UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONIQUE DA SILVA MOORE, MARYELLEN O'DONOHUE, LAURIE MAYERS, HEATHER PIERCE, and KATHERINE WILKINSON on behalf of themselves and all others similarly situated,	)	**Civ No. 11-CV-1279 (ALC) (AJP)**
PLAINTIFFS,	)	
v.	)	
PUBLICIS GROUPE SA and MSLGROUP,	)	
DEFENDANTS.	)	

DECLARATION OF STEVEN L. WITTELS IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR RECUSAL OR DISQUALIFICATION

STEVEN L. WITTELS, an attorney duly admitted to practice law in the State of New York, in the Southern District of New York, states as follows:

1. My firm represents the Plaintiffs in the above-referenced action.
2. Annexed to this declaration as "Exhibit DD"[1] is a true and correct copy of the transcript of the hearing held on January 4, 2012, in front of Magistrate Judge Peck.
3. Annexed to this declaration as "Exhibit EE" is a true and correct copy of the transcript of the hearing held on February 8, 2012, in front of Magistrate Judge Peck.
4. Annexed to this Declaration as "Exhibit FF" is a true and correct copy of the transcript of the hearing held on March 9, 2012, in front of Magistrate Judge Peck.
5. Annexed to this Declaration as "Exhibit GG" is a true and correct copy of the transcript of the hearing held on April 25, 2012, in front of Magistrate Judge Peck.

[1] To prevent confusion, Plaintiffs continue their exhibit numbering from where they left off in their opening brief.

6. Annexed to this Declaration as "Exhibit HH" is a true and correct copy of the transcript of the hearing held on May 7, 2012, in front of Magistrate Judge Peck.

7. Annexed to this Declaration as "Exhibit II" is a true and correct copy of an Order of Recusal pursuant to 28 U.S.C. § 455(a), issued by the Honorable Leonard B. Sand, U.S. District Judge in the Southern District of New York on May 24, 2011, in *Spicer v. Pier Sixty LLC*, No. 08 CV 10240 (S.D.N.Y. Mar. 16, 2011).

8. Annexed to this Declaration as "Exhibit JJ" is a true and correct copy of the transcript of the hearing held on March 16, 2011, in front of the Honorable Leonard B. Sand, U.S. District Judge in the Southern District of New York, in *Spicer v. Pier Sixty LLC*, No. 08 CV 10240 (S.D.N.Y. Mar. 16, 2011), also found as Document No. 233-2 on the case's electronic docket.

9. Annexed to this Declaration as "Exhibit KK" is a true and correct copy of an article edited by Brad Harris and Ron Hedges, *Pension Committee Revisited: One Year Later, A Retrospective on the Impact of Judge Scheindlin's Influential Opinion*, February 2011.

10. Annexed to this declaration as "Exhibit LL" is a true and correct copy of a blog post by Hudson Legal, *E-Discovery Judges in Charlotte: Post-CLE Summary*, dated January 30, 2012, also available at http://hudsonlegalblog.com/e-discovery/e-discovery-judges-charlotte-post-cle-summary.html.

11. Annexed to this declaration as "Exhibit MM" is a true and correct copy of an article by Judge Andrew Peck, *Search Forward*, Law Technology News, October 1, 2011, also available at http://www.recommind.com/sites/default/files/LTN_Search_Forward_Peck_Recommind.pdf.

12. Annexed to this declaration as "Exhibit NN" is a true and correct copy of an article by Mikki Tomlinson, *The Honorable Andrew J. Peck on the Record with Predictive Coding: Early Headlines Get it Wrong!*, eDiscovery Journal, February 15, 2012, also available at

http://ediscoveryjournal.com/2012/02/the-honorable-andrew-j-peck-on-the-record-with-predictive-coding-early-headlines-get-it-wrong/.

13. Annexed to this declaration as "Exhibit OO" is a true and correct copy of the transcript of the hearing held on December 2, 2011, in front of Magistrate Judge Peck.

14. Annexed to this declaration as "Exhibit PP" is a true and correct copy of a letter from Steven L. Wittels to Judge Peck, dated April 27, 2012.

15. Annexed to this declaration as "Exhibit QQ" is a true and correct copy of the transcript of the hearing held on December 5, 2011, in front of Magistrate Judge Peck.

I DECLARE UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Dated: May 10, 2012

New York, New York

/s/ Steven L. Wittels

Steven L. Wittels

Exhibit DD

1214KDASC CONFERENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MONIQUE Da SILVA MOORE, et al.,

Plaintiffs,

v. 11 CV 1279 (RJS)

PUBLICIS GROUPE, et al.,

Defendants.

----------x

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

Before:

HON. ANDREW J. PECK,

Magistrate Judge

APPEARANCES

SANFORD WITTELS & HEISLER LLP
Attorneys for Plaintiffs
JANETTE WIPPER
DEEPIKA BAINS

JACKSON LEWIS LLP
Attorneys for Defendant MSL Group
BRETT M. ANDERS
VICTORIA WOODIN CHAVEY
ALSO PRESENT:

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

(In open court)

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

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

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

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

on the plaintiffs' side? Ms. Wipper?

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

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

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

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

THE COURT: I read all of that.

MS. WIPPER: OK.

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

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

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

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

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

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

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

MS. CHAVEY: Victoria Chavey.

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

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

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

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

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

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

THE COURT: All right.

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

THE COURT: Why is that relevant to class certification?

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

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

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

THE COURT: All right, Ms. Chavey?

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

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

THE COURT: All right.

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

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

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

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

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

limit the HR complaints, discrimination complaints.

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

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

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

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

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

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

MS. WIPPER: No, your Honor.

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

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

Time period?

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

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

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

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

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

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

MS. WIPPER: February 2008 to the present.
THE COURT: So February 2008 to the present, does that work for the defendants?
MS. CHAVEY: Yes.
THE COURT: And what's the first date in '05?
MS. WIPPER: It would be February 2005.
THE COURT: All right. And February 2005 only for complaints that deal with pay discrimination.
MR. ANDERS: Your Honor, if I may, the one concern I would have about 2005 -- and this was shifting a little bit in the ESI realm -- is the emails that --
THE COURT: Wait. How are complaints to HR kept? Let's start with that. That's what we're talking about.
MS. CHAVEY: They're kept in different ways. There may well be emails relating to complaints or relating to the company's responses --
THE COURT: Do you know how this is done, or are we doing a law school exam?
MS. CHAVEY: Yes, no, we have investigated this.
THE COURT: Are there paper files?
MS. CHAVEY: Yes.
THE COURT: And in what form may the emails take? An email to HR from an employee?
MS. CHAVEY: Or between HR people.
THE COURT: Fine, that seems like it's easy enough to

search. OK, that's the Court's ruling.

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

MS. WIPPER: February 24th, 2011.

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

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

THE COURT: No, pay discrimination based on gender.

I think that takes care of all of the complaints of discrimination, yes?

MS. CHAVEY: Yes.

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

THE COURT: No, complaints.

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

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

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

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

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

THE COURT: Any problem with producing them?

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

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

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

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

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

THE COURT: Is that what you want?

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

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

MS. WIPPER: Yes, your Honor.

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

MS. WIPPER: Promotions, terminations.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: An error about what?

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

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

Now, what time period are you talking about?

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

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

MS. WIPPER: Your Honor, will we also be able to ask

for additional notices if we find other errors in the data beyond the sample?

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

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

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

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

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

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

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

(Discussion off the record)

THE COURT: Back on the record. Continue.

MS. CHAVEY: So the promotion recommendation forms are

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

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

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

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

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

THE COURT: Then how does your company do business?

MS. CHAVEY: They use a lot of email.

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

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

MS. CHAVEY: Human resources.

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

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

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

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

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

MS. WIPPER: With respect to HR, yes.

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

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

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

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

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

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

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

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

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

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

MS. CHAVEY: OK.

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

OK, request for raise exceptions?

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

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

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

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

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

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

MS. WIPPER: This shows the approval process --

THE COURT: Who cares?

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

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

MS. WIPPER: OK, your Honor.

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

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

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

MS. WIPPER: No, your Honor.

THE COURT: Anything from the defense?

MS. CHAVEY: No.

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

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

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

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

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

THE COURT: Ms. Chavey?

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

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

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

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

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

MS. WIPPER: Yes.

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

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

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

MS. WIPPER: OK.

THE COURT: Yes?

MS. WIPPER: Or who announced their pregnancy?

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

All right, that's it for pregnancy.

Comparators and key players?

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

THE COURT: All right. Ms. Wipper?

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

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

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

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

THE COURT: Then why are they comparators?

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

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

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

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

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

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

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

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

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

MS. WIPPER: OK.

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

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

MS. WIPPER: Yes, your Honor.

MS. CHAVEY: Yes.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: OK, President Tsokanos' personnel file?

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

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

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

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

MS. WIPPER: Could I also request that that not be

limited to the time period we already discussed, given the importance --

THE COURT: No, no.

OK, anything else on that?

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

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

Any argument on that by the defense?

MS. CHAVEY: No, your Honor.

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

THE COURT: For what, by whom?

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

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

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

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

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

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

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

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

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

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

THE COURT: Just tell me what the payroll data.

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

fed into the W-2 data, which is what's reported to the IRS.
MS. CHAVEY: I don't know, this is the first that I'm hearing this explanation of what the payroll data is that's being sought.
THE COURT: Who does the company's payroll? Is it internal or ADP?
MS. CHAVEY: They have a payroll department, and I haven't posed this question.
THE COURT: See what you can find out on that. We'll leave this as: Produce it if it's electronic, if you're telling me after you investigate -- you'll be telling Ms. Wipper if it doesn't exist, you'll work it out.
OK, I think that brings us to requests 6 and 11, about org charts among other things.
Does your company really not have org charts?
MS. CHAVEY: We do have org charts.
THE COURT: Were they produced?
MS. CHAVEY: We have produced some and, as we have told plaintiffs, we are continuing to produce org charts that we find.
THE COURT: How long does it take?
MS. CHAVEY: We have been very, very diligent in going through a huge volume of documents, both electronic and paper, and we have told the plaintiffs' counsel -- you know, by the time these issues were raised, your Honor, the September 9th --

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

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

THE COURT: All right, produce it.

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

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

MS. WIPPER: Yes, your Honor.

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

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

types of documents.

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

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

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

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

THE COURT: The question nowadays, in an ESI world, is

how one is going to find the needles in a haystack or the haystack, so you all have to work on that. And that sounds like the ESI protocol issue that hopefully we'll have time to get to this morning.

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

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

MS. WIPPER: Yes.

THE COURT: So that will turn this up.

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

(Discussion off the record)

THE COURT: All right, back on the record.

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

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

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

THE COURT: OK.

MS. CHAVEY: One other kind of general issue with

these particular bullet points, which again we saw for the first time just a couple of days ago, is the time frame covered because I believe the plaintiffs are intending for these requests as they have now been specifically articulated to go back to 2001, which, in our view, is an overly long period of time, and unreasonable under the circumstances here, and given what the allegation is of the --

THE COURT: What time period do you suggest?

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

THE COURT: Ms. Wipper?

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

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

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

THE COURT: OK, very good.

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

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

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

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

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

MS. CHAVEY: OK. Thank you.

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

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

MR. ANDERS: If I may, your Honor?

THE COURT: Yes.

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

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

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

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

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

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

What else?

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

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

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

the managing directors of the various offices, some of the plaintiffs' intermediate supervisors, I believe it has all the HR people.

THE COURT: How many people are in plaintiffs' list?

MS. WIPPER: 47.

THE COURT: Is that a difference of 11, or is it a bigger difference because you don't want some of their 36 or whatever?

MR. ANDERS: I have a difference of 12, your Honor. They had removed four people from our list of 36. They added 18 and then very recently took two more people off, so it's a net --

THE COURT: Who are the 12 that are now in dispute? I've got your respective custodian lists in front of me.

MR. ANDERS: Your Honor, I can tell you the 12 in dispute right now.

THE COURT: OK.

MR. ANDERS: If you look at plaintiffs' ESI protocol.

THE COURT: Yes.

MR. ANDERS: Well, my version is a redline version which is page 11, but if you look at the section which lists their custodians --

THE COURT: Yes.

MR. ANDERS: -- from Scott Bedowin down, who I believe is number -- I think he's number 30 on mine.

THE COURT: Got it.

MR. ANDERS: So from him down, with the exception of Merrill Freund and Lance Breisen, those people are all new people.

THE COURT: All right. Two questions: Mark Hass, former CEO, when did he leave?

MS. WIPPER: 2009.

THE COURT: So we're talking about a year-plus. Well, to the extent that some of these are managing directors in what I guess are branch offices -- Seattle, Atlanta, Boston, Detroit, Chicago maybe -- any objection to them?

MR. ANDERS: I guess, your Honor, my concern would be, and what I had said to plaintiffs' counsel, was the database with the 3.2 million documents --

THE COURT: Do you have any idea as to how many would be added if these 12 were tossed in?

MR. ANDERS: We have not collected those, so I don't know what their size is. One of the things we have encountered with this case is because of the extent to which email is used, the email accounts individually were a lot larger than we have anticipated in the past.

THE COURT: But once you do some screening of them, you'll reduce it down.

MR. ANDERS: Understood.

THE COURT: Unless somebody can give me an argument --

and I know there is some argument that I saw somewhere in somebody's letter, about the three or four people from Winter & Associates, but for the internal MSL people, I'm not sure what difference it makes.

MS. WIPPER: Your Honor, if I could address that, the Winter & Associates is part of MSL Group that was folded in as part of the reorganization.

THE COURT: When were they folded in?

MS. WIPPER: 2008/2009. We have been in contact with employees of Winter & Associates, and we believe that they are subject to similar policies and practices and --

THE COURT: As of when they were folded in?

MS. WIPPER: Correct.

THE COURT: And they are also public relations --

MS. WIPPER: Correct.

THE COURT: -- staff?

MS. WIPPER: Correct. They are not named plaintiffs but they are --

THE COURT: Can your named plaintiffs represent these people?

MS. WIPPER: They're part of MSL Group, and from the organizational charts that we have --

THE COURT: If they are part of MSL Group, then it seems to me you should not be looking at them separately. And I am certainly concerned with somebody who has the title of

general counsel.

So either they're the same as everybody else once the reorg hit, in which case I don't see why you're targeting these folks specifically, or they're different, in which case I'm not sure you've got a plaintiff with standing. What am I missing?

MS. WIPPER: They're part of the MSL Group, they share an office with MSL in L.A.

THE COURT: At this point I'm denying the three people from Winter. So that gets our group of difference down to nine. What do you all want to do about it?

MR. ANDERS: Your Honor, I would request that of the people that we had proposed, that we discuss, or plaintiffs suggest, people that could be removed. I would like to try to keep the database as close to the size it is now without --

THE COURT: In other words, is the 3.2 million you've referred to before or after the deduping?

MR. ANDERS: It's after deduping and deNISTing.

MS. CHAVEY: Your Honor, if I could also address a number on my list, it's number 41, which is Don Lee the managing director of PBJS Chicago?

THE COURT: What is PBJS?

MS. CHAVEY: PBJS is part of MSL Group but it is not a PR agency; it's a very eclectic kind of media company, and it operates separately and it is not part of the public relations business of MSL Group.

THE COURT: Why do you want Mr. Lee, Ms. Wipper?
MS. WIPPER: Because he is part of MSL Group. And he's -- we were never told by defendants that they were not a PR agency. We have asked --
THE COURT: Now you have been told they are different from the rest. Do you still want Mr. Lee?
MS. WIPPER: Yes. And I would propose that --
THE COURT: All right, you're not getting Lee.
MS. WIPPER: OK.
THE COURT: Let's narrow this list.
MS. WIPPER: Can we reconsider Winter & Associates because the organization --
THE COURT: No, no, not at this point without further evidence as to why your plaintiffs have standing to deal with this other than if Mr. Tsokanos and others in senior management of MSL were discriminating against women during this period, in which case it doesn't matter what Winter was doing.
MS. WIPPER: Well, I have an org chart right here that shows that Winter & Associates reports right into Jim Tsokanos.
THE COURT: OK. So what?
MS. WIPPER: So they're part of the leadership team that are making the decisions.
THE COURT: I don't know what a leadership team is in this capacity.
MS. WIPPER: It says leadership team at the top of the

organization chart.
THE COURT: Let me see the chart.
I'm missing this. Where is Winter on here?
MS. WIPPER: It's in the box at the bottom. I think it's sort of in the middle.
THE COURT: Well, it's various people who report to Masini, et cetera.
MS. WIPPER: No, it reports through that top layer to Jim, if you see --
THE COURT: Yes, it reports to Masini, and Masini reports to Tsokanos. So does Canada and various other things. So what?
OK, denied at this time without prejudice to renewal at some later point.
MR. ANDERS: Your Honor, I guess, going down the list, the first person that I guess I would take issue with, based on how we're doing this is, Scott Bedowin. He's an SVP of Global Consumer Marketing, not at that MD or HR type level that we were considering, so I think he should come out.
THE COURT: OK, what's his role?
MS. WIPPER: Your Honor, defendants have decided to put in the immediate supervisors of our plaintiffs. We didn't request that. What we have done is put in comparators to our plaintiffs, and we had a plaintiff who was --
THE COURT: If he is a comparator -- and this is email

searches that apparently are going to be run across everybody's email -- you're going to get a lot of stuff from so-called comparators that isn't relevant, it doesn't make sense to do it as a uniform group. If you want to say that you've got certain comparators who you want different searches run on, that's a different story. It doesn't make sense to pull all their material in because they're a comparator at the same level.

MS. WIPPER: We would agree to that.

THE COURT: All right, my 12:00 o'clock call has called in. I have lunch at 1:00. I'm hoping this won't take long. Do you all want to just sit here or do you want to go into the jury room and maybe work out some of these issues? Go, lawyers and consultants, as needed, into the jury room. Do not leave there. We will come get you after I deal with this call.

(Recess)

THE COURT: OK, it's somewhere between 12:40 and 12:45. We're back on the record after my other conference.

What progress have you made? Or perhaps the other way of looking at it is: What is it in the 15 minutes we have left before lunch that you want me to rule on or give you advice on with respect to the ESI protocol?

MR. ANDERS: Your Honor, we spent the bulk of the time talking about the custodian list. We have identified five custodians that are, I think, more on the either comparator

category or secondary category where I think your Honor suggested that maybe those email accounts get filtered prior to being put into the database -- that's what we were trying to understand -- but we have identified five where at least plaintiffs would be willing to apply some type of keyword search in the filtering to them first.

THE COURT: All right.

Ms. Wipper?

MS. WIPPER: With respect to the custodians, I believe that the parties would be able to work it out. What we would like to hear from the Court is your view on the differences between the two protocols. Our protocol is --

THE COURT: I have no idea.

MS. WIPPER: OK.

THE COURT: When you send me 50 pages each, late at night and/or the morning of, when you knew this conference was scheduled for quite some time, there's a limit, and it was not done as a redline or anything else as to where your differences are. So you tell me what it would be most helpful for you, for the ten minutes or so we have left, to rule on or advise on, and I'll deal with it.

MR. ANDERS: Your Honor, I think that the key issue is how we use predictive coding, and that's where there's probably -- that's why we have our experts here, our vendors.

The way defendant MSL proposes using the predictive

coding process would be as follows: We start with an initial random sample, with a confidence level of 95 percent, with an interval of plus or minus 2 percent. With the 3.2 million document database, that random sample is 2,399 documents. We have gone through those preliminarily. I had associates go through those; I just finished going through it last night.

Of that 2,399 --

THE COURT: Just to stop you right there, my understanding of predictive coding is that the coding, as painful as it is, should be done by a very senior attorney, meaning partner level or very senior associate, not the usual team of umpteen lower associates with a lower billing rates.

MR. ANDERS: That's why I reviewed it, your Honor.

THE COURT: Well, as "reviewed it" as every one of the coding decisions or spot-checked it?

MR. ANDERS: No, where I am right now is I have gone through every one that was marked as relevant, I went through 400 so far that have been coded as not relevant, and I intend to go through all of those but I first looked at the ones that were relevant.

THE COURT: At the end of the process, you're going to have done every single one of the --

MR. ANDERS: Yes.

THE COURT: Then I'm not sure why your client paid for someone else to do it first, but that's not my problem, that's

their problem.

OK, continue.

MR. ANDERS: So far 36 were deemed relevant. Of the 400 not relevant I have reviewed, they were clearly not relevant. So right now the baseline is .015 percent of that random sample was relevant. If you translate that to the entire database, that's 48,000 documents.

After we did a random sample, then what we have done at the same time is we have applied keywords and we have taken the results of those keywords and sample-coded. So, for example, if there's a keyword "reorganization," we may have reviewed the top 200 random hits. We did that across the board.

Also, to respond to several of plaintiffs' targeted document requests, we ran targeted searches across the database. That's what we have already produced, about a thousand pages of documents. So we have that coding that's in there.

Plaintiffs' counsel, they have sent us now three different revisions of keywords. What I have proposed to plaintiffs' counsel is, I'll give you the hit lists. I've already given them two sets of hit lists; we have another set to give them, I'll review -- or we'll review 3,000 of those hits, you tell us how you want us to review it but pick the hits, we'll review any of the top 200 in these ten categories,

you tell us how to review it. We'll give them those results as well.

Once that initial coding part is done, we'll let the system go out, it will do a sample of, you know, train itself, we'll get the results. Our proposal was to review, one, a random sample of the results that come back as well as certain judgmental sampling, share those results with plaintiff, they can make their suggestions on how certain things should be coded.

We have also identified six different categories that documents can be coded towards. I think plaintiffs have asked for us to do eight or nine. We can figure that out. Go through that iterative process twice. At that point -- and this is where sort of the proportionality and cost-limiting comes in -- after we've gone through the iterative process twice or if we have to go through another time, have the computer give us the documents in rank order. And we have agreed or proposed reviewing the top 40,000 rank documents. And we arrived at that 40,000 document number -- we estimate it will cost approximately $200,000 using a five-dollar a document cost estimate, it will cost 200,000 to review the 40,000.

When you take that 200,000 in review costs and you couple it with our vendor costs, we're looking at a total spend of approximately 550,000. We understand that plaintiffs take issue with some of our vendor costs -- we can dispute that --

but even just looking at the $200,000 attorney fee review cost, we think that that is a more than appropriate amount to spend to see what we get. We have never told plaintiffs that we're going to do this and this is all that you get. Our view is, let's see what this yields us first, we think these are the most relevant people, this is a sophisticated and excellent way to find the cream of the crop, if you will. And after that process is done, we'll be in a much better position to argue and debate whether or not the incremental value of searching another custodian is going to be worth the cost. And that's essentially our view.

THE COURT: Let me hear from Ms. Wipper.

MS. WIPPER: Your Honor, we disagree with defense counsel's position that the only issue is predictive coding, because that kind of skips over a lot of other issues that --

THE COURT: Well, let's deal with the predictive coding piece. I understand, from what little I have skimmed of your proposal and theirs, that they're sort of only looking at an email archive and you want lots of other steps looked at.

But assume that that other piece gets resolved, meaning where they have to look, and maybe their 3.2 million database will double or go up to whatever, but what's wrong with the predictive coding methodology they have proposed, which also sounds like it's being run on a fairly transparent and cooperative basis?

MS. WIPPER: Well, the main issue is cost because --
THE COURT: No, but where? In other words --
MS. WIPPER: It's impacting the methodology.
THE COURT: Well, the question becomes the review. And my understanding of the way this works is by the time that the system spits this out, and whether it's the top 40,000 or whether the break point is 50,000 documents or 30,000, that 90-something percent of the relevant documents are going to be found in the top hits, and that the costs of reviewing the rest is not worth the candle in most cases.

Now, where that line gets drawn is something that I can't decide until I've seen the results. In other words, when one sees the results, as I understand it from this method, one can see a sharp drop-off at a certain point, at which you then still sample the documents that are not going to be reviewed, and that's part of this whole iterative process.

If you are seeing that the top 40,000 documents give you 90 percent of the responsive documents, and it's going to cost a million dollars to go to the next hundred thousand documents for eyes-on review, to get another 5 percent, it's probably not worth it. If it's worth it to go to the top 50,000 because that's where the cliff line seems to be, that's what people are going to have to do.

It also may be that once privilege is determined, that they will let you -- the rest of this is so likely to be junk,

that you want, under an attorneys'-eyes-only or some process, an informal basis, you want to look at the documents that go from 40,000 to 80,000, you can look at them and if you tell them, you know, gee, having looked at it, there's a lot of good stuff here, then there's some problem with the process.

I'm not saying 40,000 is the cutoff -- I can't really determine that -- and I invite both sides' experts to tell me if I've gotten this wrong but I've sat through a lot of training sessions on this, wherever that cliff is, that where is where the break should be. So if that was the only problem you had with that part of the predictive coding process, then it sounds like you all can go down this road, all of this, without prejudice to additional search as may be necessary and additional processes as may be necessary.

So is that the only problem, Ms. Wipper, or is there anything more?

MS. WIPPER: No, there's a dispute about the scope of relevancy. What happened --

THE COURT: I've ruled on that. That's what we spent the morning doing.

MS. WIPPER: OK.

THE COURT: So whatever rulings I gave on that are going to apply to the emails as well. So any positions they were taking in the ESI protocol are now going to have to be revised, based on what I have done this morning, and similarly

on your side.

MS. WIPPER: OK, and also I'd like to respond to defense counsel's description of their proposal. I'd like DOAR to respond and give you an overview, if we may, on our proposal on predictive coding.

THE COURT: All right, though I guess I'd like to know where it differs.

MS. WIPPER: Well, it's actually a direct response to their proposal.

THE COURT: OK.

MS. WIPPER: So who am I going to hear from?

MR. NEALE: Paul Neale, your Honor.

THE COURT: Mr. Neale?

MR. NEALE: I actually think you pointed to exactly the issue. We have not taken issue with the use of predictive coding or, frankly, with the confidence levels that they have proposed except for the fact that it proposes a limit -- the ultimate result of 40,000 documents before we have seen any of the results coming out of the system.

THE COURT: I've already said -- and I want to make sure that defense counsel realizes it -- I'm not buying your 40,000 as a pig in a poke. I understand the concept, but where that line will be drawn -- whether it's 40,000, 50,000, 60,000, 20,000 -- is going to depend on what the statistics show for the results.

MR. ANDERS: I guess, your Honor, that's why I stood up before, because I wanted to ask you something. I understand that that cliff line may be at 80,000 documents. The reason why we picked the 40,000 is what we're trying to do is also incorporate the cost element. We picked 200,000 as what we think --

THE COURT: Proportionality requires consideration of results as well as costs. And if stopping at 40,000 is going to leave a tremendous number of likely highly responsive documents unproduced, it doesn't work. Plus, of course once you have the predictive coding run, the cost after that is how much you're doing an eyes-on review of. And once you've weeded out the privilege documents -- and I assume you either have the 502(d) order or you will be providing one for me to sign off on, because I think in a case of this size, if you're not agreeing to one, you're committing malpractice -- how much money you spend thereafter is a result of how much you want to know what's in the documents or, putting it perhaps a different way, CYA. If the first 60,000 are clearly showing that they're highly relevant but you're running out of money after 40,000, don't review the other 20,000. That's up to you.

MR. ANDERS: We've considered that, your Honor, and I think the attorney-eyes-only type of agreement or designation may be appropriate here, because one of the concerns we have is, some of the plaintiffs are now working for competitors. To

the extent that they're seeing --

THE COURT: This is not a case where I assume, other than on anecdotal, that there is going to be much need for the individual plaintiffs to look at the documents. I'm sure you can all work that out.

Now, unfortunately it's 1:00 o'clock. I'm happy to have you come back. I've got a 2:00 o'clock, and there may be a 3:30 from people who forgot to show up this morning and were told to try to get their act together and get here this afternoon. You can come back this afternoon, you can come back in a day or two. I think we have made some good progress, and I know that you're coming from further away than usual, so I'd like to make the most use of your time.

What's your pleasure? You want to come back at 3:30 in the afternoon and use the time from now to then? You can use the jury room.

MR. ANDERS: Maybe, your Honor. The only reason why I say that is, tomorrow I am leaving the country for a week for a family vacation, so I'm out of pocket for a week; I'll have some email but not a lot. So, again, I don't want to impose on everybody else, but that's my scheduling issue, so I'm not sure how much we'll get done within the next week.

THE COURT: That's why I'm suggesting you maximize -- I don't know what time your flight home is -- well, you're in Morristown.

MR. ANDERS: Today's fine for me, your Honor.
THE COURT: You're fine for today. If everybody wants to stay -- you just spent an hour talking about custodians and made some progress -- there's a certain benefit, I think, in keeping you hostage because it avoids the delay between phone calls, et cetera, et cetera. So if you want to take an hour for lunch, be all back at 2:00 o'clock, you can use the jury room.
MR. ANDERS: That's perfect.
THE COURT: And as soon as whatever is going on with my afternoon conferences gives me time to see you, we'll deal with you, but you're not leaving until you've checked out with me.
MR. ANDERS: Thank you, your Honor.
THE COURT: OK. Enjoy lunch, but get back, use the cafeteria on the eighth floor or whatever else, but don't waste half the afternoon by having a nice lunch.
MR. ANDERS: Understood.
(Recess)
THE COURT: We are back on the record for part two of Da Silva Moore et al. against Publicis.
What progress have you been able to make on the ESI protocols or, more importantly, which of the issues you've talked about would you like a court ruling or guidance on? Whatever you have agreed upon we will memorialize in some other

way.

MR. ANDERS: I think we made a lot of progress, your Honor. It may be easier just to say where we are.

On the list of custodians, we have identified eight custodians that the plaintiff would like us to add, five where they would be willing to first apply some level of filtering to their results, and then we would either manually review or possibly add those results into the database. We're going to go back and just confer with our clients and those individuals; there may be certain sensitivities about the particular people but we at least have been able to further narrow the custodians on the overall concept of predictive coding. We had a lot of conversation and discussion about that; I think we're in agreement on the process.

The process is going to be generally as we discussed it before, but what we're going to do is, I think, have more of the iterative reviews, and what we're going to try to do is hopefully be able to do those iterative reviews until we find the cliff that your Honor was referring to.

My only concern, and what I want to work into the agreement, is if these iterative reviews are taking longer than anticipated and the costs are mounting, having some mechanism in the agreement where there can be a point where we either discuss it or raise it with your Honor, that, look, we have reviewed 60,000 so far, this is what's coming back, the end

doesn't seem to be in sight and we've spent X amount, just having something in the agreement to address that possibility.

THE COURT: I have no problem with you all putting in the agreement that you're going to cooperate and work in good faith. But if things aren't working out because of expense or results not being what either of you hoped for or whatever, that it can be revisited with the Court, the caveat to that is obviously once you go down a certain route, it's going to be very expensive to completely abandon that and say we're now going to do something completely different, so that's probably not something you'll be able to do.

Tweaking it, in terms of adding another custodian late or doing a further iteration where you change a search term or better train the computer with some more documents, I don't have a problem with that occurring or the converse of that, with the defendant coming in and saying, you know, we've already spent twice what we thought we were going to spend, we've made enough progress that the next X percent search that that the plaintiff wants us to do is not worth the candle. That's what I said this morning as well.

All right, what else?

MS. WIPPER: We would add to that, plaintiffs would propose if we get to that point, that defendants don't do a manual review and just turn over the documents.

THE COURT: All right, that's an argument you can make

later on, that, OK, this system kicked out all of this. But usually the sampling is in lieu of that, which is to say that if you get to a certain cliff and you have reviewed -- I'll use defendants' number from before -- 40,000 and the next 50,000 are considered not likely to be relevant and you run a sample, statistical or random or whatever, of that balance, you say, OK, we looked at another thousand documents and found one that really was relevant, that's probably the end of the ballgame.

On the other hand, if you run a thousand and you find a hundred that are relevant, that may mean that more work has to be done in one way or another. And I'm not meaning to fully prescribe any, which your experts sitting behind you can probably do better, on what is your 95 percent confidence level or any of that stuff, but at some point it doesn't mean that because predictive coding spits it out as having a 1 percent chance of relevance, that I'm going to say, OK, the defendant has to forego manual review but produce all of it, as opposed to, you'll do a sampling and see if it really is mostly junk.

Understood?

MR. ANDERS: Understood.

THE COURT: On both sides?

MR. ANDERS: It makes sense, your Honor. I guess the way we had initially tried to craft the proposal was by putting up front the dollar figure that we thought was appropriate.

THE COURT: That's somewhat meaningless. And,

frankly, it then gets into fights about "if you didn't get to Recommind and you went to XYZ company, that piece of it would be 25 percent cheaper and that shouldn't be attributable to us and your associates at Jackson Lewis are paid too much per hour, that shouldn't be attributable to us." I will look at proportionality, but I'm not telling you that there is a particular number that's better than another on how much work you've got to do.

MR. ANDERS: I understand. That came across clear.

I just want to make sure that I understand what you're saying, is if, as we're going through this iterative review, we reach a point -- and I don't know what point is -- in terms of cost, where even if the computer is saying there is X percent relevance still out there, that we're not foreclosed from making the proportionality argument at that point.

THE COURT: That is correct.

MR. ANDERS: OK.

The other thing we had discussed, your Honor, were those sources that would not be reviewed through predictive coding. For those sources, we have agreed to do targeted searches of some of them; for others, we need to find more information about what information is actually housed there, but I think we were able to work through some of these other sources, shared drives --

THE COURT: This is the material that's on page 2 and

3 of plaintiffs' proposal, I assume?

MR. ANDERS: Yes, your Honor.

THE COURT: I'm not asking you to give me much more detail on that as long as there is agreement so that you're moving forward without the need of further court help on it.

MR. ANDERS: There is, your Honor. We're moving forward on that.

MS. WIPPER: There are two points that we wanted to raise. The first one was concerning the time period for the emails.

Earlier today defense counsel said that their email archive went back to 2008. There is also a separate email that's available from a legacy system that's stored in home directories or shared folders. So we would propose that for pay discrimination issues, that we would apply the longer period to 2 --

THE COURT: For pay discrimination, we're not doing an electronic search. You're getting that from the personnel material and the material you got on payroll. It's unlikely that email is going to find anything, and if it is, frankly, it's going to find it in the post-2008 period that's in the -- I'll call it the master database, the archive system, that they have established. So I don't see that as being necessary, certainly not in any immediate wave.

On all of this, I'm not foreclosing you, as you

develop information from the documents produced or from depositions, from saying that you have learned something new, but if there is a smoking gun email that says, you know, I'm the president of the company and it is our policy to pay women less than men, I guarantee you that will get repeated in the newer system. And for that needle in a haystack, I'm not going to have them bring up an additional search.

What else?

MS. WIPPER: I would just add to that much. They haven't produced the payroll data yet.

THE COURT: We talked about all of that this morning. I'm not revisiting things. It's been a long enough day.

MS. WIPPER: I just wanted, before we move from predictive coding, I also want to address the issue codes, what we agreed to do, because there's a dispute about the definitions that plaintiffs proposed. We're going to try to deal with that in the coding process; and it's possible, if we can't agree, that we would need the Court's assistance.

THE COURT: I'm sure I'll be seeing you again soon.

MS. WIPPER: OK.

MR. ANDERS: I believe that was it, your Honor. I think we were going to talk about some time frames. I think at least with the ESI protocol, my plan is probably the night before I leave to at least get emails out on questions about parts of the systems and then as soon as I return, if not while

I'm away a little bit, try to redraft the protocol to address what we discussed today.

THE COURT: I know every lawyer thinks they're indispensable and I'm not pulling the "Jackson Lewis is a big firm and you're all fungible," but is there not another person who may be less email savvy or computer savvy than you, such as Ms. Chavey, for example, who can follow up, along with the folks from Recommind and plaintiffs' counsel, and not lose an entire week because you're on vacation?

MS. CHAVEY: Of course, your Honor.

THE COURT: And I happen to know, it may not be on this case, if it's a true e-discovery dispute, I happen to know your Florida e-discovery counsel very well --

MR. ANDERS: He knows a little bit.

THE COURT: You can bring Mr. Losey into the mix if need be.

MR. ANDERS: OK, understood.

THE COURT: What else?

MS. CHAVEY: Your Honor, I know your Honor said you weren't going to reconsider what was addressed this morning, but I did look, during the break, about the issue about Mr. Tsokanos in complaints that had been made against him. I think on plaintiffs' counsel's representation that their understanding was there had been a complaint in 2005, you ordered us to provide that. There was not a complaint in 2005.

There was something earlier than that. And I just wanted to --

THE COURT: How early?

MS. CHAVEY: 2003.

THE COURT: But that was the Atlanta --

MS. CHAVEY: It was in Atlanta.

THE COURT: Produce it. Obviously it's discrete and can be found.

Before I lose track, for the paper discovery we talked about this morning, how soon can you complete that? One week, two weeks, six years? Come on.

MS. CHAVEY: Your Honor, we would need at least 30 days.

THE COURT: I don't know how you're going to do that in 30 days, finishing e-discovery protocol that's not going to be finalized for more than a week despite me getting other people involved while Mr. Anders is away, run the ESI, go through iterations and meet a June 30 discovery deadline with depositions and everything else. I think you're being a little generous there. So one more chance. Working harder, faster, et cetera, how soon can you do it?

MS. CHAVEY: Well, one issue, your Honor, for example, is with the personnel action notices. We understand the order to require us to work with the plaintiffs to come up with a statistically significant sample. That in and of itself is going to take a while and then there's going to be the

searching for the notices, so there is time that needs to be built in in order for that to occur.

THE COURT: Can you live with 30 days, Ms. Wipper? If not, tell me what you can live with.

MS. WIPPER: We have a deposition scheduled with defense witnesses starting the end of this month.

THE COURT: With all due respect, if you want to keep to that schedule, you're going to be deposing them without documents.

MS. WIPPER: Correct.

THE COURT: And let's all be clear on the way I run this, which is, if you want to take early depositions to learn things, that's fine; you don't get to redepose somebody whose deposition was finished because you get documents later that you knew you didn't have, as opposed to when they say, OK, we've completed our document ESI production and you take a deposition and then a week after the deposition they say look what we found in the warehouse somewhere; then you may get another deposition. So if you want to take a deposition at the end of the month, that's fine, but let's say I push them to get you something in two weeks, which means you both have to be very fast on how you're running the statistical significant determination, you're going to have to review it before the deposition, it's not likely to happen.

MS. WIPPER: I would propose three weeks. We work

with statisticians regularly so we can have the sample done or our proposed --

THE COURT: That sounds like a viable compromise.

So that is three weeks from today, which is January 25th, subject to somebody, by written agreement or by applying to the Court for more time, we'll go from there.

OK, other than a date for you all to come back and probably a date for you to complete the ESI protocol to ensure that your feet are held to the fire, is there anything else we need to do on discovery today?

MS. WIPPER: I just wanted to address one point from earlier today and just get clarification from the Court. On the cutoff date for the production, you said February 2011 for the HR complaints. I'm wondering if that's a global cutoff date. We have a plaintiff that left the company after that date, Carol Pearlman --

THE COURT: Is she in the original complaint or the amended complaint?

MS. WIPPER: She's an opt-in plaintiff.

THE COURT: When did she opt in?

MS. WIPPER: I don't know off the top of my head. Probably months ago.

THE COURT: The amended complaint is dated April 14th. Was it before or after?

MS. WIPPER: No, it was after that.

THE COURT: You've got to have some way of dealing with this. So I'm inclined to either leave it at the February date or maybe to push it to April 14th of 2011, other than when we get to privilege issues, I'm not going to require them to log almost anything post initial complaint.

MS. WIPPER: We would propose the amended complaint date as the cutoff.

THE COURT: So we're adding a month and a half or something. Problem, agreement?

MS. CHAVEY: Well, it seems appropriate to limit it to and cut it off at the date of the initial complaint. The fact that Carol Pearlman opted into the April Pay Act claim later doesn't seem to affect the Court's ruling that the date would be February.

THE COURT: All right, let's leave it where it was originally.

What else?

MR. ANDERS: Your Honor, I just want to make sure I heard correctly: Did you give a definite date for when the ESI protocol must be completed?

THE COURT: No. Give me a proposal. A week after you come back or a/k/a two weeks from today?

MR. ANDERS: That would be perfect.

THE COURT: Agreeable?

MS. WIPPER: Sure. And you want a joint proposal,

your Honor?

THE COURT: Yes. And if you can't agree, I want it as a single document with paragraph 3, whatever paragraph 3 is about, 3(a) plaintiffs' proposal, 3(b) defendants' proposal, and then a cover letter from each of you explaining, to the extent it's not immediately obvious, what it is you're disagreeing on. So that's January 18th.

OK, next, date for our next court conference, what's your pleasure?

MS. WIPPER: How about a week after the ESI protocol?

THE COURT: Well, I think that's probably going to be early unless you think there are ESI protocol problems, only in the sense that the document production out of what I'll call this morning's production is due the 25th. On the other hand --

MS. CHAVEY: Your Honor, what about February 2nd?

THE COURT: That's LegalTech week. Yes, by Thursday that's OK. February 2nd at 9:30.

Now, the other thing: When is it you plan to move for class certification?

MS. WIPPER: I believe it's in the schedule, your Honor.

THE COURT: I don't think it is but I'm willing to be educated.

MS. CHAVEY: Your Honor, it is in the scheduling order

but it is due on or before April 1st of 2013.

THE COURT: Frankly, that makes no sense to me. I know you convinced Judge Sullivan to do that. It won't be the first time I've overruled the district judge; it's a strange world that we live in.

Yeah, I understand the purpose of getting past the expert period, but if you make the motion on April 1, it won't be fully briefed until the summer of 2013, it won't be decided until the fall of 2013 or January 2014. You can't really do summary judgment or anything substantive until the class either has or hasn't been certified. And then if either a class or an FLSA collective action is certified or the appropriate other term for a collective action is approved, you've got to go through 30 days to draft the notice, 60 days or 90 days for people to opt in, you are assuring -- and this is something plaintiffs should be thinking about even more than the defendants -- you're assuring no merits resolution of this, assuming a class of any sort, class or collective is approved, until 2014 or '15. That hardly seems to be in plaintiffs' interests. And I'm not sure that on the FLSA collective action -- you've got discrimination claims -- that's one type of motion -- and to the extent you've got FLSA and New York Labor Law claims, that's a much more discrete area, it seems to me. And leaving all of that until the very end, particularly since FLSA requires opt-in plaintiffs, and my recollection but

you all tell me if I'm wrong, is that there is no stopping of the statute of limitations until they opt in?

MS. WIPPER: Correct.

THE COURT: So if this case, which began in early 2011, if it's not certified until 2014 or '15 for collective action issues, the whole period between now and then, when you will assume that if there was anything bad going on at the defendants, they will have cleaned up their act during the course of this lawsuit -- and I'm not saying I know there was anything bad or good going on -- you're assuring that the FLSA in particular, even with a six-year statute of limitations on the state claims, is going to be almost a nullity or it's going to be a totally different lawsuit, that most of the period within the statute of limitations is going to be a period on which there has been no discovery.

Does it make sense -- not that I want more work for Judge Sullivan or myself -- to do something differently for the FLSA New York Labor Law than the Title 7 and related discrimination claims?

MS. WIPPER: Well, your Honor, I think it depends on the discovery because we have the burden and we have been spending an enormous amount of time trying to get discovery in this case for many, many months. So, today, as I stand here today, I can't say for sure we will be prepared to file something until we have the discovery.

THE COURT: On the FLSA and New York Labor Law?
MS. WIPPER: We need the payroll data.
THE COURT: Well, you basically have that, I thought, subject to the cleanup -- and I'm not revisiting what I ordered this morning. So that you're going to have by the end of this month. Whatever work your experts need to do, I don't see waiting until April 1st of 2013, and, frankly -- and I'm not trying to help the defendants -- if I were them, I'd oppose certification at that point if for no other reason than that most of the period within the statute of limitations will be a period where there hasn't been discovery. And if we stick to the schedule, because you got Judge Sullivan to approve it and I decide not to stick my neck out and overrule him, so to speak, I'm not reopening discovery. You can bet on that. Once discovery closes, it is done, because nobody wanted bifurcation the second time today because 99 percent of it was held to be relevant either way. Think about it and maybe in February, too, we can revisit that issue.
MS. WIPPER: OK.
THE COURT: I guess the last issue, although I suspect -- I don't know what I suspect. I generally at first or early conferences raise the 636(c) issue. I don't remember raising it at our prior conference because they were on a sort of emergency basis, et cetera. But I remind both sides that pursuant to 28, U.S. Code, Section 636(c), if all parties

consent, then the case can be in front of me for all purposes, including the jury trial you've asked for here and any appeals to the Second Circuit, they're the same from a magistrate judge, consented trial or motion decision, as it would be in front of a district judge, and it's up to all of you and our missing friends from Publicis.

