made against him, so --

22 THE COURT: You can have any comments, any sexist
23 comments he made, any complaints against him for sexual-related
24 issues, gender or sexual harassment. What else?

25 MS. WIPPER: Could I also request that that not be
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1 limited to the time period we already discussed, given the
2 importance --

3 THE COURT: No, no.
4 OK, anything else on that?

5 MS. WIPPER: Can I just clarify what the time period
6 will be?

7 THE COURT: The time period is February 2008 to the
8 date of the complaint.

9 Any argument on that by the defense?

10 MS. CHAVEY: No, your Honor.

11 MS. WIPPER: If I can just state for the record, we're
12 aware of a complaint against Mr. Tsokanos I would say around
13 2005.

14 THE COURT: For what, by whom?

15 MS. WIPPER: Sexual harassment. And our allegation
16 would be that despite that complaint, he was promoted, and
17 promoted quickly, by passing women who were comparable to his
18 position.

19 THE COURT: But I thought your argument is that once
20 Mr. Tsokanos became the president, he forced women out and did
21 other terrible things. So what's the point of what happened to
22 a complaint and then despite that complaint he got promoted?

23 MS. WIPPER: Because it shows his attitude and motive
24 towards women, so within those documents it would show what
25 type of complaint was made against him.

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1 THE COURT: What type of complaint was that '05
2 complaint you're referring to?
3 MS. WIPPER: Sexual harassment.
4 THE COURT: By who? Who was the complaint made to?
5 MS. WIPPER: It was when he was a managing director in
6 the Atlanta office.
7 THE COURT: Who made the complaint? Was it to HR?
8 MS. WIPPER: It was to HR.
9 THE COURT: Well, is that something that can be
10 readily found, Ms. Chavey?
11 MS. WIPPER: Yes.
12 THE COURT: OK, produce that.
13 Other than single complaint, the time period is
14 February '08 to date.
15 MS. WIPPER: All right, your Honor.
16 THE COURT: OK, that, I believe, takes care of
17 plaintiffs' December 27 letter, correct?
18 MS. WIPPER: Yes, your Honor.
19 THE COURT: OK, so now we go to your December 29th
20 letter.
21 MS. CHAVEY: Your Honor, as to this letter, which is a
22 request for a conference, we had intended to file a written
23 response; we just haven't done it yet.
24 THE COURT: You can respond orally.
25 MS. CHAVEY: OK.

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1 THE COURT: On the compensation data, do you really
2 want paper copies of a thousand people's W-2s for three, four
3 years?

4 MS. WIPPER: No, your Honor, we just want payroll
5 data. It's not paper copies that we're interested in. We're
6 just interested in the records that of what people were
7 actually paid. What we currently have now is bonus data, which
8 had to be reproduced because it was incorrect, and then also
9 the annual rate of pay, which is the rate assigned to an
10 employee but it's not necessarily what that employee was paid
11 that year.

12 MS. CHAVEY: Your Honor, we have told the plaintiffs'
13 counsel that we have the W-2s, we have copies of those things,
14 but we don't have an electronic database that contains the
15 Box 5 information.

16 MS. WIPPER: In lieu of the W-2, we would take payroll
17 data, so --

18 THE COURT: I'm sorry, I don't know what that means.

19 MS. WIPPER: There's the HR data, which essentially
20 captures all of the personnel action changes, so any time
21 someone gets an increase, is promoted --

22 THE COURT: Just tell me what the payroll data.

23 MS. WIPPER: That's how they process their paycheck
24 every two weeks, so that's a separate database that has all the
25 deductions listed, the total earnings, and then that data is

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1 fed into the W-2 data, which is what's reported to the IRS.

2 MS. CHAVEY: I don't know, this is the first that I'm
3 hearing this explanation of what the payroll data is that's
4 being sought.

5 THE COURT: Who does the company's payroll? Is it
6 internal or ADP?

7 MS. CHAVEY: They have a payroll department, and I
8 haven't posed this question.

9 THE COURT: See what you can find out on that. We'll
10 leave this as: Produce it if it's electronic, if you're
11 telling me after you investigate -- you'll be telling
12 Ms. Wipper if it doesn't exist, you'll work it out.