So by the February 2 conference, obviously a decision to keep thinking about it keeps your options open, but it also keeps one side or the other -- whoever is in favor of it now and the other one is not so sure, by two months later, that position may reverse. So the sooner you all decide, you decide, I'll ask you to tell me where you are at the February 2 conference and we'll go from there.

And finally -- perhaps my second "finally" but finally, the jurisdictional discovery and all that against Publicis, is anything happening in that area? I don't want them to prejudice them from not being here but I don't know that the quietness with respect to that, as opposed to everything going on here, is the result of nothing going on or is the result of there not being the same problems.

MS. WIPPER: Well, we served discovery on October 19th on Publicis Groupe according to the schedule, and on MSL. They asked for a month extension to respond. We gave that to them and they produced documents, some documents, Publicis Groupe, and responded with objections on the 21st. We're probably

going to have to have a meet-and-confer with them concerning some of their objections and their responses, but right now we don't foresee any disputes at this time.

THE COURT: Well, you've got a March 12th cutoff. The earliest I'm likely to want to deal with that, since it seems like you all are going slowly, is at the February 2 conference. That's going to leave you very little time if there are problems, to get them resolved and get whatever depositions or whatever are going to occur post the paper/ESI side of discovery. So don't lose sight of it. Let's have Publicis here at the next conference, even if there is complete agreement that everything they have been doing is fine.

The other thing is, you all can figure out how to do this when we're going to have megaconferences like this. I certainly prefer everyone to be present in person. If it gets to the point where you know in advance there's one minor issue and one of the local counsel, more local, will be here and the other is from San Francisco, for example, while the airlines need all the help they can get, it's not my job to feather their covers, so if you want to show up telephonically, ask for permission to do that, which, as I say, will be granted if you really think the conference is going to be the typical half hour discovery conference and not the 500 pages of letters, et cetera, et cetera, like we had today. You do not need to ask permission for your e-discovery consultants to attend. If

there are any ESI issues, and assuming you're willing to pay the freight for them, I am not only delighted to see them but they're usually a valuable addition.

I think that covers everything. I guess I'll just say, my rules provide that if things start going much more smoothly and two business days before the next conference we decide you really are getting along swimmingly and you worked things out and things should just be put off a few weeks, you can make that application, either by a joint phone call to my secretary or by a fax, requesting that, and nine times out of ten those requests are granted. They're not granted when they come in at 5:00 o'clock the night before and the Court suspects that somebody's already on an airplane. And they're not granted unless they're on consent, meaning if one side says I don't need the conference but the other side is frothing at the mouth because they're being frustrated, we're obviously going to have a conference.

Any questions?

MS. CHAVEY: No, your Honor.

THE COURT: All right, the transcript, as usual, constitutes the Court's order. And I think I may have said this once before -- and somebody certainly took up the process and therefore knows the process -- but I'll say it this last time, I may not say it again in the future: Pursuant to 28, U.S. Code, Section 636 and Federal Rules of Civil Procedure 6

and 72, any party aggrieved by a ruling at one of these discovery conferences has 14 calendar days to bring their objections to Judge Sullivan. The 14 days starts running immediately when you attend any in-person or telephonic conference and hear my ruling accordingly, regardless of how long it takes me to obtain the transcript from the reporter. And failure to file objections within that 14-day period constitutes a waiver for all further purposes in the case, including any appellate purposes.

With that, I'll require both sides to purchase the transcript from the reporter and with that, we are adjourned. Have a good flight back, or drive back, to everyone going in different places. Have a good vacation --

MR. ANDERS: Thank you, your Honor.

THE COURT: -- and happy new year. See you all in a month.

MS. CHAVEY: Thank you, your Honor.

MS. WIPPER: Thank you, your Honor.

MR. ANDERS: Thank you.

* * *

Exhibit EE

C28rdasc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MONIQUE DA SILVA MOORE, et al.,

Plaintiffs,

v. 11 Civ. 1279 (ALC)

PUBLICIS GROUPE and MSL GROUP,

Conference

Defendants.

----------x

New York, N.Y.
February 8, 2012
3:00 p.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES

SANFORD WITTELS & HEISLER LLP
Attorneys for Plaintiffs
BY: JANETTE L. WIPPER (tel.)
DEEPIKA BAINS
SIHAM NURHUSSEIN

JACKSON LEWIS LLP
Attorneys for Defendants
BY: JEFFREY W. BRECHER
BRETT M. ANDERS

ALSO PRESENT:

PAUL J. NEALE
DAVID BASKIN

(Case called)

THE COURT: We have the major issue of e-discovery protocols and the like. Also, I got this morning a letter from the plaintiffs asking for permission to make a motion for sanctions. I guess we will deal with that first.

However, I suggest, since lead counsel seems to be out of state, perhaps, that you all talk to the New York office a lot more, because we generally don't do discovery motions as motions. If all you're asking for is money and you want to make a motion for sanctions and I'll get to it when I get to it, which may well be when discovery otherwise is over, feel free.

In addition, in general it is Second Circuit law that I can't stop you from making any motion you want at any point after a pre-motion conference. I certainly am not giving plaintiffs in this case, or either side in this case, although it was plaintiffs who requested it, the ability to file motions in the future without pre-motion conferences. I just don't see how that is consistent with our local practice. Maybe somebody on the plaintiffs' side could try to explain that to me.

MS. BAINS: Your Honor, we are OK with that ruling, but we requested that because of the numerous discovery violations that have been happening --

THE COURT: My question is, why are you trying to practice law the San Francisco way instead of the New York way?

MS. BAINS: We are not asking to do that. We respect the Court's decision.

THE COURT: That's what the letter says. You want to be relieved of all pre-motion conferences, isn't that what your letter asks for?

MS. BAINS: Given the circumstances of this case, yes.

THE COURT: Frankly, given the circumstances in the case, all the more reason why there should be pre-motion conferences. Otherwise, it will be five years before discovery is concluded, because each of you doesn't like what the other is doing. If we do it the formal motion way for everything you want to do, there will be at least a month delay while a motion is filed and responded to. So, I'm having a little bit of trouble seriously understanding what it is that you think you're doing.

MS. WIPPER: This is Jeanette Wipper. Your Honor, if I may address the Court. We are not asking to not comply with your individual practices. The issue that we are dealing with and we are trying to address --

THE COURT: Ms. Wipper, with all due respect, excuse me. Let me read what you wrote me, page 8 of your letter, last sentence on the page "Plaintiffs further respectfully request to be relieved of the obligation to file pre-motion letters and appear for pre-motion conferences before filing future motions to compel in this matter." That is directly contrary to

Southern District practice.

MS. WIPPER: Your Honor, if I may address that. The reason we raised the issue in the letter is because we are currently fighting with defense counsel about discovery that was requested on May 13, 2011, and was compelled by Judge Sullivan on September 14th of 2012 and was compelled by your Honor on January 4th of 2012.

THE COURT: Why is it that adding a month delay, if not more, to every discovery motion to compel gains anything? Plus, of course, as I explained to all of you at our last conference, whatever may have occurred before I got involved in the case, there is not much I can do about that. As to noncompliance going forward, I intend to deal with that and deal with it strictly.

MS. WIPPER: Thank you, your Honor. If you believe that it would be more efficient to have more frequent conferences, obviously we would like that to happen.

THE COURT: Ms. Wipper, have you read my rules?

MS. WIPPER: Yes, your Honor.

THE COURT: What does it say about the frequency of conferences? I'm going to embarrass you here, because I really don't think you did read them. What does my rule say?

MS. WIPPER: I understand you have a rocket docket, and I also understand that if you don't move to compel early enough, you may not allow the party to file a motion to compel.

THE COURT: What does my rule say about conferences?

MS. WIPPER: That you are available for conferences and that pre-motion conferences are required.

THE COURT: And that any time you have a discovery dispute, even if the prescheduled conference is a month away, a week away, a day away, if you've got an emergency, meaning it should be decided sooner rather than later, you contact the Court and I get you in.

I'm not happy, first of all, with the way both sides are handling this case, which frankly is only adding more costs to your respective clients or, if plaintiffs are on a contingency, more work for which you someday hope you will get paid by somebody.

In any event, you are not relieved from pre-motion conference requirements. As to whether you want to make motions after that at any point in discovery matters, even though in almost all cases I will have ruled from the bench, go right ahead. The result is not going to be any different.

With respect to this on the merits, let me hear from defendant.

MR. BRECHER: Good afternoon, your Honor. Jeffrey Brecher on behalf of MSL Group. We received this letter last night at around 8 o'clock via email, so we haven't had a full opportunity to review everything in it. But let me address what is raised in the letter.

The first issue is complaints. At the conference that was held on January 4th, you ordered the defendant to produce complaints made by females alleging gender discrimination and sexual harassment for the period of February 2008 to February 24th of 2011. They have appealed that ruling to District Judge Carter. On January 25th we produced documents falling within the scope of the Court's order.

THE COURT: Is that a complete production other than what may be in the ESI? They say it's not.

MR. BRECHER: Right. What we did is when they said it is not, we sent them an email saying that is all we are aware of and we conducted a diligent search for any complaints, if you have any other information that might lead us to something else, feel free, give it to us. We didn't hear back from them for a week. On Monday they gave us some additional names.

On Tuesday, yesterday, we did some further investigation to see if there was anything relating to those individuals mentioned. At this point we have not identified any other additional complaints that fall within the scope of the Court's order.

THE COURT: Tell me your method of search and who you spoke to, how you went about it, what files were searched.

MR. BRECHER: With respect to the names that they mentioned, we could not find any additional complaints. We have identified one other person unrelated to anyone they

mentioned that we believe will probably be responsive and will produce this week.

What did we do? We spoke with the highest levels of the company with respect to the human resources department. That would have included the senior vice president of human resources for North America, the director of human resources, and the chief town officer. We also had the local HR offices check to see if there were any other complaints that we were not aware of.

In addition to that, Judge, for the people that they mentioned specifically, we inquired of the active employees who we are able to contact, are you aware of anything, without divulging the substance of our communications that are privileged. We have not identified any other complaints, other than the one that I mentioned, that are responsive and within the scope of the Court's order.

If they have something more specific, if they have the name of the person who complained, the date that it happened, I'm happy to go look further. But at this point, Judge, we feel we have complied with the order. I would say we don't appreciate the last-minute motion for sanctions the night before the court order. It's not professional, Judge.

THE COURT: Let me hear first from -- who am I hearing from?

MS. NURHUSSEIN: Thank you, your Honor.

THE COURT: You're Ms.?

MS. NURHUSSEIN: Siham Nurhussein for plaintiffs.

THE COURT: It will take me a while to figure out who is who. Go ahead.

MS. NURHUSSEIN: Understandable, your Honor. If I could respond to a couple of points Mr. Brecher mention. First of all, this is the first we have heard as to the sort of search he has conducted.

THE COURT: I suspect that is because you and they don't talk to each other or don't talk to each other very well.

MS. NURHUSSEIN: Actually, your Honor, he mentioned that we raised this issue for the first time in terms of the types of complaints we were aware of on Monday. We actually sent an email on January 30th, so over a week ago, raising all these concerns, identifying at least one --

THE COURT: Let's get to the merits. You each think you sandbagged each other. You may well be on your way to a special master if I lose too much patience with you. But let's get to the merits.

On the employment discrimination complaints, what is it that you want them to do that they haven't done or what is it you think is missing other than you think the company is rife with discrimination and therefore there should be more? That I can't rule on.

MS. NURHUSSEIN: Your Honor, I think we do need

confirmation, which I think Mr. Brecher has just confirmed, but I'd like him to be clear about that, that he has inquired and searched the files of all individuals that MSL itself identified as having responsibility for investigating and responding to complaints of discrimination. That's a reasonable request because in response to --

THE COURT: He doesn't necessarily have to search those files if he talks to those people and they say there isn't anything.

MS. NURHUSSEIN: Yes.

THE COURT: That's what I have heard him to be saying.

MS. NURHUSSEIN: I just want to confirm that that conversation occurred with every individual who MSL identified as having responsibility for responding to and/or investigating complaints.

MR. BRECHER: Two comments, I guess, Judge. The first is, obviously, the Court has discretion to order us to disclose our efforts. But to the extent that we are constantly being asked for each response to identify every step that we took to respond, that is not how typically we respond to discovery. I'm not obligated to share my work product as to every step I took and what decisions I made.

THE COURT: No, but I'm sure you don't want a 30(b)(6) deposition on useless subjects, because it's just going to be more expensive.

MR. BRECHER: We are going to get that anyway.
THE COURT: That is probably true in this case.
MR. BRECHER: We did, as I said, speak with the highest levels of HR in our discussions with our client, again without revealing any privileged communications. We believe that that would be sufficient to identify the complaints. However, we went a step further. I'm not going to represent to the Court I personally spoke with each person, I can't make that representation, but we have inquired with the local HR people who are still active -- I can't speak to former people -- if there are any other complaints, and we have not identified any other than the one that I mentioned earlier.
Based on that, instead of calling us, discussing it on Monday, they say, here's what I want you to do, tell us one, two, three, four, five, everything you did, and on Tuesday, the next day, they file a motion for sanctions at 8 o'clock at night. Judge, this is just an example of what we have been dealing with.
THE COURT: Ms. Nurhussein?
MS. NURHUSSEIN: One other issue I'd like to raise, your Honor. MSL, our understanding is that they are limiting their search of the shared drives and have only conducted the search as to certain HR drives.
THE COURT: If we are talking about ESI, that's an entirely different issue. This is paper.

MS. NURHUSSEIN: Your Honor, I think the issue is that MSL, as we will get into more detail later on --

THE COURT: Then save it for later on.

MS. NURHUSSEIN: OK.

THE COURT: So there are no sanctions as to the discrimination complaint issue. Payroll?

MS. WIPPER: Your Honor, if I can address the Court, before you move forward to payroll, on the issue of the complaint?

THE COURT: Excuse me. Are we doing tag team?

MS. WIPPER: No. Sorry, your Honor.

THE COURT: You can show up in person next time or you can argue the whole thing yourself on the phone with your associate sitting here. You can't do both.

MS. NURHUSSEIN: Your Honor, may I make one more point? We also have concerns, because we are aware of specific complaints against --

THE COURT: Counsel, how do I rule? Tell me what ruling you'd like. That I should sanction them because you think there are others or even know of others that they haven't produced? If you want to do 30(b)(6) depositions, it's a waste of time and money. At this point on this record I'm not sure what you want me to do.

Yes, I understand there is some circularity to all of this, you give them names and then they perhaps find documents.

But since we are talking about the paper and knowledge information of the HR department and the like at this point and there is going to be a much more complete search of ESI if we ever get to that issue today, I'm not quite sure what you want me to do.

MS. NURHUSSEIN: Your Honor, the concern --

THE COURT: I understand your concern. You're telling me they didn't produce everything. Mr. Brecher is telling me they did produce whatever they found, and the description he gave of what they did sounds reasonable. How do I rule for you?

MS. NURHUSSEIN: Your Honor, I think we also need confirmation that at a minimum MSL has conducted a search for complaints relating to the specific individuals that we have identified even though we have much more limited access to information and access to MSL employees.

THE COURT: Write them a letter, and they will respond to it.

MS. NURHUSSEIN: Actually, they have not been responding to the majority of our correspondence, which is another reason why --

THE COURT: New rules. For example, one, no letter to the Court closer to the conference than two days before. I didn't see this letter until 9 o'clock this morning. It came in at 8 o'clock last night. There are limits. That's number

one.

Number two, modification of the Rifkind rule, Rifkind being the senior partner of my old firm Paul Weiss Rifkind. The modification is all letters will be responded to within a week, sooner if at all possible, certainly no later than a week.

With all due respect, I don't know how it got here. Maybe it's because when you were in front of Judge Sullivan originally, the case was not given as much judicial supervision as it needed, but you're out of control here. You all had better cooperate with each other. If you don't, I am going to withdraw Ms. Wipper's telephone privileges; and if you want a regular 9 o'clock every Friday conference or whatever, we'll do it, until I lose even more patience with you, and then you'll get a special master, and whoever loses each issue in front of the special master will pay the special master's fees of several hundred to a thousand dollars an hour.

I've seen many a big case in this court go a lot more smoothly than this. As I say, I cannot speak to what happened before I inherited the case, but I expect cooperation. Stop the whining and stop the sandbagging. This goes for both sides. Get along. You're going to run out of your judicial time. And I don't just mean the discovery period will end. You're not my only case, you're not my only big case. At some point I'm going to say every conference is two hours with you

guys and you don't get any more conferences because you have used up your allotment of judicial time.

Now let's move on to the payroll. Mr. Brecher.

MR. BRECHER: Thank you, your Honor. If I might, could you add one more little rule to your list there? Just that all correspondence be sent by the close of business, not 11 o'clock at night?

THE COURT: It doesn't matter, but it won't count until the next business day. Obviously, if it is coming to me by two days before, I don't mean anything after when I go home at 6 o'clock at night. I usually stay later, but we will count that as your cutoff.

MR. BRECHER: Thank you, your Honor.

THE COURT: For a Wednesday conference, I would expect letters no later than 6 o'clock on Monday, etc. If it's a Monday conference, that means Thursday. Business days.

MR. BRECHER: Thank you, your Honor.

With respect to the payroll, let me go back to the first request for production of documents which asked for a database or computerized information regarding salary. What we did, Judge, in the case is we gave them data regarding the entire class, every male, every female. That means every date of hire, every termination, every salary, every promotion, every bonus. They have all of that information, which would enable them to compare the salaries of one person against

another. They have all of that information.

What they then requested was, well, we want the information on the W-2, box 5 on the W-2. I'm not quite certain why that information is more relevant than the annual salary of a person, since it would seem logical you would compare two salaries as opposed to what someone earned at a particular point.

THE COURT: However.

MR. BRECHER: However, what we told the plaintiffs was the W-2 is not an electronic document. The W-2's are PDF's, but it's not a number you can extract from the PDF.

THE COURT: Why can't you just, and maybe it's because you're only doing this for a subset of employees --

MR. BRECHER: Right.

THE COURT: -- give them the disks with the W-2's on it?

MR. BRECHER: Because we have to pull each person's W-2.

THE COURT: Why don't you let them do that?

MS. NURHUSSEIN: It has all the other financial information and salary information of other people. Judge, you said if there is an electronic way to get that at that time, provide it to them. What we did was we consulted with the client, is there a way where we can get the gross earnings per year, which is what they want. If someone worked six months,

they want to know what someone made for 6 months regardless of what their salary was for the year. They already had that, but they want the subset. Is there a way to do that? We believe there is. So we extracted that data and we provided it to them.

The first I'm hearing is in a motion for sanctions that the information is erroneous, it's got errors in it. They never said to us, oh, there is a problem with the data or we need to talk about this further. I'm not sure what the problem is with the data, but we have given them now people's salary, they know exactly what everybody made, and we have given them what they earned. I'm not sure what the problem is.

THE COURT: At this point are the CD's normal CD's that can be read anywhere?

MR. BRECHER: They are CD's that I believe have PDF's of each W-2, yes.

THE COURT: Do you really want these CD's?

MS. BAINS: Yes, your Honor.

THE COURT: Fine. Here is what you are going to do. You are going to read them at defense counsel's office. No notes can be taken. You will print out what you want to print out page by page only for who you are entitled to the information on. You will then show those copies to Mr. Brecher or his colleagues. Then you will get the copies, assuming they are for the right people. This is all so much ado about

nothing.

MS. BAINS: Your Honor, at the last conference defense counsel also claimed that they have given us all pay information, which we then received actual pay information that was in the people's database all along.

THE COURT: One issue at a time. Do you want the W-2's or not?

MS. BAINS: We do, because we didn't get full and complete payroll.

THE COURT: Stop. Please. I take judicial notice of the fact that you don't like the defendants. Stop whining and let's talk substance. I don't care how we got here and I'm not giving anyone money today. In the future not only will there be sanctions for whoever wins or loses these discovery disputes, -- and so far you're one for two, I think -- there will be sanctions payable to the clerk of court for wasting my time because you can't cooperate.

You're getting the W-2's in the way I have just ordered. With that information, is anything else from this thing relevant as opposed to what they gave you in the past or how they screwed you in the past or anything else?

MS. BAINS: No, your Honor, that's it.

THE COURT: Good. Then we are done with this. Is there anything else in this nine-page letter that requires the Court to rule? I'm denying sanctions.

MS. NURHUSSEIN: Your Honor, there is one issue I would bring up just briefly that we mentioned in passing in the letter, which is the issue of the deposition schedule. I know your Honor during our first conference instructed us to work to come up with a schedule and to indicate priority.

THE COURT: Are you in any way able to do that before you get the ESI, or is this an issue that we will probably take up at our next six conferences?

MS. NURHUSSEIN: All I'm asking your Honor is -- so far they have had an opportunity to take virtually all the plaintiff depositions, six of the seven.

THE COURT: Stop. Tell me when you want depositions to start? Do you want them to start next week? I'm order them to start next week.

MS. NURHUSSEIN: Your Honor, we submitted a proposed deposition schedule with the first deposition beginning I believe on March 22nd. What we want is MSL to confirm the deposition dates.

THE COURT: Even if you don't have the ESI by then?

MS. NURHUSSEIN: What we indicated to MSL is that all of these dates are contingent on us receiving the data two weeks ahead.

THE COURT: What's the point? Your request is denied. At this point it's premature. Or I'll give you two choices. I will fix those dates, including quite possibly saying whatever

you ask for in your letter you get but they are not adjournable. To go through hoops and say this person will be made available on March 22, whatever date you said, and the next person will be March 24, and then have the whole thing blow up because we haven't talked about and it's been months and months and other than the fact that I'm probably just going to rule on it all today, I hope, you're making no progress on the ESI. Once we agree on a protocol, it is not something that is likely to get achieved in two minutes.

MS. NURHUSSEIN: I understand, your Honor. The only reason I raise it is because --

THE COURT: Do you want a ruling? That's what I'm asking you. If not, it's half an hour into the conference. Tell me what ruling you want.

MS. NURHUSSEIN: Your Honor, I think your ruling from earlier today requiring the defendants to respond in a timely manner --

THE COURT: The response now is going to be it's premature. Come on. Somebody practice law. I'm really not happy with this.

MS. NURHUSSEIN: I understand, your Honor. I think we can resolve it among ourselves.

THE COURT: I doubt you can, but I don't think you can get a court order now, because you don't know what you want.

My inclination on all of this is even if it requires

me to extend the discovery schedule because I'm having so much fun with all of you that I want to keep the pleasure going -- note my sarcasm -- I would rather, because of the expense involved here and the size of the case, take this in stages. If that means defendants' proposal wins across the board, which it probably won't, so be it. Let's get something happening with however many custodians that means.

I must say I have a better memory of all your letters before you all canceled or postponed the conference because of somebody's availability. But we will all get back into it. But that is certainly my inclination.

My second inclination is to remind you that at the moment the only plaintiffs are the plaintiffs who are in the case. I'm not giving you discovery as to class issues other than whether there should be a class or collective action. Basically, as I read some of this, you are going on the assumption that it's going to be a class and collective action on the plaintiffs' side even though you refuse to make a motion on that until after all discovery is over, but you want all discovery on that. You're not getting it.

I remind you we talked about this last time as to the date for your motion. And particularly now that the case is no longer in front of Judge Sullivan, it seems to me at least the collective action application needs to be made very quickly. How soon can you do it?

MS. NURHUSSEIN: Your Honor, I'll allow Ms. Wipper to address that.

THE COURT: Ms. Wipper.

MS. WIPPER: Your Honor, we would object to moving the briefing schedule to an earlier period given the discovery disputes in this case.

THE COURT: That wasn't my question. My question is, how soon can you do it? Democracy ends very quickly here, meaning you don't want to give me a date other than no later than April 1, 2013. I get to pick the date and you get to whine to Judge Carter. Collective action is a very easy standard. The preliminary collective action motion is very easy.

MS. WIPPER: However, your Honor, it's not clear what standard would be applied to the collective action, because discovery has already commenced. In order to prove a common policy as well as pay disparities and to show that the plaintiffs are similarly situated to the other public relations employees at the company, we would need discovery. The case law has two standards. It has the conditional certification standard at the commencement of the action.

THE COURT: Ms. Wipper, that's what I'm talking about. You haven't had enough discovery to say we are beyond that. That's the standard. How soon? Last chance.

MS. WIPPER: Your Honor, there is no guarantee what

standard would be applied. That would be up to Judge Carter. Depending on his judgment on the level of discovery --

THE COURT: Ms. Wipper, your motion is due two weeks from today. Thank you very much for not participating. I'm also withdrawing your ability to participate telephonically in the future.

MS. WIPPER: Your Honor, can I ask you to reconsider given the fact that we don't have the payroll data?

THE COURT: No. February 29th. I'll give you one extra week. February 29th. If you don't move by that point, you never get to move. Of course, you can do what you have done before, which is take objections to Judge Carter so he can enjoy the fun I'm having with all of you. If he affirms me and you haven't moved by that point, you don't get to ever move, period. That takes care of that.

MS. WIPPER: Your Honor, plaintiffs request that you issue a written order.

THE COURT: You're very close to getting not only your telephone privileges removed but your pro hac vice removed. You have a written order. It's called the transcript. If you want to object to every single ruling I make, feel free. The rules allow you to do that. Does it make me happy? You figure that out.

Would you like to have your pro hac withdrawn or would you like to learn the rules of the Southern District of New

York, counsel? Do you want to practice in California? Do you want me to transfer this case to California? I'd be happy to do that. This is ridiculous, Ms. Wipper. Do you have anything to say? Are you there?

MS. WIPPER: Yes, I'm here, your Honor. No, your Honor. I would just say that we are complying fully with the local rules of the Southern District of New York as well as your individual rules.

THE COURT: What local rule says I've got to give you a written order other than a transcript?

MS. WIPPER: I was just requesting it, your Honor.

THE COURT: It's not the first time you have requested it and been told we don't do it that way.

MS. WIPPER: OK, your Honor.

THE COURT: Off the record.

(Discussion off the record).

THE COURT: Do you want to start with custodians or sources of ESI? What's your pleasure?

MR. ANDERS: Custodians, your Honor, if you wouldn't mind.

THE COURT: OK. Let me get the letters organized. What is the dispute on custodians? Let's get you to summarize your positions.

MR. ANDERS: Thank you, your Honor. In short, we believe that 30 custodians is more than sufficient for the

first phase of ESI. Using your Honor's most recent date rulings, the 30 custodians that we have suggested is 2.5, approximately 2.5 million documents. Those custodians consist of several high-level officers, including the president Jim Tsokanos, other members of the executive team, the majority of the HR staff, including the upper level HR people, and a number of managing directors.

It is our belief that given plaintiffs' theory of the case, there was a centralized management team that directed the alleged discriminatory behavior, that this group is the group most likely to contain relevant emails and documents. Certainly if that review identifies other custodians, we would consider reviewing additional custodians. But we believe the appropriate step is to review these 30 custodians. Again, that date is set after the duplication is approximately 2.5 million documents.

THE COURT: What are the other custodians that you want, Ms. Bains?

MS. BAINS: Your Honor, the other custodians we want, we included one in error, number 41 Donnelly. That was subject to your ruling about entities under MSL, so that was in error. Other than that, all of the other custodians are managing directors. And the CEO and former CEO of MSL, Olivier Fleurot and Mark Haas, who we have emails already showing that they made decisions that affected employees in America about pay and

promotion, including the pay freeze, we think those especially.

THE COURT: Slow down one minute. Which exhibit is your custodian list?

MS. BAINS: The custodians are listed at the beginning of page 17 of the protocol.

THE COURT: Thank you. How many of these 44, or we are now down to 43, are ones that are in dispute?

MS. BAINS: There are 7. Start with the ones that are starred with the comparators that the parties agreed last time and defense counsel represented to the Court that we would cull down those database sets before adding them to Axcelerate. It seems that defense counsel has withdrawn that.

THE COURT: Let's deal with the 7 comparators.

MR. ANDERS: Thank you, your Honor. If you look at the record of the last time we were here, we did not agree to do anything. What we agreed was that we would first take a look at those accounts and then make the decision. We were willing to consider. We never made an affirmative agreement to do anything.

Our current position is for these additional people, we don't believe they should be included as it relates to the comparators. Our feeling is that as comparators, we don't see what in their email accounts could be of relevance to decisions made about them. Certainly emails from higher-ups about their employment, we have those people. But I don't see what in the

comparators' email account could be relevant.

THE COURT: Ms. Bains?

MS. BAINS: On that theory there is a comparator already on the defendants' list, number 6, Kelly Dencker. If we are going to throw out all comparators, we would like to get in all decision-makers instead of taking up a spot.

THE COURT: There is no magic number. If you're telling me you don't want Kelly Dencker even though they wanted it, I'm sure they are going to be happy to reduce the list, and that will make their list 29 subject to whoever gets added. So be careful what you wish for. Let's erase Kelly Dencker. Do you want Kelly Dencker or not?

MS. BAINS: We want Kelly Dencker if we are going to include comparators.

THE COURT: Tell me about comparators, what it is that means when you run the same email search.

I have another case that we have stalled a few times and it is now their turn. I'm going to put you on hold, Ms. Wipper. Ms. Wipper, you're going to have to be disconnected. You can call back in 15 minutes.

MS. WIPPER: OK, your Honor.

(Recess)

MS. BAINS: I think we were talking about comparators. We think that the comparators are important because their emails will contain important discussion of their job duties,

which is directly relevant to the claims, especially for the EPA claims.

THE COURT: Aren't you better off deposing? Is there any dispute as to what their job duties are?

MS. BAINS: Yes. In the depositions of the plaintiffs, already plaintiffs have claimed that some men were comparators, and the questioning was geared towards showing that those particular men were not their comparators based on their job duties, etc.

THE COURT: I guess my question is, and I'd have to go back and look at all your predictive coding approach to this, unless you run the comparators as a separate unit, are all the other things you're asking for the other 30-plus relevant from the comparators? And by asking for job responsibility type information through an email search, are you then getting that from everybody, including the president of the company? I'm not quite sure how, since you want different things from these people, that would work out.

MS. BAINS: We propose to do a targeted search before adding the comparators so that they would be culled down to just the issues that would be relevant to comparators before they are added.

THE COURT: How are you targeting that search, so to speak?

MS. BAINS: We wanted to give search terms to defense

counsel, but then defense counsel said they were taking them off completely. We would like to create a search term list to apply to the comparators' mailboxes before they are added to the Axcelerate system and subjected to predictive coding.

THE COURT: Then what?

MS. BAINS: Subject them to predictive coding.

THE COURT: Subjecting them to predictive coding, unless you are searching their data for this, you are reducing the volume, but that means that whatever the words are or the seeds are is going to run across all 37 to 44 people. It makes no sense to me. If you want to get your ESI consultant help me out, that's fine.

MS. BAINS: Yes, please.

MR. NEALE: Your Honor, Paul Neale. I think in this instance the way to address that would be to add another category to the seed set review that would relate to the issues associated with the comparators.

THE COURT: What I think I'm hearing, and maybe I'm wrong here, it seems to me that the search of the comparators data is totally different from the search of everybody else.

MR. ANDERS: Your Honor, not only is it totally different, but if they are looking for emails which would tend to show their job duties, that is going to be most of their emails. Conceivably, there will be emails saying do you want to handle this meeting or here is a PowerPoint for the next

presentation. I am having difficulty even understanding how we would find those types of emails. It is almost every email related to their job and what they are doing.

THE COURT: Mr. Neale?

MR. NEALE: I think there are two approaches here, your Honor. We will discuss predictive coding, but the random sampling of the total document set will bring documents up regardless of what search term they were or weren't responsive to, so you will see comparator data during that process.

THE COURT: This is a case where the plaintiffs worked at the company. What is it that you expect to see in the comparators' email that is relevant? Describe the concepts to me. Frankly, I don't disagree that whether they are comparators or not is a relevant issue, but I don't see why, if you want to find out what their job duties were and these people have no stake in the case, you don't just take their deposition.

MS. BAINS: We do want to take their depositions. To answer your question about the specific things we would be looking for, for example, one of the plaintiffs testified about her job duties, including client contact. We would look for client contact in the comparators.

THE COURT: That's ridiculous. That means basically forget sophisticated searches, any email from one of these comparators to or from a client is relevant?

MS. BAINS: I mean on the substantive issues regarding contacts.

THE COURT: How do you train a computer for that? How do you do a key word on that? I'm having a very hard time seeing what it is you expect. You've got the plaintiffs' emails. If you don't have their emails, you have their memory of them. If comparator whoever, Kelly Dencker, I don't know if that is a he Kelly or a she Kelly, but if Kelly wrote to a client and said, I'd like to meet with you next week to discuss the following presentation, that's what you're looking for?

MS. BAINS: That would be part of it.

THE COURT: What else? You keep giving me this is part of it. If you want me to order this done, you've got to tell me how it is that it could be done in a reasonable way.

MS. BAINS: I think we could treat the comparators as a separate search.

THE COURT: Then what is that search going to be? Also, by the way, we've gone from throw the comparators into the bundle but do a little key word screening first to reduce volume to now we are at the let's do the comparators separate, and I'm still not hearing how you're going to search through their emails separately.

MS. BAINS: One of our allegations is that they were given opportunities, including job assignments, etc., that plaintiffs weren't.

THE COURT: That is basically every substantive email, every business email they have. All right, comparators are out at this time without prejudice to you coming up with some scientific way to get at this. Otherwise, take the deposition and go from there.

I think we are down to six or seven where you disagree.

MS. BAINS: There are about eight. All of the other eight are managing directors or the CEO, former CEO, of the company.

THE COURT: If the former CEO is before the time period that you allege the discrimination started --

MS. BAINS: It's within the class period.

THE COURT: When was the last time the former CEO was the CEO?

MS. BAINS: 2009.

MR. ANDERS: April '09.

THE COURT: Remind me when the class period starts here.

MS. BAINS: 2008 for promotions and pregnancy discrimination and pay, but 2005 for --

THE COURT: The pay I thought we are getting at for all the payroll data and other things. What is the anecdotal that you are looking for here?

MS. BAINS: That's not an issue here.

THE COURT: Good.
MS. BAINS: Because he started in 2009. I'm sorry. He was the CEO until 2009.
MR. ANDERS: Your Honor, one maybe very practical way to resolve the Olivier Fleurot issue. My understanding is that the majority or many of these emails are in French. We are not able to incorporate him with predictive coding of the English, the majority of the other emails. I think just from a language standpoint alone that would warrant not including in him in the first set, if at all.
MS. BAINS: I have an email in my hand that is in English from him.
THE COURT: If you want to do a cull that looks for only English language emails and excludes all the French, assuming that that can be done -- can that be done?
MR. ANDERS: I don't know, your Honor. I'm not sure if that can be done.
THE COURT: Tell me who your expert is and let me hear from him.
MR. ANDERS: This is David Baskin. He is with Recommind.
THE COURT: OK.
MR. BASKIN: There is a language filter that is roughly 80 percent accurate in it's association of French to English.

THE COURT: I'm sorry? I didn't hear.
MR. BASKIN: In association of French to English, it is 80 percent accurate. There is a language filter that is about 80 percent accurate.
THE COURT: Knowing we're not getting 100 percent accurate, it can filter out all the French emails with 80 percent accuracy?
MR. BASKIN: Filter out French and English emails as well as other languages.
THE COURT: Where was this person located and what did he do?
MR. ANDERS: He was located in France, your Honor.
MR. BRECHER: Are we talking about Olivier Fleurot?
THE COURT: Yes.
MR. BRECHER: He is the CEO, and he joined I believe it was in May of 2009. He is located in Paris.
THE COURT: I thought we were talking about --
MR. BRECHER: There are two people. There is Mark Haas, who is the former CEO.
THE COURT: Who are we talking about? I thought we were talking with the former CEO.
MS. BAINS: I thought we were, too.
THE COURT: Come on. Somebody try to stay on one person. Mark Haas, who is he, where was he located, why isn't he being searched?

MR. BRECHER: He's in New York.
THE COURT: Why shouldn't he be searched?
MR. ANDERS: Your Honor, I think there are certainly a lot of people we could possibly search.
THE COURT: Right now the dispute at 4 o'clock is apparent between 6 or 7 people, between your list of 30, which became 29, and their list of 44, which lost 8 people because they were comparators.
MR. ANDERS: Your Honor, I think we are starting to get duplicative now. We have Jim Tsokanos. He is the alleged key bad actor. We have his email accounts. Certainly emails from Mr. Haas and other people will be included in there. Once we see what is in there, maybe we can decide to expand it. My concern right now is the amount of time it takes --
THE COURT: What is the volume of Mr. Haas's email?
MR. ANDERS: 6,098.
THE COURT: Include them. Let's not fight over the miniscule. Now, who is the Frenchman? That is Olivier Fleurot?
MR. ANDERS: Yes.
THE COURT: Why is he relevant?
MS. BAINS: He is the successor to Mark Haas. He is the CEO of MSL Group. We have emails from the few that were already produced that show that he had discretion over pay and promotion decisions, particularly a companywide salary freeze,

and he was on correspondence regarding exceptions to the salary and pay increase freeze. We think his emails, especially given our theory of the case that it is coming from the highest levels of the company, his emails would be one of the most probative.

MR. ANDERS: Your Honor, if it is coming from him, then he's obviously directing it to somebody. Those would be the people we already have in the U.S.

THE COURT: We have one other issue here, which is if his emails are either in France physically or coming from France, you've got the privacy and blocking statute. Let's leave him out from the first wave and only deal with his emails that are in the U.S. because they went to somebody else.

MS. BAINS: Your Honor, can I have my expert address the issue of phasing of the custodians?

THE COURT: Sure.

MS. BAINS: And the effect on predictive coding?

MR. NEALE: One of the issues is agreeing on sources, and custodians fall into that. In the way we are defining phases, I think, as we have been discussing them, the protocol identifies effectively three phases, phase 1, phase 2, and a to-be-determined phase added by the defendant in their draft.

While I think we all agree that a phased approach makes sense to deal with the high priority stuff immediately and factor in the phase 2 stuff, the way that we have been

talking with the defense is their view is we should finish phase 1 altogether before even considering what falls into phase 2 and what to do with it. Given the time line associated with this process and the scope of discovery, I don't see us finishing phase 1 before the discovery deadline approaches.

THE COURT: If that's the only problem, I'll extend the discovery cutoff date.

MR. ANDERS: Your Honor, I apologize, but we haven't finished the custodians yet.

THE COURT: This is custodian-oriented.

MR. NEALE: The suggestion was moving certain custodians into phase 2. I'm just saying if we add that to the sources, among the sources that are phase 2, it raises the issue that --

THE COURT: If that's the only problem, which is timing, I can deal with that.

Two down, four or five to go. Who is next?

MS. BAINS: All of the others are managing directors.

THE COURT: Where are they located and are they the managing directors of any office that a named plaintiff works in?

MS. BAINS: The first is Steve Bryant. It's managing director.

THE COURT: Give me the number from your page 17-18.

MS. BAINS: Number 32.

THE COURT: What office is he?
MS. BAINS: Seattle.
THE COURT: Does any plaintiff work in Seattle?
MS. BAINS: None of the current plaintiffs.
THE COURT: That's what we are taking discovery on. He's out, as is any other managing director of an office that doesn't have a plaintiff working at it. Despite your colleague in San Francisco not liking my approach, that's why you're going to do your conditional certification sooner rather than later. You get some plaintiffs who work in Seattle opting in, and we have to reconsider this.
MS. BAINS: The next is number 34, Carl Farnham, managing director of Atlanta. We have a plaintiff from plant a who worked in the Atlanta office.
THE COURT: During the period that Mr. Farnham worked there?
MS. BAINS: I don't have that information with me.
MR. ANDERS: Your Honor, our understanding is he became the managing director in June of 2010, and at that point no plaintiffs were working in the Atlanta office.
THE COURT: Based on that representation, he's out. Next.
MS. BAINS: The next is Megan Gross.
THE COURT: Number 36.
MR. ANDERS: Your Honor, she became a managing

director in May of 2011, which is after the cutoff date that your Honor prescribed on January 4th.

MS. BAINS: That issue is with Judge Carter, so we understand that ruling.

THE COURT: Then why are you wasting my time?

MS. BAINS: If it's overturned --

THE COURT: If it's overturned, you can make an application for me to consider things. At the moment I win until someone says I don't. Anyone else?

MS. BAINS: The next is number 40, Kelly Cohagen, MSL Detroit.

THE COURT: Have you got a plaintiff in Detroit?

MS. BAINS: No, we don't.

THE COURT: My ruling is on any office you don't have a plaintiff, you don't get the managing director of that office. Do I have to name each one individually?

MS. BAINS: No. That ruling would also apply to number 42, Michael Morsman.

THE COURT: Good.

MS. BAINS: Actually, I'm sorry, I misspoke. Michael Morsman was the managing director of the one of the named plaintiffs.

THE COURT: Time period, who, what, where, when?

MS. BAINS: Plaintiff Laurie Mayers.

THE COURT: Mr. Anders, do you want to help out there?

MR. ANDERS: I'm looking, your Honor. Your Honor, all I can tell you is he was hired in January of '09 and terminated in May of 2010. I don't know in that interim for what period of time he was a managing director.

THE COURT: Ms. Bains, it's your application.

MS. BAINS: We are looking to verify the dates.

MR. ANDERS: Your Honor, I will note that there are no allegations in the amended complaint regarding Mr. Morsman.

MS. BAINS: There are. Paragraph 109.

THE COURT: I'm sorry. What?

MS. BAINS: There are allegations in paragraph 109 and later.

THE COURT: That's not the question.

MS. BAINS: Plaintiff Laurie Mayers worked until May 2010.

THE COURT: Any reason Morsman shouldn't be in? I assume before arguing over this you do have his email?

MR. ANDERS: Yes, your Honor. We haven't collected it from the client yet, but it exists, and there are 29,000.

THE COURT: Collect it. Who else?

MS. BAINS: The last is Matthew Gardner. We have one plaintiff in San Francisco, but I don't believe it was during the same time period.

THE COURT: Then he is out. We have now agreed on custodians.

MS. BAINS: There is one other issue with custodians. The defense has date-limited many of the custodians, and we are not sure what those date limitations refer to. I wanted to get a little more information on that.

THE COURT: Mr. Anders?

MR. ANDERS: Yes, your Honor. The date limitations generally refer to the period of time for the managing directors that they were overseeing one of the plaintiffs. For the later set of individuals, and that's numbers 25 through 29 on our list, those date limitations correspond to the Court's ruling as it relates to the applicable time period.

THE COURT: That makes sense. The question is for the ones that are shorter time periods, such as number 21, Donald Hannaford, on your list.

MR. BRECHER: Judge, this is Jeff Brecher. Don Hannaford was a managing director of the, I believe, D.C. office. There is one plaintiff, Heather Pierce, who moved to the D.C. office. That is the period of time when both were employed in the D.C. office. He left I believe in March of 2008, and she arrived in January of 2008 in the D.C. office. She used to work in the San Francisco office.

THE COURT: With those explanations, any problem with the dates?

MS. BAINS: No, to be consistent with your rulings. However, we would like to double-check all these facts after.

THE COURT: That's fine.
MS. BAINS: Also, can Mr. Brecher explain the date restrictions for number 23, Neil Dillon? I think the explanation was given that a certain plaintiff was there during those times, but the dates don't seem to match to us.
MR. BRECHER: I was speaking about Don Hannaford. That's what we were talking about.
MS. BAINS: In the last meet-and-confer.
MR. BRECHER: Neil Dillon, I believe, was the next managing director in D.C., and I believe that time period reflects the period where he was employed and where Ms. Pierce was employed. If that is inaccurate, then we can reconsider, but I believe that is accurate.
MS. BAINS: Again, like the others, we would like to check the facts.
THE COURT: You can all check out the dates. If there is a slight variant, hopefully you can reach agreement. If not, you will bring it back to me.
MS. BAINS: Thank you, your Honor.
THE COURT: Sources beyond custodians. What is this sources about laptops or whatever before we get to predictive coding and some of the shared drives and other things?
MS. BAINS: Plaintiffs would have liked to have seen all of the data or run searches on the data from laptops, home directories, and desktops. The defense counsel expressed

concern that that would be too burdensome, so we came up with a duplication testing theory. We suggested 7 custodians and they suggested 2. We just think 2 is too little to do any sort of testing, especially as a run against the sample of the total number of custodians is not a significant percentage.

THE COURT: When you say home directories, are you talking about home computers? No?

MS. BAINS: No. The directories on the work computers.

THE COURT: I think this may be ones where the consultants are more useful to me than the lawyers. Let's start with Mr. Neale.

MR. NEALE: Your Honor, there are certain sources that are controlled by custodians, like laptops, desktops, and the home directories are the My Documents folder to which they would save information. In our discussions with defendants, they represented they thought that that information would be wholly duplicative of attachments and things that are in the LTA.

We had suggested early on that we pick some number of folks and do a comparison between that dataset and what is in the LTA to get a sense of the rate of the duplication. If it was high, then perhaps we would agree that those sources don't need to be addressed. Since

then, we just haven't been able to agree on the

number. As Ms. Bains said, we suggested 7, they suggested 2. We just don't think 2 will be representative enough to give a good sense as to whether they are truly duplicative or not.

THE COURT: Let me hear from --

MR. ANDERS: Your Honor, I don't know if we disagree on the technical aspect.

THE COURT: If you don't disagree on the technical why 2/why not 7, why not the old split the baby?

MR. ANDERS: Your Honor, if you look at our letter, we don't believe any should be done at this point, for a number of reasons. One is if there is a comparison, and even if it is shown that there are some differences in the types of documents, the next level of inquiry is, OK, what are the different documents that are in the home directories and are they even relevant, do we even care about them?

Our position is before addressing the home directories or the computers, complete the search of the emails. Let's find out what documents exist there, and then at that point decide is it worth the cost to start looking at the laptops and the home directories. If it is, and we do a comparison, there is still --

THE COURT: Did you or did you not agree to do it at one point for 2 custodians?

MR. ANDERS: Yes, your Honor, we initially suggested that.

THE COURT: Do 2 and we will see where that goes.
MR. ANDERS: OK.
THE COURT: What's next?
MS. BAINS: The other sources.
THE COURT: Where is that in your exhibit and their exhibit?
MS. BAINS: In the letters?
THE COURT: No. I know where it is in the letters. There are all sorts of lists.
MS. BAINS: In the protocol it begins on page 3. My expert can speak to the phasing and technical aspects. If we want to go source by source and talk about the substance of the sources, I can address that.
THE COURT: I think I want to talk about the substance of the sources. What page is it on your Exhibit D on the defense side?
MS. BAINS: We submitted a joint protocol on January 25th. It was an attachment to plaintiff's letter.
THE COURT: That's what I'm looking at or not?
MS. BAINS: Yes.
MR. ANDERS: Pages 3 and 4, your Honor, of the joint protocol. The first chart is plaintiffs' proposal. The second chart is ours. If it makes it easier, your Honor, I could explain the, I think, 6 items we differ on.
THE COURT: That's all I need to know about.

MR. ANDERS: There was the home directories, which your Honor just addressed. The next would be the shared folders. These are folders that different groups have shared access to. Plaintiffs had asked for a directory tree of all these shared folders within MSL. We spoke to the IT department, and they said that is not something that they can easily generate.

We located HR shared drives. These are shared drives issued by the HR department. There is a corporate HR drive, there is a North America HR drive, and then there are several local drives. What we proposed was doing a manual review of all the documents in the corporate and North America as well as New York HR drive for documents. The types of documents, your Honor, that are in these folders, there are templates, there are form letters, there are some training programs, there are some other general HR documents.

We also have the shared drives for some of the other local offices. All told, if you take everything we have, that is 40,000 documents. We are proposing to take the corporate and North America, which are the more general HR drives, plus the New York One, review those manually. Based on the theory of the case, we would think that the general HR directories would be the ones most relevant and review those three main ones and do that outside of the predictive coding.

THE COURT: Let's take this in two steps. For HR, are

there other shared folders you want reviewed?
MS. BAINS: Yes, the local folders at least.
THE COURT: Whose local folders?
MS. BAINS: The local HR folders.
THE COURT: What is in the shared material? It seems to me if we are talking about forms and templates, doing the corporate, New York America, and New York probably is enough. If you are telling me these are also where people do shared work type material, that's a different story.
MS. BAINS: We deposed the HR director last week, and she noted that a lot of complaints don't even come to her, that she is in New York, and that the local HR people deal with them.
THE COURT: Would it be in the shared folder?
MS. BAINS: I think you would have to ask defense, because we don't have access and they haven't given us a directory listing.
THE COURT: It would really be nice if you folks talked to each other substantively. What's in the shared folders? Let's limit it to HR for the moment.
MR. ANDERS: Other than what I have represented before, your Honor --
THE COURT: Let me put it a different way. If an employee made some sort of complaint to HR about discrimination, pay issues, or whatever, and for whatever

reason it crossed two offices or more than one person was working on handling the matter, would that be in a shared folder?

MR. ANDERS: I don't know, your Honor. I can tell you from my cursory general review going through folders, I didn't see anything like that. There are thousands of folders, and I didn't review every one. I don't know the answer to that question.

THE COURT: I understand that. But they are your clients. At the moment I can't rule on the shared folders until somebody tells me what's in it. Right now the shared folders are up in the air except for the three that they have agreed to include in phase 1.

MR. ANDERS: Your Honor, thank you. Just so I'm clear about the ones we are reviewing in phase 1, I don't believe we are going to review every single document, but certainly we are going to look at the folders. If a certain folder has ten documents of a certain type not relevant, we are going to move on. We are going to do it judgmentally.

THE COURT: You are going to do it judgmentally with the assistance of your clients.

MS. BAINS: Your Honor, for the other non-HR folders, we need some sort of indication of what's in there.

THE COURT: Either you folks are going to talk to each other and develop the information cooperatively or you're going

to spend the money and take a 30(b)(6) deposition or hundreds of 30(b)(6) depositions. They are only saying it doesn't go in phase 1, it goes in phase 2, so already you may be getting it.

Number two, I can't rule until I know what you mean by shared folders. In some corporations the shared folders are templates and the like that somebody then pulls down off the shared folders onto their drive and then uses to create a memo or an action or whatever. In other companies people do document drafting collectively.

I have no idea what you are talking about here. Absent information, it stays in round 2. In the meantime, talk to each other.

What's the next category?

MR. ANDERS: Your Honor, the next category is the company's corporate intranet otherwise known as Noovoo, N-O-O-V-O-O. We explain in page 9 of our January 25th letter at page 10, that the type of information in Noovoo is general information for employees. This includes press releases and other company notices, for example, notices regarding upcoming system maintenance, an employee directory.

There are more form documents and templates, such as sample PowerPoint decks, electronic company logos that can be used. There is information regarding company contests, job openings, information about the worldwide offices. It's generalized employee information.

THE COURT: Job openings may be the only thing that sounds relevant out of that, and even that is questionable.

Ms. Bains?

MS. BAINS: Your Honor, counsel also told us that there are employment policies in Noovoo. Also, the HR deponent said that she accesses Noovoo to get employment policies. We think those are relevant.

MR. ANDERS: We have given employment policies. They may exist in Noovoo, but they I believe would exist elsewhere. They have asked for employment policies. We have given them. Now we are focusing on searching the intranet, which is another place where certain information is stored.

THE COURT: Search Noovoo for any documents that are employment policies documents. It may be redundant, but there is no way to know that unless you do it.

Is there anything else, Ms. Bains, from what you have learned that seems relevant in this?

MS. BAINS: That's all from what we have learned.

THE COURT: Your clients worked there. I know they didn't necessarily work in every department. But if you can't give me a basis for saying that the defendants are wrong -- and in this case I'm not saying you will never get it, the issue is is it a phase 1 or phase 2 or phase 3 approach -- it seems to me, considering how expensive this case is already going to be for discovery, under 26(b)(2)(C) you have not met your burden.

MS. BAINS: Can we clarify the phase? I think the parties have a different opinion.

THE COURT: You're going to finish phase 1 ESI production. You're going to have a chance to review that. We are going to set a deadline for it once we finish the rest of the ramifications that you are in dispute over. Then we are going to do phase 1.

If as a result of phase 1, depending on both the cost to the defendants, the information developed, and everything else, it is appropriate to go to phase 2 or 3, we'll go there. If it isn't, it may be that you will do depositions in between, and only if you develop through the deposition enough information that shows we should spend the money to go past the phase 1, will we do so.

I can't determine what we are going to do. There is no sense in getting to phase 2 earlier than the completion of phase 1 or it defeats the whole purpose of phasing, which is to see what is out there.

MS. BAINS: I understand. I just had the impression that the defense's proposal was to do email only as phase 1 and everything after if costs allowed.

THE COURT: I'm going on what you are all telling me, which is what you are in dispute on. Reading defendants' position and your position, it seems like there is a lot of stuff in phase 1, such as Prism, PeopleSoft, corporate

feedback, Halogen, EMC SourceOne archive, and others.
MR. ANDERS: That's correct, your Honor.
MS. BAINS: Thank you.
THE COURT: What else is in dispute?
MR. ANDERS: The last item in dispute is a system called Hyperion Financial Management. That is the company's financial management program. That's where they have their P&L information. When we were here on January 4th, we had discussed this system in particular. The question that Ms. Wipper had was whether it contained information regarding budgets, bonus pools, and personnel costs.
We inquired and found out that it does not contain that information on an individualized level but rather more on a high-level and general basis. I don't see how that type of information, what their bonus pool or the personnel costs are, is relevant to this case.
MS. BAINS: Your Honor, this is a class case, so we are alleging high-level --
THE COURT: No, it's not. You refused to move in any way, shape, or form unless I beat you over the head to try to get the court to certify a class of any sort or even a collective action. Right now it's an action by whatever the number is, half a dozen, individual plaintiffs who hope someday that you will make a motion for class certification.
In any event, what difference does it make, even if

this were classwide, if, as they seem to be describing it, it shows that the budget for bonuses for the company for the year 2009 was $1 million or $100 million? The issue is did your plaintiffs get a fair share of that compared to their comparators.

MS. BAINS: We anticipate that one of the business justifications will be that they just didn't have the money to pay people.

THE COURT: That's not anything I've heard in the case. Is that one of the justifications? We have an answer. It would seem to me that that would be something that is an affirmative or other defense that would have been included in the answer.

MR. ANDERS: I think what the plaintiffs may be getting at is there was a salary freeze imposed at some point. Whether or not the it was a good decision or bad decision to freeze the salary, they imposed a salary freeze. I don't think this case is about whether or not that was a good decision.

THE COURT: I assume the freeze applied to everybody of every sex, age, and other protected class.

MR. ANDERS: Yes, your Honor.

MS. BAINS: We have emails showing that exceptions were made.

THE COURT: The exceptions may be relevant. What the total pool was or what the policy was has nothing to do with

the budget documents. What am I missing?

MS. BAINS: We believe the budget is closely tied to compensation policies. If there is information in there about what part of the budget is going to go to compensation, we think that would be relevant.

THE COURT: The request is denied. It's ridiculous. What else? Are we done with the sources?

MR. ANDERS: I believe so, your Honor.

THE COURT: Good. What's next?

MS. BAINS: I'm sorry. I think there was actually one more, Vurv Taleo, that was in this.

THE COURT: That's L on your list, talent recruitment software.

MS. BAINS: I understand that that contains information about job descriptions and job duties.

MR. ANDERS: Your Honor, that is essentially an applicant tracking program. It tracks an applicant through the hiring process, sort of the date that they applied, the date they had this interview, the date they had the next interview. Again, it's more of a tracking program.

THE COURT: Does it say in doing that we're tracking Sherlock Holmes, who applied for the job of consulting detective, and that job has the following requirements, and then we interviewed him on such and such a date? Or is it merely person, position, and date tracks?

MR. ANDERS: Your Honor, it will track specific individuals.

THE COURT: Does it have anything about what the job description for the job they are applying for is?

MR. ANDERS: I don't believe it does, your Honor. The individualized forms. If Sherlock Holmes was applying for a job and there was a printout on Sherlock Holmes's information, that does not have any information like a job description. It identifies the position, but it generally is a time line of on what days various -- this would be really individualized discovery.

THE COURT: Ms. Bains?

MS. BAINS: I have a question. Does this system also track current employees and promotions?

MR. ANDERS: It would track anybody that applied for a position, whether it's internal or not.

MS. BAINS: That's relevant. It's similar to the data provided by PeopleSoft for promotions analysis.

THE COURT: You have it with the other system. There has to be a limit to redundancy here.

MS. BAINS: Not the job qualifications. That's not in PeopleSoft.

THE COURT: That's not in this, either. Please listen to each other.

MS. BAINS: The job qualifications of the applicant?

THE COURT: Who cares?

MS. BAINS: It would be relevant if somebody is denied a promotion.

THE COURT: If you're telling me that your plaintiff applied for a particular position and you're comparing who was hired for it, that's relevant perhaps, if that's your theory. I don't think it is. But that is not going to be done through the Vurv Taleo system necessarily. I didn't hear anything here about it has the qualifications of the person applying. Did I miss something?

MR. ANDERS: No, your Honor.

MS. BAINS: The HR deponent testified that job applications and rsums could be accessed through Vurv Taleo.

MR. ANDERS: Again, your Honor, what I'm looking at is something that could be exported and printed out. I asked for a printout of what would a printout look like if I asked for all information on a particular individual. I received a sample report, and that's what I'm looking at.

THE COURT: Let me see the sample. Is any of this click-through? What I mean by that is, for example, it shows that so and so, quote, submitted profile. If I clicked on that and I were on the system live, would that bring up the profile?

MR. ANDERS: I don't know, your Honor.

THE COURT: Why don't you show this to Ms. Bains and see if that satisfies everybody that this system need not be

included. Now give the document back.

MS. BAINS: We ask that MSL verify that there are no rsums or job descriptions and that --

THE COURT: Come on. Job descriptions, you just looked at the document. This is the best way to resolve a lot of this stuff, to look at samples in the system. The only thing there might be is the job application, what is called the submitted profile, and I fail to see the relevance of that unless it is for a candidate who applied for the same job as your client and your client didn't get it. And I don't even believe that is one of the allegations in the case as to specific jobs as opposed to glass ceiling type issues in general perhaps.

MS. BAINS: I believe we do have allegations about certain promotions that were denied to plaintiffs.

THE COURT: Then give them a list of those promotions and if the Vurv Taleo system will show who else applied for that job. Again, unless it also gives the profile, i.e., job application of the person, it doesn't do the least bit of good.

MS. BAINS: That's fine.

MR. ANDERS: Your Honor, so I'm clear, within the system you can although search based on a specific position, not individual, that will have a job description. My understanding is we have already provided job descriptions. If their allegation is there was a specific position that they

were denied, we could search for that specific position.

MS. BAINS: That's fine.

THE COURT: That's how that will be handled, not part of the general protocol. That finishes the sources, at least as to the dispute between phase 1 and phase 2.

What's next?

MR. ANDERS: I think the actual protocol, your Honor, on the application of predictive coding.

THE COURT: What page are we on on the joint proposal?

MR. ANDERS: That begins, your Honor, at page 20, I believe.

MS. BAINS: Yes, page 20.

THE COURT: Since you all did this mostly in narrative, I guess if I look at number 3, that will take me through the specific?

MR. ANDERS: Yes.

THE COURT: What is the best way to figure out where you disagree? Whatever you agree on, I'm happy to let you agree upon.

MS. BAINS: I think it might make sense for us to each give a presentation of our position.

THE COURT: I'd rather do it issue by issue. If you give me your position with five to ten subparts, by the time you finish and they respond, it's going to be very hard for me to rule. So issue by issue.

MS. BAINS: May I have my expert address this?
THE COURT: Yes.
MR. NEALE: Your Honor, I think perhaps the best place to start is at the beginning of the process, which would in my view and I think in our discussions with defendants be at the point at which we determine what the confidence level within the predictive coding system will be set at.
There has been a lot of discussion between us about their use of 95 percent plus or minus 2, which drives the sample size that is going to be used at the various stages. Leaving the last conference, we were I think close to an agreement on the overall approach. The recent submission I think took a pretty sharp 180 away from it.
THE COURT: Don't be a lawyer, be a tech person. We're doing one issue at a time. 95 percent confidence level of what?
MR. NEALE: At a 95 percent confidence level against the number of documents in the system. The sample size would be 2,399 documents.
THE COURT: Go slowly. Two thousand what?
MR. NEALE: 399 documents.
THE COURT: OK.
MR. NEALE: The first point at which that would be applied would be the initial random sample, which is used to determine and give you a sense based on the review of those

documents what the likely percentage of relevance will be. It's also used, in my understanding, as one of the components of the seed set that starts to train the system as to how you train relevance in the categories.

THE COURT: Let me back up one second. Are you all talking about training the seed set through a random sample or through a nonrandom sample based on already having found, through one method or another, certain key documents?

MR. NEALE: We are actually a great deal ahead of that process. You have your entire document collection. You randomly sample 2399 using that confidence level. At that point you do a review and determine what is relevant and what --

THE COURT: That's if you're doing a random sample seed.

MR. NEALE: We already agreed that that would be at a random sample level.

MR. ANDERS: I think this is maybe where we are disagreeing. The way I understand and the way we have prepared the protocol, and the more recent one was designed to take some of your Honor's comments, the very first step is a pure random sample to get an understanding of how many relevant documents are likely in the corpus. Not which ones, just likely how many. That is where we used the 95 percent confidence level plus or minus 2 percent as the confidence interval, which I

understand is the industry standard. That is just an initial random sample to get a sense of what percentage of documents are likely relevant in the system.

Yes, we will use the coding of that as part of the ultimate training. But once we move beyond that random sample, the way we propose doing these seed sets --

THE COURT: Now I see what page you are both on. The difference seems to be 99 percent versus 95 percent.

MR. NEALE: Actually, if we limit it to this, I think Mr. Anders explained it exactly the way I did, and we have an agreement as to what constitutes the random sample for the initial random sample set.

THE COURT: That's the 2399.

MR. NEALE: Yes.

THE COURT: That's not what your lawyers wrote to me, but OK.

MR. NEALE: Actually in the conference we had we agreed to that number. And we in our letter indicate that we would, if other components of their process were changed, in taking it a step at a time, I'd say --

THE COURT: Good. Everybody agrees on the 2399, what's next?

MR. NEALE: However, your Honor, they have already conducted the review of those 2399 documents without taking into account the entire corpus of documents, which makes that

set not as random and not taking into account the two additional categories.

THE COURT: Despite my ESI expertise, you're going much too fast.

MR. NEALE: I'm sorry.

THE COURT: Dumb it down. You both agreed to use a 2399 random sample.

MR. NEALE: Yes.

THE COURT: What did they do to that that you don't like?

MR. NEALE: They reviewed that sample set in advance of our discussion.

THE COURT: Advance what have?

MR. NEALE: Of us agreeing on that number and --

THE COURT: What's the difference?

MR. NEALE: -- and, importantly, the categories that would be reviewed for during the process.

THE COURT: By categories, you mean?

MR. NEALE: The seven subjective categories that are a critical component of training the system. We had just suggested, and I thought we had agreed, that those 2399 would be rereviewed to take into account all the categories so the system was properly trained at the first step.

THE COURT: It seems that your issue tags or whatever it is you're doing here -- I'm having a hard time figuring out

where you agree and where you disagree.

MR. ANDERS: Your Honor, I'll make it simpler if I can. On the random sample, we conducted the random sample when there were 2.9 million documents in the system. We were just trying to get started in doing some of the work. An additional 400, 300,000 have since been added.

Plaintiffs' position is because you did that random sample before an additional 300,000 documents were added to the 2.9 million, your random sample isn't valid. I understand, in consulting with our vendor, that adding that number of documents to that large database already doesn't really impact the validity of the sample.

The other difference is since we have done that sample, two issue codes were added, so that sample doesn't have those two issue codes. But that is more for the training of the system. Our position is when we do further training and incorporate those additional two concept groups, it will eventually catch up; it's not necessary to go back and do another random sample because we have added 300,000 documents to 2.9 million and because we have added two concept groups.

THE COURT: As to the 300,000 additional documents, would it help plaintiffs to take whatever the appropriate random sample is of the 300,000 and review that?

MR. BASKIN: If I may?

THE COURT: Or are they now so mixed in?

MR. BASKIN: It won't make a difference. The random sample is still going to be 2399. What happens is once the categories are reviewed of those 2399, you can retrain the system when the 300,000 additional documents are added, and the similar documents will indeed make it into those categories without a rereview.

THE COURT: That I understand.

MR. NEALE: That we don't disagree with. However, the system is only as good as the training that it gets.

THE COURT: I agree.

MR. NEALE: This issue of recoding documents will come up through our entire process here.

THE COURT: Let me ask you this. Other than however many of the 2399 get pulled for privilege, and since you both, as I recall your protocols, are taking a fairly transparent view, am I remembering correctly that plaintiffs' counsel are going to be allowed to review the 2399 that you have coded?

MR. ANDERS: Yes, your Honor.

MR. NEALE: We don't expect necessarily to have an issue with the way in which they were coded. We take issue with how they get applied and therefore iteratively trained and educate the system.

THE COURT: To the extent that two new subject matter codes or whatever, I take it -- I won't say "I take it," because I'm not sure I take anything the way you are all

explaining it -- does that change the relevance? In other words, will it move a document from relevant to nonrelevant or, rather, probably the other way around, or will it just deal with the issue codes that you can separate what documents are relevant to out of the relevant group?

MR. NEALE: We believe that the two categories are new categories of relevance that would have not otherwise been captured during the initial review.

MR. ANDERS: Your Honor, how about this? Since we are going to provide those 2399 to them anyway, they are going to review them to make sure that we coded them relevant or not relevant correctly. If there are any that they think should go into those two new categories, they can tell us, and we'll make those designations in the system.

THE COURT: Does that work?

MR. NEALE: As it relates to this sample, it would.

THE COURT: Good. What's the next issue where you disagree?

MR. ANDERS: I think it would be the true creation now of the seed set. There is one area where we did all agree on that, and that was the judgmental sampling that we have done. Those documents have been coded and entered.

The remainder of how the seed set will be created is defendants had a list of key words. There were hits. We reviewed several thousand of those hits, encoded them. That's

attached I think as Exhibit B to the protocol. It shows the key words that we used and how we judgmentally sampled those and the number of documents we coded as being relevant.

THE COURT: Wait. I think it's your Exhibit C, not D.

MR. ANDERS: On the joint protocol I think it would be Exhibit B. Exhibit A is our key words. Exhibit B is a document we provided the plaintiffs which showed basically our analysis of our review of our key words.

THE COURT: Right. I'm sorry. Are you saying B as in "boy" is what I should be looking at?

MR. ANDERS: B as in "boy." Sorry.

THE COURT: OK.

MR. ANDERS: That is defendants' half of the training. What we would do is all the documents that we marked relevant here except for the privileged ones we would turn over to plaintiffs' counsel.

I think plaintiffs' issue on this is because we conducted this review prior to the inclusion of the two additional issue codes, all of these documents would not have been coded for those two new codes. I think we can address this the same way as we addressed the random sample. When we turn over these documents to plaintiffs, if during their review they believe that any of them fall within those two new codes, they can advise us.

THE COURT: Wait. On these email hits from Exhibit B,

are you giving them everything the key word hit or are you just giving them what you reduced from that? I'm not sure I followed you.

MR. ANDERS: Just from what we reduced. There were so many hits, we did not review every single hit. For example, if you look at the first page of Exhibit B, the initial term we used was "training."

THE COURT: Right.

MR. ANDERS: Going back to Exhibit A, the term "training" resulted in 165,000 hits. What we then did was we connected "training" with "Da Silva Moore," "Mayers." That second column shows all of the terms that we then did an "and" search essentially. We show next the document count, and we reviewed the top 50 ranked. What we reviewed were the top ranked.

THE COURT: All the ones you reviewed, whether you then coded them responsive or not, you're going to give them to review, other than privileged?

MR. ANDERS: Yes.

MR. NEALE: I think our only issue there is that what's being reviewed are those results of the search that was used to bring back those documents. Again, that search did not apply against at least 300 and now growing number of documents.

THE COURT: Once you get your seed set, that will pull in the 300,000 extra documents.

MR. NEALE: However, your seed set is determined based on a sample of the documents that you have reviewed.
THE COURT: Once you are out of random sample, you're just getting documents to train the system.
MR. ANDERS: Your Honor, importantly --
THE COURT: You're winning. You talk and you might lose.
MR. NEALE: However, your random sample is not reflective if it's not taken into account all of the documents.
THE COURT: Is there any reason to think that 300,000 documents are different than the other 2.9 million?
MR. NEALE: I think there is, and I think the effort to rereview that number of documents does not outweigh the value of getting it right.
THE COURT: What number of documents?
MR. NEALE: Reapplying the search and rereviewing in the initial sample the 2399 which we have moved on from, but now this seed set, load the documents, research the documents, and do your search again. This is a critical component of the process.
THE COURT: How many documents? I'm looking at the first page, which already is several hundred, maybe a thousand documents. If you had to redo all of these --
MR. BASKIN: May I?
THE COURT: Yes, sir, please. I'm sorry. I need your

name again.

MR. BASKIN: David. David Baskin. B-A-S-K-I-N.

THE COURT: Mr. Baskin.

MR. BASKIN: Once you go through the random sample and you do any kind of seeding of a particular category, the training algorithm will actually return all of the relevant documents of the 300,000. You can do this over and over and it continues to iterate. Our system is a learning process. It goes over time and it will pull in those documents.

As compared to other systems that may be compared to ours, they have to do everything up front. There is no need to do everything up front. You can learn as you go within the Recommind Axcelerate system, and all the relevant documents will be pulled in over time through the various iterations.

THE COURT: Where do the extra 300,000 documents come from?

MR. ANDERS: They came from the email accounts of --

MS. BAINS: I believe they were new HR custodians, so they would be largely different.

THE COURT: Why would they be largely different?

MS. BAINS: Because they probably contain mostly complaints.

MR. ANDERS: Your Honor, let me go back. Plaintiffs also provided us with three different iterations of their key words. The last round of that was applied against the full

dataset, which includes those additional 300,000. We still have to review a portion of plaintiffs' key word hits which are based off of that larger database.

Our position is that half of the seed set creation which is the result of plaintiffs' key word hits is based off of the entire current database. So, we still are going to be reviewing a lot of documents in the creation of the seed set that is based off of the full database.

THE COURT: It doesn't sound to me like this needs to be redone in terms of percentages or other things. You're going to get the thousands of documents that the defendants' key word hits caused them to review. If you think that the things they coded as nonresponsive should be coded as responsive, you will do so, and they will run it accordingly.

MR. NEALE: Can I just add one comment to Mr. Baskin's?

THE COURT: Yes.

MR. NEALE: I think we agree that as long as the system has some exemplar documents to go, it will iteratively be trained. However, I think it is important to point out, and we'll get to it, that the defendants have from the beginning tried to limit significantly the number of documents that are subject to the iterative process. You can't have one and not the other.

THE COURT: No, I think what they have said is that

once the system is fully trained and run, at some point, undetermined and subject to court approval, they are going to say the likely relevance when you have reached X number is too small.

MR. NEALE: Actually, their initial protocol suggested that they would do two rounds of iterative review for training of 2399 each using the 95 percent confidence. There is nothing to say that after two rounds the system will be trained.

THE COURT: That's what you are all going to figure out.

MR. NEALE: The latest protocol suggests we'll add more rounds but we will significantly reduce the confidence level or the number of documents to 500. Now we will do 7 rounds of 500 or 3500 documents to be relied upon in order to-determine relevance.

MR. BASKIN: No, that is completely wrong. There is no random sample or confidence anymore. The process that we have created in our algorithms returns as many documents as it finds. It finds it with a certain quality score. Then it ranks them by the highest score to the lowest score.

THE COURT: Is that zero to 100?

MR. BASKIN: It's 100 to zero. The top ones are the 100 percent or close to it, and it goes down from there. I believe that is what defendants are looking to review, the 500 top ones.

MR. NEALE: The patent submitted by Recommind I think is inconsistent with that. Despite that, taking that representation, you cannot at this point determine how many rounds of iterative review you can do to get the system right.

THE COURT: That is a different issue from what we are talking about now, although it may be the one you want me to get to next.

MR. NEALE: There is one issue related to the seed set. We have the defendants' search terms, which we have dealt with. We have the judgmental sample, which I think Mr. Anders mentioned first. Then we have the plaintiffs' search terms which would be applied against the entire document collection.

THE COURT: Right.

MR. NEALE: We suggest 5,000 documents be reviewed as a result of that search. I think defense suggests 3.

THE COURT: You know what King Solomon suggests.

MR. ANDERS: 4,000.

THE COURT: Is there any magic to any of these numbers other than everybody gets paid a lot more depending on how much work is done? 4,000. Solomon rules.

MR. ANDERS: Your Honor, that's fine.

Going back to defendants' seed set and what we are going to be turning over to plaintiffs, the only issue that we were discussing is the way we had reviewed our key word hits was, for example, the key word "training" yielded a few hundred

thousand hits.
THE COURT: Then you did training within --
MR. ANDERS: With "Da Silva Moore." The document count was 133 documents.
THE COURT: You reviewed 50.
MR. ANDERS: The top 50 ranked. We didn't find any relevant. The only issue I may foresee, because more documents were added to the system, is if we were to do that same search right now, I don't know if the top 50 would be the same top 50. We can certainly produce all of the relevant documents.
THE COURT: Wait. Are you telling me that you didn't save these results and that you have to rerun the system to get them and therefore there might be some slight differences?
MR. ANDERS: Yes, your Honor. I think as we were learning the system and when we were doing these initial reviews, I don't know if each specific search was saved as an individualized search.
THE COURT: It sounds like you have to run it again, which also solves the plaintiffs' problem, because then you're running against the full 300,000 added to the set. You will still review the same number. Whether you rereview them on your side or as long as you have screened for privilege, if you did 50 before, it may not be the same top 50, but you're going to give 50 to the plaintiffs, etc.
MR. ANDERS: What I would envision producing is not

necessarily these 50 went with this grouping. It would just be here are all of the relevant ones and all of the nonrelevant ones. I don't think it really matters how we got to it. What matters is how we coded it.

THE COURT: Any problem with that?

MR. NEALE: I wanted to clarify that that, to the extent it is being rerun now, also includes the custodians that were added today. That will round out the entire dataset.

THE COURT: Yes. Good. We have made progress.

MR. NEALE: All of the documents that are reviewed as a function of the seed set, whether are ultimately coded relevant or irrelevant, aside from privilege, will be turned over to us?

MR. ANDERS: Correct.

MR. NEALE: OK.

THE COURT: Good.

MR. ANDERS: Your Honor, if I may move on to the iterative rounds. I heard what Mr. Neale was saying, and I think there is one big source of disagreement. When we were here last time we had proposed doing two rounds and then, after that second round, reviewing the top 40,000. Your Honor said no, that wasn't sufficient. The way we revised the protocol was to include seven iterative rounds where at each round we review a minimum of 500 documents, not 500 total.

We discussed this with our vendor. Because this is

such a fluid process and we don't really know what is going to come back in that first round or that second round, it is tough to pinpoint an exact number. What we said in our protocol was we are going to use our best judgment along with the assistance of the project manager to review an appropriate number but at least 500 during each round.

We'll look at different concept groups. There may be certain rounds that have better sets. And we will stop either at the end of the seventh round or if, between two rounds, the number of new documents being brought back is less than 5 percent. That was a number that we picked. There is no science to it. What we are trying to find is a point where the machine is not returning a large number of new documents.

But assume we get to the seventh round. I think plaintiffs' concern was we don't know if seven rounds is enough. What we have in our protocol is at the end of that seventh round we will do another random sample of the discards to compare against the first random sample. That will give us a sense of whether additional highly relevant documents are being left out in the discards.

THE COURT: When you say you are comparing the discards at that stage to the original discards, what do you mean by that?

MR. ANDERS: What I mean by that is at the very beginning of the process we did the random sample of 2399

documents, and a certain number of documents, I think 26 or 30 of that, were found to be relevant. We now have a general baseline. After we go through the seven iterations, the system is going to be pulling out what it believes are the most relevant documents.

When that is done, we are going to have the documents the computer pulled and then everything else that's out there. We are going to do a random sample of everything else that is out there and see how many relevant documents are in that set.

The idea and the hope is it is going to be much less than what we found the first time. If it is, that is the assurance that the process worked. If it's not, and if it's the same number or higher or just one or two lower, we'll have to discuss. Maybe we will need to do another one or two iterations.

That is our proposal for how we do the iterations.

THE COURT: Mr. Neale.

MR. NEALE: I think we are stating that we don't at this point agree that this is going to work. This is new technology, and it has to be proven out. We are going to have insight into it and we are glad to see it proven out. However --

THE COURT: Does Doar have its own computer-assisted review a/k/a predictive coding tool?

MR. NEALE: We advise clients on its use and its not

being used. But no.
THE COURT: I'm sorry. You advise clients on its use?
MR. NEALE: On the use of other predictive coding systems.
THE COURT: So you know if done right, in theory if not in practice, and I think in practice, it works?
MR. NEALE: Yes.
THE COURT: It certainly works better than most of the alternatives, if not all of the alternatives. So the idea is not to make this perfect, it's not going to be perfect. The idea is to make it significantly better than the alternative without nearly as much cost.
MR. NEALE: Right. I think it is fair to say we are big proponents of it. However --
THE COURT: Let me ask one more question. If my memory is right, your protocol is that at each of these rounds they are going to see the same documents you see, again except privilege?
MR. ANDERS: Yes.
THE COURT: It seems to me I'm accepting the protocol that you have suggested in that regard. But if you get to the seventh round and people are saying the computer is still doing weird things, it's not stabilized, etc., we need to do another round or two, either you will agree to that or you will both come in with the appropriate QC information and everything else

and do another round or two or five or 500 or whatever it takes to stabilize the system.

MR. NEALE: I just want to add in response that our concern about the approach overall, and Recommind in particular in this instance, is the complexity of the case and the data. Along with that is the fact that it is only going to serve up for review after your initial seed set what it determined at that point to be relevant.

THE COURT: Right.

MR. NEALE: Those 500-document iterative reviews or 3500 documents plus or minus subject to review are not being randomly sampled and giving us a proper representation of whether it is getting the irrelevancy right. So it is a very limited verification for the training set of what's relevant.

THE COURT: In the end you're going to be sampling probably greater than 2399 because it may be both a statistical sample and what I will call comfort sample and you will see how much of that is coming out of the system is not relevant that should have been coded as relevant.

MR. NEALE: The proposal suggests 2399 of whatever the number of the irrelevant documents, I think in their estimation a few million, one round of 2399 to verify the irrelevancy, which we have had no insight into throughout the entire process.

THE COURT: You have had insight only in the sense

that you're seeing everything they are seeing in terms of training.

MR. NEALE: But we are only seeing what the system thought was relevant that they coded to be irrelevant, not to be what the system thought was irrelevant that should have been coded relevant.

THE COURT: Maybe the answer is that the seven iterative rounds of a minimum of 500 should not only be looking at the highest-response documents but should be looking at some other group of the low-response documents, whether that is 2399 or, because we are doing lots of iterations, it's 500 or whatever you all think. That may make perfect sense. If it keeps turning up relevant documents, that's good. But if it's missing a lot of documents on each of those reviews, we need to figure that out sooner rather than later.

MR. ANDERS: Your Honor, one of my understandings is with each iterative round, the system will create, I think we have it set for up to 40 different concept groups where it just finds like documents. That was going to be part of the 500-plus documents we review, picking different concept groups that seem to make sense.

THE COURT: What about the concept group that they say is totally irrelevant? That's probably not a group, but it's what I call the tail.

MR. ANDERS: I guess is the request that we would also

review a certain number of documents at the lower end of the spectrum?

THE COURT: Or the middle of the spectrum.

MR. NEALE: That's the suggestion. Our protocol suggests a random sample of everything.

THE COURT: How big a random sample?

MR. NEALE: At the 95 percent confidence level of 2399.

THE COURT: That's 2399 each time?

MR. ANDERS: Yes.

MR. NEALE: Getting to the 500 document number --

MR. BASKIN: It's not, no.

MR. NEALE: -- our sense is that we will wind up doing several more rounds of iterative review at 500 than we would if we agreed to 2399, and that in the end we will get there faster and review less documents.

THE COURT: Does that make sense, Mr. Baskin? In other words, instead of 7 times 500, 5 times 1,000 or whatever the math is?

MR. BASKIN: I'm trying to make sure that both parties get what they want in the scenario. What happens in the proposal by the defendants is that they are providing the most relevant documents in their review.

THE COURT: Right.

MR. BASKIN: If you do a random sample within that

particular subset, it is not the 2399, because if the computer returns let's say 10,000 documents, 95 percent plus or minus 2 is no longer 2399.

MR. NEALE: We are not talking about that's the difference. We are not limiting it to what you think is relevant. We want to randomly sample everything and the coding that was applied or not applied, so that we know whether your irrelevancy categorization is correct.

MR. BASKIN: That will happen at the end.

MR. NEALE: We don't think one random sample of 3 million documents will give us enough.

MR. BASKIN: Judge, from what I understand, the request is not to do the random sample iterations, finish the iterations. I'm still not understanding.

THE COURT: What they are saying is each time you run it, whether it's 7 or less, and it may be two different things to satisfy yourself on the defense side and something else to satisfy the plaintiffs, but whether you do the 500 best documents or not, the 500 and possibly more, Mr. Neale was suggesting that on each iteration there is a random sample drawn and the computer will have coded some of those as relevant and some of them as not relevant; and if it is miscoding the documents that are not relevant, then there's a problem.

MR. BASKIN: Let me clarify. The computer doesn't

code documents. The computer suggests documents that are potentially relevant or similar.

THE COURT: Same thing.

MR. BASKIN: What happens is during the seven iterations, all the defense attorneys are going to do is refine the documents that they are looking at. After the seven iterations, what you are getting is a sum of it all. Then you are performing a random sample. Doing random samples in between makes no sense. The actual sum of the seven iterations will just be the sum of that. You are refining and learning.

THE COURT: What Mr. Neale is saying is that you might not have to do it seven times and that the sooner you find out how well the seed set or the training has worked, the better.

MR. BASKIN: What's going to happen, at least from what I understand the request to be, is that you do one iteration, which is 500, then you do 2399 samples, then you do another iteration, do another 2399. I think they are looking for the 7 times 2400 plus the 500 each. We are looking at 21,000.

MR. NEALE: That's not what we are suggesting. We are actually suggesting that each iteration be one sample randomly selected of 2399, indicating which of those the system would have flagged as relevant so we know the difference in the way in which it is being categorized.

MR. ANDERS: I would think, too, we are now just

completely missing the power of the system. What we were going to review at each iteration are the different concept groups where the computer is taking not only documents it thinks are relevant but it has clustered them together and we can now focus on what is relevant to this case. By reverting back to a random sample after each iteration, we are losing out on all the ranking and all the other functionality of this system. It doesn't seem to make sense to me.

THE COURT: I'm not sure I understand the seven iterations. As I understand computer-assisted review, you want to train the system and stabilize it.

MR. BASKIN: If I may. What happens when you seed the particular category is you take documents, you review them. The relevant documents are now teaching the system that these are good documents.

THE COURT: Right.

MR. BASKIN: It also takes the irrelevant documents and says these are not good documents. It continues to add more relevant documents and less irrelevant documents into the iterations. The seven iterations will then refine that set and continue to add the responsive documents to each category.

At the end of that, after seven iterations, you will have not only positive responsive documents, also the nonresponsive documents, but the last set of computer-suggested documents the system suggests. From that point the defense is

saying we can then verify with a 95 percent plus or minus 2 of 2399 to see if there is anything else that the system did not find.

THE COURT: Let me make sure I understand the iterations then. Is the idea that you are looking at different things in each iteration?

MR. BASKIN: Correct. It's learning from the input by the attorneys. That's the difference. That's why the random sample makes no sense.

MR. NEALE: I don't doubt that that is how Recommind proposes to do it. Other systems are, however, --

THE COURT: We are stuck with their black box.

MR. NEALE: -- fine to do it.

MR. BASKIN: It's not a black box. We actually show everything that we are doing.

THE COURT: I'm using "black box" in the legal tech way of talking. Let's try it this way, then we'll see where it goes. To the extent there is a difference between plaintiffs' expert and the defendants' on what to do -- and to the extent I'm coming down on your side now, on the defense side, that doesn't give you a free pass -- random sample or supplemented random sample, once you tell me and them the system is trained, it's in great shape, and there are not going to be very many documents, there will be some but there are not going to be many, coded as irrelevant that really are relevant, and

certainly there are not going to be any documents coded as irrelevant that are smoking guns or game changers, if it turns out that that is proved wrong, then you may at great expense have to redo everything and do it more like the way Mr. Neale wants to do it or whatever.

For the moment, since I think I understand the training process, and going random is not necessarily going to help at that stage, and since Mr. Neale and the lawyers for the plaintiffs are going to be involved with you at all of these stages, let's see how it develops.

MR. ANDERS: Your Honor, the last phase, just so we close this out, at the end of the seventh iteration our proposal calls for them to manually review all of the results with the caveat and the provision that depending on that number, we reserve the right to come to the Court for some level of relief, whether it's cost shifting, whether it's you stop at the top 30, 40, 50,000, whatever that number is. Also, by that point we will have the relevance rankings or percentages and we will have a sense of what is there.

THE COURT: As I said before, I'm not prepared to rule on where you stop until I see those relevance rankings. Any issue on that, Mr. Neale?

MR. NEALE: Again, the biggest concern that I will convey to my clients here is that we are not going to have proper insight into how the system is determining irrelevancy.

We are not going to see representative samples of those documents.

THE COURT: You're going to see the training. Frankly, since you're going to see all the documents used to train the system, it's not like the system is then black box or not -- Mr. Baskin doesn't like me referring to it as a black box -- you're going to know how the system was trained to find relevance.

MR. NEALE: Right. But we are only going to see as a result what is relevant. We are not going to see how it actually interpreted it to the result set. We are only going to see coming out of the seed set things that are relevant.

THE COURT: That's always how it's going to be.

MR. NEALE: Maybe in their system, but not in other systems.

THE COURT: In other computer-assisted review systems?

MR. NEALE: They are simultaneous random samples that compare machine-generated review to human review, compare the two, reach a level, and tell you you're there. This is we are going to tell you what is relevant, as long as you confirm it, we're good, we're done.

THE COURT: I thought seven iterations is doing exactly what you are saying.

MR. BASKIN: That is correct. It's human review.

MR. NEALE: I think it is actually worse because it's

only giving you what it first determined to be relevant, having you verify or not those calls, and then using that to determine better what's relevant, not against how you have miscoded for irrelevancy. So, if I think 500 documents as a sample is too small, 7 is certainly too much of a limit. I question why the original protocol suggested 2399 and was valid and this protocol suggests 500.

THE COURT: How many times?

MR. NEALE: 2.

THE COURT: Will 2 times through at 2399 work, and then you do whatever else you want to do after that in terms of irrelevance as opposed to relevance?

MR. BASKIN: The system could return 300 documents in the first iteration. At that point you can't do 2399. I'm actually impartial. I designed the system. I work for the company, and I'm not getting paid for this. I just wanted to let you know that 7 iterations from a quality perspective is better to the plaintiff.

MR. NEALE: It is also inconsistent with your patent, which suggests that you do the iterations until the system tells you it's got it right. Speaking to the limit on that without having done it is not consistent with your own patent and with what is generally accepted as best practice.

THE COURT: They also claim to have a patent on the word "predictive coding" or a trademark or a copyright. We

know where that went in the industry. But I'm just tweaking you.

MR. BASKIN: No problem. The predictive patent coding does indeed go through that. However, when you have a certain number of iterations and you have a final review of all computer-suggested documents and you are confined to 7 iterations as well as having the plaintiffs review those documents and seeing yourself what's happening, then you can judge for yourself whether or not the defendants are making the right decisions on these documents. If you agree on those decisions, then you will agree on the actual response of the computer-suggested returns from the training sets. If you don't agree on those, then you might have a different opinion.

THE COURT: Let's see how it works.

MR. NEALE: The other thing on the second part of that, which is where the cliff comes in, I don't think counsel truly understands what the expectations of the process should be, assuming it works. Again, the patent itself suggests that as a result of this process you should be reviewing 10 to 35 percent of your total document collection, which is supposed to indicate a significant savings, which in this case would be about 300 to 1 million documents. They keep talking about 40,000 to 75 as being burdensome and disproportional. If they don't understand the result of the system, what to expect, I don't understand why they are proposing it in the first place.

MR. ANDERS: Your Honor, one of the reasons why we developed this work flow was, again, this is not a case where we are prepared to review a million documents during this first phase. We worked with our vendor and came up with a modified work flow that we believe is defensible but is also reviewing a more reasonable number of documents for this case.