13 OK, I think that brings us to requests 6 and 11, about
14 org charts among other things.

15 Does your company really not have org charts?

16 MS. CHAVEY: We do have org charts.

17 THE COURT: Were they produced?

18 MS. CHAVEY: We have produced some and, as we have
19 told plaintiffs, we are continuing to produce org charts that
20 we find.

21 THE COURT: How long does it take?

22 MS. CHAVEY: We have been very, very diligent in going
23 through a huge volume of documents, both electronic and paper,
24 and we have told the plaintiffs' counsel -- you know, by the
25 time these issues were raised, your Honor, the September 9th --

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1 our responses to the September 9th discovery requests were
2 about two and a half months old, there were 93 requests, many
3 of them pertained to the individual plaintiffs, many of them
4 were very, very broad. And we have been working very hard to
5 get through them and we have told plaintiffs' counsel that we
6 have not asserted that we have completed our disclosures.

7 If it's taking too long, from their view, we apologize
8 to them, we apologize to the Court, but we are working through
9 it.

10 THE COURT: All right, produce it.

11 MS. WIPPER: Your Honor, if I can make one comment:
12 These org charts were requested eight months ago and were
13 ordered by Judge Sullivan to be produced four months ago.

14 THE COURT: Did he set a deadline or, rather, four
15 months ago, he said you've got to produce it?

16 MS. WIPPER: Yes, your Honor.

17 THE COURT: Well, part of the problem is, if they're
18 going through lots and lots of data, we're now at the point
19 where objections are gone, it's time to produce; and once I
20 order you to produce something, if you don't, you will be
21 sanctioned, personally as well as your client. So whatever
22 dilatoriness or game-playing that plaintiff suspects was going
23 on is now over. So we will set a deadline for all production
24 or at least all paper production at the end of this conference.

25 I think I'm now over to page 5, which are specific

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1 types of documents.

2 MS. CHAVEY: Your Honor, when we were here on
3 December 2nd, you asked or directed plaintiffs' counsel to let
4 us know, in light of the ambiguity of the term
5 "reorganization," you asked them to let us know what specific
6 decisions they were seeking, and they didn't do that. We did
7 follow up with them to ask them to do that. The first we got
8 this was another midnight email on December 29th, with this
9 page 5 of bullet-pointed items. But we didn't have this
10 before. We sought to do that --

11 THE COURT: Now that you have got it, do you
12 understand what they're looking for and do you have any
13 objection to searching for it, to any of the bullet points on
14 page 5?

15 MS. CHAVEY: Some of them are very vague. For
16 example, the third bullet point, documents relating to
17 restructuring plans, we're not sure if what the plaintiffs are
18 asking us to do is to use a keyword search in the electronic
19 data using the term "restructuring plans" or whether there's
20 something else, but there's not a folder in somebody's desk
21 that says "restructuring plans" on it.

22 MS. WIPPER: Your Honor, defendants produced
23 PowerPoints to us that had several pages with the heading
24 called "Restructuring" --

25 THE COURT: The question nowadays, in an ESI world, is
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1 how one is going to find the needles in a haystack or the
2 haystack, so you all have to work on that. And that sounds
3 like the ESI protocol issue that hopefully we'll have time to
4 get to this morning.

5 MS. WIPPER: Your Honor, in our keywords that we
6 proposed --

7 THE COURT: So "restructuring" is presumably one of
8 them.

9 MS. WIPPER: Yes.

10 THE COURT: So that will turn this up.

11 Anything else? Let's go off the record a minute.

12 (Discussion off the record)

13 THE COURT: All right, back on the record.

14 Any of these other bullet points, other than word
15 search or whatever ESI protocol we're going to use, seem to be
16 a problem?