THE COURT: We'll see. Make sure you're keeping track of your costs in ways that you will be able on both sides to present to the Court not for reimbursement but for proportionality as to where you draw the line. I'm not saying that there is a dollar number that I'm going to cut it off at or a percentage or where the cliff is. We are going to figure all that out.

All of this, obviously at some expense, can be revisited if things are not working well. I also remind both sides that by the time you get to trial, even with six plaintiffs, if you have more than 100 trial exhibits it will be a miracle. The idea is I think people should focus less on do I have every last document that says the same thing or do I have the big hot docs that are going to prove my case, I know the response from the bench on that is, sure, if they can assure me they will give me the 100 hot docs that I'm going to use as my trial exhibits, I'll quit right there. It doesn't quite work that way. Let's not overkill the system.

Is there anything else we are supposed to be doing or

resolving or have we now got the protocol locked?

MS. BAINS: Your Honor, on the 500 documents, I'd just ask that it is at least raised to the number that was originally suggested, which was the 2399 times 2. That gets you more documents than they are proposing in the 3500. Can we raise the 500 document number?

THE COURT: The difference is 500 relevant versus 2399 of which probably 2200 are going to be not relevant. Mr. Neale, do you agree? Let me not ask it that way. Do you have any suggestion?

MR. NEALE: If we are going to apply their suggestion, I believe that 7 rounds of 500 as an indicator as to whether it is working is better than 2 rounds of 2399.

JUROR NO. 94: It is at least 500, maybe more, depending on what we see.

THE COURT: OK.

MR. ANDERS: The last thing I want to mention, your Honor, and it is nothing we need to decide, but we have a clawback provision in the current confidentiality agreement. I will likely be submitting a more detailed clawback provision for counsel's consideration.

THE COURT: Detailed? Are we talking 502(d) or something else?

MR. ANDERS: 502(e), I believe. Well, we will ask your Honor to so order it.

THE COURT: You can do one that says if you do the following 52 steps, then we should be covered under 502(d). That's great, but when step 49 got screwed up somewhere, you've lost your protection. It seems to me that 502(d) can say that unless you intended to waive the privilege, whether you were sloppy or careful, you retain the privilege and you get the clawback. I'm happy to sign an order that says exactly that. If you all want to do it a different way --

What I dislike and what I usually refuse to sign are orders that purport to be 502(d) orders that really do nothing better than repeat the language of 502(b), as in "boy," which is already a federal rule in place.

MR. ANDERS: Let me review the language in our confidentiality agreement. I just want to make sure that the language we have in place is sufficient to cover us.

THE COURT: Did I sign the confidentiality agreement?

MR. ANDERS: I don't believe so. I don't believe it was you, your Honor.

THE COURT: Then it probably isn't right. I'm happy to give you the plain vanilla protected against anything except an intentional waiver 502(d) order. That is almost all it has to say. Write it up as a separate the document and submit it to me, preferably by consent. I can't imagine why there would be any objection.

MR. ANDERS: Thank you, your Honor.

THE COURT: Now are we done with the protocol?
MS. BAINS: I guess the last thing is defense doesn't want to put anything in the protocol about its preservation obligations.
THE COURT: That's what that got to do with the protocol as opposed to the Zubulake Compensation Committee?
MS. BAINS: It's in a lot of the model protocols. There are extensive sections on it.
THE COURT: What is it you want it to say? Is that in the draft in front of me in any way?
MS. BAINS: Yes. Just a couple of sentences here and there. I didn't understand what the problem was.
THE COURT: Give me the page.
MR. ANDERS: It essentially says that we agree to preserve everything in their section C. My concern, your Honor, is we understand our obligation, we have an obligation to preserve. I don't see why we need to sign another agreement, especially when their proposal had longer time frames than we had agreed to, has different sources that we had disagreement over. We have an obligation to preserve. We have sent out the preservation notices at least three separate times. I don't see why I need to sign another agreement now on the preservation issue.
MS. BAINS: Because of the phasing.
THE COURT: What paragraph? What page, what

paragraph?

MR. ANDERS: It appears in a few different places, your Honor. The first time it appears is --

MS. BAINS: (b), page 2.

THE COURT: That's near the beginning.

MR. ANDERS: At page 2, (b)(1).

THE COURT: I don't see that this does anything. Indeed, if you do it your way and then don't hold something from a source other than a source in paragraph C, you've given them a free ride on something that is otherwise required to be held under Zubulake Pension Committee and the like.

In addition, since so far you have not been able to prove to me that a lot of the systems that we killed have anything to do with this case. I don't want to hear it today at 2 to 6:00, but if someone came to me and said, I want a preservation order, Judge, that says I do not need to preserve anything in source XYZ, etc., I might well agree to that.

MS. BAINS: OK. Lastly, the issue tags. Plaintiffs have inserted definitions of what the issue tag would mean so that the system is accurate, the reviewers are looking for the right things. We think we should have some language in there for what each issue tag means rather than just two words.

THE COURT: First of all, I assume, with the number of documents we are talking about for the seed set, that the review is going to be done by high-level attorneys.

MR. ANDERS: Yes.
THE COURT: If you all want to try to write something, that's fine. I'm not sure what page on that you want me to look at, or what attachment.
MS. BAINS: It's on page 24. Given that a high-level attorney is going to be reviewing and will see the documents, if it becomes an issue, we'll deal with it later.
THE COURT: OK. This may be for the benefit of the greater bar, but I may wind up issuing an opinion on some of what we did today. It would be very helpful to now finalize the protocol, without prejudice to anyone's rights to go to Judge Carter, finalize the protocol based on everything that was agreed or directed today and submit that back to me quickly.
How soon can I get that? That I assume will mean largely taking out the argument parts of the protocol of plaintiff wants this and defendant wants that and merely show what's in phase 1, what's in later phases or not in a phase, the five rounds, the seven rounds, etc.
MR. ANDERS: Can we do it by next Friday?
THE COURT: Sooner if you can.
MR. ANDERS: Certainly.
MS. BAINS: As in next week, Friday?
THE COURT: I'd rather have it a week from today, which is next Wednesday. Where does Lincoln come in? You

probably work through Lincoln.
MR. ANDERS: That's probably the 20th.
THE COURT: Presidents Day is the 20th. Lincoln's birthday is going to be either the 13th or the 14th. Thursday the 16th, does that work for all of you?
MR. ANDERS: Yes, your Honor.
MS. BAINS: Sure. Can we set an intermediate deadline to have a draft from one party to the other? It became a problem last time because we didn't have enough time to review it.
THE COURT: Sure. Who is drafting it?
MR. ANDERS: I'll draft it, your Honor.
THE COURT: Can you get them a draft by Monday?
MR. ANDERS: Yes, your Honor.
THE COURT: Good.
MS. BAINS: Thank you.
THE COURT: With all due respect to both of you, if I have to start doing Mickey Mouse of who does a draft to whom when on something somewhere between what's already on paper so all you have to do is delete all the arguments and the things that one side or the other lost -- it should be a no-brainer. You will have the transcript. Really, if you all can't do this, you're going to encourage me greatly to give you a special master and run your bills up instead of me dealing with all of you.

MR. BRECHER: Judge, I have one quick issue, if I can, before we end.

THE COURT: Yes. We are also going to have to pick a date for your next visit here.

MR. BRECHER: The plaintiffs served a third-party subpoena yesterday on ADP. I'm just asking, in light of the Court's ruling today, whether that subpoena was going to be withdrawn so that we can avoid further motion practice.

MS. BAINS: Yes, if we get the W-2's from the defendant, we can withdraw that.

MR. BRECHER: Thank you.

THE COURT: Withdraw it now, period, without prejudice if the W-2 issue somehow doesn't work.

MS. BAINS: Sure.

MR. BRECHER: Thank you, your Honor.

THE COURT: When do you all want to come back?

MS. NURHUSSEIN: Your Honor, if I could address one more issue very quickly? I need about 30 seconds.

THE COURT: Sure. I have to remember to start giving you six-hour conference blocks.

MS. NURHUSSEIN: I just want to note, your Honor, that since the last conference we have been conferring with the defendants regarding the jurisdictional discovery requests. We have had meet-and-confers with the defendants, some follow-up correspondence regarding some of the outstanding discovery. We

received a response from Publicis yesterday which we are reviewing.

I discussed with Mr. Evans, counsel for Publicis just before this conference. What we proposed is that the parties confer again this week and then submit to the Court a proposed schedule on jurisdictional discovery. We are trying to narrow the discovery disputes and reach agreement on any additional time that we need.

THE COURT: Good.

MS. NURHUSSEIN: Thank you, your Honor.

THE COURT: I guess the other thing is since there is going to be lots of cooperation and iteration, what sort of deadline do you want me to impose on everything you're all doing collectively to make the predictive coding end up? Or should I leave you to your own devices?

MR. ANDERS: Your Honor, it's tough for me to estimate how long it's going to take. We are going to start on it right away, obviously. It's just tough to give a time estimate right now.

THE COURT: That means we will probably get you in for conferences sooner rather than later to make sure things are moving along. With that, when do you all want to come back?

MS. BAINS: The first week of March.

MR. ANDERS: The 5th and the 7th are good for me, your Honor.

THE COURT: The amount of time you all need, are you free on the 8th in the morning?

MR. ANDERS: I have a deposition that day, your Honor.

THE COURT: What about the 9th?

MR. ANDERS: That looks good, your Honor.

MS. BAINS: That's fine.

THE COURT: I'm going to give you a date of March 9 at 9:30. I may have to move that date to earlier in that week. I'm supposed to be talking at an e-discovery conference or a conference with an e-discovery session on the 9th, but I'm trying to bail out of that because I just don't have time for it. It depends on whether they can get someone to replace me, since I said I was going to do it. Right now I'm assuming that I'm replaceable. If that changes, we'll let you know.

For the last time perhaps but so it's on the record again, pursuant to 28 U.S.C. Code section 636, Federal Rules 6 and 72, any party aggrieved by any of my rulings has 14 days, calendar days, to bring objections to Judge Carter. Failure to file objections constitutes a waiver for all purposes. Obviously, not a waiver on anything that I said is a phase 1 versus phase 2, other than if you want it in phase 1. In other words, anything that I said you may get later but you are not getting now is probably not ripe for review. But you'll figure that out and objections filed with Judge Carter will figure that out.

Failure to file objections within the 14 day period constitutes a waiver for all purposes, including appeal. The 14 days starts immediately regardless of how soon you get the transcript because you have heard the rulings. In any event, because I think you're all going to need the transcript and I'm certainly going to need the transcript because of all the protocol-related decisions made on it, I'm going to direct both sides to split the cost 50-50 for an expedited transcript. That means, since we have kept Tom late, as soon as he can get it, which is probably Friday, maybe, Monday at the latest.

I think that's it. Is there something I forgot to do? I don't think so.

(Adjourned)

Exhibit FF

C39AAMOOC Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MONIQUE DA SILVA MOORE,

Plaintiff,

v. 11 CV 1279 (AJP)

PUBLICIS GROUPE, ET AL.,

Defendants.

----------x

New York, N.Y.
March 9, 2012
9:40 a.m.

Before:

HON. ANDREW J. PECK,

Magistrate Judge

APPEARANCES

SANFORD WITTELS & HEISLER, LLP
Attorneys for Plaintiff Moore
BY: DEEPIKA BAINS
JEREMY HEISLER

MORGAN LEWIS
Attorneys for Defendant Publicis
BY: PAUL C. EVANS

JACKSON LEWIS
Attorneys for Defendant MSL
BY: BRETT M. ANDERS
VICTORIA CHAVEY

(Case called)

THE COURT: Be seated.

Okay. Let's deal first with the scheduling order on jurisdictional discovery. I am inclined to grant it but I would like to know more about what's slowing things down there so I guess that's Mr. Evans

MR. EVANS: Yes, your Honor. Primarily, our problems are in terms of timing of the discovery are twofold. First, my client is exclusively located in France. It has about 70 employees. Many of whom are more operational employees, so to get the type of information that the plaintiffs have been requesting and that we're producing, we're dealing with the CFO of the company, sort of the top four or five level officers of the company. So in terms simply getting their time and getting on their schedules we often have difficulties.

THE COURT: Let me make a comment which is, that's not acceptable. And if they don't want to be found to be in jurisdiction here they'd better free up their schedule much more and I know it's -- I was a lawyer once. I know that you have to be delicate with senior executives but a delay because they're only willing to clear an hour every third Thursday or something is not going to cut it.

MR. EVANS: I understand, your Honor. And, perhaps, I misspoke. It's not that we can't get their time in order to confer with them and get information. It's collecting the

documents and types of things that the plaintiffs have requested has taken more time because it requires a lot more of their involvement. But I understand and we have pushed them to provide information. We have provided documents already and we are supplementing this month with additional information and we are responding to a second set of discovery requests by the end of this month.

The other issue we're dealing with is the French blocking law which I know your Honor mentioned at the last conference, so there are some delicate issues with respect to the type of discovery with which we can engage. So we're navigating those waters as well which has slowed us down somewhat in terms of making sure we're not violating French law at the same time we're anticipating French discovery.

THE COURT: Have you and do you anticipate that you will successfully navigate that? In other words, I don't want to give an extension now only to find out that we have to then start considering the Hague Convention or something else that will --

MR. EVANS: One thing I think that the schedule contemplates is that I think we've navigated it with respect to the discovery which we have agreed to produce. There are still outstanding issues that we're working through with the plaintiffs. We have disagreements with respect to the scope of discovery. If they persist in arguing for the type of

discovery they're arguing for, specifically, discovery related to Publicis' interactions with up to 41 subsidiaries with offices in New York other than simply MSL Groupe. If they continue to seek that sort of discovery we will not be able to navigate those waters and we will be invoking the blocking statute to protect ourselves from such discovery. so the schedule sort of contemplates presently that our meet and confer processes will continue and that if need be we'll be able to raise those issues with the Court during the timeframe we've talked about, probably, talking about April.

THE COURT: Okay. Anything from the plaintiff on this other than you seem to agree with the extension?

MR. HEISLER: Nothing, your Honor.

THE COURT: All right. Let me raise one other consideration and maybe the answer is, you are going to have to much shorten your motion schedule. But the way this extension is working out and while I recognize that the June 30 merits fact cut-off date is probably going to slide, although, we haven't really done anything with that, but you are now finishing jurisdictional discovery contemporaneously with finishing alleged merit discovery and, certainly, not finishing the briefing of the jurisdictional discovery motion until lack of jurisdiction motion and until much, much later in the process.

Indeed, taking two plus full months or the briefing.

That is going to mean even though there will be participation by Publicis in the fact discovery that is occurring against MSL and with the plaintiffs, it means if the Court does have jurisdiction over Publicis that after we finish all the other discovery we're going to go into another six months or whatever of discovery vis-a-vis plaintiffs and Publicis. That doesn't seem to be the greatest way to do this.

Anyone have any thoughts on that? I mean how much discovery do you think will be needed on the merits, if any, once Publicis is in or are they really on a sort of responde superior may not be the right way of putting it, but in other words, if MSL is guilty of any of plaintiff's complaint then Publicis is similarly on the hook or is there going to be something else involved?

MR. HEISLER: Your Honor, Publicis has held we will need discovery. We'll try to keep it as condensed as possible.

THE COURT: But you know then you also get into a similar problem which is the discovery is going to be from France, I assume, and I think we all can recognize that because of the French blocking statute that's got to be done carefully and, presumably, carefully means more time than if we were just doing U.S. based discovery.

MR. HEISLER: The only possible suggestion would be a shortened briefing schedule but I don't know if it's really a tenable solution.

THE COURT: For whatever reason you all have thrown an extra week onto each of the opt and reply. The typical time in this district under the local rules is two weeks and one week. Certainly, that's my chamber's rulings and I believe the local rules are the same. You are also taking a month plus from the close of jurisdictional discovery until whoever is the movant is moving. And I think you are going to have to much sharpen that time even if I leave the jurisdictional discovery deadline where it is.

MR. EVANS: From our perspective, your Honor, we have no problem shortening the time. I think we will be the moving party under the current contemplated schedule. We can certainly do within two weeks of the close of jurisdictional discovery and otherwise follow the typical Southern District practices with respect to the time we reply.

MR. HEISLER: We're okay with that.

THE COURT: All right. Okay. July 2 for the motion. That means July 16 for the opt and July 23 for the reply. And, frankly, if you can do it faster, that would be even better. I mean, frankly, if you are the movant on the Publicis side and the discovery is largely to give the plaintiff the ammunition to object to your motion to dismiss any reason why you can't do it even sooner than two weeks.

MR. EVANS: We have a deposition that we are currently contemplating on June 6 assuming that deposition takes place

then we can do it contemporaneous with the end of discovery absent some discovery issues at the end there that we don't expect right now.

THE COURT: All right. Good. So let's do that June 18 for the motion. July 2, opt, and July 9, reply.

And why don't you, Mr. Evans, send in a new proposed order. You can just fax it in later. With the new dates so I can sign it.

MR. EVANS: Yes, your Honor.

THE COURT: Okay. That took care of the easy one and I guess the only other point I would make before we leave this subject is I am not going to be inclined despite the difficulty with French blocking statutes to further extend this period. So whatever discussions you need to have, whatever you need to get done, do it. If it's something you can do fast, if it's something where there is need for meet and confers get it done quickly and get it raised before me quickly if you can't resolve it on your own.

Okay. Now we can do the subpoenas to Dr. Madden and Dr. Vecker. I guess my first question is, why were these issued by Publicis instead of MSL?

MR. EVANS: Your Honor, they were jointly issued by both defendants. I think there was a deposition that day that the MSL lawyers attended and the plaintiffs attended, so we served the subpoenas and we sent a letter but they're jointly

issued subpoenas.

THE COURT: Technically, they are under your signature and only our signature. Who is going to take the lead in the deposition if I allow the deposition?

MR. EVANS: I am, your Honor.

THE COURT: All right. Well, I guess let me ask you all because the agreement you all made that Publicis would participate in discovery was that contemplated that you would on co-motions or co-issues with MSL be able to take the lead or was the contemplation that plaintiff would be doing its stuff and you would attend and do whatever MSL would be taking its discovery and you would also be able to participate so things wouldn't have to be redone as opposed to even though you and MSL are aligned in interest, Publicis taking the lead?

MR. EVANS: I don't know that we contemplated one way or the other that sort of scenario. At the time the thinking in terms of depositions that we were trying to insure it continued during the jurisdictional discovery period were more the depositions of the plaintiffs and MSL witnesses. We, certainly, indicated that we wanted to reserve our right to attend those depositions and ask questions of those witnesses. And I think that this falls within that same category, although, we will be taking the lead in the depositions, I expect that MSL will also be asking questions of those witness in their capacity.

THE COURT: All right. Mr. Heisler. I'm sorry. Ms. Bains.

MS. BAINS: I believe, actually, during the meet and confer on this issue that the contemplation was more of what your Honor was describing that Publicis would attend, if they wanted to, the deposition scheduled by MSL or plaintiffs schedule. So far they haven't attend any of them or asked any questions. So it was, certainly, a surprise that Publicis issued this subpoena and intends to take the lead from plaintiff's point of view.

THE COURT: All right. Does anything change if to the extent this was a joint subpoena effort if I say, okay, it has to be MSL taking lead, does that change anything from your point of view other than which pocket of money gets used on the defendant defense's side?

MS. BAINS: We have our other arguments that we've outlined in the letter.

THE COURT: We are going to get to the other argument. What I want to know, can I move off of whether this a Publicis lead or an MSL lead and see the more merits based arguments?

MS. BAINS: I think it does because, you know, the due process argument made by Publicis that they should get discovery, plaintiffs weren't allowed any discovery against Publicis to support its motion, so I think it would matter.

THE COURT: One other question for both, all three of

you and I see Ms. Chavey is trying to rise. Remind me on the motion or collective action certification, is it only against MSL employees or is it in some way against Publicis? Let's hear from the plaintiffs first and then Ms. Chavey can respond.

MS. BAINS: Plaintiffs were ordered to file the motion, so we had to file it against Publicis and MSL but the employees are MSL employees.

THE COURT: But if the motion applies to Publicis and that's up to you, then I don't see why, particularly, since to some extent it's a game as to who goes first, MSL or Publicis. I don't see why this should make any difference. If you want them to be bound by and I assume -- and I'll ask Mr. Evans in a minute -- that it's understood that if they're participating in the deposition if it's allowed of your quote/unquote "experts" and I assume they will be filing enough briefs when they're due along with MSL, if they are going to be bound by this then this is something that directly affects them if it's only a motion as to MSL and whatever its effect, if any, on Publicis would have to be decided after jurisdiction, then I might come out differently.

In the end, I am not sure it'll make any difference because, ultimately, if I had to guess, you know, if I say, okay, this subpoena is quashed, not because it's a Publicis led subpoena, it wouldn't surprise me that tomorrow or Monday you get served with a subpoena from MSL and Ms. Chavey is shaking

other head "yes" on that. So is this meaningful?
MS. BAINS: Besides what I said, I mean I think --
THE COURT: I think you are saying "no".
MS. BAINS: There's nothing else.
THE COURT: Ms. Chavey.
MS. CHAVEY: Your Honor, the only point that I wanted to address was the one that you raised which is the motion for conditional certification. Does seek relief against both defendants and both defendants are seeking to protect their clients interests by participating in the deposition.
THE COURT: All right then, as to which of you take the lead doesn't distress me and we'll move onto the merits based arguments.
The first argument plaintiffs have made is that you have not decided that these two people, and I take it it's either/or term in terms of the deposition, but you've not decided that they are going to be testifying experts at trial. And with all due respect that argument sounds incredibly silly.
MS. BAINS: Well, the argument is they don't have a complete report yet, so they can't be considered experts who will testify at trial.
THE COURT: But the issue isn't they're testifying at trial. The issue is they're testifying by affidavit on this motion. You chose to put them in on the motion. You didn't have to or you know you did, you didn't but the rule about non

testifying experts is to protect the situation where a lawyer hires a potential expert and says, advise me on this case, but you haven't decided if you are testifying yet. A decision that is almost never made until the day that there is a deadline for that having to be disclosed. But putting that part of the lawyer game aside, these are testifying experts.

MS. BAINS: Plaintiff submitted expert reports from these experts. Their reports were incomplete due to the incomplete nature of the data.

THE COURT: Understood and that's something that presumably you already explained to Judge Carter. I have not read very much of the motions that have been submitted on this because that's Judge Carter's bailiwick and I'm sure you will prep Dr. Madden or Dr. Vecker whoever gets deposed. If I allow the deposition to say that their report is not yet complete and may change when the big bad defendants produce all the data that you want from them etc., but seems to me you either withdraw their reports for purposes of the certification motion or it is fair for the defendants and very promptly to be able to have a deposition of it's -- what am I missing?

MS. BAINS: Well, Rule 26 18B requires a complete report for --

THE COURT: Well, Rule 26 and 37 also preclude experts who have not given a complete report. If this is the best you can do, you know, make your full record because I want you to

have a full record so you can take objections to Judge Carter after I rule which seems to be your side's want but that is a silly argument. I mean, I can't find a better, you know if we didn't have history in this case I might be more polite other than saying it's silly. It is a non winnable argument.

Any other points you want to make either for me to had listen to or so you have a full record for Judge Carter?

MS. BAINS: Well, the arguments in the letter, the second is that there's a low standard for conditional certification and defendant's evidence is not even regarded.

THE COURT: That me be but you put in the expert reports and were the defendants to be able to show that the experts were totally wrong. Let's take a simple case. You know they can't add two and two. And when they added two and two in our report they came up with five and that's the reason that all their information is wrong, why shouldn't they be able to show that to Judge Carter? You can't have it both ways. Either you don't need these experts' testimony for the conditional certification motion in which case pull them and notify Judge Carter accordingly or a quick and dirty deposition is appropriate.

Anything else?

MS. BAINS: I believe that's all we had in our letter.

THE COURT: Is there any other argument that you wish to make whether it was in your letter or to the --

MS. BAINS: Well, we would like to talk about the scheduling if the deposition will go forward.

THE COURT: Okay. Well, that's a different issue. Anything else as to whether it should or shouldn't go forward?

MS. BAINS: No, your Honor.

THE COURT: Okay. The deposition and I take it you prefer to have the deposition go forward as opposed to pulling their affidavits from certification motion.

MS. BAINS: Right. We will comply with the order to --

THE COURT: Okay.

MS. BAINS: -- produce.

THE COURT: Good. Then the order is that the subpoenas as to testimony are not quashed. I don't know if there is any objection to the production requests and then we also have to talk about scheduling.

MS. BAINS: The objections to the production requests we'll have to go through them and we will produce what is required under the law of a testifying expert. We have until Monday to produce or object based on Rule 45.

THE COURT: So should I schedule another conference for Tuesday of next week, is that what you are telling me?

MS. BAINS: No.

THE COURT: Is there anything you object to now so even though there probably going to meet and confer on this

once and not have to have you come back on an emergency basis to deal with it next week?

MS. BAINS: I can't go through request by request but what I will say is if Drs. Madden and Vecker are considered testifying experts we'll produce everything as required by the rule.

THE COURT: Okay. That's fair.

MR. EVANS: If I may, your Honor?

THE COURT: Yes.

MR. EVANS: We mentioned this in our letter as well. The two most crucial aspects of the document requests are that we receive Drs. Madden and Vecker's analytical data files and the programs from those data files that resulted in the conclusions and analyses they reached in their report. So if anything can be reviewed here today I would suggest that's one I think is clearly covered by the rules and clearly appropriate and if we can get a confirmation we'll receive that by Monday we might short circuit future disputes.

THE COURT: Ms. Bains.

MS. BAINS: I am not prepared to address that.

THE COURT: Well, I am prepared to rule on it, so I suggest one of the two of you address it.

MS. BAINS: I will have to review the rules on whether it's required or not but --

THE COURT: Counsel, you want a copy of the Federal

Rules?

MS. BAINS: If it's --

THE COURT: Counsel, I'm going to rule on this. I will help you. If you need a copy of Rule 26, I will give it to you. If you need to confer with Mr. Heisler, confer with Mr. Heisler. We are not -- You know, you knew this issue was on the table. I am not waiting until Monday so that you can show up at the deposition without this and I get a frantic call that their brief is due in two days or whatever afterwards and you've stonewalled the process. You are speaking now or I am ruling now. So if you need Rule 26 I'll hand you the Federal Rules book.

MS. BAINS: Can I have a moment to --

THE COURT: Sure.

(Pause)

MS. BAINS: So with respect to the analytical files and data program we'll produce those.

THE COURT: On Monday?

MS. BAINS: Yes.

THE COURT: Good. Okay.

MS. BAINS: And we don't wish to delay the schedule for briefing at all so we will produce Dr. Madden for a deposition on Monday as noticed in the subpoena. I think we may need to move it back a couple hours to two p.m. I think counsel has represented it'll be a half day deposition.

MR. EVANS: No problem with that, your Honor.

THE COURT: All right. Is there a way you can get the data to them first thing in the morning and do the position at two so it'll save your witness time because otherwise the first hour of the deposition is likely to be Mr. Evans and/or the MSL counsel sitting there going through the data set.

MS. BAINS: Yes. We'll make every effort to do that.

THE COURT: Okay. Good. So ordered.

What other issues, if any, do we have to deal with today?

MS. CHAVEY: Your Honor, I just wanted to clarify, you just made reference to the due date for the motion for the opposition to the motion for conditional certification. The motion was supposed to have been filed on the 29th. Service wasn't effected until Monday, the first of March, so our calculation is that our opposition brief is due on Monday the 19th because of the three days for mailing from when it was served. So I just want to clarify that because you had made reference to it being due on the 14th.

MS. BAINS: Service was effectuated the next morning because we filed under seal the night before.

THE COURT: Okay. So that would formally be the 15th of March and then by adding the three days you get to the 19th. If you can do it sooner, you should do it sooner. I'd like to get all of this wrapped up as quickly as possible. You said

the 19th.

MS. CHAVEY: Thank you.

THE COURT: How are we doing on the review of the 2399 documents and/or whatever else that needs to be done for the predictive coding operation?

MR. ANDERS: We're moving along, your Honor. Just to give you a sense of what's taken place since we were here on February 8th, very shortly after the conference we requested that MSL provide us with e-mail accounts of Haas & Morseman which were the two new people that were added. We then were working with plaintiff's counsel on putting together the revised protocol based on your Honor's rulings.

One area which we had some discussions back and forth was on the date ranges for certain witness. Plaintiffs had some questions regarding date ranges. We chose based on their understanding when a particular plaintiff worked in an office. We worked that out. We revised the date ranges. That was submitted to your Honor by the February 17 deadline. At that time we also requested that MSL provide us with the updated e-mail accounts for those individuals. We received those recently. Those have now all been uploaded onto the system.

The 2399 documents, those have been rereviewed based on your Honor's updated relevancy rulings. I think we're in a position to produce those early next week.

The one issue or question, your Honor, is we had

prepared a streamlined call-back agreement in line with what your Honor had commented on the 8th. I had sent it to plaintiff's counsel early in the week. They had provided their proposed changes. And if I could address one of them now, your Honor, I think it's the main one that we have issue with is they would like to insert language that says -- well, let me go back. The language we proposed was in line with what your Honor said which is, basically, unless we intentionally disclose or intentionally intend to waive the privilege with the disclosure, the privilege is not waived. Plaintiff sought to insert language of taking reasonable steps.

THE COURT: That destroys the 502(D) purpose and puts you back into 502(B). So I would reject that even if it had not been raised by Mr. Anders. And if you want to shortcut all the fighting, I am going to dictate your 502(D) order to the reporter right now unless you've got some other bells and whistles but I'd like to get this over with. Do you have --

MR. ANDERS: If I may present what we have prepared?

THE COURT: Yes. Hand it up.

MS. BAINS: Your Honor, there was one other change that we hadn't gotten confirmation with whether the defense objects to --

THE COURT: Hold on. Let me get the document first so I can --

(Pause)

THE COURT: Okay.

MS. BAINS: In the confidentiality order ordered yesterday the parties had agreed to ten day period after which the party, actually, discovers the inadvertent disclosure in which it must take action and I believe that is not in this order, in this proposed order.

THE COURT: That's correct. And I guess the question becomes since I did endorse Paragraph 22 of your protective order, except the typed version is 502(A) when it should say 502(D). Yeah, let's do it the simple way. Why don't you revise what you've just handed me purely to add the time period after "actual discovery" as an additional paragraph and then fax it in later today and I'll sign it.

MR. ANDERS: I will, your Honor.

MS. BAINS: And I guess the only other change is plaintiffs added a reference to the procedures identified in 26(B)(5)(B) which is also any signed after confidentiality order.

MR. ANDERS: Your Honor, I think that's the same issue. If we include those procedures it's we're now avoiding what we're not doing with, we're intended to do by this order. The idea is I don't want to have to abide by those procedures. The purpose of this order was to relieve the parties of that obligation.

THE COURT: What is it you think 26(B)(5) get's you

that the ten day after discovery process doesn't get you? And frankly since the actual discovery is most likely to be at a deposition it's all going to be taken care of, virtually, simultaneously. I mean, yes, there could be other ways in which MSL and, frankly, the protection goes both ways but we'll say MSL. MSL in prepping for a deposition of a witness or prepping for defending the deposition of one of its witnesses and may find some documents and say, oops, yes, this was privileged and then within ten days send you the notice.

I am not sure what the 26(B)(5) protections get you once there is a fight on any of this as long as you are within my control you are going to get it brought before me promptly one way or the other. And about the only issue could be either they waited 11 days, not ten or regardless of the 502(D) protection it's not a privileged document.

MS. BAINS: Right. The language says reasonable steps to retrieve the information if the party disclosed it before being notified. I guess the ten days takes care of that.

THE COURT: Okay so that's the only thing you'll do is add an extra paragraph here on the ten day revision and everyone sign it and get it back to me today, if possible, Monday if not.

MR. ANDERS: Will do, your Honor. Additionally in terms of progress we've made the protocol called for you to manually review all the e-mails that were in four different

suggestion box type e-mail accounts. We've completed that review. None of those documents were remotely responsive. They were some of them, for example, were responding to survey requests. Again, that has been reviewed and completed. We were also directed to obtain any employment related policies from the company's intranet. We've requested that from the company. We've received it. We are going through those now to make sure they sent us what was encompassed by your order. We've produced those.

As it relates to know the bulk of the review, as of March 6 all of the updated e-mail accounts were loaded into the system. Batches were created. One of the four thousand e-mail random samples of plaintiff's hit words, plus because these additional e-mail accounts were added your Honor directed we would have to do a rereview of defendant's key word hit list. That was previously reviewed. We'll rerun that. So we now so a batch of 13,507 e-mails to review. Those have been batches have been created. That review started earlier in the week. We have had one partner start the review. We will now dive into completing that reviewed by individuals that were at the partner level. I anticipate that will take 135 hours using a 100 document per hour review rate. Presuming we divide up that review by three partners, that's for, approximately, 45 hours per person. Obviously, we have other obligations in this case as well as in other cases, so I would ask or anticipate that we

be provided 30 days to conduct a review of the 13,500. In the meantime though, your Honor, we will produce the 2399 to plaintiffs next week so they can begin working on that.

THE COURT: Can you be producing -- I am not sure the 30 days will work at all but in any event without disturbing your work flow process cause I know you are doing a double review, any reason that you can't do it in waves?

MR. ANDERS: We can, certainly, do it in waves, your Honor. We will do that in waves. For example, the plaintiff's four thousand document hit list, that's been broken out into four one thousand document batches. As a batch is finished we will produce it.

THE COURT: All right. Well, I mean, frankly, I am just concerned that if we don't have the seed set done until the middle of April and that's assuming and once you give it to plaintiffs they have to review things and check the coding and heaven forbid in this case there might, actually, be disputes which I am going to have to resolve. So I know this is not a Staple's Easy Button process but I think you've got to review faster. I would like the seed set totally done by the end of this month. So figure out how to do that. And I'd like plaintiffs response since this will be going on a rolling basis probably within a week after that, maybe ten days but I'd like you all to be sort of jointly working on scheduling this and figuring out how the whole process is going to work timewise

and then get me something in the next few days based on these as the starting assumptions which is seed set done by March 30th from defendant rolling basis. Plaintiff review since it will be going on a rolling basis should finish within a week or so of that. And then figure out how long it's going to take to run each round of the seven possible seven iterations, etc.,. And try to come up with a plan so we'll know when document production should be complete via the predicted coding system.

And, yes, I recognize that because you are doing this at a partner level, review partners do not quite have the same ability as contract attorneys or young associates to just do 18 hour days doing nothing else but reviewing documents but we got to get this moving. Obviously, the fact cut-off of June 30 is most likely going to be extended. When you get me the guesstimate of how long the predictive coding operation is going to take to completion we can then come up with a revision of the cut-off date for what is likely to just be phase one. And whether there will be a phase two or beyond we'll see as we go. I am not going to change the cut-off date now. I do recognize it will have to be changed but, obviously, I still believe in a rocket docket and I want to get this over with.

Any comments from the defense side on -- sorry -- from the plaintiffs on this issue?

MS. BAINS: Outstanding ESU issues, we're also waiting on defendants to give us some information regarding the content

of the shared folders which were discussed at the last conference.

THE COURT: Let me do it one at a time.

Mr. Anders, any news on that or are you still working on it?

MR. ANDERS: I received a breakdown of the types of share folders. I will go through that and give plaintiffs a summary. My thought was describe for them, generally, the types of share folders there are. Based on my initial review it appears to be department based and then client or project based. So I could summarize that, provide that to plaintiffs. And then if there's a particular department or project that they believe is relevant we could discuss that and if we agree, do a deeper dive on that particular share drive.

THE COURT: Okay. Ms. Bains, what else?

MS. BAINS: I believe that's all we have at the moment.

THE COURT: Okay. Anything else on any issues from other either side other than a date for our next conference?

MS. CHAVEY: Judge, there is one thing I'd like to raise. The plaintiffs have asked to us provide deposition dates in May for our witnesses. There are eight to ten MSL witnesses whose depositions have been identified by plaintiffs and we're preparing those dates. What I want to --

THE COURT: I don't know where you are going with this

but does that make any sense until the ESI production is complete or until you are sure when it will be complete?

MS. CHAVEY: That's why I am raising it. We were requested to provide dates in May and my understanding based on your prior ruling was that once -- the depositions have been scheduled several times and they have been put off because of the document discovery and electronic discovery. But our understanding was that you had ruled that once the depositions get set at this point they're going to go forward whether the electronic discovery catches up with this or not.

THE COURT: Ms. Bains or Mr. Heisler, what's your pleasure? You want me to have them set the dates in May? But I don't want when we find out, as we are, that you are still going to be running this e-mail search through at least some time in April, if not beyond, what's your pleasure?

MS. BAINS: Plaintiffs were under the impression that the discovery would be ending at the end of June. So given your Honor's inclination to extend that, I am going to confer with the other attorneys on this case and if there are particular depositions that we want to go forward with without the document we will correspond with defense counsel on those.

THE COURT: All right. Very good. And otherwise, I mean once we have a fairly firm anticipated end date for the predictive coding reduction, at that point when the plaintiff says, okay, we've now figured out that you are going to be done

on tax day, April 15, they say but you won't be done by but I'll use it as your example, you know you are not going to be able to say my witnesses are extremely busy people and they're not available for six months. I am going to expect very quick confirmation of reasonable deposition days thereafter.

Okay. Anything else?

MR. ANDERS: No, your Honor.

MS. CHAVEY: No, thank you.

MS. BAINS: No, your Honor.

THE COURT: OK. When do you all want to come back? I would think early to mid April just to make sure the predicative coding process is running as fast as it possibly can.

MS. BAINS: Perhaps the second week of April.

MR. ANDERS: April 11 works for defendants, your Honor.

MS. BAINS: Fine with the plaintiffs.

THE COURT: Okay. If we do it that week what I would do is give you a five o'clock conference date because I am on trial that week. And if the trial resolves itself, as they often do as we get closer, I would then send you an order saying, okay, we've moved you from five p.m. to two p.m. or something. Alternatively, we can go over to Monday April 16th and give you a more normal time slot, whatever you all prefer.

MS. BAINS: April 16th would be more preferable to

plaintiffs.

MS. CHAVEY: Your Honor, I am not available on the 16 but if that's the desired date we'll cover the conference otherwise.

THE COURT: Okay. April 16th at 2:30.

The usual drill. I require both sides to split the cost of the transcript. I think you know the drill by now. But I will one last time say that pursuant to 28 U.S.C. Section 636 Federal Rules of Procedure 72, any party aggrieved by my rulings today has 14 days to bring objections to Judge Carter. The 14 days starts running immediately since you've heard my ruling from the bench regardless of how soon you get the transcript from the court reporter. I likely will not say this at every conference but it, certainly, applies throughout.

Okay. Thank you all. We are adjourned.

(Adjourned)

Exhibit GG

C4p9mooc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MONIQUE DA SILVA MOORE, ET AL.,

Plaintiffs,

v. 11 CV 1279 (ALC) (AJP)

PUBLICIS GROUPE SA, ET AL.,

Defendants.

----------x

New York, N.Y.
April 25, 2012
2:06 p.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES

SANFORD, WITTELS & HEISLER, LLP
Attorneys for Plaintiffs
BY: STEVEN LANCE WITTELS
DEEPIKA BAINS
SIHAM NURHUSSEIN

JACKSON LEWIS LLP
Attorneys for Defendant MSLGroup
BY: BRETT M. ANDERS
JEFFREY W. BRECHER

MORGAN, LEWIS & BOCKIUS LLP
Attorney for Defendant Publicis Groupe SA
BY: PAUL C. EVANS

C4p9mooc

(In open court; case called)

THE COURT: What are the issues? Since you're here, I assume there must be some issues. Let's start with the plaintiff.

Just remind me who you are.

MR. WITTELS: Yes, your Honor. Steven Wittels from Sanford Wittels & Heisler for the plaintiffs.

Your Honor, we would ask on behalf of plaintiffs and the class we've moved to certify that your Honor issue a stay of discovery in this case until after Judge Carter has ruled on the pending motions for class certification of the EPA.

THE COURT: The request is denied.

Next.

MR. WITTELS: May I just explain why we think it's appropriate.

THE COURT: Sure.

MR. WITTELS: The reason we believe it's appropriate is because presently there is an extension of ESI discovery until September. The current discovery cutoff is June. If Judge Carter rules, and we don't know when he would rule, and grants class certification of the EPA class, as well as allowing us to amend the complaint, there will be a significant issue with respect to the scope of discovery that defendants apparently would agree to produce at that time.

Given your Honor's prior rulings in this case,

referencing one of them on February 8, at page 20, your Honor had decreed that the class discovery would be -- well, that the discovery would not be to all class issues but would be limited, in fact, to the seven plaintiffs we have presently. Our position was that --

THE COURT: Let me interrupt for one minute. And just correct me if I'm wrong.

You moved for collective action, but you still have not moved for class certification; is that correct?

MR. WITTELS: Yes. We need certain --

THE COURT: Well, you know, we've talked about that before. And, you know, you sold this schedule to the original judge, I think. And you or one of your colleagues got very upset when I thought and suggested that that date be moved.

You can't have it all ways from Sunday. I understand you may need some discovery for that motion. But you've set it up in a way that you're putting the cart before the horse. And you're going to have to live with that.

Now, meanwhile, as -- to correct one other statement you made, the discovery cutoff is no longer June for obvious reasons.

Now, you could convince me that the schedule you and defendants have agreed on, which seems to be the first thing in the history of the universe that you all have agreed upon and haven't backtracked from, I could be convinced that that's much

too leisurely. But I took you all at your word that that was what was necessary. I had said when we were discussing the ESI protocol and all of that, that if that took longer, that I wasn't going to hold you to the original discovery cutoff date. What that ultimate cutoff date will be is something that we'll figure out once document production has been determined. Meanwhile, we'll see how long it takes for Judge Carter to deal with the motion for class -- sorry, for the collective action and whatever notices have to go out on that.

But you can't keep holding the case in limbo merely because you want to take your time when it's in your interest, and serve motions on your time schedule, not anyone else's.

So if there's anything you'd like to say so you have a complete record, feel free.

MR. WITTELS: Thank you.

May I just ask for a clarification. When you said there is no longer a June cutoff, what your Honor meant by that? Maybe I missed an order on that.

THE COURT: Maybe you weren't here and you didn't read the transcript.

But, obviously, if you're not going to have all the documents under the protocol until somewhere in the neighborhood of September, either you shouldn't get the documents at all because it's useless, or obviously there can't be a June discovery cutoff date.

I've made that clear before. And I really do think with the tag teaming of lawyers in this case on your side you guys got to talk to each other.

MR. WITTELS: Well, is your Honor amenable to entering an order then that extends the discovery cutoff --

THE COURT: Are you from the New York office or the California office?

MR. WITTELS: From the New York.

THE COURT: Excuse me?

MR. WITTELS: New York. What was that?

THE COURT: You seem to be picking up the infection of your colleague in California that you don't seem to know how we practice law in this court.

MR. WITTELS: I've been practicing here for over 25 years.

THE COURT: Good. What don't you understand about transcripts or orders?

MR. WITTELS: Well, your Honor, is there -- I don't think there's an order which extends the discovery cutoff beyond June 30.

Presently there's an ESI order from your Honor extending it to September 7.

THE COURT: Would you like me to leave the cutoff where it is and say there will be no ESI discovery?

You're talking nonsense.

MR. WITTELS: Okay, your Honor.

I'd like to -- I'd like to put on the record then the reasons why we believe there should be a stay, which I hadn't finished.

The other reason is that defendants have repeatedly brought up the issue of the burden of costs and insisting that when they came jointly with us to your Honor with a letter in March, that they wanted to wait until Judge Carter's ruling so there would be no increase cost associated with the ESI given that the scope of discovery wouldn't change from their perspective.

THE COURT: Are you prepared to make your class certification now if I hold off on discovery?

MR. WITTELS: No, your Honor. We need --

THE COURT: Then what's the point, counsel?

MR. WITTELS: My point is that under Wal-Mart v. Dukes which talks about getting discovery that shows a common practice and policy; and Rossini v. Ogilvy, which is the Second Circuit --

THE COURT: Counsel, counsel, let me be clear, which I may not have been.

You're asking for the Court to stay discovery while your collective action motion is pending and your motion to amend is pending.

Assume Judge Carter grants your collective action

motion and that a certain number of plaintiffs opt in, but that it's not everybody who could possibly be in the class, you are still saying you want to complete discovery before you file your class certification motion. And then you want to do everything all over again. So this makes no sense.

MR. WITTELS: In many of the cases, if not all that I'm involved in, on terms of whether it's Title VII, whether it's a collective action in a FLSA context, whether it's a consumer fraud, the courts very frequently have a two-stage discovery process; wherein the first phase you do class discovery; and then the second phase you do merits discovery. That's what we did in the Novartis case that ended up in front of Judge McMahon. It was a two-stage process.

We need discovery in a wide basis, not limited to seven plaintiffs. Because the rule in Rossini and Hnot, 228 F.R.D. 476, is that you need discovery showing how the decisions of the corporation would affect many other employees, not just the seven at issue in this case.

THE COURT: You have not asked for a separate class discovery period. You want everything.

What am I missing?

MR. WITTELS: Well, will your --

THE COURT: If I were to say -- and we'll put aside the collective action. And frankly, I have every reason to believe Judge Carter will be deciding all your motions quickly.

But I can't guarantee that, obviously. It's a guess.

If you were to do very limited -- well, appropriate discovery solely for purposes of deciding to move for class certification, what would you need?

Because if it's everything anyway, then what you're basically saying is whether or not a class is ever certified and whether or not we move for class certification, we want discovery as if a class were certified.

MR. WITTELS: Well, discovery must be broad enough in the class discovery phase.

THE COURT: Specifically.

Counsel, I understand.

Specifically tell me what you want. You want a deposition or two, or do you want all the ESI you've already asked for and then some?

MR. WITTELS: Well when you say "and then some," your Honor, we need to evaluate the ESI. We also would want targeted --

THE COURT: What's the process of staying discovery. You need this regardless is what you are saying. But you want it stayed.

MR. WITTELS: Well, the defendants have taken the position we're not giving you any discovery beyond the seven people. If there are decisions regarding employees who are not among the seven and there --

THE COURT: If there is a company-wide policy, you are entitled to that.

You are not entitled, because that's called blackmail to convince the defendant to settle, to say I need information about virtually every employee who might be in the class, which obviously is extraordinarily expensive, in order to prove that there is a class. That's not what the case law says. And that's what you seem to be asking for. While at the same time saying let's stay discovery. So I don't know if your funding source has run out. But you keep reinventing the wheel at every conference.

MR. WITTELS: We're asking for a stay because we're being blocked in terms of our discovery.

THE COURT: You're not being blocked of any legitimate discovery. And if you are, either you're being blocked by me, in which case when Judge Carter rules you'll get an ultimate decision on that, ultimate subject to going to the circuit at the end of the case. Or you're being blocked because you and they are not agreeing. And I have not had any discovery issue brought before me on that issue.

MR. WITTELS: Your Honor, because of your prior rulings, the discovery -- the defendants have taken the position that they don't have to produce discovery that we feel should be produced under Wal-Mart, Rossini, Hnot and all of the Second Circuit cases.

THE COURT: Counsel if you say I've ruled on it, then I've ruled. And Judge Carter will deal with it. Because presumably that's something that's in front of Judge Carter.

MR. WITTELS: Well what's not, I believe, in front of Judge Carter is the fact that defendants are not producing discovery beyond the seven and are now using your Honor's prior rulings to block legitimate class discovery.

Therefore, they've taken the position if there is change -- and I have an e-mail from them on this point.

THE COURT: First of all, is this an issue you want me to rule on, or is this because -- and this is not the clean Supreme Court oral argument where you get to argue and then the red light comes on and you're done. But let's try to keep one issue at a time.

MR. WITTELS: Well, my argument is as to why there should be a stay. And the argument I'm making is that defendants, as recently as two days ago, have told us in an e-mail that they won't produce any additional documents relating to the complaints other than what we've already produced. And this is a quote: If the motion to file a second amended complaint is granted, we might revisit this.

THE COURT: Okay.

MR. WITTELS: So their position is if there is a change --

THE COURT: Let me ask --

MR. WITTELS: Sorry.
THE COURT: Let me ask the defendants. Are you joining in this application as a way to save money?
MR. BRECHER: No, your Honor. We do not join in this application. Thank you.
THE COURT: Then my ruling stands.
Anything else?
MR. WITTELS: If your Honor will not stay it, I would ask you to extend the discovery period for a year after certification is granted and the reason for that is --
THE COURT: I will deal with any issues on a what-if when the what-if comes to pass.
MR. WITTELS: Meaning if there is a ruling by Judge Carter in favor of class --
THE COURT: If Judge Carter gives you a class certification, and discovery is necessary, and you haven't slept on your rights -- you know, my question, quite seriously, goes back to what we've talked about before.
When are you moving for class certification?
Right now the deadline is April 1. You move -- sorry. April 1 -- that can't be right.
What is the old deadline? The one that came from Judge Sullivan, if I'm remembering right, which was supposedly when discovery was ending at one point. I think it's April 1, 2013. And although I looked at that date and said how on earth

could it be that far out?

MR. BRECHER: Judge, I think that is correct.

I don't have the order in front of me, the original scheduling order from Judge Sullivan. But my recollection was after the completion of fact discovery, then there was going to be a period of expert discovery. And then after that, class cert. motions.

THE COURT: Okay. If that's the date you're still aiming at, I'm going to have to change the date.

MR. WITTELS: We'd ask that you allow that date to stand, your Honor. It's necessary given that we're not able to get --

THE COURT: But then you want -- you want to make the motion in April of 2013 when otherwise discovery is all over. And then you want a chance, if the motion is granted, for new discovery.

Is that what you're telling me?

MR. WITTELS: No, your Honor.

THE COURT: Okay.

MR. WITTELS: Judge Sullivan's order number ten of August 9, 2011 said the motion shall be filed no later than April 1, 2013.

THE COURT: I've yet to see a lawyer who files something before a deadline. But you've done lots of things that other lawyers don't do. So maybe you will.

Look, you'll file your motion when you file your motion. The repercussions of that will be the repercussions of that.

Or you can tell me that you're going to file your motion sooner but after you've had some significant discovery here. And then I can think about the ramifications of it. You can't have it both ways.

So if you're sticking to the April 1, 2013 date, you're sticking to it. What the ramifications of that will be is something that we can all worry about once the motion is granted, if it's granted.

MR. WITTELS: All right.

My final request, your Honor, is that your Honor not issue orders in this case until the recusal motion is decided.

THE COURT: Or until the motions you want get decided.

You started this conference asking me to rule on something. And now you say well, I didn't win that one so why don't you not rule on anything.

What makes sense about the way you've presented your arguments? Other than, you know, if you win, it's good, and it isn't affected by the recusal motion. But if, heaven forbid, you lose, then you go to your recusal.

MR. WITTELS: We feel, your Honor --

THE COURT: Why didn't you just waive that argument by asking me to rule on two or three things in the course of the

discussion we just had?

MR. WITTELS: The reason, frankly, your Honor is I believe that you were not going to grant the stays, and that we requested. And given the tenor of the case thus far, I didn't want to antagonize you.

THE COURT: I think you're a little late on that Mr. Wittels.

MR. WITTELS: Well the intent is not to antagonize the Court at any time, your Honor. I brought it up because I had asked your Honor not to rule any further until it's decided. I think that's the appropriate thing to do.

THE COURT: Request is denied.

MR. WITTELS: Thank you.

THE COURT: You waited forever to file the motion. You filed a letter application for recusal. And when I said you want me to rule on that and give the defendants a chance to respond to the letter, or do you want a motion? And you took another, whatever it was, two, three weeks to do the motion on a schedule you set. And now it's nothing can go on in the case unless it favors you.

So I will rule on the recusal motion when it is fully briefed and when I have time to get to it, although it will get a high priority. But at this point I'm not granting you a stay of my activity on the case. You cannot get such a stay merely by making a disqualification motion. You want to take this to

the circuit, go wherever you want.

Anything else from the plaintiff?

MR. WITTELS: Just to respond briefly to your Honor's point about dealing things under our own schedule. We moved as quickly as we could once we had a full set of facts and information that we believe supported our --

THE COURT: First of all, that's nonsense. And second of all, your letter had basically everything except bells and whistles that was in your motion. So, it should not have taken as long as it did if you thought that the case should stop dead in its tracks while the motion was pending.

MR. WITTELS: We did make a motion -- as part of our application in our notice of motion, we specified that your Honor not make any further rulings in the case.

THE COURT: Yes, but I didn't hear that you were elected to the Court of Appeals or the Supreme Court.

Yes. You asked for that relief.

MR. WITTELS: Yes.

THE COURT: You didn't bring it on by an order to show cause or anything else.

I assume that you know that defendants wrote a letter saying they would like to respond to your application.

Is there a reason that I should follow you and not give them a chance to say anything? Putting aside my own interest in this matter? When you've attacked my integrity.

MR. WITTELS: What we've attacked is the appearance of impropriety. That's what we've attacked.

THE COURT: Yeah well, you call it what you call it.

MR. WITTELS: And no, we believe that all parties should be heard fully and completely in court.

THE COURT: Good. Is there any reason I should be spending anymore time on this until the motion is fully briefed?

MR. WITTELS: No.

THE COURT: Thank you.

Any issues from the defense?

MR. ANDERS: Yes, your Honor.

If I could, I'd like to talk about the ESI process and the schedule and maybe a concern or an issue that I see.

THE COURT: Okay.

MR. ANDERS: Under the schedule entered by the Court defendants were to have provided the C set to plaintiffs by April 11 with our coding designations. We met that deadline.

April 23, this Monday, was the deadline for plaintiffs to provide their challenges to the certain designations. We received that at 9:15 Monday night.

Yesterday our vendor had taken their data file, incorporated it to the database, and by eleven o'clock we were able to start reviewing and seeing the changes.

There are approximately 3300 documents where they

disagreed with our coding designations. I spent a few hours yesterday and a few hours this morning going through them. I've only --

THE COURT: Thirty-three out of how many documents?

MR. ANDERS: 3300 out of about fifteen thousand.

THE COURT: So one in five?

MR. ANDERS: Yes, your Honor.

The pace right now, in terms of -- and then on the schedule itself, your Honor, we had designated April 24 to April 27, Tuesday through Friday of this week, to meet and confer over the disagreements and start the first iteration on Saturday.

Based on how long it's taken to go through just 150, it's going to take longer to go through the 3300.

But my concern, your Honor, and maybe it was addressed by Mr. Wittels in his comments. We are following your Honor's rulings in making coding designations. And it appears plaintiffs still disagree with your Honor's ruling.

Because what I'm noticing is the vast majority of documents where they disagreed with our coding designation had to do with personnel decisions regarding nonplaintiffs. For example, an employee was being transferred. A raise to a different employee who is not a plaintiff.

But I think some of the more -- I don't want to say egregious, but bizarre coding changes were somebody sent in a

resume looking for a position in HR. We marked as not relevant. We get a response that that should be relevant. An employee who is not a plaintiff, they're out-of-office assistant said I will be out of on maternity leave until June 5, please contact so and so. We marked that as not relevant. Plaintiff said that's relevant.

What I tried to do was start breaking it out into broader categories that we can possibly address.

One suggestion would be allow us to go through the 3300.

Another suggestion would be maybe go through five hundred. I think if we go through five hundred, we'll get a good sense of categories, discuss those categories with plaintiff, and then bring that to your Honor.

But my concern is a lot of what I'm seeing is something that your Honor has already ruled on in terms of what is relevant and what's not.

THE COURT: You all want to come back Friday? I'm on trial next week. Unless -- if you want to stick around until after the 3:00 conference, the trial may or may not crater based on some issues that the parties raised at the last time. Otherwise I'm not seeing you next week. But if we do deal with 500, I'm certainly willing to suffer through it on Friday.

Another possibility -- although it's expensive and we can either do it on a loser-pay or on a 50/50 cost shift is for

me to give you a special master who can go through all of these in light of my rulings.

But frankly, Mr. Wittels, if that description of these documents is correct, I am not going to let you destroy the predictive coding protocol process because of a difference of opinion as to relevance on which I have ruled.

MS. BAINS: Your Honor, I'll address this. I don't agree with Mr. Anders' characterization of our coding.

In fact, I got this e-mail yesterday saying that plaintiffs coded things that were individual decisions who are not the named plaintiffs. So did MSL. Many, many, times. There are also at least 20 that I counted manually. Examples of the same exact document being coded as relevant and not relevant. Identical documents. And I have some examples with me.

THE COURT: Well that has to be cleaned up.

MS. BAINS: So I don't think that the answer is coming up with broad categories because, honestly, when we went through the coding we couldn't figure their coding out because of all of the inconsistencies. So it raises a lot of issues with us about the accuracy of the process and the reliability of the process if the coding going into it is going to be inaccurate.

THE COURT: That's certainly true. How many people coded, if we're seeing inconsistent coding?

I know there's a lot of documents and there's a limit to how much a senior person can do at one time.

MR. ANDERS: Either myself, Mr. Brecher, or Tori Shevet looked at every single document.

THE COURT: Did you run any sort of de-duping? Because if they were exact duplicates and one of the three of you coded it as responsive and relevant and someone else coded it as irrelevant; or frankly, if the same person, based on tiredness or whatever, coded it the same way at different times in the morning and the afternoon, you know, that certainly has to be cleaned up.

MR. ANDERS: Our vendor did de-dupe the set. But from what we're told, there will still be the same documents.

For example, attachments may appear to different e-mails. So that attachment may appear multiple times. It was de-duped but there are still certain duplicates or near duplicates in there.

THE COURT: Well that's certainly something that has got to be cleaned up.

MS. BAINS: So plaintiffs would propose that MSL relook at its coding, make sure it's consistent. We can go over --

THE COURT: That's like 20 documents. Or even if it's a hundred out of your 3300.

How do you all want, without extending this schedule

materially, to work through this?

I'm not going to look at 3300 documents. I'll tell you that right now. They can be categorized. They can, you know, you all pull some sort of sample. You could have a special master who gets paid by the hour.

You tell me what you want.

MR. ANDERS: Your Honor I think one initial decision is, from plaintiffs, do you agree to abide by Judge Peck's ruling that --

THE COURT: Asked that way, there is no way they can answer that other than yes unless they are total idiots.

MR. ANDERS: Your Honor, my point is I have examples of documents here that are individualized decisions for nonplaintiffs. And if the position is plaintiffs still think that those are relevant and should be in, well we now have a fundamental disagreement over something I believe your Honor has ruled on.

MS. BAINS: I think we need to understand the thought process behind MSL's coding because in the fifteen minutes I had to review this after getting notice of it, I found at least five documents that MSL itself coded as relevant that were individual personnel decisions for employees who were not plaintiffs.

Now if there's some --

THE COURT: To the extent they're giving you more than

you deserve, I doubt that you really want to complain about that.

MR. ANDERS: Your Honor, some of those e-mails, I recall some of those, it may have been an individualized decision. But within the body of the e-mail there was a comment about you need approval from these people to do this. So we took a more liberal or broader approach and included that.

Yes, it was an individualized decision topic. But there was comments in there about what the process is.

THE COURT: Well the question is where do you want to go from here, sticking to the timeline you have as much as possible.

MS. BAINS: Could we have a moment to confer to come up with a plan from plaintiffs' side?

MR. WITTELS: Can we step out for four minutes or three minutes?

THE COURT: How about a minute.

(Recess)

MR. ANDERS: Your Honor, if I may. We were discussing. There are 3300 documents where there is disagreement. We still haven't, I think, reached a resolution on those e-mails regarding nonplaintiffs -- personnel decisions for nonplaintiffs. Our suggestion would be that plaintiffs go through the 3300, pull out the ones that truly are personnel

decisions for nonplaintiffs.

THE COURT: Let me find out what plaintiffs' view is based on the discussion we just had.

MS. BAINS: Well in our view the documents we marked as relevant that were individual decisions were related to a centralized decision-maker which is central to plaintiffs' case.

THE COURT: That means every decision is "central" because it was made by somebody somewhere about everybody in the company.

MS. BAINS: Well on the face of the document it is, where it says New York is making this approval. It has to go to Paris. I mean --

THE COURT: How many of the 3300 are that and how many are just so and so is getting promoted or so and so sent in a resume asking for a job in HR?

MS. BAINS: I can't give you a number.

THE COURT: Okay. So here's the question -- I'm not reviewing 3300 documents. I'll make that very clear.

Tell me how you want to resolve this. You and they are taking very different interpretations of this Court's rules.

Do you want to give me, each of you, a sample of a hundred documents? And whoever wins or loses as we go through them on Friday, or whenever I have time to deal with all of

you, you know, that rules for all 3300.

Do you want someone to review all 3300 sitting down with you? That will be a special master. That's fine too.

MR. WITTELS: I think, your Honor, taking over for Ms. Bains.

We just got these documents. We haven't had time, very compressed amount of time to look at --

THE COURT: This is your schedule, guys. This is the stipulation you asked me to resolve -- to approve, by the way, at a time when you still didn't want me to decide anything but, hey, that's another story.

Here's the schedule. It's a stipulation both of you asked for. I approved it. You're now woefully behind schedule already at the first wave. We need to resolve that.

I'm asking how you want to resolve that. You gave them the documents Monday. So what do you mean you just got something?

MR. WITTELS: Your Honor, the compressed schedule is based on your Honor having put us on a very short timetable. We wouldn't have agreed to that type of timetable.

THE COURT: But you did.

MR. WITTELS: We had no choice. We were forced into a very short timetable to review as many --

THE COURT: Mr. Wittels, stop.

MR. WITTELS: I'm just saying, your Honor, to review

many thousands of documents. We didn't expect to have so many different coding issues.

THE COURT: Well neither did anyone else.

Let me repeat myself. Give me a solution.

MR. WITTELS: The proposal we -- we need A time to consider the suggestion about whether there should be a special master.

THE COURT: No. You can decide that now.

MR. WITTELS: I need to confer with the rest of the team, your Honor, as to what --

THE COURT: Then you should bring them.

Come on. This is a stall tactic, Mr. Wittels.

That's fine. I can overrule all your objections sight unseen.

MR. WITTELS: Is that what your Honor wants to do without seeing any of our arguments, just overrule us?

THE COURT: I'd like you to be prepared and not stalling because I didn't give you the stay you asked for. That's what it appears to me, counsel.

MR. WITTELS: No, your Honor.

THE COURT: Come on. You're lead counsel. Who do you have to confer with and why?

MR. WITTELS: I want to speak to Janette Wipper and the rest of our team who --

THE COURT: Then why isn't she here?

MR. WITTELS: Your Honor we have three attorneys from my firm here.

THE COURT: Good. Then the three of you make the decision.

Let me hear from defense counsel.

Whoever gives me a view --

MR. WITTELS: Our view would be A we have a sitdown, sitdown meet and confer with --

THE COURT: Why didn't you do that already?

MR. WITTELS: We have it scheduled for Friday.

They have now -- yesterday proposed this broad categories documents for the first time.

They're coming up with solutions. We're coming up with solutions.

They haven't reviewed all of our proposals as to our -- our issues on the coding. We've identified for your Honor, just briefly here today, from our first pass many, many inconsistencies in the documents. We need time to work it out.

THE COURT: You've identified one inconsistency.

MR. WITTELS: Well, to see documents -- there are multiple documents that are marked relevant and irrelevant, which shows that the defendants' methodology is flawed.

THE COURT: Did you give them that counterlist, or is that something you just held in abeyance to use at a motion?

MR. ANDERS: Your Honor, I think when you're going

through the volume of documents that we went through, there are going to be discrepancies in the coding on similar documents. That's the whole reason or one of the reasons why we have this second passthrough where plaintiffs can go review it.

I think that's, your Honor, a separate issue than what I'm dealing with, which is getting -- I never anticipated disagreement on 3300 documents. And when I'm seeing somebody applying for an HR position that's being marked relevant and out of --

THE COURT: Hand up a few of the samples you have.

MR. ANDERS: Yes, your Honor.

MR. WITTELS: Can we see them, please.

MR. ANDERS: Sure.

THE COURT: I'm very tempted to treat this under Rule 37 as cost shifting. I'll look at a number of documents. Whoever wins or loses pays.

MR. WITTELS: Your Honor, we have asked that your Honor defer any ruling on this. We haven't had time to confer with defendants yet. Your Honor is putting the cart before the horse, not allowing us to discuss with the defendants what these issues are, work them out, and now you're stating that we, on the basis of no preparation, no dispute before your Honor, are going to rule from the bench.

THE COURT: There is a dispute.

MR. WITTELS: And perhaps --

THE COURT: Counsel, this may not be fair, but along with the low pay of being a federal judge I get to interrupt you. You don't interrupt me. Period.

As to no preparation and all of that, you or one of your colleagues coded these documents as relevant. I'm going to look at that and give you some guidance. We're not doing briefing on this issue. Whoever reviewed the document from your team is presumably sitting here.

MR. WITTELS: Your Honor, may you tell us which you're looking at.

THE COURT: I'm looking at document NR 6406, 6407. An assistant account executive asking for tuition reimbursement. What's the relevance?

I take it you had marked this as nonresponsive and they marked it as responsive, Mr. Anders?

MR. ANDERS: Yes, your Honor. The Bates number all the ones we marked as nonresponsive start with an NR.

THE COURT: Okay. Got it.

Okay what's the relevance of this document?

If I could read the document for the first time this fast, you guys should be able to tell me why you marked it relevant.

MS. BAINS: This is compensation to a member of a class. One of the issues is pay.

THE COURT: Counsel, how many times are we going

through -- do I have to make the same ruling more than once? Is it a named plaintiff? Is it a policy document?

It's a document saying I want some tuition benefit reimbursement. Maybe if there were a response to it attached somewhere that said in accordance with our policy you're entitled to it or you're not. But that's not what this is.

How on earth is this relevant under the rulings that I've already given you, unless Judge Carter reverses them, assuming it's even one you've taken up with objections. I can't keep track.

MS. BAINS: The way it stands, the way the ruling stands, we don't agree with that because we can't --

THE COURT: So every time -- you stop. Come on counsel. This is really contempt. Every time you disagree you're going to make me and the defendants make the same ruling multiple times? On every single document?

You've got to be kidding me. You are to rereview the 3300. For every document that violates my ruling that I have to read that you don't work out before Monday there will be contempt -- sorry, there will be sanctions under Rule 37 and the court's inherent power starting at a hundred dollars a document.

This is outrageous counsel.

MR. WITTELS: Your Honor, I think that your Honor is now really expressing here a bias, not the appearance --

THE COURT: Yeah, it's a bias that you guys want to run this Court.

That's not a bias counsel.

Sit down.

MR. WITTELS: Your Honor, you're screaming.

THE COURT: Sit down, counsel.

MR. WITTELS: You're screaming at me, your Honor.

THE COURT: I am yelling at you because you are showing contempt for the Court.

You know the law. The bias is bias formed outside of court.

If you are making outrageous ridiculous arguments that even though I've ruled that this document is irrelevant, you have the right to code it as relevant and reargue it. Yes, I'm not a happy camper.

Sit down.

MS. BAINS: Your Honor, may I ask that MSL be required to rereview.

THE COURT: No. You are required to redo this. The only thing you're not -- sorry. The only other thing you are to do, since -- wherever you have found inconsistent coding, you are to give them the document correspondence list. So that document, you know, MSL221B was marked relevant and document NR100 of the same thing or very similar was marked irrelevant.

MS. BAINS: So wasn't that something that they should

have noticed when they were coding it?
THE COURT: They should have.
MS. BAINS: I'm not sure why it should be plaintiffs' burden.
THE COURT: Have you already done it?
MS. BAINS: Not for all of them.
THE COURT: Have you done it for some of them?
MS. BAINS: We did the ones we noticed, but we think there are many more.
THE COURT: Excuse me. Counsel what don't you understand?
You're interrupting me.
For whichever ones you have done it, I'm not saying you have to do anymore, and they will doublecheck. But where you've done it, the game plan of the Court -- maybe not the plaintiffs -- is to try to make this process work.
It requires, as I've said before, all discovery, regardless of whether there were predictive coding, or keywords, or good old-fashioned paper requires lawyers to cooperate. You've got a list. Give it to them. Today. That's the Court's ruling.
MS. BAINS: We're okay with giving the list. However, if there are more --
THE COURT: I'm glad you're okay with giving the list when I've ordered it.

Are you -- what are you guys doing here?

And then you're going to say yes, I'm biased. I'm not biased. I think you guys don't know how to practice law in the Southern District of New York. That's what I think. Based on today's appearance and prior appearances by you and some of your colleagues.

I have ruled. Unless and until Judge Carter overrules me, that is the ruling you live with.

I'm going to do one more of these while waiting for the lawyers on the 3:00.

NR47383. Other than it shows that somebody was on maternity leave, why on earth is that relevant? Where is the policy here? It's the second document they handed me. I don't know if your stack is in a different order.

MR. ANDERS: Your Honor, I gave you the full stack that I brought. I had made copies for plaintiff just so they could have them.

MS. BAINS: We don't have that document.

THE COURT: Come on. It's a two-sentence letter.

Fine. You're not going to talk. I'll tell you the answer.

MR. WITTELS: We will speak, your Honor.

Apparently the defendants have coded a number of documents as relevant that are similar to this. And that's why we are now, have said we believe it's relevant.

THE COURT: What document? Show me the document.

MR. WITTELS: Your Honor, again, we are here without having had an opportunity to meet and confer and go over these with defendants. We didn't bring down the documents. We weren't prepared to argue the discrepancies in their coding.

THE COURT: If the only issue is that it's a discrepancy, that's what you'll work out when you give them that list.

But if the discrepancy is as Mr. Anders described before, which is other people with memos referring to maternity leave talked about the policy or process involved and that's why it was coded relevant, that is relevant. The fact that an individual who is out on maternity leave can't teach a media relations class and refers them to somebody else in the organization does not strike me as the least bit relevant to this case, even if the class was certified.

All I'm telling you all --

MR. WITTELS: Well it also enables us to identify who went on maternity leave because defendants refuse to provide us a list of who went on maternity leave which is relevant and germane to our class.

THE COURT: Yes. It is relevant to your class. And what the class is certified we'll deal with it.

MR. WITTELS: Again we're being hamstrung in our ability to identify who might be in the class.

THE COURT: And you have the right to take objections to Judge Carter, which you're not shy about, so take your objections. Stop arguing with me.

MR. WITTELS: Your Honor, may we have until Wednesday, a week from today, to do what your Honor ordered?

THE COURT: How are we going to get this schedule to work? That's my question.

Let me give you the documents back.

You tell me. You've got a schedule where there's supposed to be a first iteration starting April 28.

How are we going to do that if you're not ready to even sit down with the other side on this until a date after that date?

And I'm not really interested. You know, this schedule was much longer than I contemplated. But you all agreed to it and submitted it to me by stipulation. It appeared you all thought it would work.

I'm not interested in September 7 of 2012 becoming September 7 of 2013.

MR. WITTELS: We need or I would propose, I don't know the defendants' position, we haven't had an opportunity to confer with them.

THE COURT: Well with all due respect counsel, why not?

MR. WITTELS: Well we have a meeting scheduled for

Friday which is why not, your Honor. We were to do that on Friday. We didn't come down here today with any particular agenda.

THE COURT: Get to the point.

MR. WITTELS: We'd ask for two weeks. To push back this schedule.

THE COURT: Ain't happening.

MR. WITTELS: It won't materially affect --

THE COURT: It's not happening.

MR. WITTELS: Two weeks, your Honor, doesn't seem --

THE COURT: Two weeks on this one, which means two weeks on the next one, and the next one, and the next one.

MR. WITTELS: It only -- your Honor, a two-week adjournment doesn't really cause any material change in the ultimate outcome here. Something that's pushed two weeks from --

THE COURT: Are you saying you're going to push everything, or you're going to find -- getting those two weeks back somewhere else in the process?

MR. WITTELS: The proposal would be to push everything.

THE COURT: Yes, of course. Because delay somehow -- I could swear you're sitting at the plaintiffs' table but you don't seem to want too move this case anymore.

This is fine. Democracy has its limits. You all

figure it out.
Bring however many members of your team you need.
No "I'm going to confer with somebody else."
I'll see you Monday, May 7 at 9:30.
You all figure out how you're going to fix this.
But that's as far as I'm willing to give you. And I'm only willing to give you that because I'm on trial all of next week.
MR. ANDERS: Your Honor to confirm plaintiffs are still going to review those 3300, remove whatever --
THE COURT: Let's set a trigger date. How soon can you redo the 3300 on the plaintiffs' side?
MR. WITTELS: Next Thursday, your Honor.
THE COURT: No. Come on. Okay. So much for democracy.
MR. WITTELS: Wednesday, your Honor?
THE COURT: No. Monday of next week you're going to give the new list. Have fun this weekend guys. You're going to give the new list Monday at 9:30. You're going to give it to Mr. Anders. He is going to have until Thursday of next week at 9:30 to review. And you all are going to get together not only this Friday but a week from Friday and workout whatever you can workout. And I will see you May 7 at 9:30.
And in addition the list that you have talked about of duplicates are going to be given to them by five -- make it

6:00 p.m. today.

MR. WITTELS: Your Honor the plaintiffs are being obliged to provide a list of the inconsistencies of the ones we've just had an opportunity to look at.

THE COURT: Yes.

MR. WITTELS: Are you going to instruct the defendants under the same fairness issue --

THE COURT: If anyone finds inconsistencies during the review you will share that and any solution with the other side.

You have the darn list. You want to say even though I've got a partial list, I don't want to give it to the other side. Now do you want to explain to me the reasoning behind that other than obstructionism?

MR. WITTELS: No, your Honor.

We will turn over the list. There is no problem with that. We only have a partial list of the things that we identified.

We're asking that defendants, since they put us to the expense and burden of looking at documents that are coded relevant and irrelevant, that they be ordered to relook at their documents as we've been ordered to relook at ours and produce a list to us of all the documents and explain why those documents --

THE COURT: If they discover, in going through this,

that there are any duplications and that they need to re-categorize either a relevant document as not relevant or vice versa, they will supply you that information as soon as they have it, within --

MR. WITTELS: Can it be under the timetable we've been put under, under Monday at 9:00 a.m.?

MR. ANDERS: Your Honor plaintiff is asking us to rereview the fifteen thousand documents that were initially reviewed.

THE COURT: I assume this can be done on a computer review, no? I mean isn't this a dupe -- de-duping issue or partial de-duping?

MR. ANDERS: Well again, your Honor, I'll talk to our vendor about it. I was told that the set was de-duped the way their system can de-dupe documents. However there still will be certain duplicates based on, again -- different e-mails have the same attachment. That attachment is part of that e-mail. So that will appear multiple times. That won't get de-duped out.

THE COURT: All right. But does that mean that the e-mail in that example was nonresponsive but the attachment made it responsive or what?

MR. ANDERS: Well, your Honor, an example would be when we did this -- the C set review did not include families. It was simply the documents that were hit as a result of our

keyword searches, or plaintiffs' keyword searches, or random sampling. So we will have attachments without the e-mails as part of the C set generation.

When we do the final review, we will review the entire family for the final production.

So, yes, your Honor, there could be -- we could have just looked at an attachment because that's how it was presented as part of a keyword search.

THE COURT: Okay. Whatever.

If you find anything, you'll tell them. I'm not requiring you to rereview the total fifteen thousand.

MR. BRECHER: Judge, if I may, I know you have another conference. Just one other quick issue. Relates to the privilege log.

We have agreed that the parties do not need to log on a privilege log any of the privilege responsive documents that were -- that existed after the commencement of the lawsuit.

They've taken the position, however, that we need to log documents after the filing of the EEOC charge. And our position is that once the commencement of the case, and that we shouldn't have to log, for the same reasons you don't log --

THE COURT: How many documents are we talking about that fit in that category?

MR. BRECHER: Out of the thousands of documents that -- so far I think it was about two hundred -- is it 209?

MR. ANDERS: 210.

MR. BRECHER: There were 210. The second issue is they want us to log nonrelevant documents.

So if a document is a -- let's say an e-mail between general counsel and the president regarding an issue unrelated to this case, they want us to log nonresponsive e-mails. And our position is the rules don't require that. And we don't see any basis for making us take the time and expense and burden of logging nonresponsive privilege documents but they've asked us to do that.

THE COURT: As to the relevant ones -- well, let me hear from plaintiffs.

MS. NURHUSSEIN: Thank you, your Honor.

I just want to address the issue as far as the timing of the documents that are being logged first.

The only thing -- there is no authority for MSL's position that they don't have to log documents that precede the filing of the complaint. The only thing defense counsel appear to rely on, at least in our communications --

THE COURT: How about a certain level of common sense and the Faccio or Redgrave article on wasting time.

But if we're talking two hundred documents, do the log at this point. Let's see what happens. Do the log for that two hundred or 209. A fairly simple one that the computer can spit out. To, from, you know, subject, re, whatever.

MR. BRECHER: I may have misspoke. The nonrelevant are 210.
THE COURT: How many are the relevant ones?
MR. BRECHER: I think we've only had to log maybe 29 relevant documents.
THE COURT: So log the 29.
As to the nonrelevant.
MS. NURHUSSEIN: Yes, your Honor. The reasoning behind that is, as you know, there are obviously disputes in terms of the relevancy determinations and because --
THE COURT: Let's assume -- first of all, you're going to work the relevance out for the nonprivilege documents. Let's assume they're wrong and one of these 209 is relevant. You're not going to get it anyway unless you break the privilege. As long as -- and are these mostly with outside counsel or with inside counsel?
MR. BRECHER: I would say a mix.
THE COURT: Any with outside counsel you don't have to log.
As to in-house counsel, at this stage of the litigation, what do you gain by this?
Plaintiffs?
I mean this is a cost/benefit analysis.
MR. BRECHER: Judge, we think it's consistent with the local Rule 26.2, with Rule 1 and with Rule 26(b)(5).

MS. NURHUSSEIN: Your Honor, our concern is specifically when we're dealing with an ESI protocol --

THE COURT: What's the difference? If this wasn't a an ESI protocol, you would never get a privilege log for nonrelevant documents.

MS. NURHUSSEIN: Our concern, your Honor --

THE COURT: If you can't figure out with the fifteen thousand nonprivilege documents what is going on, I guess my question is this. Paralegal. Two hundred documents. You want to pay for it on the plaintiffs' side?

My inclination is there is no reason to log it. You want it logged, this is one of the cases where I'll consider a checkbook discovery.

You want to pay for it?

MS. NURHUSSEIN: Your Honor, we don't think --

THE COURT: That's a yes or no.

MS. NURHUSSEIN: No, your Honor. We don't think we should have to pay for that.

THE COURT: Fine. They don't have to be logged.

MR. BRECHER: Thank you, your Honor.

MR. EVANS: Paul Evans for Publicis. I have a conflict on May 7. But I don't think there's any need for me to be here at that hearing, if I can be excused.

THE COURT: You managed to almost get off today without saying anything. Let me just ask you one question.

MR. EVANS: Yes, your Honor.

THE COURT: And that is: Is the discovery ongoing and on track for the new cutoff of June 18 as far as you're concerned?

MR. EVANS: It is, your Honor. We met and conferred with the plaintiffs yesterday. We have a deposition scheduled for June 6.

Publicis has produced supplemental discovery of April 2, and we're working out remaining issues with the plaintiffs at this time.

THE COURT: Plaintiffs agree?

MS. NURHUSSEIN: Yes, your Honor. That's accurate.

THE COURT: Okay.

The June 18 deadline is not likely to be extended. We're going to get the Publicis issue briefed so that we can figure out if they're in or out.

MS. NURHUSSEIN: Your Honor, the only thing I would add is, as Mr. Evans pointed out, there are some -- we are still waiting for some documents. So there are some outstanding disputes that we are in the process of working them out. We, obviously, will try our best to meet the deadline.

THE COURT: No. You will meet the deadline. The deadline is nonmovable. If you have problems with them, either Mr. Evans will send a colleague, if you want to resolve this in the hour-and-a-half I'm now setting aside for your conference

on Monday, May 7, or you can decide what date makes sense and we'll have a conference dealing with the Publicis issue.

The June 18 deadline is not going to be extended again. It's been extended once. Let's decide if they're in the case or not in the case. Got it.

MS. NURHUSSEIN: Yes. I understand, your Honor.

THE COURT: Very good.

Anything else?

MS. BAINS: Your Honor, yes.

On the ESI protocol there's a couple issues.

There are several documents that were marked either nonresponsive or responsive that have the statement the -- something like this message --

THE COURT: Your senior lawyer told me a minute ago that you needed more time to work things out with the other side. My 3:00 conference is ready. Is this something that needs to be decided today?

MR. WITTELS: That's fine, your Honor. The defendants have stood up and made multiple requests of your Honor about things that we were not here to discuss and you allowed them to do it. We didn't want --

THE COURT: Counsel.

MR. WITTELS: I'm not interrupting, your Honor. Yes.

THE COURT: You're not?

MR. WITTELS: No, I'm not. I wasn't finished --

THE COURT: Remember I judge credibility. You're not doing well with that last statement. Interrupting me with the words I'm not interrupting you.

However, I want to be fair to you. So you can sit around. When I'm done with the 3:00 we'll take more issues. Sorry for the defendants. Sit in the back. We're going to deal with the -- Alli case.

MR. WITTELS: Well your Honor we can bring them up with them when we meet with them.

THE COURT: Counsel which is it you want? You're complaining I'm being unfair to you. So now I say I'll hear you more and you don't want to do it.

MR. WITTELS: Your Honor, you've given us until 6:00 to give them things.

THE COURT: You can have until 8:00 to give them the list.

MR. WITTELS: Your Honor why don't we --

THE COURT: Whatever you want. A minute ago you said I was being unfair to you by not letting you do more. I'm letting you do more. I can't win with you. Tell me what you want, Mr. Wittels. Either choice. I can deal with you after the 3:00 conference or we can hold it until May 7.

MR. WITTELS: We'll try to deal with the defendants if possible. If we can't work it out, we'll bring it to your Honor on May 7.

THE COURT: Excellent.

Both sides are required to purchase the transcript. The usual rules apply. That is the Court's ruling.

If you are taking objections to Judge Carter you know the drill. The 14 days begins running immediately regardless of how soon you get the transcript.

Quickly make your arrangements with the reporter.

Folks on Alli move on up.

(Adjourned)

Exhibit HH

C57LMOOC Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MONIQUE DA SILVA MORE, et al.,

Plaintiffs,

v. 11 CV 1279 (ALC)(AJP)

PUBLICIS GROUPE SA, et al.,

Defendants.

----------x

New York, N.Y.
May 7, 2012
9:35 a.m.

Before:

HON. ANDREW J. PECK,

Magistrate Judge

APPEARANCES

SANFORD WITTELS & HEISLER, LLP
Attorneys for Plaintiffs
BY: STEVEN WITTELS
SIHAM NURHUSSEIN
DEEPIKA BAINS

JACKSON LEWIS LLP
Attorneys for Defendants MSLGroup
BY: VICTORIA WOODIN CHAVEY
JEFFREY W. BRECHER
BRETT M. ANDERS

(In open court)

THE COURT: How many of the 3,300 documents have you whittled down and reached agreement on?

MR. WITTELS: Well over probably two-thirds. We're done to about 840, roughly, down from the last week we were about 3,300, your Honor. The defendants agreed to change all of the issue tag codes we had issues with. We thereafter met. We lowered our list from about 3,300 down by about half. We met again, well, by meeting, talking. The defendants took out about 300. We then after hearing their arguments took out 60, and then over the weekend we took down another hundred.

And where we are now is a dispute really about relevance versus irrelevant. To us that's a very important issue obviously because that's how the computers are trained, and we need to make sure there's reliability here so that the system has the right coding.

And one of our major concerns today is that the documents that we're concerned about are where, for example, the defendants have said any document not relating to a plaintiff is irrelevant, and what we're concerned about is that the computer apparently can't distinguish between, when they do the search, between the relevant and irrelevant so that we don't think there will be reliability if the computer can't distinguish and is not sophisticated enough to drill down, then our documents won't get pulled out when the computer is

trained.

And we've asked defendants to explain that. We want to really talk to their experts about it. We haven't been able to have a response on that. So that's a big concern of ours.

THE COURT: Why don't we start with that issue. Are you finished, Mr. Wittels?

MR. WITTELS: There are a few others, but if we could take them one at a time.

THE COURT: Mr. Anders.

MR. ANDERS: Thank you, your Honor. Friday when we had the phone call, that's when that issue was raised again. I spoke to Recommind that afternoon, and the short answer is the computer will be able to make distinctions and nuances between documents that only relate to the plaintiffs about compensation and documents that relate to others.

The open question is how quickly does the computer learn it. It may learn it on the first iteration; it may learn it on the seventh. That's not something that we know right now.

In an effort to address plaintiffs' concern what we can do is as we do coding going forward, if there's a document again let's say related to a compensation decision that we mark as relevant because it relates to a plaintiff, we can add a subcode with that plaintiff's name. So we're telling the computer this is relevant. It's in the compensation category,

but it also relates to this plaintiff. That will help drive the computer in that direction.

The other thing that we can do is, again, using a compensation document as an example, if there's a compensation document that we coded as not responsive because it did not deal with a named plaintiff, we would code it as "no" for responsive, but there would be a subcategory "out of scope." And what that means is here's a document that potentially could be relevant based on the content, but because of the discovery rulings on the scope of discovery, this document is out of the scope.

That assists us because as we go forward if other plaintiffs join the case and are pulled in, we now have a group of documents that are premarked as potentially being responsive but for the scope of that document.

So in short answer that is what Recommind has advised me about that concern and how we can possibly address it.

THE COURT: Mr. Wittels.

MR. WITTELS: I may need a little assistance from my colleagues on this but, as I understand it, our expert would like to talk to their expert, Recommind, about that because from our understanding of the system, Recommind talks about doing searches as content searches and it doesn't appear from what they say on their website and our expert that they could make the distinctions that we're hearing counsel doing. So

we're asking if we could do that today or tomorrow, our experts would be ready to talk to theirs to confirm that.

THE COURT: I certainly think expert-to-expert discussions, if it doesn't become harassing, meaning, if it's not every five minutes there's going to be a call, is probably the best way to avoid the game of telephone where, you know, you ask your expert some question or your expert asks you a question, you ask Mr. Anders or his colleagues, he asks someone at Recommind, and the answer goes back through the chain and has little resemblance to what it started as.

Any objection to that?

MR. ANDERS: No, your Honor, not with the caveat or instruction you provided. Again, I'm happy to let our expert answer a question or two. I just know we have our protocol. I don't want this to devolve into every day another question about the process. We have the final random sample which will help determine the reliability. We just need to let the process run its course.

THE COURT: This at least is clearly an important issue. Either it can do what you just described or it can't. If it can, it sounds like plaintiff will be satisfied with that.

All right. So with that, does that eliminate the issue on the 800 something documents or do I need to review some of them further?

MR. ANDERS: Your Honor, if I could just briefly address that. In terms of what we discussed on Friday as a way to resolve the 800 that are in dispute, our proposal to plaintiffs was as follows.

As we reviewed, we identified approximately nine different categories where the documents where we disagreed could be classified: documents regarding individualized personnel decisions, org charts where plaintiffs were not mentioned, client presentations.

Our proposal to plaintiffs' counsel was for each of those categories, we each select a representative sampling of the types of documents that fall within those categories. For some categories we would only need a few because there's much of the same, financial spreadsheets, for example. Other categories we may need more. But the idea was pick some number that we each select the documents that we think are representative, provide that to your Honor, and based on your Honor's rulings, we can then go back and apply it to the rest of the set.

Plaintiffs, you know, I believe they rejected that proposal. Their response was they want to preserve their rights and get a ruling on each of the at that point 970 documents we were disagreeing on.

THE COURT: Let's start with the samples and go from there. And if plaintiffs want a ruling on every particular

document in the 800, we'll see whether we go to a special master or I've got all afternoon free as well today. We'll see what we do but, you know.

MR. WITTELS: Our response, your Honor, why -- what we were willing to do Friday was go through all the documents. Defendants said they had to leave and we were prepared to sit there and go through them on the phone and we proposed that but the defendants didn't want to do that, so.

THE COURT: Would you all like to do that this morning in the jury room, and I'll deal with what's left on a sample basis or a document-by-document basis starting at 2 o'clock.

MR. WITTELS: We're ready to do that. The problem we had, just so your Honor knows, with the sampling was this. We asked the defendants and we said Friday, we put it in -- I think we put it in writing as well, we would like to know which of the documents fall into which of these categories because, obviously, if it was an expense report, that was maybe a category we could live with. But they were very broad categories, generation operation, which meant many things or could mean many things.

So we asked them to tell us which of the 900 fit into which category because, obviously, if they're going to pull a few samples, they would have to know from what group they're pulling. They didn't do that so we don't know where they fall in in these categories.

THE COURT: Here's my question. We had this on the docket for today. I'd like to use at least between now and 11 when the next case comes in to get as much done as possible. I don't feel that it's useful when it just keeps throwing the schedule off if you all, for whoever's fault, and I don't know, but you all needed to be ready to proceed today.