17 MS. WIPPER: I just want to make one comment. All of
18 these documents cited here are Bates labeled MSL, not MSLAX,
19 meaning that it's not a part the Recommind platform that
20 they're using on the ESI protocol. So I just want to clarify,
21 or have defendants clarify, that they would also look outside
22 ESI for any of these documents.

23 MS. CHAVEY: Of course, of course we would do that.

24 THE COURT: OK.

25 MS. CHAVEY: One other kind of general issue with
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1 these particular bullet points, which again we saw for the
2 first time just a couple of days ago, is the time frame covered
3 because I believe the plaintiffs are intending for these
4 requests as they have now been specifically articulated to go
5 back to 2001, which, in our view, is an overly long period of
6 time, and unreasonable under the circumstances here, and given
7 what the allegation is of the --

8 THE COURT: What time period do you suggest?

9 MS. CHAVEY: I would suggest February 1 of 2008
10 forward.

11 THE COURT: Ms. Wipper?

12 MS. WIPPER: That's fine -- well, I would suggest
13 January 1st because that's when James Tsokanos was promoted.

14 THE COURT: OK, fine. January 1, 2008.

15 MS. CHAVEY: And, your Honor, as to some of these
16 other bullet points, there are just a lot of words in here that
17 are in quotes -- management structure approved, new business
18 team, reductions, terminations. These are words that we will
19 work with the plaintiffs in the course of the ESI protocol to
20 uncover, and we'll do our best in terms of hard copy documents.

21 THE COURT: OK, very good.

22 That concludes this letter, other than the sanction
23 requests are all denied at this time without prejudice to the
24 possibility that if the Court thinks there is gamesmanship
25 going forward, that the Court will go back retroactively to

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1 this period as well. Otherwise, let's all just get along, as
2 the old saying goes.

3 I believe that your January 3 letter on the defense
4 side was just responding to plaintiffs' letter; and therefore
5 we've taken care of that, correct?

6 MS. CHAVEY: Yes. Our letter on January 3rd related
7 to the plaintiffs' letter from December 27th. We had not yet
8 responded in writing to the --

9 THE COURT: Which you don't have to now.

10 MS. CHAVEY: OK. Thank you.

11 THE COURT: On the ESI protocols, we have ten minutes
12 before I'm expecting a telephone emergency conference call from
13 one of my other favorite cases.

14 I'm not sure what your difference is. Literally, I
15 got plaintiffs' this morning when I came in, to find that you
16 broke my fax machine with a paper jam. I have skimmed it but
17 I'm not really sure what the difference between the two
18 parties' plans are and what we need to do, perhaps put you,
19 either with your consultants or maybe your consultants without
20 the lawyers, in the jury room for an hour and see what you all
21 can work out.

22 MR. ANDERS: If I may, your Honor?

23 THE COURT: Yes.

24 MR. ANDERS: I think there are a few main areas --
25 some we may have already addressed -- one of which is the

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1 overall time period. As it relates to the emails, where we
2 have pulled the data from is, in 2007-2008 the company put in
3 place a long-term archive which captured every incoming and
4 outgoing email. That is the data set that we pulled from to
5 get the 3.2 million documents.

6 So, for purposes of a protocol that we have proposed a
7 2008 going forward as the time period, plaintiffs' protocol
8 went back to 2001. I understand from some of the Court's
9 rulings today that 2008 is the time period with the exception
10 of the EPA claims, which went to 2005.

11 THE COURT: So any problem with using January 1, '08
12 for this search?

13 MS. WIPPER: With respect to email only, there is not
14 a problem, but our protocol is much broader than email.

15 THE COURT: All right. Well, on the email side,
16 January 1, '08.

17 What else?

18 MR. ANDERS: Custodians, your Honor. Our list had
19 included 36 custodians. That list was higher than we initially
20 intended. We had made some additions after we received --

21 THE COURT: Does it include all the HR people, since a
22 lot of this data seems to be in HR?

23 MR. ANDERS: Yes, it does now. That was one of the
24 later additions once we received plaintiffs' definition of who
25 the class A custodians are. The list is the senior executives,

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