So tell me how you'd like to proceed. I hear Mr. Anders say samples out of nine categories at least to start. If there is something you'd like to do, look, you want me to start going through document one through 860 or whatever number we're talking about, that's fine, but at some point you're either going to say I understand your rulings, Judge, we can stop the process or it's going to cost you. It's not my job to review hundreds and hundreds, almost a thousand documents. That's what special masters are for who you pay by the hour.

You tell me what you'd like to do. I'm willing to do whatever you want, and I'm willing to give you all of the today except for the roughly hour and a half or two hours that I've got a settlement conference coming in at 11 o'clock.

MR. WITTELS: May I confer for one minute?

THE COURT: Sure.

MS. CHAVEY: I'm ready, your Honor.

MR. WITTELS: Your Honor, we would like to go back into the room, but we'd like to show you a few documents so we

can just sort of have, so we have a flavor of what the dispute is, but we can go back in the room.

THE COURT: Sounds like an awful lot like defendant's proposal in some ways, but that's fine.

Ms. Chavey, you've been standing for a minute. Is there something you want to add before we start looking at documents?

MS. CHAVEY: I would agree with Mr. Wittels that it would be most useful to the parties to put some samples before the Court and get rulings. The parties did spend about two and a half hours on Friday and we had scheduled a one-hour call but we went long; and I don't believe we resolved any issues on the approximately 20 documents that we looked at. So we do need some guidance, I think, to make any further conversations between the parties directly effective.

THE COURT: Fine. Let's start with a few samples from the plaintiff. Then we'll do a few samples from the defendant and we'll see what you want. So pick your sample. You'll need to obviously hand me the documents. Why don't you hand up ten documents, five documents, not one at a time, and we'll start with the plaintiffs.

MS. BAINS: We can give you our stack and then refer to the number.

THE COURT: That's fine. Okay. Which document are you starting with?

MS. BAINS: The top one, 45316, sorry, 315.
THE COURT: All right. NR0045315-16 deals with exceptions to the pay freeze, does not involve any of the plaintiffs, but I take it that your argument -- I'll let you make your argument. Go ahead.
MS. BAINS: Yes. So this is a document that was produced before, before even the ESI protocol got started and was redacted. But this shows that Publicis Groupe is approving personnel decisions. It's centralized decision-making.
THE COURT: All right. So this goes to your jurisdictional motion over Publicis?
MS. BAINS: Yes, and also shows that all the decisions for local offices are made at a high level. They're centralized.
THE COURT: Okay. On the defense.
MS. CHAVEY: Your Honor, I believe, if I'm remembering correctly, we had produced a form of this document in hard copy with redactions over decisions as to individuals other than Carleen Trimble. We produced it because the plaintiffs had seemed to identify Carleen Trimble as a comparator, as a female without children who received better treatment. So in connection with other documents about Ms. Trimble that we produced, I believe we produced this document.
THE COURT: Why wouldn't this be part of the relevant set for predictive coding?

MS. CHAVEY: There is one employee in here from Frankfurt. But putting that aside, it otherwise appears to be reflective of individual employment decisions. And the plaintiffs' claim now, which is also what they articulated to us on Friday with respect to a number of documents, is that with regard to individual decisions, individual employment decisions, they're seeking discovery where there appears to be centralized decision-making.

That is a theory that we haven't been able to understand. We've reviewed the complaint again several times after the conversation on Friday to try to find the contours of that theory and we don't particularly understand it.

With regard to the issue of personal jurisdiction, I believe that when we responded to the plaintiffs' single request for production, we indicated that we had produced documents already. So this may be duplicative of what we had already produced.

THE COURT: That doesn't help me. If it's duplicative of something that was produced in paper form, I'm still not sure why, and I'll even put it a different way, it would seem to me it should be coded as responsive.

MS. CHAVEY: Okay. We will recode that on that basis.

THE COURT: Let me be even clearer. As I understand it, it should be coded as responsive for two arguments: one that plaintiffs' counsel just made that it deals with the issue

of whether Publicis has enough control over MSL to be a defendant in this case jurisdictionally; but the second issue, as I understand it from our previous conferences though this was not articulated at the moment by plaintiffs' counsel, is that the issue of the pay freeze and the exceptions to the freeze being done in ways that prejudice the plaintiffs is a relevant issue.

So code it as relevant. It's one in the plaintiffs' column.

MS. CHAVEY: And as to the issue tags, we are accepting the plaintiffs' coding on that.

THE COURT: Okay. Next.

MS. BAINS: The next is NR47609.

THE COURT: Hold it. Are these in any order?

MS. BAINS: They're in order, numerical order. This is a native file so it's not printed on it. It's written on it.

THE COURT: Okay.

MS. BAINS: The reason we believe this is relevant is because it shows transfers and critical salary increases for comparator Mr. Chamberlain to the named plaintiffs. Also for Melanie Babcock --

THE COURT: I thought we decided we were not doing comparators off of the email.

MS. BAINS: No, I think that was about the custodians.

The custodians that were --

THE COURT: All right. So, I'm sorry, who is the comparator?

MS. BAINS: The comparator is David Chamberlain.

THE COURT: What page is that on?

MS. BAINS: It is on the fourth page. It was difficult to print this on all the columns fitting on one page so we made it a little larger. But if you match it up, it will correspond to a salary increase and a transfer.

It also shows on the first page Ms. Melanie Babcock, who is one of the declarants that MSL included a declaration from in their opposition to the conditional certification briefing.

THE COURT: So what?

MS. BAINS: So if they're including information from people to oppose our class cert motion.

THE COURT: Information about what?

MS. BAINS: About the job duties and position as a vice president.

THE COURT: Why has that got any relevance to her salary?

MS. BAINS: It has her position and expertise. Another argument that defendants are making is that there's an expertise and that makes all the VPs and SVPs different from each other.

THE COURT: All right. Let's focus on the David Chamberlain issue. For the defense.

MS. CHAVEY: Your Honor, we viewed this document, as well, as reflecting just a list of individual employment decisions.

As to Mr. Chamberlain, we have produced compensation data and other data that was requested with regard to comparators. So to mark this entire document as responsive because it contains a piece of data about Mr. Chamberlain did not seem appropriate. It's a listing of individualized decisions, and your Honor has already ordered that that is not the subject of discovery.

MS. BAINS: Your Honor, that wasn't our understanding of how this process would work. If a document has relevant information on it or --

THE COURT: If it's repetitive information, to wit, how much money he's getting paid, and you've gotten that in three or four other ways, you're going to -- it may be marginally relevant, but it's going to mess up the predictive coding process.

MS. BAINS: Another thing it includes is an explanation for the pay increase and also some of the duties and --

THE COURT: The explanation being what, promotion or something?

MS. BAINS: It's a little hard with how it's printed. But in the latter pages, there's explanations for each business motivation, it's called.

THE COURT: So what?

MS. BAINS: So if it's a comparator, then it's explaining why -- I mean apparently --

THE COURT: We're getting to the point -- and the way this is printed, I can't tell what it says about David Chamberlain.

MS. BAINS: If you look at the fourth last page.

THE COURT: Okay. I guess the question becomes if the only relevance of this document is the David Chamberlain information, how does this work in the coding system so that the computer will know that it's because of David Chamberlain and you're not going to create something where you're now getting every salary increase document like this that doesn't have David Chamberlain or any of the other people who are flagged as either the plaintiffs or the comparators?

MS. BAINS: Plaintiffs would propose that after we speak to Recommind, after our experts talk to Recommind, there could be backup coding on documents such as this.

THE COURT: What do you mean by backup coding?

MS. BAINS: What Mr. Anders described, how there would be sort of out of scope category for documents that we've withdrawn our relevance coding because it doesn't --

THE COURT: This is putting it in the scope, so to speak.

MS. BAINS: Right. We'd like to talk to Recommind.

THE COURT: Talk to Recommind. It's marginal because of David Chamberlain. If there's a way to train the system that the reason this is in is because David Chamberlain is a comparator, that's one thing. And maybe what -- I'll leave it to your experts to figure out what to do. See what is doable and, if you need to, come back to me.

Next.

MS. BAINS: The next is NR45698. It's a spreadsheet.

THE COURT: Okay. You got to go slowly because I have to find it.

MS. BAINS: Yes. It's NR45698.

THE COURT: Okay.

MS. BAINS: So, among others, this has named plaintiff Laurie Mayers on it.

THE COURT: All right. Sounds like you need to handle this like the other documents with the named plaintiffs is train the computer that it's here because of the named plaintiff and not because of all the other folks.

MS. BAINS: It also shows reporting to Publicis, MSL Digital is reporting directly to Publicis, so it's relevant to the personal jurisdiction issue.

THE COURT: Maybe, although by the time you get these

documents, that issue is going to be decided, which is the subject of next Monday's conference.

MS. BAINS: I think we have another iteration scheduled before that.

THE COURT: Excuse me?

MS. BAINS: The next iteration that will be trained from the seed set documents.

THE COURT: You'll be getting documents periodically if that's what you mean. Yeah, okay.

MS. CHAVEY: And, your Honor, I believe the jurisdictional question pertains to Publicis Groupe SA, which is not referenced on this document. There are various entities that carry the name Publicis, but they're not the entity at issue.

THE COURT: Do we know what Publicis group this is?

MS. CHAVEY: This is a group, I believe I've seen it referred to as PRCC, that is connected to MSL and we've produced documents thus far that include PRCC.

THE COURT: So it doesn't have anything to do with the jurisdictional issue?

MS. CHAVEY: No.

THE COURT: All right. So it's relevant because of Laurie Mayers. Train the computer accordingly.

MS. CHAVEY: And, your Honor, just so that our position is clear on this document, it does mention Laurie

Mayers and her salary, which is not disputed. We could have a stipulation as to what her salary was. And it's duplicative of lots of other information that we've provided about Ms. Mayers and that she's provided to us because she knew what her salary was.

So with the exception of that entry about her salary, this document appears to us that the plaintiffs are trying to do individualized discovery, which is what the Court has already ordered is not permitted.

THE COURT: All right. But this does seem to show increases so it may have some relevance as to why she was getting an increase of 7 percent while somebody else was getting increase of 4 percent which, of course, sounds like she was doing very well.

MR. BRECHER: Judge, one thing on this document to keep in mind is that we had already produced very early in the case the data from the human resources database PeopleSoft. That has all of this information, so this is very duplicative of what we've already produced. So to produce every time a named plaintiff might appear on a chart where they have their salary, we've already given them. What was point of giving them our entire HR database?

THE COURT: Let me raise this question with you. If we keep loading things like this in which are marginally relevant but totally repetitive, it is going to affect the

output, obviously. The defendant has previously said because of the $5 a document review cost, they want to stop reviewing after the top 40,000 documents. I said I'm not deciding that yet.

But the more of this sort of stuff that's repetitive that you push into the system, the more likely it is that -- you are going to get cut off, whether it's 40,000 documents, 50,000, whatever it is. The more of this repetitive stuff that you load into the system, the less material you're likely to get.

If you understand that and you still want this coded as relevant with the subcode of Laurie Mayers, that's fine, but don't complain to me when I cut you off at the end and you get 10,000 of these spreadsheets and, you know, that counts against how many documents you get.

Is that really what you want?

MR. WITTELS: Your Honor, we don't want to be cut off, but we don't want to be training the system that because the defendants have said, well, we gave you a different document and they make that representation, doesn't necessarily pick --

THE COURT: On this, we've been through this many times. You've gotten the W-2s, however painfully. You've gotten other salary information. It's my understanding you've gotten, however much you may have disliked the way you have gotten it or other things, you have gotten full salary

information for the plaintiffs, for comparators, etc., etc.

I agree this is marginally relevant. If we were in a paper world, it's repetitive, but so what.

What I'm concerned about -- I don't know how often they run these -- if you load up a lot of this into the system and it gets coded high for relevance because compensation is one of your issue tags and this is a plaintiff, does it get you anything? And rest assured that I do believe in Rule 1 and 26(b)(2)(C) proportionality. I don't know where the cutoff will be or where I say if you want more, you're paying for it.

I'm just telling you if you want this put into the system now, it is going to generate multiples of this document or documents very much like it. I don't know that that gives you any new information about the named plaintiffs. And as to everybody else on the document, it's irrelevant unless and until there is opt-ins or class certification.

You want it, you know, you got it. I'm just telling you, I'm making sure you understand the repercussions of that now to an issue that we're going to face in however many months it takes to finish this process when the issue is where do we cut off production based on a cost and relevance issue.

If you want it, you have it. If you don't want it because of that, because it doesn't add anything to your knowledge base, that's fine. If you don't want to make that decision now, you know, you could make it when you get back to

your office and talk to your colleagues and reflect on it.
But I want the record to be clear that a lot of the repetitive material will be multiplied through the use of predictive coding and if this shows up in the top 40,000 documents 200 times, that may be 200 narrative documents that you're not going to see depending on where the cutoff is.
Do you want to make a decision now or sleep on it?
MR. WITTELS: I think we should reflect on it.
THE COURT: Okay. Just by tomorrow morning let defendants know what you want done on it.
MS. BAINS: Your Honor, the next document is NR67266.
THE COURT: Is there really an issue of carryover of vacation days in this case?
MS. BAINS: There is an issue about the maternity leave agreements.
THE COURT: What's that got to do with vacation days?
MS. BAINS: It's as applied to this individual's maternity leave policy.
THE COURT: And how do we know this is maternity leave?
MS. BAINS: Because of the lower email.
THE COURT: Okay. It's an individual who's not one of your parties.
MS. BAINS: There's a statement from corporate HR about an exception to the normal carryover policy.

THE COURT: What is the normal carryover policy?

MS. BAINS: It's showing that it's centralized at corporate HR and that there's a carryover policy and an exception is being made to it.

THE COURT: All right. Defense.

MS. CHAVEY: Your Honor, there is no issue in this case that we're aware of with regard to vacation carryover policy. That's never been alleged, ever, in anything that we've seen or heard from the plaintiffs.

And, again, this raises the issue that we don't really understand the scope of the plaintiffs' centralized decision-making theory which doesn't come across in their complaint. We don't really know what they're referring to.

Valerie Morgan, who has been deposed, by the way, is an HR person. She may have been covering the Boston office at the time although she does sit in New York. But she's not part of a select centralized team of male decision-makers -- that's some language out of the plaintiffs' conditional certification motion -- narrow inner circle of male executives. She's obviously not part of any group of male people, and she's not a high-level executive. She's an HR person who works there.

So the centralized decision-making theory that we keep hearing in relation to the responsiveness of these documents again seems to be the plaintiffs' effort to get discovery on lots of individualized decisions that are not part of the case

per the Court's rulings already.
THE COURT: All right. I guess I'm confused as to what the vacation day issue on maternity leave can possibly have to do with sex discrimination, one way or the other, since the only people who get maternity leave are female. So maybe some got two and a half days of vacation tacked on and others didn't, so what?
MS. BAINS: At the very least, your Honor, we think this is referencing a policy with reference to maternity leave.
THE COURT: It's referencing a policy about vacation days. It's not relevant.
MS. BAINS: The next one is NR31468. It's a spreadsheet.
THE COURT: Give me the number again.
MS. BAINS: NR31468.
THE COURT: Okay.
MS. BAINS: Okay. We believe this document is highly relevant to the individual claims of Ms. Maryellen O'Donohue. One thing she claims is that she was constructively discharged and pushed out and that it was coincidental that Ms. Jeanine O'Kane took over her position a few days after Ms. O'Donohue left the company. This shows that MS&L was recruiting Ms. O'Kane during the time period when Ms. O'Donohue was still at the company.
THE COURT: I don't see that name on here.

MS. BAINS: It's under new names as of week of 11/16/09 towards the bottom.

THE COURT: All right. On the defense.

MR. BRECHER: Judge, I think this is another example of a document that is representative of individualized decisions or actions with respect to various individuals.

I think the question we have to ask ourselves, is this the type of document that we want the predictive coding to spit out? It seems to me that they're injecting into the system documents that if we train the computer like this and we get these types of documents, this case will go nowhere. I don't understand. It seems that they're on our side, that they're trying to put in documents to mistrain the system perhaps to undermine it and justify their objections. That's the only reason I can think of.

These, we don't want to train the system to produce documents like this. This is not going to answer any dispute in this case.

MS. BAINS: Your Honor, it directly relates to the dispute of constructive discharge of a named plaintiff and we don't have this anywhere else, so.

THE COURT: I guess one question is -- this is the risk with allowing you to review documents that are quote/unquote nonresponsive -- if you get this document in paper, do you need it run through the predictive coding system

because I'm not sure how many names the computer will be able to accept on what we're calling the special coding or whatever you want to call it. We've got the named plaintiffs. We've got David Chamberlain, the comparator.

Now we're going to have Jeanine O'Kane so that this will be coded as only relevant because of Jeanine O'Kane, which means you're likely to get lots of other documents about Jeanine O'Kane which have nothing to do with this case. That's even assuming they can do this for an almost unlimited list of names.

A solution is keep the paper document but don't use it to train the system. I'm open to suggestions, but I am concerned that you are going to generate a lot of junk into the system, that this is not generalized enough as a way to train the computer.

So you tell me what you want to do with it.

MR. WITTELS: We're going to have to talk, your Honor, to Recommind about this and with the experts because under the same line of thinking that your Honor just articulated, we're concerned that documents that are responsive won't get pulled out and, obviously, there's seems to be a reliability issue here that we're concerned about with respect to the predictive coding methodology that has to be sorted out, if it can be, because defendants keep reiterating they don't understand the complaint, which we think is pretty clear and articulates quite

well and if you look at certain cases -- we're not going to get into a case law argument.

But if you have high-level managers and a common centralized policy of decision-making, which we allege, and which many of these documents are showing, that's the theory and those are the theories that the Supreme Court is allowing to go forward. So when they keep reiterating they don't understand the theory, they then go back to --

THE COURT: This one does not show anything about centralized decision-making or anything else, or if it does, that's not the argument your associate just made to me.

MR. WITTELS: Well, it does, your Honor, because Jim is the centralized decision-maker --

THE COURT: Who's Jim?

MR. WITTELS: He's the president of MSL North America. So it's very relevant to his decision-making.

So what we're concerned, sure, we want the computer, if it can be reliable, to review and produce these documents.

THE COURT: Think about one other thing which is if you throw predictive coding out, is this something that would be found with key word searching. You know, maybe if you're searching for O'Kane, I'm not sure if -- a key word search for Jim would bring up so much garbage, etc.

So you want this in with an explanation to Recommind, you all try to work it out. Just let's be clear, and this is

not a question for you to answer, it's a comment. If you're trying to get the system to work as best it can, that's great. If you're trying to blow the system up, just think about what the alternative is which is key word searching. You've already seen from the preliminary key word searches how much junk that brings back. The budget on this case that the Court will allow is not unlimited.

MR. WITTELS: Your Honor, when you reference key word searching, are you saying, so I can understand it, that that's an alternative or backup methodology that would be used?

THE COURT: What I'm saying is I don't think your predictive coding approach which you and Mr. Neil and DOAR approved and then walked away from -- and I'm not trying to rehash history.

Either predictive coding will work, and I don't see that your method is so different from theirs or, for whatever reason, predictive coding won't work in this case, and if we go through this process and at the end of the day, after having spent, you know, six months and $6 billion -- and I'm only being facetious as to one of those figures -- if you prove to me it doesn't work, the question will then be, okay, how do you get the documents? We're probably not going to do a different predictive coding approach at that point.

The other logical thing with 3 million emails is the good old-fashioned terrible key word search approach.

So all I'm saying, and you've already seen some of the results of that because some of the ways that they found the documents for the seed set and working with you and your colleagues was to use key word searches, Boolean key word searches, but instead of reviewing every one of the multiple thousand hits from each of those key word searches, they took the top I think 50 and used that to generate documents for the seed set.

So what I'm saying is if you were attempting to blow up the predictive coding system -- and I'm not saying you are -- instead of making it work the best way it can, just remember that the solution of going back to the old-fashioned key words is probably not going to get you a document like this anyway and not without extraordinary expense.

So if you want this one in, why don't DOAR and Recommind and one lawyer from each side have a quick conference call and see what you can do with it, the fact that Jim is relevant and the fact that Jennifer O'Kane is relevant.

Okay. Next.

MS. BAINS: Your Honor.

THE COURT: And, obviously, any of these that turn out to be ones that you quote/unquote win on today but decide it's really going to mess the system up and we're merely keeping the paper document on and moving that to a relevant production but not relevant for the predictive coding is always an

alternative.

Next.

MS. BAINS: The next document is NR17405.

THE COURT: Hold it. Okay.

MS. BAINS: This is an excerpt of a much larger document that is a pitch. But the relevance of this is it has bios for many people, including named plaintiffs and comparators Peter Harris, David Mankowski and others. And one of defendant's main defenses is that Peter Harris is not a comparator to Maryellen O'Donohue or that someone in corporate is not a comparator to someone in healthcare. This shows corporate people, digital people working on a healthcare pitch together. So we think it's relevant.

THE COURT: All right. Do you have any idea how many pitches there are like this? It this looks like it's a standard form bio inserted into a particular client pitch. Again, if you wind up with a thousand of these in the system and they're within the most relevant that you get, you're going to get them and that will knock out a thousand narrative documents that you may not get when I do the cutoff.

Is this one where merely keeping this document in paper form satisfies what you want or, on the assumption there are going to be lots of pitches with our team bios in them, that to put this through the system is going to, you know, just load the system up with junk?

MR. BRECHER: Judge, well said, but I have the actual document and it's about 70 pages. As you can imagine with a public relations firm that generally has to pitch clients, there are hundreds and hundreds of client pitches where people's bios would be included.

THE COURT: That's what I just said. So the question is, look, plaintiff wants it, it's going to get it, but it's convincing me more and more that there will be a cutoff based on proportionality.

Do you want hundreds of these or is one of them enough, and by "one" I mean the paper version of this presentation. My guess is there's bios like this in every customer presentation.

MS. BAINS: We'll consider it.

THE COURT: Okay.

MS. BAINS: The next document is NR7534.

THE COURT: What am I looking for in this?

MS. BAINS: On the email that starts near the top of the first page, it references Zaneta, that's a named plaintiff, and it talks about her maternity leave.

She does not have an employee ID yet and Zaneta is on leave and may not return to work. We can leave Zaneta and George off the list.

And her return to work is a disputed issue, whether she wanted to or not.

THE COURT: It's about the workplace giving campaign, which I assume is a United Way or something like this.

MR. BRECHER: Judge, first point with Zaneta Hubbard, Zaneta Hubbard is not a named plaintiff. Zaneta Hubbard was an opt-in plaintiff for the equal pay case. So she doesn't have a pregnancy discrimination claim at the moment. She has an equal pay claim that is time barred, No. 1.

No. 2, I think this is a critical difference that we're having is they're under the impression that any time a named plaintiff's name appears in any email that they're entitled to that document. Even if we were in a paper world in a simple single plaintiff employment discrimination case, we would not be producing emails, every email where a plaintiff's name appears. It just it would be impossible even in a single plaintiff case. To extrapolate that into a class-wide case is crazy.

THE COURT: All right. Since this is not an equal pay issue --

MS. NURHESSEIN: Your Honor, if I could add one comment. Ms. Zaneta Hubbard does have an Equal Pay Act claim. But as my colleague pointed out, the circumstances of her termination are disputed and that relates directly to her damages in the case. And so we do think it's relevant and also think Mr. Brecher mischaracterized our position.

THE COURT: How is the equal pay and her departure

connected -- what am I missing -- in the complaint?

MS. NURHESSEIN: In terms of the damages to which she would be entitled in terms of front pay and damages.

THE COURT: I thought the Equal Pay Act case is for pay while she is employed. If she ain't employed, her pay isn't unequal unless you're claiming that she was fired in retaliation for something, which is not part of the opt-in case. I fail to see it. And, in any event, in general, this is a United Way campaign email.

MS. NURHESSEIN: Your Honor, the subject, the email may relate in part to the United Way campaign, but it contains responsive information.

THE COURT: That's the question. I don't see it.

Okay. This one is not relevant.

MS. BAINS: Okay.

THE COURT: Let's cut your list. One more of yours and then let's go to some of the defendant's list and then you can all go and confer.

And it may be that one of the most useful things you can do during that is a very quick phone call if one of you either has your BlackBerry or if not, because you're out of towners, to borrow the plaintiff's or go to the pay phone and get some quick supplemental advice from Recommind so we're not doing a lot of work based on, well, Recommind can code it extra to show the names of plaintiffs or comparators and then find

out that really doesn't work.

MS. BAINS: The next one is NR65386.

THE COURT: Okay.

MS. BAINS: If you could look at the middle of the page in the paragraph that starts "Dear Robert, thanks," in the middle of that paragraph it says, "you know that we are still, the whole group, in a hiring freeze period of time and that we can recruit by exception but that each recruitment has to be authorized by the group's CFO, Jean-Michel, and by Mathias Emmerich, the group HR."

This relates to Jean-Michel and Mathias are Publicis, high-up Publicis executives, so it relates to the jurisdictional issues, and also the group-wide, meaning Publicis group-wide freeze. So we think like the first document we went through, this is relevant for similar reasons.

MS. CHAVEY: Your Honor, Robert Yohansen at JKL Group is not an MSL Group in the Americas. JKL Group is a Nordic-based company that's part of Publicis Groupe, but it's not part of MSL Group. This purported class action is confined to public relations employees.

THE COURT: How did this get into MSL?

MS. CHAVEY: Your Honor, I believe it came, it must have come through -- I'm not sure, but I imagine it came through Peter Miller's email box. Peter Miller is the worldwide chief financial officer; he sits in New York. And so

by taking on his emails, we have seen lots of emails about things around the world that he may have responsibility for, but it has nothing to do with this case at all or the jurisdictional issue or anything else.

MS. BAINS: Your Honor, Olivier Fleurot, who's the CEO of MSL Group, is also on this.

THE COURT: I know, but if the pay freeze and head count freeze is for a different subsidiary.

MS. BAINS: It's referencing the entire group which it says, you know that we are still, the whole group. So it references a group-wide decision.

THE COURT: Fine. Produce it. I mean mark it relevant for that basis.

Okay. Let's now go to some defendant documents so I can give you some guidance your way and we'll go from there.

MR. WITTELS: Your Honor, while they're looking, one problem from our standpoint is we don't have any phones so we're at a big disadvantage here. We would have to go out to get to a phone.

THE COURT: You know, the first answer is it's been two years since you've been allowed to bring phones in if you get your smart pass or whatever we call it. And if you guys haven't done it and you're local, shame on you. The folks who are not New York-based can't get it. Mr. Brecher is the only one -- Melville, New York State bar. You know, on the

plaintiffs' side, you all should have your smart passes. But if you don't, that's what pay phones are for.

MR. WITTELS: We'll walk outside today but is smart pass the bar card?

THE COURT: Yeah, the bar card.

MR. WITTELS: New York State.

THE COURT: I cannot believe people who have been so upset that we didn't allow it in have not read the 200 notices in the law journal. If you have your state bar card, you bring it in to our either audio visual or district executive office on the day that's allowed, which I think is maybe a Thursday, and you get issued an S.D.N.Y. bar card which allows you to bring your one cell phone in per lawyer who has that card for the rest of your life. So the fact you don't know about it, you should. Okay. Otherwise, do what you got to do with cell phones. Just use your time well.

Okay. Personnel action notice, NR67445. And I guess there are three of these, for the record, 67445, 76345, 76347.

MS. CHAVEY: Your Honor, these are three personnel action notices that we've provided as examples because these are ones that we marked as not responsive, plaintiffs have marked these as responsive.

Our position is that these pertain -- I guess two things. First of all, they pertain to individual employment decisions. These individuals are not comparators. They're not

named plaintiffs. They're not even the opt-ins.

But also your Honor had already ruled with regard to the personnel action notices. That was the subject of a prior conference, and your Honor ordered that the plaintiffs provide us with a sampling proposal, which they did. We provided all the samples, and we never heard another thing about it. So to mark these documents as responsive because they pertain to individual decisions is not something that we would agree to.

MS. NURHESSEIN: Your Honor, all the personnel action notices are relevant because, as you can see at the bottom, every PAN has to be approved by both the group CFO or MSL America CFO as well as a representative from North America headquarters.

THE COURT: We dealt with this in a separate way.

MS. NURHESSEIN: Sure. And, your Honor, if I can just comment on that, if I recall your ruling correctly, you ordered a sample of the PANs. I believe you ruled that the PANs were relevant, but you ordered a sample based on burden argument articulated by defense counsel. Their argument was they would have to go through all the personnel files to pull the PANs. That was the reason why I believe you ruled that only a sample would have to be produced. Here there's no burden and all the PANs relate to our theory of centralized decision-making.

THE COURT: You know what, you can have every PAN that comes up through this system and one less responsive document

for each one. I'm going to use this as a cutoff.

Is it that relevant to you that you want every single one of these, might be thousands of them, and when they tell me that they want to cut off at 40,000 documents or less or more and these are in the top 40,000 responsive documents, I don't want to hear any arguments that you didn't get what you're looking for because you got so many personnel action notices.

MS. NURHESSEIN: And, your Honor, I do understand your rulings today and we can, in light of your comments, we will consider whether we -- we'll discuss it internally, consider whether we need all of them.

THE COURT: That's what the computer will give you. So either these come out because you've done your sampling and I want to go back and try to look at my notes on what we did with that.

You know, since these are individual and what you're saying is it shows, not that this really does show it because this has no signatures, at least on some of them, all of them, you know, if what you're trying to show is that personnel actions require some sort of sign-off, the sample in a deposition that you've done should give you that. I don't see what these give you at all. It's a form. The bottom of the form says all salary-related changes and terminations must have two signatures in order to be processed.

MS. NURHESSEIN: Yes, your Honor. I mean it's an

example of a policy or practice.

THE COURT: What do you need these for? How many samples did you get through the prior paper discovery of the personnel action notices?

MS. NURHESSEIN: Your Honor, I don't recall the exact count.

THE COURT: Approximate.

MS. NURHESSEIN: It may have been around a hundred or so.

THE COURT: And they all -- it's a form. Seriously.

MS. NURHESSEIN: Yes, your Honor. And one thing I would also note is that at the last conference you did indicate to defense counsel that an alternative to producing all the PANs would be for them to stipulate that certain central decision-makers are required to sign off on all the PANs and I don't believe they ever responded to that.

THE COURT: You've got a hundred of them. You're going to show a hundred of them to the jury, in theory, if you don't get the answer you want at a deposition. Is 200 or 500 going to make any difference? It's a standard form document. It seems either, you know, there is an explanation that this says it but it's not true and that will be the same whether you have 500 of these or one.

Okay. I'm ruling these as nonresponsive.

MR. WITTELS: Well, your Honor, our concern is that

these are the documents to train the system and while your Honor is alluding to, you know, the cutoff, what we're concerned about is that by knocking documents out that obviously are relevant, because this does show a central policy.

THE COURT: Why are these -- look, it's very simple. Do you want thousands of these?

MR. WITTELS: No. What we want to do is be sure that the computer is trained properly and I mean that's the --

THE COURT: Training the computer properly means it will say, oh, personnel action notices are relevant. Any time it sees one of these documents, which is a standard form, regardless of the name of the person or what happened or anything else, it's going to say these documents are relevant.

Now, I don't know how many are in the 3 million ESI documents that are in this system, but let's say there are a thousand of these. That's going to come up relatively high in the coding. That means, you know, let's say there are 5,000 and let's say that I agree with them at a later point that 40,000 is the cutoff. If these are in the top 40,000, you're going to get that and you're not going to get the next 5,000 documents that may be much more relevant to you. Pick your poison.

MR. WITTELS: All right. May we consider this? Again, it's a matter of walking a delicate line to make sure

that we code it properly and at the same time don't eliminate a relevant genre or category, so.

THE COURT: I still fail to see how a standard form document that isn't signed that you have a hundred samples of, giving you more of them doesn't seem to me is any more relevant.

Let me hear from the defense on this.

MR. BRECHER: Judge, quickly, I think we've been down this road before. That was the whole point of producing the sample PANs. They had argued we need to see the decision-making, who's approving those. We explained that a PAN, there's hundreds and thousands of these. Every time any name is changed, an address is changed, anybody is hired, you know, there's thousands of these.

So you ruled give them a sample so that they can see what the decision-making process is. They gave us a sample size. We didn't even object to it, Judge. We gave them the sample PANs. That was the resolution of the issue.

So now they're saying even though we've done sampling and you ordered sampling, give us them all anyway.

THE COURT: I'm ruling these out, period.

Next.

MR. WITTELS: Your Honor, you say you're ruling them out, for the purposes of coding, not that they're irrelevant, but they are, in other words, they are relevant, but --

THE COURT: They are being coded as not relevant for training the system.

MR. WITTELS: Right, even though the document itself is acknowledged to be pertinent and relevant to the centralized.

THE COURT: You have the sample. That's all you need. You don't need any more.

Okay, next, NR7944. Are these -- you gave me three. Should I put all three?

MR. BRECHER: Separate documents.

MS. CHAVEY: They're separate documents, your Honor. They do all pertain to individual employment decisions that are not related to a plaintiff. They don't reflect a policy or practice.

The first one, 7944 appears to be an exchange about somebody named James's departure and the announcement of it.

THE COURT: Yep. What's the relevance?

MS. CHAVEY: 7944.

MS. BAINS: Your Honor, this must have been one that we inadvertently marked relevant.

THE COURT: Okay. So you agree it's not relevant.

We move on. NR9120.

MS. CHAVEY: Your Honor, this is an announcement of somebody named Holly Jerrill being promoted, and we don't see what the responsiveness of this would be. I mean the

announcement is being made by the president of the company, but there's nothing in there to suggest that it has any responsive quality for this case.

MS. BAINS: Okay. First, I've seen this document marked as responsive by defendants many times, so there's an issue of inconsistency. And second --

THE COURT: I thought you all worked the inconsistencies out. If it's not relevant, it should be marked not relevant throughout and you'll need to do a search for it to pull it out.

MS. BAINS: Can I address that? Actually, I think what defendants did to address the inconsistencies was run a computer program to find exact duplicates. I can hear what their position is, but it's my understanding that it wouldn't pull out further chains of emails where the relevant part was common to both, so.

THE COURT: Okay. But marking this relevant in this version doesn't help you, and they have to figure out how to pull all other versions of this unless it's attached to something else that is relevant.

So they're going to do the best they can. To the extent you have information, you know, that says this is also in the system as responsive one, two, three, four, tell them that and that's what I thought you all did last week.

MS. BAINS: We did.

THE COURT: So why is this relevant?

MS. BAINS: This is an email from Jim Tsokanos, the president of North America. One of our allegations is the reorganization led to the discrimination against women. In the last paragraph --

THE COURT: I assume Holly is a female.

MS. BAINS: Yes. In the last paragraph it says Holly will be joining Tara, Maury, our managing directors, and I on the MSL North America team. It gives color to the reorganization into a centralized North America team.

THE COURT: So any document that has "team" in it is going to be relevant in your view?

MS. BAINS: No, it explains who is part of the team and the reorganization that defendants are unaware of who actually would be part of this centralized team.

THE COURT: First of all, this is in '08. I thought you said the re-org was later.

MS. BAINS: We allege it started at the beginning of '08.

THE COURT: This sounds like usual internal PR, somebody got promoted, isn't that wonderful. If what you're saying is the fact that it says the North America team is what makes it relevant, I find that somewhat hard to believe that that is going to make or break your case here.

MS. BAINS: It seems to me the defendants are denying

that they know what the reorganization is and what the parts of it is. This illuminates that.

THE COURT: Not really. It doesn't illuminate it to me.

MS. CHAVEY: I can address the issue about the reorganization. The allegation is that there was a reorganization that began in '08 and is continuing today. That, we still don't know what that is. As it pertains to the centralized decision-making, again, the allegations in the complaint are virtually nonexistent about centralized decision-making. To the extent --

THE COURT: Assume it's in the case for this purpose.

MS. CHAVEY: To the extent the allegation is in the case, it is about a male executive team that makes decisions together and Tara being the first person listed, it just doesn't even -- and Holly joining the team doesn't seem like this is the team that's at issue. But if any team is going to be deemed to be potentially a centralized decision-making team, then the doors are just blown wide open on discovery and this is a fishing expedition and not discovery on a theory that's been articulated.

MS. BAINS: We have the organizational charts that were made after the reorganization that shows exactly who's on the team and, you know, this is building upon that team and they call it consistently the North America team.

THE COURT: Well, they also refer to Holly and her team. Team seems to be a word for people who work together.

MS. BAINS: It's not the team that I'm referring to. The MS&L North America team, I haven't seen that referred to anybody else. It's corporate HR, it's Jim Tsokanos, his regional heads.

THE COURT: All right. I don't buy your theory but figure out a way to code it that shows that it's the last paragraph, first sentence, that's what makes this document relevant. It's borderline in the extreme.

Next, NR32327.

MS. CHAVEY: This document from April of 2009 is from the same HR person whose name we saw before, Valerie Morgan. She's emailing Neil Dhillon, who's the managing director in Washington, D.C., and she's just talking about potential candidates for a low-level position, assistant account executive. We don't see what the responsiveness of this is either.

MS. NURHESSEIN: Your Honor, I can address that. First of all, Valerie Morgan is part of the North America or corporate HR team. She didn't just manage --

THE COURT: So what?

MS. NURHESSEIN: This document is relevant to the jurisdictional, the personal jurisdiction inquiry. One of the relevant factors under New York CPLR 301, one of the factors

that courts consistently consider when deciding whether a subsidiary is a mere department of the parent is whether the parent is involved in the personnel decisions of the sub and also if it fails to observe corporate formality.

A typical example of that is when the parent, when you have employees that are shifted among various subs of the parent. Here Valerie Morgan is talking about an employee who works for Publicis Consultants, which at the time was a separate subsidiary of Publicis, and talking about potentially shifting an employee from Publicis Consultants to MSL.

So we think it's directly relevant to the jurisdictional inquiry and the joint discovery that the Court ordered as part of the jurisdictional discovery order.

THE COURT: Comment?

MR. ANDERS: Your Honor, in this case they're not shifting her over. It's not a situation where one subsidiary is saying you can borrow our employee. It looks like they're saying here's somebody you might want to hire. It looks like it's an external hire.

MS. NURHESSEIN: Your Honor, I would not call that an external hire. Another thing I didn't mention is you have the same HR person, Valerie Morgan, handling personnel decisions for both Publicis Consultants and MSL, and I think that clearly shows a lack of corporate formalities.

MS. CHAVEY: Your Honor, I'd like to respond as well.

Publicis Consultants is what MSL calls a conflict shop. I don't believe it exists any longer. But Wendy Lund, who ran Publicis Consultants, was the manager for two of the plaintiffs here, Maryellen O'Donohue and Monique da Silva Moore. So we never contested that Publicis Consultants is part of the case. We provided discovery about it and here again --

THE COURT: So this is not the Publicis in France that is at issue.

MS. CHAVEY: No. That's Publicis Groupe SA. That's the parent company. Publicis Consultants is just another PR firm that we've enveloped into the case for purposes of discovery here.

MS. NURHESSEIN: Your Honor, I think Ms. Chavey is confusing two separate issues. There's the Publicis Consultants system there, and then the personal jurisdiction analysis, which is different, and the lack the corporate formalities.

THE COURT: This doesn't show lack of corporate formalities. I'm going to say this gets coded as not relevant.

MS. NURHESSEIN: Your Honor, we take exception to that. We believe it does show lack of corporate formality.

THE COURT: You know how to file objections. I'm sure Judge Carter will love to see you.

You're not old enough to take exceptions. That's an old New York lawyer's term that I think got eliminated in

thirties if not whatever, although some New York state lawyers still use it.

Okay, NR14140.

MS. CHAVEY: Your Honor, these three documents that we've just handed up, which are 0014140, 0054589, and 0007799, are all basically financial statements that are of the same ilk and that's why we've grouped them together for purposes of the Court's consideration, but they all are just financial statements.

The first one, which is 14140, is of the Los Angeles office, December of '08, and it just shows what the different numbers are in terms of the forecast and the commitments and it doesn't have any responsive quality.

THE COURT: What's the relevance? And, frankly, that question goes to all three of these.

MS. NURHESSEIN: Your Honor, it's a little hard to read these but generally, the forecasts, I believe that's what this is, the forecasts are relevant for a couple reasons. One is for Publicis' policy, the Janus book, all the MSL forecasts are rolled up from MSL to corporate headquarters and then they go to Publicis, the parent company in Paris.

THE COURT: You don't need each of these. You've got the policy statement that says it's rolled up. What else?

Okay. The document is not relevant. That goes for all three of them.

Next. This is probably your last group so pick a good one.

Okay, let's start with the first one, NR2248, which seems to be passing on an article about this lawsuit. What's the relevance?

MS. BAINS: Well, this is directly responsive to not only plaintiffs', one of plaintiffs' requests, but also defendant's request for all correspondence regarding the lawsuit. So I mean this passing on also to the president of the company, Jim Tsokanos, we think is relevant and also responsive.

THE COURT: Why?

MS. BAINS: Because it's information about the lawsuit that's getting passed on to the president. Also, it has information about the lawsuit, so if you're talking about --

THE COURT: It's a press release for God's sake. It's a press release.

MS. BAINS: But if you're talking about the training the system, it has the substance of the lawsuit which is basically the words we're trying and the concepts we're trying to capture in the process.

THE COURT: Well.

MS. CHAVEY: Your Honor, this just appears to be an article from PR week, which is probably based on the press release that the plaintiff issued at the time, and it doesn't

have any relevance. There's no issue.

THE COURT: I guess this document doesn't have relevance. The question that I guess plaintiffs are saying is by putting this into the system as relevant, it may pull up internal memos about the lawsuit, etc. So I think it's on its face a useless document, but for training the system, I'll let it be relevant.

MS. CHAVEY: Your Honor, our position is that training the system with documents that are not responsive isn't going to be effective.

THE COURT: The concepts in the document are responsive, albeit the fact that a press release getting circulated is not particularly interesting. So, okay, the Court has ruled.

Next. NLR15000. What is this?

MS. CHAVEY: This document is a long spreadsheet that reflects Twitter coverage of the lawsuit and it's many, many pages and it has a bunch of information about websites and different, I guess, individuals tweeting on Twitter about the lawsuit. And we do not understand what the responsiveness of this document would be. It doesn't appear to have any tweets from individuals who, you know, from any of the named plaintiffs, for example, or anybody at MSL Group. It just doesn't seem to be responsive at all.

MS. BAINS: It's hard to tell just in a few minutes if

it doesn't include anyone from MSL Group or Publicis, but there is commentary in here similar to in the last document about the lawsuit. It's a little hard to read the way it's printed, but.

THE COURT: The question is sort of considering the way tweets read, what's the point of this?

MS. BAINS: Again, it's the same argument as the last document. It does have information in here that's I think the same --

THE COURT: Marginally. I guess the question is how often otherwise do you have documents dealing with Twitter?

MS. BAINS: If there's commentary by an MSL employee, I'm assuming that these are MSL people. It's a little hard to tell.

MS. CHAVEY: There's no basis for making that assumption, your Honor.

THE COURT: I didn't make that assumption, and even if it is, so what? I guess my question is you are a PR firm. Do you have lots of runs with Twitter accounts and is there going to be a way to train the system that the reason this is relevant is not that it's Twitter coverage of something but that it's got to do with this lawsuit.

Does the Recommind system allow you to explain the basis for coding?

MR. ANDERS: I don't think so, your Honor. The way I've had my discussions and what we discussed in response to

plaintiffs' concerns is, you know, potentially having further tagging of particular documents. But at some point if you have too many of those subtags, it becomes unworkable.

THE COURT: All right.

MS. BAINS: Your Honor, I did notice there are a few entries by Twitter.com/MSL Group, so that's directly from the company. I can't tell the way this is printed what they wrote, but I do see some commentary in here like, wow. If MSL is commenting on the lawsuit, I think that's relevant.

THE COURT: I'm not sure it's MSL as opposed to an MSL employee.

MS. BAINS: This is their official Twitter: Twitter.com/MSL_group.

THE COURT: Show me.

MS. BAINS: It's on the third page or fourth page after the cover page. The commentary is on separate pages.

THE COURT: I don't even see the --

MS. BAINS: It's towards the bottom on the third page of the document, but with the cover page it's the fourth page.

THE COURT: Okay. Is that MSL's official Twitter page, Twitter account?

MS. CHAVEY: I don't know. I know that the plaintiffs had asked us in discovery about any social media postings about the lawsuit, and we had not found that there was any after due diligence talking with our client. So I don't have any reason

to think that it is.

THE COURT: Yeah, well, it looks like it might be because what appears to be linked to one of those is a comment that says, please see our official statement http://blog.MSL Group.com, etc. Okay. Well --

MS. CHAVEY: Your Honor, the substance of the document appears to be a list of headlines about the lawsuit. I mean Publicis sued for alleged hundred million dollar gender bias lawsuit. Yes, it was.

MS. BAINS: There's commentary here too: I hate to read things like this. I hope it all gets straightened out, is an example.

THE COURT: And what's the relevance of that?

MS. BAINS: Well, it depends who's saying it.

THE COURT: Frankly, it doesn't matter who's saying it. Let's say it's Jim Tsokanos. I hate to read that we've been sued.

Look, as with all of this, my concern is if we're looking at this particular document, it is largely irrelevant. If you want to go do a Twitter search historically as to who commented on the lawsuit, including MSL, that's publicly available information.

The concern is if this is a standard type document where they run Twitter, you know, commentary on particular client matters, you're going to get so much junk. And you can

get this in other ways, it would seem to me that this one should get coded as nonresponsive merely to protect your getting junk. So that's the answer.

All right. Let me give you each back your sets of documents. This is the plaintiffs' set and this is the defendant's. All right. I'm going to take my 11 o'clock conference.

You all are going to go into the jury room and keep working this out. If you resolve it before 1 o'clock, let me know and we'll squeeze you in before lunch, assuming I'm done with the settlement conference I'm about to do. Otherwise, you can eat lunch from one or two or whenever you want and we'll resume at 2 o'clock and spend as much time as we need to to resolve all this.

I would certainly hope perhaps taking five minutes to go to the pay phone and call Recommind and DOAR respectively that you can get some further guidance from the experts on what sort of special coding can be done or whether it's just getting too ridiculous and, therefore, we have to be careful what we're putting in the system.

MR. ANDERS: Your Honor, if I may, on my way in this morning there were two attorneys in front of me bringing in their computers. Can I bring it in today?

THE COURT: It's too late now because I can't get you the order in any shape of time, so you're out of luck.

MR. ANDERS: Thank you.

THE COURT: If you need to break into separate groups, you can also use the rather claustrophobic mini rooms that are between the two sets of doors on the left. Make sure things are open.

(Recess)

THE COURT: All right. Where are we?

MR. WITTELS: Judge, I think we made some good progress with the defendants and we have a proposal to make to you and the defendants, I believe, are in agreement with it.

The proposal would be this: We would like to present a number of documents for you to review now that we still have some disagreements about. We propose then to go back to the room here and finish the hard copy documents we have.

Thereafter, we both consulted with our experts about timing. We would have a call, we have a call scheduled from three to five tomorrow with the experts after we've consulted with them and showed them the issues that are problematic.

We would then by Wednesday at six exchange any change in coding that the parties agree on in light of the rulings today and going back to the rulings this morning.

Thursday, we have an all day meet and confer with each other scheduled to go over any further disputes in light of the change in coding, to see if we can resolve this and narrow it down to whatever few remaining documents there are, hopefully.

And to come back to you on Monday when we're scheduled and have your Honor resolve any further disputes, if you're agreeable to that.

THE COURT: Let's see where we are at the end of today. I really -- we're going to have a lot to do on Monday with the Publicis-related issues, No. 1, and, two, and I'd have to find in the ever-growing stack of papers you have, but we are obviously getting further and further behind on the schedule you all agreed to and I'd like to try to avoid that.

So whatever we can resolve today, as painful as it is to have all-day sessions with you guys, I'd rather do it sooner rather than later.

But let's start with the ones that you each want me to give you my 2 cents on and we'll go from there.

MS. CHAVEY: Your Honor, I just wanted to mention that there are some markings in dispute that we have talked about. We just talked about some of them. And because some of them do relate to the question of personal jurisdiction, our proposal was we would like Publicis Groupe to be involved in those conversations. So there are some documents in that category that, even if we can resolve other things, we'd like to push to Monday, if we could.

THE COURT: All right. So whose turn is it or how are we doing this?

MS. BAINS: We have a couple documents and then

defendants have a couple documents.

THE COURT: Fine. Start with plaintiffs. Okay.

The first one you've handed me is NR9153.

MS. NURHESSEIN: Yes, your Honor, and if you turn to the last page of the document, NR9157, you'll see it's an email from Rob Baskin, who is the managing director of the Atlanta office and the head of the south.

THE COURT: So this has to do with exceptions to the hiring freeze?

MS. NURHESSEIN: Yes. Exactly, your Honor. And he sent a request again to Peter Miller, the MSL CFO, Jim Tsokanos, who's the president of the Americas, and Tara Lilien, who's North America HR. And in response to the request, Peter Miller, you see him pushing back, so it's obviously not a mere rubber stamp here.

On page 9156, he again alludes to the global hiring and salary freeze, mentions that the sister agencies are running at 120 percent billability and all the brands are being asked implicitly by Publicis to do more with less.

And then if you go to page 9155, you know, he grants his approval and it says he got the approval from the higher, again, presumably from Publicis.

THE COURT: What's the objection with respect to this one, which sounds like on one hand while it's an individual hiring or an individual issue, it does sound like it goes to

whether there is a hiring freeze and how exceptions are given, etc.

MS. CHAVEY: Your Honor, our objection to the responsiveness marking here is that this is just a one-person employment decision that's being sought. The email on the last page, 9157, is addressed to Peter Miller, Jim Tsokanos, Tara Lilien. If we understand the centralized decision-making theory, despite it really not being in the complaint, it's that there's this male executive team that makes decisions as a team and this just doesn't --

THE COURT: Two out of three are male.

All right. This is relevant.

Next.

MS. NURHESSEIN: And, your Honor, the next document is 10421. Again, we marked this relevant for, you know, similar reasons. You look at the last page, again, it's an email from the HR manager of the midwest region seeking approval from Peter Miller again and there's some back and forth with Peter Miller, the CFO, you know, and seeking approval to seal the deal with an employee.

And you can see from the first email on page 10421, which begins with here we are again knocking at your door, that this is something that is part of their -- this is their usual process, clearly, to go to Peter Miller to seek approval for any of these hiring decisions.

MS. CHAVEY: And, your Honor, we're looking at this document as different from the one before and we actually did talk outside of your presence about the ones that we would bring forward to get rulings that would then help us come to resolution on the other ones.

This one doesn't mention the freeze at all. And it is an email addressed to Mr. Miller, but it's not addressed to the alleged centralized team, whatever that is. It doesn't have to do with Mr. Tsokanos at all. It doesn't have to do with Tara Lillian, Olivier Fleurot. So it appears to be a one-person, the nature of it is just a one-person request and Mr. Miller makes a decision and they move forward. But there isn't any of the freeze-related language, and it isn't addressed to a team of people at all.

MS. NURHESSEIN: Your Honor, Peter Miller is one of the members of the centralized decision-making team. I can't imagine that Ms. Chavey is suggesting we only get documents --

THE COURT: What's his position again?

MS. NURHESSEIN: He's the global CFO of MSL Group. And according to the parent company's policy, the Janus book, he's one of the few individuals with authority to approve these sort of employment decisions.

And, again, Ms. Chavey pointed out there is no explicit reference to the hiring freeze. But as we repeatedly alleged, you know, we're alleging that decisions were made by a

centralized team of decision-makers. And under Second Circuit law, including Rosini v. Ogelvie, that's 798 F.2d 590, and HNOT v. Willis, 228 F.R.D. 476, as well as under Dukes v. Wal-Mart, evidence of centralized decision-making --

THE COURT: One question is you talk about the whatever book you call that, is there any doubt that, any dispute that Peter Miller or somebody at his level or above needed to approve any new hires or salaries over existing salary in the '08, '09, '10 period? I mean if that's not in dispute, we can save an awful lot of time.

MS. NURHESSEIN: That's true and up until now, it appeared to be a disputed issue.

THE COURT: Why don't you let defendants answer.

MS. CHAVEY: It was different at different times throughout the '08, '09, and '10 period. There was a hiring freeze, as we've heard a lot about. There was a salary freeze during portions of those times. During the freeze, I believe Mr. Miller had authority to approve hires, but I believe compensation increases did not end with him. At different times they had to go to different people.

THE COURT: Okay. But if, you know, this document would appear to indicate that he had the authority to come up with an extra five or $10,000 in salary for a new hire.

MS. CHAVEY: Right. So he did have the authority to give approval of the local office decision or recommendation to

hire, so he was the final sign off, yes.

THE COURT: If that can be stipulated to, then we don't need any of this stuff, you know. On all of this, anything that's not in dispute, that is legitimately not in dispute, you can all handle and save millions of documents of predictive coding or anything else by stipulating to the policy or the practice whatever it is.

If you're not able to agree on that or not able to do that without too many caveats that make it unacceptable for the plaintiff, then this document is relevant based on their theory.

If you want to move to dismiss or move to do something that their theory of this centralized decision-making doesn't appear anywhere, that's something Judge Carter will have to decide down the road. As it is, he's got the motion for not class certification but the collective action issue in front of him, and one of those years will have class certification.

MS. CHAVEY: We would certainly try to put together a stipulation that states the facts as we know them.

THE COURT: So this document is relevant until you get a stipulation quickly done, meaning between now and next Monday, that is acceptable to both sides. I think on a lot of this -- and, I'm sorry, what's the name of the book you keep referring to, the policy?

MS. NURHESSEIN: That's the Janus book, J-A-N-U-S.

THE COURT: If the Janus book says certain things and if you're not going to challenge that, stipulate. Do whatever you need to do and you'll save thousands if not hundreds of thousands of dollars on both sides on document by document discovery on an issue that's not in dispute.

MS. CHAVEY: Okay. And our concern about a document like this one, 10421, is that there are probably thousands of documents like this. And to the extent the plaintiffs would seek to prove that there was a particular practice because Mr. Miller is on this email, then all the emails that don't have Mr. Miller on them or have somebody else, those would all be part of the same issue just to show there's --

THE COURT: Either plaintiffs are creating garbage and they won't be able to complain when they get garbage back, but if the issue on any particular one of these type things is they're using it to show that certain things had to be approved at the quote/unquote management team level, Miller, the president, etc., etc., if you can stipulate to that, you don't need any of these documents.

If you can't stipulate to that, this document is relevant. To the extent it may drag in a lot of other specific hire decisions that don't go to Miller because the computer can't tell the difference, that's a risk plaintiffs will have to take.

Okay. Defense group of documents for guidance.

MS. CHAVEY: Your Honor, first looking at 65959, I suppose this may fall into the same bucket we were just discussing.

THE COURT: It does.

MS. CHAVEY: Would you like to move then to 14325?

THE COURT: Delighted. Okay, what's issue?

MS. CHAVEY: We don't know what the responsiveness here other than there are references to Jim, who is probably Jim Tsokanos, and Maury Shapiro as dictating a format for the business plan slide, otherwise making business decisions.

THE COURT: Let me hear from the plaintiff.

MS. BAINS: We think there's indications in here that this is talking about personnel decisions and Jim having to approve them.

THE COURT: Where does this show anything about business hirings or the like? This appears to be the California business plan for some time period.

MS. BAINS: In the middle of the page, the paragraph that starts slide 11, it says org chart which needs addition of VP for digital entertainment and elimination of one person per the agreements we came to with NY today.

Later, the document in the second last paragraph that starts Jim efforts today. It says Jim is willing to make the investments and the commitments, but he also expects us to make some hard decisions and execute.

We think those are talking about --

THE COURT: That last paragraph is meaningless without context. As to the single line about org chart, you know, again, this may be something stipulable. If not, my concern is you've got this I don't know how many memos there are every time a particular office was doing their business plan. Yes, this talks about there might be the need of a VP for digital entertainment and, therefore, eliminating the job of somebody else so that they can fill that job.

The problem is, you know that that's why you want this. The computer is not necessarily going to separate that from anything else about 2009 revenue and all the other things about the various business plans.

In order to prove something that you can already prove from the Janus book, are you going to get all sorts of garbage into the predictive coding system and then complain when it gets marked relevant by the computer. The lawyers in going through it move it into the not relevant pile, but it counts against your quote/unquote 40,000 documents or whatever that cutoff is going to be.

If you're saying you'll take your chances, I guess I got to give it to you because it does have a personnel decision being made by New York. But, I think you're going to get a tremendous amount of junk as a result of this, and I don't want to hear a complaint later that you get all sorts of junk by

documents that are similar to this.

MS. BAINS: I think we need to speak with the experts, but it was our impression that we were --

THE COURT: Excuse me one second, and it may be you all need to bring the experts next time we do this. We should have thought of that ahead of time. But I think there is a limit under Recommind's system or what DOAR would have been doing to how much you can special code the documents. If there isn't, I know at least one vendor has some system, but I think it's based on key words, but where their system actually highlights the information that is found to be relevant in a particular document and that helps the computer understand what it's doing. I have no idea if there's any chance of Recommind doing that or anything else.

I think we're dealing with an issue, is New York involved in making staffing decisions, which seems like a no-brainer. But absent anything else, as long as you understand that I'm giving you this on relevance subject to the possibility that you'll take it out because of a stipulation over the Janus book admitting already that New York had to make these decisions, but that if you don't reach such a stipulation and if the computer pulls in a lot of documents that it thinks are similar to this not because there's a single line in here about two jobs being switched but because of all the other things about California and Los Angeles versus San Francisco

and all that jazz, that you're not going to complain to me at the end of the day that you're getting garbage.

Is that agreed?

MR. WITTELS: Your Honor, if I may respond to that. What concerns us about what you're saying is that by virtue of what may be defendant's refusal to stipulate to something that we have to prove, i.e., if there are many documents that come up showing the centralized policy, we get sort of punished in a sense on perhaps a cutoff that your Honor is considering because of their, you know, conduct rather than ours.

In other words, we would like a stipulation perhaps showing there's a centralized policy. That's what the documents seem to be showing, but they're trying to carve it out by saying not this month or so we're up against a --

THE COURT: We'll see who's offering a reasonable stipulation. I have the ability, you know, it doesn't necessarily have to be a stipulation as opposed to something I cram down somebody's throat.

I understand what you're saying. I'm just saying that we are taking a lot of documents that look like they're individual job decisions having nothing to do with the plaintiff in order to prove something that if the Janus book is as high level a company policy book as it sounds like, whether they stipulate or not, it's going to be something you can prove and prove by cross-examination of their witnesses and the like,

but we have to do document production first.

So this is marginally relevant, it is. But, you know, it's going to have repercussions subject to what your expert can tell me next Monday or what their expert can tell me Monday as to the effect on the system. And while I don't know what the cutoff has to be or will be, as we've said before, there is not an unlimited budget for any lawsuit. So at some point, you make your decisions, they make their decisions. If there were a lot more cooperation between the two sides, you all might save a lot of money, but we'll see what happens on the stipulation.

But you have to understand that if you're training the system with a document that could cover 20 different subjects and you want it for one line in it, you may wind up getting similar documents that don't have that line in it. That's all.

Understood?

MR. WITTELS: We understand your Honor's position.

THE COURT: The document is to be coded relevant subject to the stipulation issue.

Next.

MS. CHAVEY: Next is 39895.

THE COURT: Yep.

MS. CHAVEY: This --

THE COURT: This is an eye test.

MS. CHAVEY: It's an expense report from Monique da

Silva Moore, who is a named plaintiff, but it's our position that not every document that pertains to her is responsive. This one shows that she was reimbursed for mileage of 40 miles and she was reimbursed $5 for breakfast.

THE COURT: Let's hear from the defendant as to why Ms. da Silva's expense reports are relevant.

MS. BAINS: Plaintiffs.

THE COURT: Sorry.

MS. BAINS: One of the issues is the amount of international travel and travel that Ms. Monique da Silva Moore and others had to do. We're willing, if we can do some sort of isolated search for these, we're willing not to put them in for predictive coding purposes. But that is a disputed issue for at least a few of the plaintiffs.

THE COURT: This, how does this show other than on 40 miles she can't have gone very far?

MS. BAINS: Sorry. We would withdraw this one but there are other expense reports that have --

THE COURT: What you're saying is you want her expense reports that show when she was traveling internationally?

MS. BAINS: Or traveling cross country, something that took her away from her home extensively. You know, we don't need -- hers and also this is an issue for plaintiff Maryellen O'Donohue and Heather Pierce.

THE COURT: Let's be clear. She only got 40 miles,

looking at the third page. That was I guess the mileage to the airport since there is a hotel room charge.

MS. BAINS: I see this says business purpose, local travel, and we're willing to withdraw those. But just there are very similar documents that have international travel or travel across the country.

THE COURT: Wait. How do you figure out what's travel across the country?

MS. BAINS: I don't have -- I may have an example here. There are some where the title is international travel.

THE COURT: This actually is air fare to China. But if you want her expense reports, there's got to be a better way to find it than through predictive coding.

MS. BAINS: And we're willing to come up with a different way that's acceptable to defendants doing a targeted search or looking at some other source.

THE COURT: Let me understand your theory that she was forced to travel internationally and that's bad or that she didn't get the same travel opportunities men got, what's the claim? What's the theory?

MS. BAINS: Well, part of it is retaliation for taking maternity leave.

THE COURT: What's the theory, what was she forced to do or not do?

MS. BAINS: That she had to travel a lot for her job,

more than others, that took her away.
THE COURT: And how do you prove that?
MS. BAINS: If we see her travel trips every week.
THE COURT: Her travel will show she went to China, at least this report. How do you compare that to anyone else? What's the theory here?
MS. BAINS: Or if we can show she had to travel a lot more after taking maternity leave.
THE COURT: What's your theory? A lot more than what?
MS. BAINS: It's about the work life balance so that her job was made burdensome by international travel, travel across the country after she took leave, that it was --
THE COURT: I fail to see how you're going to prove this, but I assume that all of her expense reports are findable somewhere other than through predictive coding or am I wrong?
MS. CHAVEY: Your Honor, they may be. They haven't been requested so we haven't looked at them. In any event, Monique da Silva Moore left MSL essentially at the end of her maternity leave.
THE COURT: So there couldn't have been a difference in post maternity leave travel.
MS. BAINS: I know there's an issue for other plaintiffs as well.
THE COURT: Counsel, it really helps, this is complicated enough, pause before you talk if need be, but don't

give me a theory that's immediately proved to be nonsense.

Okay. The expense reports are out. If there turns out to be a need for them, you'll get them in some other way. This is somewhat ridiculous.

Finally, 26249.

MS. CHAVEY: Your Honor, this email sequence involves Peter Harris, who's been identified as a comparator to at least one of the named plaintiffs, and we deemed this to not be responsive because it's him talking to his managing director, Renee Wilson, about what was on his business plan slides. And your Honor had ruled in February with regard to the comparators and discussing how to go about getting comparator information or data through the predictive coding that there didn't seem to be a workable way and plaintiffs had requested --

THE COURT: Let me hear what plaintiffs' theory on the relevance of this is.

MS. BAINS: Right. If you look at the first paragraph, the org chart shows a bunch of U.S. experts in a bunch of areas.

One of the defenses is that all the SVPs are not the same, all the VPs are not the same and that they have expertise in areas. So this --

THE COURT: How does this document without the org chart which it's referring to prove anything?

MS. BAINS: The fact that she's questioning that

they're experts in areas we think is relevant to the fact that people in certain positions are similar to each other.

THE COURT: What? Try that again. I don't understand.

MS. BAINS: So she's talking to Peter Harris, okay, about his org chart and it says your org chart shows a bunch you as experts in a bunch of areas. So if we're talking about in our collective motion action, we talked about SVPs being similar to each other, VPs being similar to each other, and defendant's defense in their opposition was that SVPs all do different things, VPs all do different things.

THE COURT: You're picking the sentence before the semicolon about the part of the sentence after. Is everyone really an expert in all those areas or is it better to show gaps, which frankly seems to support the defendants, not you, and without the org chart and without knowing what this is all about, it seems like it's garbage.

How does this, without the attached org chart, help you at all when you read the sentence in its full context, not by three dotting it?

MS. BAINS: My understanding of the way productions are going to go are that the attachments are going to be produced.

THE COURT: That's if there was an attachment to this. Was there an attachment?

MR. ANDERS: Your Honor, there may have been. I think I mentioned this last time, for the seed set, we only reviewed the documents that were actually selected and hit. We did not review the families as well. When we do the final production, we will produce documents along with families.

THE COURT: The question is if there is, it may be that with the attachment, if there was an attachment that this refers to, that this has got something useful. As it stands now, I'm going to say it should get coded as not relevant.

Next. Any group who's turn or who has some documents to give me.

MS. CHAVEY: I think there were two others that plaintiffs had hard copies of and we just asked. That was 7366 and 7560.

7560, I think we're going to wait and treat that as a Publicis Groupe issue.

MS. BAINS: I don't see a copy, but we'll just hand up our copy.

THE COURT: Which one am I looking at now?

MS. BAINS: It's one document.

THE COURT: 7366 through, all right. You have two copies of it here, so.

7366 through 69, what's the relevance?

MS. BAINS: On the second page, the email from Rosalin Fogarty or actually from Rita Masini: Okay, so we presented

Peter, Maury is on vacation, we will do Monday. Need some bullets from Hanna on why 5K spot bonus is justified.

So, again, this is showing that approval for compensation has to go to Peter Miller, CFO.

THE COURT: It sounds like you're going to work this out.

MS. CHAVEY: Our concern is, your Honor, there are just likely thousands and thousands of these emails.

THE COURT: Then, you know, try to stipulate. Otherwise, you run the risk that you're going to review thousands of these for the final production. They run the risk that will reduce the more relevant documents that they could get. That's a good incentive on both sides, since nobody knows where I'm cutting the production off or saying that after we get to X thousand documents, if the plaintiffs want the next batch, they're going to pay the defendant's review costs. Neither of you know where that's coming out, good reason on something as simple as this that apparently is fairly accurately described in the so-called Janus book that you reach a stipulation on it.

But, otherwise, it's relevant.

Okay, where does that leave us? And I don't know whose documents are whose anymore. If you want them back, you can come get them. Sort them out.

We are already one iteration behind on your schedule.

Do you have more documents that you're all going to go through today or what?

MS. BAINS: Yes. We have a binder of more docs we can go through in hard copy, and if we require more rulings, perhaps we can come back in a couple hours.

THE COURT: All right. It's quarter to three. Why don't you go back in the jury room and at 4:30, why don't you tell me where you are in the process, and that is whether you need me, whether you want more time. I can give you until 5:30, 6 o'clock, although the court reporter may not be available after 5 o'clock.

MS. CHAVEY: Your Honor, the plaintiffs have additional hard copy documents, we ran out of ours, but there aren't that many. I don't know that it will take us as much as an hour even.

THE COURT: As soon as you're ready, you can call chambers. Use the phone here and all you have to do is pick it up and call 0036 and we'll come up. But you're not leaving here until you've checked out and we'll go from there.

You also should spend a few minutes talking about how you're going to revise the scheduling document to provide a catch up in some way and, hopefully, now that we've resolved all of this, hopefully the further rounds will go much smoother, but hope is hope.

MS. CHAVEY: Your Honor, that raises one other issue.

We've heard the Court loud and clear indicating that it should be partner-level review as the seed set is being populated and the lawyers you're looking at here on our side of the room have done many, many, many hours, very late nights, lots of weekend work to get through the documents. If we could, I don't know if the plaintiffs have followed the same protocol, but if we could --

THE COURT: Who's doing the document review on the plaintiffs' side?

MS. BAINS: I am and Ms. Nurhussein.

THE COURT: And what level associates are you?

MS. BAINS: I'm a senior associate and Ms. Nurhussein is an associate as well.

THE COURT: How many years out of college is that?

MS. BAINS: Out of law school, five.

THE COURT: And Ms. Nurhussein?

MS. BAINS: Six years.

THE COURT: All right. That's senior enough.

MS. CHAVEY: So our thought is if we could bring some additional people, certainly we would have loved to have some fifth year associates join our ranks, but we haven't done so given the Court's direction. But if we could at this point, we think it would speed things up.

THE COURT: The problem is, is it only the two of you on the plaintiffs' side or is it the two of you plus?

MS. BAINS: Two of us. There was a little bit of review done by also the same level, fifth, sixth year.

THE COURT: The idea is to keep it as a very small team so that there's consistency.

MS. BAINS: Right. It's never been more than three. And in these latest stages, it's either been me doing it myself, the entire set, or Ms. Nurhussein helping me with a portion of it.

THE COURT: All right. If you want to bring one associate in to reduce your cost level, that's fine, but it's hard enough at the rate you're all doing it. So do what you can. And I really do think none of this should become as problematic as we go forward unless we start seeing totally new types of documents. I think you know how the rulings are going and, you know, if I have to have you and your experts show up every Monday to keep this on schedule, we're going to have to start doing that. You know, believe me, I don't want to see you that often. But, you know, you got to do something to make what is already a very lengthy process not into an indefinite process.

All right. Go back to the --

MR. WITTELS: Your Honor, I have a scheduling issue so if I can, I didn't know we were going to be here all day. But the two associates from my office who are most familiar with the documents would finish going through that if your Honor

would permit.

THE COURT: That's fine. But whatever they agree to or whatever I order in your absence, I don't want to hear any, you know, they weren't authorized, they weren't senior enough, they're not a partner in the firm. If you're comfortable with them handling it without you, I'm comfortable with it.

MR. WITTELS: Thank you.

THE COURT: But also expect that next Monday may be a full-day affair when we go through the Publicis and MSL with regard to Publicis issue. Plan accordingly.

MR. WITTELS: Thank you.

MR. BRECHER: Thank you, your Honor.

THE COURT: All right. So somewhere in the neighborhood, four, 4:30, you'll call and tell me you need me or don't need me, but we'll talk jointly before you leave anyway.

(Recess)

THE COURT: All right. What documents do you have for review now?

MS. CHAVEY: Your Honor, we conferred during the Court's recess and we actually made quite a bit of progress. There are three documents left that we have hard copies of to present to the Court. As to many of the others, we, the defendant, MSL changed its position and agreed to the responsiveness marking of the plaintiffs.

And we also had the same conversation in light of the Court's comments about whether the plaintiffs really want to invite responsive documents through the predictive coding like the ones we agreed to mark responsive because we share the Court's concern that we put garbage in, garbage is going to come out. But we are trying to move the process forward and be cooperative so we took a liberal interpretation of your rulings and have agreed and the plaintiffs indicated they wanted all those documents to come in.

So there are three left. The first one I have is 59197. And this is a document that basically relates to Maryellen O'Donohue's work schedule and her responsibilities for a client called Lily and we don't think that -- this is just a very routine kind of email about what a plaintiff is going to be doing and we have not marked and, in fact, plaintiffs haven't requested us to mark every single email showing what plaintiff is doing every day as responsive.

THE COURT: Wait. Are we looking at the same document?

MS. CHAVEY: 59197.

THE COURT: Sorry. I was handed it in a different order. What's the relevance?

MS. BAINS: Your Honor, plaintiff Maryellen O'Donohue, one of her claims was that she was on a part-time schedule and paid on a part-time salary. One of her complaints was that she

was overloaded with work after the reorganization when Mr. Tsokanos took over the company. And something she testified to in her deposition was about all the time she had to spend on the Lily business. So we think -- she, as a result, instead of working three to four days a week, she ended up working seven days a week because she was overloaded with work so we think that's relevant to that.

A second reason in the top email it says I think it's just important that we resolve all this time and whether it is billable. We know based on the questioning and the depositions of the plaintiffs that one of the business justifications will be that certain individual's time was not billable enough. So to show, you know, that the plaintiff is required to do all of this work and it might not be billable would be relevant.

MS. CHAVEY: And our view is this doesn't say anything about what she was required to do. She's discussing she made an agreement to go to the client every few weeks. So this seems to be the opposite of the theory.

THE COURT: Well, that will be the proof issue. Since it is one of the plaintiffs, it's relevant.

Next.

MS. CHAVEY: Next in our stack is 20532.

THE COURT: Okay.

MS. CHAVEY: This also is an individualized employment decision. It's actually a request by an employee named Margie

Mysolin about when she would be considered for a raise.

This email is distinct from those the Court already ruled on because it doesn't involve Jim Tsokanos, Peter Miller. It doesn't mention, you know, anything about centralized decision-making. She makes reference to the raise freeze, but apart from that, there's really nothing in this document and this just falls on the other side of the line, in our view, that this is really going to clog up the predictive coding.

MS. NURHESSEIN: Your Honor, this relates to the global salary freeze which -- global raise freeze, as it says in the document, which, as we discussed, is one of the policies in the case.

THE COURT: Except there is no dispute that there was a raise freeze. The issue is what exceptions were made for whom. And this the only reference to the wage freeze and wanting more is from an employee, not from management.

MS. NURHESSEIN: Your Honor, I was just about to get to that. What I was going to say, this specifically relates to mission criticals. In the first sentence where she says, do you think I should have put her forth as a mission critical. Mission criticals are basically a list of employees whose names are submitted for raise exceptions during the salary freeze and justification, you know, is usually either because the employee is below the salary band or they haven't received a raise for years or they're a flight risk. And actually all these mission

criticals are compiled at MSL's corporate headquarters in New York and sent to Publicis in Paris for approval.

THE COURT: Is your argument that women were not called mission critical? What's the theory?

MS. NURHESSEIN: Well, one theory which we've discussed a little bit is that the exceptions to the raise requests were not granted, you know, exceptions were often made for male employees and not female employees. And another, which this goes to, is that it may be that certain employees were put forward for raise exceptions while others weren't.

And this, we received a number of the mission criticals from defense counsel already, but what makes this interesting is it's important to see why decisions were made to omit certain people from the mission criticals list, which this document gets to.

THE COURT: Well, but are any of the people, either Maury Shapiro or Valerie Morgan, high enough up in your chain?

MS. NURHESSEIN: Yes, your Honor. Valerie Morgan is part of the North America HR team. Maury Shapiro is the Americas CFO. So there's the brand global CFO, Peter Miller --

THE COURT: I'll give you this one with the warning that you're going to pick up a lot of individual raise documents that are going to be totally irrelevant because of this. And if that's how you want to spend your documents, i.e., your money at the end of the day, that's up to you.

But, remember, when they go through the first -- and I'll use the 40,000 number although I have not blessed it any way -- when they go through 40,000 documents and you get 5,000 documents showing whether somebody who's not a plaintiff did or didn't get a raise or anything else, all of which, unless it's done in some scientific way, is going to be anecdotal and largely useless, don't complain to me that you want me to go beyond 40,000 documents because so much of what got ranked high was garbage.

If you understand that, and are willing to say you agree to that now, I'll mark this as responsive.

MS. NURHESSEIN: Your Honor, I can't say that we agree to it right now. We can confer --

THE COURT: You have to because you can't say I want this marked relevant and then when we get to the end of the day and you get a lot of what frankly is going to be anecdotal junk, you can't say because the defendants had to review a lot of anecdotal junk that we asked them to mark as relevant and those are produced to you as relevant that you should get more.

MS. NURHESSEIN: I understand that, your Honor. And earlier today I know you had said that we can either make a decision to mark certain documents as relevant or, you know, we could discuss it and get back to you and this is one where I think we would have to -- I think it's clearly relevant and --

THE COURT: When are you going to make the ultimate

decision because this is going to be put to bed by no later than Monday of next week. If you're saying in a day or two, you'll go back and talk to your partners, one of whom abandoned you because you were capable of handling all of this, you can't have it all six ways from Sunday. What's your pleasure? It's in or out with the caveat that I've already put on it.

MS. NURHESSEIN: Your Honor, we think it's clearly relevant and we can make a final determination in the next couple of days as to whether we want to include this particular document.

THE COURT: By tomorrow you'll tell them whether you want it in or out. If you keep it in, it is on the explicit understanding that when you get a lot of these at the end of the day, which may well be at the top of the production curve, that you're not going to say because you got so many of these and not enough of something else, that that's a reason to go deeper into the production set.

MS. NURHESSEIN: And, your Honor, just to clarify, we're coding this as relevant not just because -- it's because it involves an employment decision and explicitly discusses an exception to the raise freeze so it's tied to a policy in the case and it goes to centralized decision-making. So presumably we want --

THE COURT: Your view of centralized decision-making seems to be three-quarters of the senior members of the

organization. I don't really understand what is the central.
MS. NURHESSEIN: No, your Honor.
THE COURT: Who are the central decision-makers?
MS. NURHESSEIN: Yes, your Honor. In the second amended complaint we note that --
THE COURT: The one that's not filed?
MS. NURHESSEIN: The one that's not filed but the one that's been filed in the court and Judge Carter is going to be ruling on.
THE COURT: At the moment it's not in the case.
MS. NURHESSEIN: No, but we included a lot of the same information in the original complaint. I don't know if we named every --
THE COURT: Who are the central decision-makers?
MS. NURHESSEIN: Okay, your Honor, according to the Janus policy, there are five specific individuals that are mentioned.
THE COURT: Maury Shapiro and Valerie Morgan on that list of five?
MS. NURHESSEIN: Not in the Janus policy. So the Janus policy references Jean-Michel Etienne, who is the CFO of Publicis; Mathias Emmerich, who is the Publicis Groupe general secretary. And then it references the brand CEO, who in the case of MSL America would be Jim Tsokanos. The group CFO would be Peter Miller; and Olivier Fleurot, the MSL CEO.

And then in terms of some of the other personnel decisions, so, for example, the PANs that we referenced, those need the approval of either Peter Miller or Maury Shapiro, as well as corporate HR, which would be either Rita Masini or Tara Lilien. So it's a pretty circumscribed group of individuals we're talking about.

THE COURT: Okay. You've got Maury Shapiro on here. Again, I will say it for the third time, and this time I want an answer.

If you don't withdraw the relevance coding for this document, do you understand and do you agree that you may not complain at the end of the day when you get a lot of documents about individual raise decisions and that may, because of cost issues and Rule 26(b)(2)(C), be part of the group of documents you get and, therefore, there may be other documents that you're not going to get.

Do you understand and agree to that?

MS. NURHESSEIN: Your Honor, I can't.

THE COURT: That's a yes or no question.

MS. NURHESSEIN: No, I can't agree to that. But we will -- I need to confer with my colleagues and in light of the rulings --

THE COURT: Sorry. You're here. Mr. Wittels has left. You two are here. Make a decision. And I understand you might pull the document later. I'm just talking about if

you don't pull it, do you understand what I've said and do you --

MS. NURHESSEIN: Yes.

THE COURT: -- agree with it?

MS. NURHESSEIN: Yes, your Honor, I understand that.

THE COURT: And you agree?

MS. NURHESSEIN: Yes, your Honor. I mean and this document, I think, let me just confer with my colleague for one minute.

Your Honor, I think we want to keep this one in, especially because it references mission critical.

THE COURT: Counsel, you have it. What I'm trying to get without waffle so that when you later argue in front of me or Judge Carter or the Second Circuit or the U.S. Supreme Court, do you understand that because this is an individualized raise decision for a person who is not a plaintiff, that if you get a lot of documents like this because of the way predictive coding works, it finds more like this among other things that may well clog up the top-ranked documents, and I'm not going to go beyond a certain cost level.

Do you understand and agree to that? That's my question and that's a yes or no.

MS. NURHESSEIN: Yes, your Honor, I understand, but if I could just add one thing.

THE COURT: No. Stop. Yes or no.

MS. NURHESSEIN: Yes, your Honor, I do understand.
THE COURT: Now, counsel, you're about to be in serious trouble. The question isn't whether you understand which means I understand your position, Judge, and I'll appeal it later.
Do you agree? That's the question.
MS. NURHESSEIN: Your Honor, can I confer with my colleague for one minute?
THE COURT: Yes, which I thought you just did.
MS. NURHESSEIN: Your Honor, we understand and we do agree, although we obviously can't waive our right to object to anything, but we do understand and we do agree.
THE COURT: If you agree, there's no objection possible. So stop the double talk, confer --
MS. NURHESSEIN: Your Honor, in that case, I can't agree.
THE COURT: Okay. The document is not relevant.
And if you can't agree because you don't have the authority, I suggest that that means Mr. Wittels will have to be here at every subsequent conference all day, all the time, just like we have three partners here from Jackson Lewis. You either get some courage or get a partner here.
Next.
MR. BRECHER: Judge, the last document is NR47822. This is a document that they marked as responsive. We marked

it as nonresponsive. It's an email, it starts from Kate Wilkinson, who is a named plaintiff. She's emailing the Harumika team, which is a client, and Kate Greenberg, who's an account supervisor, not a VP, an SVP or managing director or anybody on this centralized management team, says great job and she responds, thanks chica.

So we don't see this as a relevant document and one again that we believe is just going to clog up the system with documents that are not responsive.

MS. NURHESSEIN: Yes, your Honor. This one is relevant and was coded as relevant because it relates to one of the named plaintiffs, Kate Wilkinson, and one of the disputed issues in this case is her performance. She was placed on probation two months after announcing her pregnancy and so this --

THE COURT: Which was when?

MS. NURHESSEIN: I believe it was, I believe it was fall 2009 she announced her pregnancy. Two months later she was placed on probation. And so it was right around this time period and this document, you know, is proof that she was a strong performer.

MR. BRECHER: Judge.

THE COURT: I'm sorry, who's the plaintiff here?

MS. NURHESSEIN: Kate Wilkinson is one of the named plaintiffs, your Honor.

THE COURT: Who's Kate Greenberg?

MS. NURHESSEIN: Kate Greenberg is apparently an account supervisor who worked with Kate Wilkinson.

THE COURT: Well, this seems to be one account supervisor telling Ms. Wilkinson your team did a great job. Is that really relevant? And, again, you get the same risks that you're going to get lots of presentations and good work or whatever else the computer thinks is why you're coding this and then you're going to tell me at the end that there's too much garbage in the predictive coding system.

MR. BRECHER: Or, Judge, you might get emails that are relating to.

THE COURT: Multilogger.

MR. BRECHER: To multilogger or a pitch. So we're going to have all these emails in there, so that's the concern.

MS. NURHESSEIN: Your Honor, again, we believe it's relevant. I understand given the limitations of the predictive coding system that it could pick up junk. So given your rulings, we'll agree to withdraw this one if it's between that.

THE COURT: That's fine. Very good.

So what's left that you all have to do?

MR. ANDERS: Your Honor, we briefly spoke about the schedule and how we can get ourselves back on track and stay within the completion date in the order. Our thought was this, your Honor. There is time during the final review that we've

allotted where we could steal some days from the final review.

THE COURT: Let's steal some from the early review so we get back on track because unless you all start figuring out a way to work better together, you're going to need those end days because there's going to be enough going wrong in each one of these blocks.

MR. ANDERS: My thought was, your Honor, in addition to the final review, the latter iterative reviews should go faster and more smoothly than the earlier ones so we'll need less time there.

THE COURT: What I may do is say let's see where we are after the first iteration of documents gets run because if we continue to have, you know, thousands reduced to hundreds reduced to 800 or to one, you're going to wind up with a special master and, two, this schedule, you're going to finish discovery in the next millennium and that's not going to happen in this court. So think about it and by the time we finish the first review, let's see where we are.

MR. ANDERS: That was going to be our suggestion, not to do any final dates until we saw how the first round went. Thank you.

THE COURT: Okay. Now, did I understand you're done or that you're done only based on the number of documents that one or the other of you had in hard copy here so there's still others in dispute?

MS. CHAVEY: The latter, your Honor, the other documents that are in dispute we have electronically, and we looked at them across the street during the midday break but we only had so much time to do that.

So we have a plan, as I believe Mr. Wittels indicated, we have agreed that we will exchange by, in light of the Court's rulings today, each party will go back and look further at documents to see what we can agree to withdraw our dispute about. And we'll exchange our lists of those documents where we were withdrawing our dispute by Wednesday at 6 p.m. Eastern. We then have a call scheduled on Thursday from 8 to 11:30 and then two to six if we need all of those hours.

THE COURT: If you need more hours, spend the weekend, but bring every last document that's in dispute in hard copy on Monday. We are finishing this first pre-round on Monday come hell or high water. And, if necessary, I hate to add to your expense, bring DOAR and bring Recommind.

If there's any issue as to what's doable or not doable as opposed to is it a relevant document, is it not a relevant document, and how much junk will be pulled into the system because the document has one, you know, buzz word in it that's otherwise irrelevant, bring what you need to bring. But when I release you Monday from this and whatever we're going to wind up doing with the Publicis-related jurisdictional discovery, including its impact on MSL, we're done with this at that

point. And if you say but, but, but, the answer is going to be that's your record and I'm ruling on what's in front of me.

MR. ANDERS: Your Honor, would it be possible in advance of Monday to get an order allowing a computer on that day so we have a computer with the documents on them?

THE COURT: No, because that's not going to do me any good.

MR. ANDERS: Fair point.

THE COURT: So I don't want documents emailed to me so I can read them on the screen and get even dizzier from all of you. We're at the point where there shouldn't be too many documents to carry. Bring them.

MS. CHAVEY: Thank you, and we do appreciate the Court's time attending to these disputes.

THE COURT: All right. And I do hope that as it's clear that this, if not going to work ultimately, at least work for an iteration or two to see how the system works, cooperate with each other, see what you can stipulate. If this Janus book has policy statements, stipulate to it, you know.

Plaintiffs' concern, I would assume, is that the Janus book will say one thing and your witnesses will come in and say, well, maybe or sometimes or whatever and so they've got to back that up with other documents.

And instead of spending hundreds of thousands of dollars on document review to set up the predictive coding

system, the expense of running the system, the expense of post review, post iterative reviews, etc., on a lot of documents that are not really on issues in dispute, spend some of that all-day conference time figuring out what you really dispute and what you don't.

Obviously, you're not going to agree that you discriminated, etc., etc. But if there are freezes and the exceptions have to be approved by one of five people or eight people or whatever it is, whatever you can stipulate to, or not, if you can't do it as an affirmative stipulation, a we will not challenge the assertion that or whatever, will reduce the expense on both sides. It's in your interest to figure out what is the legitimate disputes in the case and what discovery is needed for it.

And, frankly, and please pass this on to Publicis' counsel, between now and Monday, plaintiffs and Publicis and MSL, which is why I don't feel uncomfortable saying this, should figure out what issues are legitimately in dispute on the Publicis jurisdictional motion and what aren't. If there is no doubt that Mr. X from Publicis had to approve certain things, let's try to avoid the fight about the French blocking statute and whatever and get that material.

You also obviously should spend some more time talking about what is viable from the MSL system. We've got a June cutoff for the Publicis motion. Even under the current

schedule, while you'd be significantly done, you would only be at somewhere between the third and fourth iteration of the predictive coding system and yet there are MSL documents that go to Publicis-related jurisdictional issues.

On the one hand, it's probably impossible or cost prohibitive to run one system for predictive coding and some other method of getting a faster approach to certain other emails, but you all figure out what's viable on both sides and try to work together instead of the lack of cooperation and lack of discussion that seems more prevalent here than it should have been.

And expect to spent the whole day here Monday, if necessary, because there isn't enough time on the Publicis issue to not have it under control by the time we're done with Monday's conference.

Okay. Usual drill. I'll require both sides to split the cost of the transcript.

And I will suggest, Ms. Bains and Ms. Nurhussein, I don't invoke the trial counsel must be here, but if the two of you are going to be here, you've got to be able to make decisions, and if because of the way your firm works or because, whatever, you need someone else to help you on those decisions, whether that's Mr. Wittels or another partner, they got to be here. I don't have time for I don't know the answer, I can't commit because I have to talk to someone more senior.

That just doesn't work. Okay.

Purchase the transcript, make your arrangements with the reporter.

I'll see you next Monday.

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Exhibit II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CELESTE SPICER, AUTUMN BURGESS, AMY LEDIN, JOSEPH RUSSO, ESTHER MARTINEZ, LYSETTE ROMAN, and SERENA SIYING HUI, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

PIER SIXTY LLC, and JAMES KIRSCH,

Defendants.

ORDER

08 Civ. 10240 (LBS)

SAND, J.

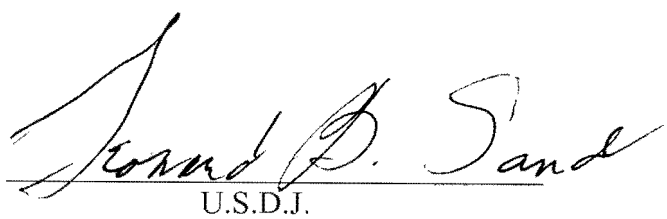
Before the Court is Defendants' motion for recusal. Defendants argue that the undersigned should be recused pursuant to 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Plaintiffs contend that this motion is untimely. Untimeliness is "a failure to seek recusal when it should first have been sought, that is, as soon as the facts on which it is premised are known to the parties." *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000). The Court finds that Defendants learned of the factual basis for their motion for disqualification on February 11, 2011, informed the Court of their request for recusal on March 16, 2011, and filed a motion for recusal pursuant to a request from the Court on April 13, 2011. Defendants' motion for recusal is timely, and is therefore granted.

Accordingly, the Court hereby withdraws its order of March 17, 2011, which rescinded its earlier order of recusal, dated March 16, 2011, to enable Plaintiffs, who objected that the first recusal order did not afford them adequate time to brief the issue, to file further briefs. As a

consequence of recission of the order dated March 17, 2011, this Court is recused and the reassignment of the case to Judge Richard M. Berman is effective.

SO ORDERED.

Dated: May 24, 2011
New York, NY



U.S.D.J.

Exhibit JJ

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CELESTE SPICER, et al.,
Plaintiffs,

v. 08CV10240(LBS)

PIER SIXTY LLC, et al.,
Defendants.

----------x

New York, N.Y.
March 16, 2011
2:00 p.m.

Before:

HON. LEONARD B. SAND

District Judge

APPEARANCES

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SETH M. KAPLAN

(Case called)

THE COURT: Somebody requested a conference with me.

MR. FLAUM: Yes, your Honor, I did.

THE COURT: What can I do for you.

MR. FLAUM: Thank you for hearing us, your Honor. We wanted to bring to your attention, bring to the court's attention and plaintiffs' attention certain new facts that came to our attention and knowledge in the last month relating to your Honor's relationship with Robert or Bob Bernstein and Helen Bernstein who are the parents of Tom Bernstein who is one of the principals of Chelsea Piers which is the interest with an economic interest in this case.

We wanted to bring this information to your attention as soon as possible because we thought it was appropriate. We retained and consulted with Stephen Gillers, one of the foremost ethics experts who also told us in his view that it was important we bring this information to the court's attention right away, so we are doing it.

Specifically, what happened, your Honor, was in mid February, I received a phone call from Tom Bernstein who was very concerned and agitated. He had just gotten off the phone with his mother Helen Bernstein who informed him that you and your wife were to have dinner at their house up in Bedford the following day, and the Bernsteins were, the senior Bernsteins were uncomfortable having dinner in light of the case, but they

were also uncomfortable canceling dinner in light of the case. They were very upset and wanted to know what they should do and didn't know how to proceed. We told them if they were uncomfortable, they shouldn't have dinner at that time.

We, following this information, tried to understand fully the nature of the relationship and then what to do. We took two steps; we retained Professor Gillers to advise us and we did an investigation, my partner Ms. Bebchick, including interviews of Robert and Helen Bernstein, other people, and found the accountants and whatnot. Certainly, Tom Bernstein was aware you and your wife --

THE COURT: You know, it's on page 2 of the June 15 conference. The case is captioned Pier Sixty. I didn't know what the relationship would be. I set forth the relationship. I said, does anybody have any comments. Ms. Schulman, no, we don't. All right. That was it. You know, I make it a practice, if there is any possible grounds for me to recuse myself, I do that before anything else happens so that there isn't the question of whether somebody is seeking recusal of the judge because the judge is making rulings which displease him. Anyhow, I recall very well getting a phone call from, I think my wife took the call, from Helen Bernstein canceling our dinner engagement. Tell me what has come to your attention.

MR. FLAUM: What has come to our attention is that the relationship which your Honor was not fully familiar with I

think of the fact that Tom Bernstein and in fact the Helen and Robert Bernstein trust are major shareholders in Chelsea Piers, that Pier Sixty here is in essence a joint venture in which Chelsea Piers owns 70 percent. This is a very significant case for them and the entire livelihood of their son and significant economic interests of all are very much implicated. But What has come to our attention --

THE COURT: I did not know that and I did not know that until this moment.

MR. FLAUM: I fully understand. This is amongst the things I thought it was critical that you knew. What you said, you described three events you attended at Chelsea Piers. Then it says you were a friend and neighbor in the same general community in Northern Westchester with Robert Bernstein who is the father of Tom Bernstein. What has come to our attention is that the relationship is very, very significant, certainly to the Bernsteins and I think to you and your wife, that for 20-odd years, almost 20 years you played tennis, you and your wife, and almost every weekend at the Bernsteins' house or a facility, that you frequently have dinner and have had dinner.

THE COURT: I regard the Bernsteins as being very close dear friends. No question about that. I have since moved out of that neighborhood, but nevertheless.

MR. FLAUM: Your Honor, what has come to our attention is the depth of that, that what was on the record that you were

friends with them, you lived in the same community, but the relationship is far deeper, and their relationship and their son's relationship to the plaintiff in this are far deeper than I think you appreciated and certainly that we knew. You and the Bernsteins have spent numerous New Year's Eves at a small party at their house. There are just lots of contacts. And your Honor, I understand that the timing here --

THE COURT: Bottom line, you wish me to recuse myself?

MR. FLAUM: Yes, your Honor.

THE COURT: Is there objection if I recuse myself?

MR. KIRSCHENBAUM: Absolutely, your Honor. If your Honor wants me to be heard, I can be heard now.

THE COURT: You want to finish.

MR. FLAUM: I think I have made the salient points, your Honor. I guess the only thing I would add is that we do think this is an extremely awkward uncomfortable situation, one that we think really does, given the economic interests here and what's at stake and the long-time relationship, is one that does properly call for recusal. Thank you.

MR. KIRSCHENBAUM: Your Honor, I just want to preface briefly by stating that in my last conversation with defendants' counsel on this topic, I specifically wanted to understand that they were going to move to have your Honor recuse himself, in which case we would have been somewhat more prepared.

THE COURT: It was really sort of a rhetorical question. I didn't see what else there would be for a conference on this other than an application for me to recuse myself.

MR. KIRSCHENBAUM: To go back a little bit in the history, in the first initial conference, scheduling conference in this case, I was the only attorney in this room present at the conference and your Honor and another firm on the defense. Your Honor then mentioned his relationship with Mr. Bernstein and discussed with the parties whether they thought that would be a problem. At that point, we indicated that we didn't think it would be a problem. Defendants indicated that they didn't think it was a problem. Again, as your Honor said at the summary judgment oral argument, your Honor made the same point. Defendants didn't object and we didn't object.

What is interesting is that the defendants' counsel, defendants themselves had whatever knowledge they needed to know at the time that their lawyers did not object to your Honor's presiding over this case. Defendants know who owns Pier Sixty. I am assuming they always knew who owns Pier Sixty. I don't want to be so bold to place any directly improper motives on defense counsel, but it is somewhat troubling that this comes up at this stage in the game, given that this information was readily available to the defendants at every single point in this litigation.

THE COURT: I have quite a few cases that raise some of the same issues that are involved in this case.

MR. KIRSCHENBAUM: Your Honor, we are plaintiffs' counsel in several.

THE COURT: Several of them before me?

MR. KIRSCHENBAUM: Yes.

THE COURT: You are in discovery?

MR. KIRSCHENBAUM: In this case?

THE COURT: What stage are you in?

MR. KIRSCHENBAUM: Discovery for the most part closed a short while ago and then Magistrate Judge Maas extended discovery briefly for us to conduct some additional discovery regarding defendants' good faith defense, but other than that, the summary judgment phase is already closed; defendants moved and lost. So essentially after discovery we are pretty much hoping to move forward with trial.

MR. FLAUM: Your Honor, there is discovery ongoing on the issue of good faith. We disclosed to Judge Maas we intend to move for summary judgment relating to issues of good faith following the close of that discovery.

THE COURT: Essentially, I raise this question on page 3 of the meeting with the parties. The recusal application is being made as the case is about to come to a head. What's bothering me, and it's the only thing that's bothering me, is that my good friends, the Bernsteins, seemed to be upset about

it to the point where they felt uncomfortable about having dinner with me. After the conference, the usual response that one gets when one raises with lawyers the question that I raised here is may we have an opportunity to consult with our clients are before we respond. That didn't happen here.

MR. FLAUM: Your Honor, I think that part of the issue is that the lawyers that were there didn't know the real level and extent of the relationship. You were a friend and lived in the neighborhood. It was not disclosed the full nature and extent of the relationship.

THE COURT: No, that's not, please, that's just not --

MR. KIRSCHENBAUM: Your Honor, for what it's worth, your Honor did bring it up at the first initial scheduling conference of this case, and the clients, regardless what they may have communicated or not communicated to their lawyers, the clients were certainly well aware of whatever the defendants are raising.

THE COURT: What's giving me pause is not about this case, because, obviously, whether I have half a dozen cases on the subject or 11 or whatever it is doesn't matter. Two pieces are disturbing me. One is the practice. This is what really should not happen when a judge raises an issue of a possible grounds for recusal and asks the parties whether they see any reason for it. That should dispose of it, not until after the court has made some rulings.

So the question becomes, well, is the recusal motion just a pretext for getting a substitution for a judge who they feel might be adverse on the merits. That's my concern. My concern is that if I recuse myself, it really is disturbing to me, because it's so exactly opposite of what my practice has been and should be.

The other thing that disturbs me is if I don't recuse myself, I think I may jeopardize a relationship which I have had for many years with people I regard as among my closest and dearest friends. I resent being put in that position and that resentment is another question.

How close is this case to terminating?

MR. KIRSCHENBAUM: Discovery closes at the end of March. Defendants have stated that they intend to move for summary judgment on the good faith issue, which I guess will leave open another round of motion practice, except I think it's worthwhile to point out that in your Honor's decision granting permission to plaintiffs to amend their complaint to add these liquidated damages, your Honor wrote in a footnote that even if defendants were making a motion for summary judgment, plaintiffs have already provided sufficient evidence to establish that plaintiffs are entitled to liquidated damages. So, as far as we are concerned, there really should be no more motion practice. This case is absolutely ready to go to trial in about 15 days.

THE COURT: I am going to recuse myself. I am going to recuse myself because I think that if I don't recuse myself, my resentment about the motion being made and being made at this time may be something which would impact on my ability to be a disinterested judge in this case.

MR. KIRSCHENBAUM: Your Honor, obviously, we can't stop your Honor from doing anything, but the way that your Honor set forth the law in the Second Circuit on this topic and the law that we have seen starting from the Drexel Burnham case and then your Honor's decision in Estate of Ginor v. Landsberg is that in the court's own words and in your Honor's words, a judge is as much obliged not to recuse himself when it is not called for as he is obliged when it is.

Your Honor specifically took a specific concern into consideration, the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case.

Here we have a situation where defendants created the conflict by expressing this level of resentment to your Honor and now they are using it to their own advantage by creating a situation where your Honor has this choice between feeling resentful to defendants or to the Bernstein family or to anyone else. It seems unfair to us that defendants actively by their own choice of action put your Honor in this position in which his impartiality is questioned.

Your Honor made a decision at a time when defendants openly said that they had no problem with the conflict at all. In fact, to the extent there may have had been a conflict, I think that plaintiffs might have been more concerned than defendants. We were not concerned because we were absolutely certain that your Honor was impartial.

THE COURT: I think what differs this circumstance from the conventional is, as I understand it, not the lawyers who raise this, but the Bernsteins themselves.

For the reasons previously stated, the court will enter an order recusing himself in this case.

We adjourned.

- - -

Exhibit KK

Pension Committee Revisited

One Year Later

A Retrospective on the Impact of Judge Scheindlin's Influential Opinion

Edited by Brad Harris and Ron Hedges

A Legal Hold Pro™ Signature Paper

February 2011

ABOUT BRAD HARRIS

VICE PRESIDENT OF LEGAL PRODUCTS, ZAPPROVED INC.

Brad Harris has more than 25 years of experience in the high technology and enterprise software sectors, including assisting Fortune 1000 companies enhance their e-discovery preparedness through technology and process improvement. Brad is a frequent author and speaker on data preservation and e-discovery issues, including articles in *Corporate Counsel, Metropolitan Corporate Counsel* and *Information Management* and presentations at leading industry events such as LegalTech New York. Prior to joining Zapproved, he led the development of electronic discovery readiness consulting efforts for Fios, Inc. from 2004 to 2009. He has held senior management positions at prominent public and privately held companies, including Hewlett-Packard, Tektronix and Merant.

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FORMER UNITED STATES MAGISTRATE JUDGE

Judge Ronald J. Hedges is the principal in Ronald J. Hedges, LLC. He has extensive experience in e-discovery and in management of complex civil litigation matters. Mr. Hedges was appointed in 1986 as a United States Magistrate Judge in the United States District Court for the District of New Jersey, where he served as the Compliance Judge for the Court Mediation Program, a member of the Lawyers Advisory Committee, and both a member and reporter for the Civil Justice Reform Act Advisory Committee. From 2001 to 2005 he was a member of the Advisory Group of Magistrate Judges. Mr. Hedges has also been an adjunct professor at Seton Hall University School of Law (1993-2007) and at Georgetown University Law Center since 2006. He is also Co-Chair on the Planning Committee of Georgetown University Law Center's Advanced E-Discovery Institute since November 2007.

Ron Hedges has not been compensated for contributing to this article, is not affiliated with Zapproved, Inc. and offers no endorsement of its products or services.

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A Legal Hold Pro™ Signature Paper

Pension Committee Revisited: One Year Later

Edited by Brad Harris and Ron Hedges

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Pension Committee Revisited: One Year Later

A Retrospective on the Impact of Judge Scheindlin's Influential Opinion

Introduction

The story of "Pension Committee Revisited" really begins in 2003, when Judge Shira A. Scheindlin issued the first of several decisions in *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003), and brought into focus the preservation, production and spoliation of electronic information. In subsequent decisions in *Zubulake,* Judge Scheindlin expanded on those questions and, fair to say, illuminated existing legal obligations, began the continuing debate about those obligations, and helped pave the way for the 2006 amendments to the Federal Rules of Civil Procedure.

What is that continuing debate addressing? Among other things, the courts (both State and Federal) struggle with what might be called a "trilogy" of scienter (or state of mind), relevance and prejudice: Is negligent loss of electronic information sufficient for the imposition of severe sanctions or must there be some showing of intentional misconduct? How can the relevance of electronic information be established when that information no longer exists? Likewise, how can a party show that it has been prejudiced by the loss of electronic information? The courts continue to grapple with the interplay of the trilogy as they decide whether a party should be sanctioned for spoliation and what the proper sanction ought to be.

Zubulake, and its progeny, *Pension Committee,* remain in the forefront of argument about spoliation and sanctions. Subsequent decisions (including representative decisions referenced in this white paper) and future amendments to the Federal Rules of Civil Procedure may or may not follow Judge Scheindlin's conclusions. Nevertheless, Judge Scheindlin has framed the debate.

This white paper summarizes the 89 pages of *Pension Committee* and several opinions that followed, and hopefully contributes to the debate.

Ron Hedges

Looking Back at Pension Committee: A Summary of the Opinion

Adapted from *The Pension Committee Opinion: Judge Scheindlin's Call to Action for Effective Legal Holds* by John Jablonski and Brad Harris (February 2010)

The case involves a complex securities litigation filed by a group of 96 investors attempting to recover $550 million in losses due to the collapse of two British Virgin Island-based hedge funds in April 2003.

The case was filed in the Southern District of Florida in February 2004. The case was subsequently transferred to the Southern District of New York in October 2005. Defendants began asserting discovery violations from October 2007 to June 2008, including allegations that plaintiffs failed to preserve ESI and other documents and then made "false and misleading declarations regarding their document collection and preservation efforts."[1]

Judge Scheindlin states at the outset that this case does not involve "any egregious examples of litigants purposefully destroying evidence."[2] Yet the discovery shortcomings caused Judge Scheindlin to issue sanctions because plaintiffs failed to meet the standard needed to avoid spoliation.

In anticipation of litigation, plaintiffs engaged outside counsel who "telephoned and emailed plaintiffs"[3] requesting copies of relevant documents to help draft the complaint. However, the Court noted that counsel's emails and memoranda "did not meet the standard of a litigation hold" because plaintiff's counsel failed to direct employees to preserve all relevant records and failed to create a mechanism for collecting records.[4] The memoranda required employees to determine what was relevant and to respond without supervision by counsel. Further, the memoranda did not instruct employees to suspend the destruction of potentially relevant records.

Plaintiffs did not issue a formal written litigation hold until 2007[5] – nearly four years after the time of the bankruptcy filing.

Defendants, noticing gaps in the opposing side's document production, made a request to the Court for declarations describing plaintiffs' preservation efforts. In response, plaintiffs filed declarations in the first half of 2008. Following depositions of certain declarants, defendants uncovered significant gaps in discovery proffered by thirteen plaintiffs, including finding that "almost all of the declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents."[6]

According to the Court, defendants showed that the thirteen plaintiffs targeted by the motion "clearly failed to preserve and produce relevant documents."[7] Missing documents included 311 cross-referenced emails that were not produced by some plaintiffs, although produced by other plaintiffs. The Court also concluded that unknown documents were missing, including documentation of the investors' due diligence records that were presumed to have existed as part of plaintiffs' fiduciary duty of due diligence prior to making significant investments.[8]

Plaintiffs argued that it was absurd for them to be held responsible for an allegedly missing class of unknown documents. The Court disagreed, holding that "[t]he paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed."[9]

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[1] Pension Comm. v. Banc of America Sec., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010),p.4
[2] Id., p.5
[3] Id., p.28
[4] Id., p.28
[5] Id., p.30
[6] Id., p.32-33
[7] Id., p.34
[8] Id., p.35
[9] Id., p.35

Judge Scheindlin, giving plaintiffs the benefit of any doubt, held that the duty to issue a written legal hold was not well established in 2003 (although clearly established by mid-2004 in her jurisdiction following her *Zubulake V* opinion). Therefore, the court held that issuing a written legal hold was certainly appropriate in 2005 when the case was transferred to the Southern District of New York.

> The failure to [issue a written legal hold] as of that date was, at a minimum, grossly negligent.[10]

Defendants were able to show that after the duty to preserve was established, a number of plaintiffs failed to collect and/or preserve documents, made even more serious by the sworn declarations offered by some plaintiffs claiming that "all" relevant ESI was produced. The Court held that the declarations were deliberately vague, lacked detail seemingly "to mislead" defendants and the Court, or were prepared by someone lacking sufficient knowledge of preservation efforts.[11] While none of this rose to the level of willful misconduct in the Court's eyes, the lack of diligence in preservation was deemed grossly negligent by some and negligent by others.[12]

Given the complexity of this securities case and the heterogeneous group of plaintiffs, the Court delved deeper and ruled on the preservation efforts of each plaintiff. Six plaintiffs were deemed grossly negligent, while the remaining seven were deemed merely negligent. In the Court's analysis, gross negligence was the result of a number of missteps, including failing to issue a proper written litigation hold prior to 2007, continuing to delete ESI after the trigger event, failing to request documents from key players, delegating search efforts without any supervision from management, destroying backup tapes relating to key players (where other ESI was not readily available) and/or submitting misleading or inaccurate declarations.[13] The latter group were spared harsher judgment "after careful consideration"[14] because the "failure to institute a written litigation hold" was "not yet generally required"[15] in early 2004 in federal court in Florida. As a result failure to issue a litigation hold alone was insufficient to constitute gross negligence, absent additional discovery violations.[16]

When meting out sanctions, Judge Scheindlin states that defendants "demonstrated that most plaintiffs conducted discovery in an ignorant and indifferent fashion."[17] The opinion includes a detailed "spoliation" jury instruction to be used to provide the jury with detailed information about the spoliation caused by the "grossly negligent" plaintiffs.[18] In the case of gross negligence, the burden of proof was shifted to the plaintiffs to rebut the presumption of relevance and prejudice caused by the missing documents, and an adverse inference was appropriate. For those deemed merely negligent, the defendants would be required to demonstrate that they were prejudiced by the spoliation.[19]

Monetary sanctions were also meted out to the plaintiffs. The Court awarded reasonable costs to defendants, including attorneys' fees associated with bringing the motion, deposing the declarants and reviewing declarations. Costs would be allocated among the thirteen plaintiffs.[20] The Court determined that an award of additional discovery "would not be fruitful"[21] with the exception of two plaintiffs who acknowledged that backup tapes had yet to be reviewed (and were subsequently ordered to search backup tapes at their own expense).[22]

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[10]Id., p.36
[11]Id., p.38
[12]Id., p.38
[13]Id., pp.42-43

[14]Id., p.63
[15]Id., p.64
[16]Id., p.64
[17]Id., p.82
[18]The Court drew a distinction between a "spoliation" jury instruction and an adverse jury instruction, reserving the later harsh instruction for cases of egregious conduct akin to willful destruction of ESI. See Id., pp. 21-23
[19]Id., p.41
[20] Although projected costs associated with monetary sanctions were not discussed, it is reasonable to assume that these costs will be in excess of $100,000, given the complexities of the issues before the Court. See Id., p.84.
[21]Id., p.85
[22]Id., p.85

AMENDMENT ON MAY 28, 2010

On May 28, 2010, Judge Scheindlin made a minor adjustment to *Pension Committee* that followed the original opinion (January 11) and the amended opinion (January 15). It follows in its entirety:

> The Amended Opinion and Order filed January 15, 2010 is hereby corrected as follows:
>
> At page 10, lines 7-10 replace
>
> <By contrast, the failure to obtain records from all employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability.> with <By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence.>.

These modifications to the January 15th opinion appear to clarify Judge Scheindlin's original intent and to dispel any uncertainties that the original opinion may have led to. In summary, the changes include:

- Clarifying that written legal holds need only be issued to "key players" rather than all employees; and
- Failure to obtain records from key players "could constitute negligence" rather than is "likely" to be deemed negligence.

With this one-sentence change, Judge Scheindlin updated some language that did not meet her precise meaning.

Selected Highlights from *Pension Committee*

DUTY TO PRESERVE MEANS WHAT IT SAYS

"By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence." (p.1)

WRITTEN LITIGATION HOLD

"[T]he failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." (p.4)

SUSPEND ROUTINE DOCUMENT RETENTION/DESTRUCTION

"[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." (p.5)

FINDING OF GROSS NEGLIGENCE

"[T]he following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a *written* litigation hold, to identify all of the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control, and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources." (p.9)

AVOID THE DETOUR OF SANCTIONS

"[P]arties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions." (p.9)

EXTENT OF THE FAILURE TO COLLECT EVIDENCE

"[D]epending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful. For example, the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category." (p.4)

SPOLIATION SANCTIONS

"[A] court should always impose the least harsh sanction that can provide an adequate remedy. The choices include - from least harsh to most harsh – further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions)." (p.7)

MONETARY SANCTIONS

"Monetary sanctions are appropriate 'to punish the offending party for its actions [and] to deter the litigant's conduct, sending the message that egregious conduct will not be tolerated.'" (p.9)

In Judge Scheindlin's Own Words:
Excerpts from Georgetown Advanced E-Discovery Institute

On November 18-19, 2010, Judge Scheindlin participated in the Georgetown University Law Center's Advanced E-Discovery Institute in Pentagon City, Virginia. The judge was free to speak about *Pension Committee* because the action had settled by that time. Following are transcriptions of her comments that help to enlighten her thought process behind her decision.

The comments were made during two sessions. The first was an e-discovery case law update that involved a panel of many preeminent jurists. The panel was moderated by The Sedona Conference's Ken Withers and included the following: Hon. John M. Facciola, Hon. Nan R. Nolan, Hon. Andrew J. Peck, Hon. James M. Rosenbaum (Ret.), Hon. Lee H. Rosenthal, and Judge Scheindlin. The second was called "2010 – A Sanctions Odyssey" that included Judge Scheindlin, Judge Rosenthal, William Butterfield, Paul Weiner, Jeane Thompson and was moderated by Ron Hedges.

The format of the panel discussions allowed the judges to maintain a relaxed, collegial rapport.

Note: This is an unofficial transcript of the event. Every effort has been made to ensure the accuracy of commentary provided by this esteemed panel.

ON SANCTIONING NEGLIGENCE:

I just have a couple of small points that I think are important to note. First of all, the Second Circuit is not alone. There are a couple of other Circuits that take the same view as the Second Circuit. But secondly, we have to distinguish among the kinds of sanctions.

Negligence, in any Circuit, may be sanctionable if there's a loss, if there's prejudice, if what was lost is relevant. It doesn't matter what sanction, but we may not get the adverse inference instruction, we may get a monetary sanction, but if people are negligent and the evidence is lost and somebody's hurt by it, the court has a basis to impose a sanction, in any Circuit. It's a matter of what sanction the conduct will support but we have to be careful to talk about that continuum from intentional, willful to reckless, gross negligence to negligence, but negligence counts. It depends on what happens as a result. I think it's an important point that we have to take away.

Hon. Shira A. Scheindlin

ON WRITTEN LEGAL HOLDS:

Now, the other rebuttal is I know that a lot of the world is unhappy with me about this litigation hold issue, but I've never understood what the big problem is. Write it up, protect yourself, it's credible, you can defend it, and I still… I'm not going to back off! I would go all over the country saying, "Why not issue a written litigation hold?" Spell out for your company what they have to do. It's wise. Instead of fighting me about it – just do it. Because if you just do it you will have a defensible process and people will have guidance as to what they have to hold on to.

ON SCOPING LEGAL HOLDS:

So, I mean, some people say, "Well, I have a company of one, do I have to issue a written legal hold to myself?" Now that's kind of ridiculous, and I'd like to think that judges aren't that dumb. So no, if you're one person, don't write a letter to yourself. Fine.

We're primarily talking about institutions and companies with lots of employees and lots of locations. What's the problem? Send out a blast email. Tell people what to do, and then if they don't do it, then that's a different issue, but at least you've shown the good faith. Counsel's shown the good faith. Counsel has supervised this to some degree. So there you have a little bit of prevention.

ON COMPLEXITY OF PENSION COMMITTEE:

First of all, I had thirteen plaintiffs that I dealt with there and the case had 96 plaintiffs, so not everybody failed in their preservation efforts.

Secondly, this case went back a long way. The case was brought in 2004 and I made that point very carefully. Had it been brought in 2007, 8 or 9, it would've been a different standard anyway.

The third point I want to make very quickly in my remaining seconds is that…about this reasonableness idea. Obviously it's an evolving concept and the more we learn the more we have a right to expect different litigants to act reasonably, but we talk about proportionality now. Proportionality is the word of the day. So if it's a smaller case with less documents we don't need to expect a Cadillac treatment. But if it's a larger case with $10 million or more at stake then people have to put the time and money into it.

ON PROPORTIONALITY:

So we do want to be proportional every time when judging the efforts that litigants have made. I do think plaintiffs are particularly unnoticed. When they're going to bring this lawsuit they know – they should know now — that they have to preserve everything exactly proportional to their business. Obviously we're not saying that they have to go outside and hire, necessarily, expensive outside vendors but they have to take the steps that are reasonable for that case.

> "The bottom line is that we really don't disagree, our Circuits disagree."

ON WHAT MADE THIS OPINION IMPORTANT:

I will add that *Pension Committee* was the toughest of cases on these lists because we don't have that intentional destruction, wiping, deletion. This is a case, in a sense, that teaches the most about best practices and preservation, I think, because it's not the dramatic case. Everybody knows that if you put on a shredding program, a Window Washer, you've been bad. That's easy. Those are the easy cases, and that's *Victor Stanley* which Judge Grimm said conduct was just so obvious and egregious. The tougher case is the "gray area." What conduct is enough to be reasonable and what's not?

ON CREATING MORE UNIFORMITY:

I want to start by saying that when the press has nothing else to write about they like to make trouble so they go around saying "Judge Rosenthal, Judge Scheindlin, they're on opposite sides. They're at war, they're fighting… And so one of the reasons that we're going to get to later for a national Rule is to harmonize, try to harmonize nationally one standard for sanctions.

So we have no warfare, it's really applying Circuit law that is different place by place and when you're practicing around the country you have to know what the Circuit law is. And I realize that's hard for clients because they want to know, "What's the law?" "How do I prepare?" All that said, I'm in the Second Circuit. You heard yesterday, the Second Circuit has a lower threshold of state of mind for imposing some of the more severe sanctions, that is, the sanction of an adverse inference can be imposed with negligent or grossly negligent conduct. In other Circuits, it has to be willful or intentional. So that's that basis really of this so-called split.

THRESHOLD FOR GROSS NEGLIGENCE:

How did I distinguish between the seven who were negligent and the six who were grossly negligent? I can tell you it wasn't easy, I changed my mind every day for a month. I had

"2010 - A Sanctions Odyssey" Panel with (l-r): Hon. Lee H. Rosenthal, William Butterfield, Paul Weiner, Hon. Shira A. Scheindlin, Jeane Thomas and Ron Hedges. Georgetown University Law Center Advanced E-Discovery Institute, Pentagon City, VA, Nov. 19, 2010 (Photo courtesy of Chris Dale)

somebody in one bucket and then moved them to the other bucket. Moved them back and forth. Went over and over the facts, so I didn't do this lightly. The court spent an awful lot of time analyzing what each party did.

Again, the negligent people didn't issue litigation holds or begin collections. They failed to supervise the collection efforts by their employees. They delegated search efforts to very junior personnel who did not really understand what they were supposed to be doing. They didn't do a wide enough search. They failed to collect from employees who had knowledge. They didn't search in all of the appropriate locations. And, again, they submitted witnesses to testify about the search efforts who then at a deposition couldn't explain what they were doing at all. So that was, yet again, another problem.

Other Voices from the Bench:
Citations of Pension Committee in Other Opinions

What makes *Pension Committee* significant is not only its language, but the immediate reaction of other federal judges to that language. Shortly after *Pension Committee* was decided another eminent and well-respected federal judge, Lee Rosenthal of the Southern District of Texas, issued *Rimkus Consulting,* in which she referred to *Pension Committee* in the course of ruling on preservation and spoliation questions in the action before her. What follows are descriptions of several of these post-*Pension Committee* decisions.

Rimkus v. Cammarata

Rimkus Consulting Group Inc. v. Nickie G. Cammarata, et al., 07-cv-00405 (SDTX Feb. 19, 2010)

Coming on the heels of Judge Scheindlin's *Pension Committee* opinion in January, an opinion was issued that centers around appropriate actions to preserve potentially relevant evidence. The case is *Rimkus v. Cammarata* out of the court of Judge Rosenthal in the U.S. District Court for the Southern District of Texas.

To summarize the case, a group of employees left and filed a suit against their former employer, Rimkus Consulting, to release them from their non-compete agreements. In a countersuit, Rimkus Consulting fired back that the former employees violated their non-competes and additionally made off with "trade secrets and proprietary information." (p.4)

The *Rimkus* opinion is a direct parallel to Judge Scheindlin's words in the *Pension Committee* opinion in which the Court is clear from the outset about its frustration regarding the distractions caused by spoliation of evidence:

> Spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.[23]

Although Judge Rosenthal has a different perspective based on the facts of the *Rimkus* case and the precedent in her circuit, many of the same principles and ideas are applicable. Even though *Pension Committee* is little more than a month old when this opinion is written, the impact is marked. References to Judge Scheindlin's opinion are ubiquitous and Judge Rosenthal is deferential to the prior opinion as shown by the following reference:

> In her recent opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC,* No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), Judge Scheindlin has again done the courts a great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery. The focus of *Pension Committee* was on when negligent failures to preserve, collect, and produce documents – including electronically stored information – in discovery may justify the severe sanction

[23] Rimkus v. Cammarata, p.1

of a form of adverse inference instruction. Unlike *Pension Committee,* the present case does not involve allegations of negligence in electronic discovery. Instead, this case involves allegations of intentional destruction of electronically stored evidence. But there are some common analytical issues between this case and *Pension Committee* that deserve brief discussion.[24]

Judge Rosenthal reinforces much of the preceding case law that has developed from *Zubulake* through *Pension Committee.* The Court affirms the need to preserve evidence at the time of the "trigger event"[25], the "unpersuasive" arguments as to the failure to preserve sufficiently[26], the lack of "safe harbor" in this case under Rule 37(e) because the destruction did not involve routine operation of computer systems.[27]

The *Rimkus* opinion also provides insight into how a court goes about deciding what type and level of sanctions are appropriate, and Judge Rosenthal outlines the need to consider both the spoliating party's culpability and the level of prejudice to the party seeking discovery.

Her conclusions in this case depart from *Pension Committee* opinion and are greatly influenced by the facts of the case. Even though there was willful destruction of evidence, a significant amount of the incriminating evidence was recovered by the plaintiff. The Court was unwilling to issue an adverse inference instruction and rather chose to present the facts as they are and allow the jury to determine the implications of the defendants' misconduct. Judge Rosenthal also ordered that the defendants pay attorneys' fees and costs associated with the spoliation motion.

Much of *Rimkus* is in agreement with *Pension Committee* with variances that can be attributed to the facts of the case as well as differences between the jurisdictional standards for the Second and Fifth Circuits. The most notable differences within the context of these two opinions are about how to handle sanctions, judicious use of adverse inference instructions and the definition of "gross negligence," primarily around whether a culpable state of mind is needed to reach that standard.

> "Unlike *Pension Committee,* the present case does not involve allegations of negligence in electronic discovery. Instead, this case involves allegations of intentional destruction of electronically stored evidence."
>
> — Judge Lee H. Rosenthal, *Rimkus v. Cammarata*

[24] Id., p. 8-9
[25] Id., p.66
[26] Id., p.84
[27] Id., p.67

Crown Castle v. Fred Nudd Corporation

Crown Castle USA, Inc. v. Fred A. Nudd Corp., 2010 U.S. Dist. LEXIS 32982, (WDNY Mar. 31, 2010)

U.S. Magistrate Judge Marian W. Payson's opinion on a spoliation motion does not cite *Pension Committee,* but it does refer to Judge Scheindlin's earlier *Zubulake* extensively and thus reiterates the underpinnings of the judicial principles set out in the case. The opinion was issued in a commercial litigation involving a product defect of a cell transmission tower. Crown Castle, a leading owner and operator of cellular towers, sued the Fred A. Nudd Corporation, one of the top manufacturers of transmitter towers, following a November 2003 collapse of a tower.

During the course of the discovery process, the plaintiff made a number of errors that resulted in spoliation. After requesting information following the event that triggered the preservation obligation, counsel failed to monitor the approach used to determine where and what to look for in terms of responsive documents. The result was that many custodians missed information. As discovery progressed, a number of responsive emails were subsequently uncovered, nearly half of the total eventually produced. Among the afore-missing emails was one that showed that there was a product defect.[28]

The plaintiff also failed to take adequate steps to suspend the routine destruction of electronically-stored information, namely the automatic deletion of emails. Older emails were automatically purged according to company procedure, resulting in spoliation.

> It is undisputed that [the witness's] electronic documents were destroyed following his departure from Crown in August 2005, ten months after the duty to preserve arose and four months after this lawsuit was filed…such wholesale destruction is inexcusable.[29]

Finally, in failing to issue a litigation hold and the resulting loss of responsive information, including that from key players, the Court found that the plaintiff "failed to take adequate measures to preserve electronic documents."[30] Judge Payson concluded:

> Having found that Crown failed to implement a litigation hold, resulting in the destruction of [a key player's] documents, I must conclude that Crown acted with gross negligence. I cannot find that Crown acted in bad faith, however, as Nudd urges. No showing has been made that Crown intentionally sought to destroy documents or to conceal them from Nudd. Crown has produced a prodigious number of documents in this litigation; unfortunately, some were inexcusably destroyed, while others were produced exceedingly late. On this record, I find that the carelessness with which Crown attended to its duties to preserve and produce documents amounted to gross negligence, but not bad faith.[31]

The Court found Crown to be grossly negligent for not issuing a legal hold which aligns with *Pension Committee.* The Court cited Rule 37(d) when awarding attorneys' costs and fees and the costs for additional depositions.[32] While rejecting a claim for dismissal and an adverse inference instruction because the spoliation did not result in prejudice,[33] the Court left the door open to reconsidering that position pursuant to further discovery efforts.[34]

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[28] *Crown Castle v. Fred Nudd,* p.11

[29] Id., p.23
[30] Id., p.24
[31] Id., p.24
[32] Id., p.35
[33] Id., p.30-1
[34] Id., p.32

Merck Eprova v. Gnosis

Merck Eprova AG v. Gnosis S.p.A. et al., 07 Civ. 5898 (SDNY Apr. 20, 2010)

On April 20, 2010, U.S. District Judge Richard J. Sullivan strongly reiterated the need for a proper legal hold when he determined the defendants' failure to adequately preserve information was gross negligence and issued a $25,000 monetary sanction. The opinion referenced *Pension Committee* frequently.

This civil case was originally filed in June 2007 as a result of an alleged mislabeling of a nutritional ingredient. The defendant, an Italian biomedical company called Gnosis, did a "haphazard"[35] job of meeting its discovery obligations. Following a failed settlement agreement, the litigants entered into a year-long discovery battle.

After months of urging by the plaintiff, details emerged about the defendants' preservation efforts. In a hearing on January 22, 2010, (only days after the issuance of *Pension Committee)* the Gnosis CEO admitted that the company had not issued "an explicit litigation hold, much less a written one." Further, employees continued to delete, "or at least fail to prevent automatic deletion of" relevant emails, and the company failed to produce responsive documents because the custodians decided that they were not relevant.[36]

Judge Sullivan relied heavily on *Pension Committee*:

> In *Pension Committee,* Judge Scheindlin recently discussed in some depth the question of when discovery violations should be considered sanctionable, as well as the related question of what the appropriate remedies should be in such cases. The Court agrees with the analytical framework set forth in that opinion and will rely on it here.[37]

This included the expectation that a written legal hold represents a reasonable and good faith response to a preservation obligation.[38] Gnosis' CEO claimed he had instructed employees to "pay attention" to saving relevant documents. Yet the Court responded: "there is no doubt that Defendants failed to issue a written legal hold"[39] and ruled this failure a "clear case of gross negligence."[40]

The Court ordered that the defendants should pay costs and attorneys' fees and fined the defendants $25,000 "to deter future misconduct…and to instill a modicum of respect for the judicial process." Judge Sullivan continued: "Lesser sanctions…would simply be insufficient to achieve these purposes."[41] Additionally, a decision on an adverse jury instruction is pending further discovery, as well as consideration for more sanctions "down the road."[42]

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[35] *Merck Eprova v. Gnosis Spa,* p.7
[36] Id., p.6
[37] Id. p.9
[38] Id., p.9
[39] Id., p.11
[40] Id., p.12
[41] Id., p.12
[42] Id., footnote 10

Passlogix v. 2FA Technology

Passlogix, Inc.v.2FA Technology LLC, et al., 2010 WL 1702216 (SDNY Apr. 27, 2010)

U.S. District Judge Peter K. Leisure issued his opinion for motions requesting sanctions for spoliation and committing fraud on the court in a breach of contract case. Judge Leisure, who sits in the same jurisdiction as Judge Scheindlin, cites *Pension Committee* as the standard around spoliation, including reiterating Judge Scheindlin's position that lack of a *written* legal hold constitutes gross negligence.[43]

In this case, the Court considered the egregious acts by the defendant to purposefully undermine the discovery process. The Court characterized the defendant's tactics were undertaken "in an effort to expand discovery, cause Passlogix competitive harm, and garner a favorable settlement."[44]

The plaintiff sought sanctions for the defendants' failure to issue a legal hold, specifically regarding the destruction of incriminating anonymous emails as well as computer records about the alleged email "spoofing."

Judge Leisure determined that the bad-faith spoliation by Passlogix was intentional, at which point the burden shifted to 2FA as the innocent party to demonstrate prejudice. The Court found that the case was indeed prejudiced by the defendant's actions. Additionally, the Court noted that the defendant failed in its preservation obligation and, despite the intentional spoliation by the defendant, the court denied issuing an adverse inference instruction and issued monetary sanction:

> The Court also holds that 2FA's failure to preserve relevant documents led to the spoliation of evidence in this case. Therefore, the Court hereby orders 2FA to pay a fine in the amount of ten thousand dollars ($10,000.00)….[45]

The Court took into account that the defendant was a small company, with only two principals, and both of whom were bad actors, so the sanction was designed to punish them directly.

[43] *Passlogix v. 2FA Technology,* p.69-70

[44] Id., p.3-4

[45] Id., p.104

Jones v. Bremen High School

Jones v. Bremen High School Dist. 228, 2010 WL 2106640 (N.D. Ill. May 25, 2010)

In May 2010, a new opinion was issued out of the Northern District of Illinois that is noteworthy in that it focuses on spoliation and determining sanctions without citing *Zubulake* or *Pension Committee.* Yet, U.S. Magistrate Judge Susan E. Cox independently arrives at a similar set of requirements for what constitutes reasonable and good faith effort when it comes to preserving potentially relevant data.

The case involved an EEOC complaint from an employee at a high school in suburban Chicago. The plaintiff alleged that she endured discrimination based on race and disability and was wrongfully terminated in retaliation for the discrimination charges.

The "trigger event" began when the plaintiff filed her EEOC charge in October 2007. Failing to issue a litigation hold, the defendant's initial response was to instruct three administrators to "search through their own electronic mail"[46] and save relevant messages. No further guidance by counsel was given. Furthermore, no effort was made to suspend routine destruction of ESI, such as a 30-day destruction policy of back-up tapes (and it wasn't until October 2008 that automatic archiving of email was initiated). Finally in the spring of 2009, the defendant instructed all of its employees to preserve emails which might be relevant to the litigation (plaintiff's first request for production was filed in May 2009).

In December 2009, the plaintiff filed a motion for sanctions due to spoliation of evidence. The defendant subsequently produced thousands of additional emails in an effort to fill in "most (if not all) of the gaps"[47] in their previous production. However, the Court concluded:

> [B]ecause there was no hold put in place on electronic documents and because emails could be manually and permanently deleted if an employee chose to do this, we cannot determine with certainty that all email relevant to plaintiff's claims were preserved.[48]

Judge Cox determined that sanctions were necessary because "defendant's attempts to preserve evidence were reckless and grossly negligent." [49] The sanctions included the following:

1. Jury instructions that the lack of discriminatory emails during the period when a legal hold was not issued is not evidence that no such statements were made. (Note that the Court denied issuing an adverse inference instruction.)
2. Defendant will cover plaintiff's costs and fees for preparing motion for sanctions.
3. Plaintiff can depose witnesses on recently produced emails and the defendant will pay for the court reporter.[50]

As previously mentioned, Judge Cox's opinion cites 15 cases with all but one of them originating in the Northern District of Illinois or the Seventh Circuit Court of Appeals which has jurisdiction. (The only outlier is a case from the District of Massachusetts.)

The Court does not automatically deem the failure to issue a legal hold as a breach of the duty to preserve, but the section on "Legal Standards" echoes the sentiments and guidelines outlined in other cases involving preservation, including:

- Trigger event – Defendant's duty to preserve is triggered when "it reasonably knows or can foresee [evidence] would be material (and thus relevant) to a potential legal action."
- Timely Issuance – "It is undisputed here that defendant did not place a litigation

[46] *Jones v. Bremen H.S.,* *3
[47] Id., *5
[48] Id.
[49] Id., *9
[50] Id., *10

hold…when it first learned" of the charge.
- Key Players – "Defendant inexplicably did not request all employees who had dealings with plaintiff to preserve emails so that they could be searched further for possible relevance…."
- Supervision by Counsel – Defendant "unreasonably" instructed employees "to search their own email without help from counsel and to cull from that email what would be relevant documents."
- Suspension of Automatic Back-up Deletion – "[D]efendant's technology department could have easily halted the auto-deletion process."[51]

In the past, some litigants have argued that issuing a legal hold is a burden. In this case, the Court takes that argument to task when raised by the defendant:

> [T]here is no evidence that a simple litigation hold to preserve existing electronic mail would have placed any burden on defendant.[52]

The defendant clearly failed to take reasonable steps to preserve information and the consequences in this case were sanctions.

"[T]here is no evidence that a simple litigation hold to preserve existing electronic mail would have placed any burden on defendant."

— Judge Susan E. Cox, *Jones v. Bremen H.S.*

[51] Id., *5-6

[52] Id., *7

Medcorp v. Pinpoint Tech

Medcorp, Inc. v. Pinpoint Tech., Inc., 2010 WL 2500301 (D. Colo. June 15, 2010)

When analyzing failure to preserve, Magistrate Judge Kristen L. Mix in Colorado used *Pension Committee* as the template on which she based her decisions on sanctions. This opinion mirrors Judge Scheindlin's case in that the spoliation was on the part of the plaintiff. The opinion explores the appropriate sanctions pursuant to the Special Master's findings that the plaintiff destroyed 43 hard drives that contained relevant information to the case.

In the beginning of her opinion she states:

> The parties and Special Master agree that the standard set forth in *Pension Committee* provides the appropriate analysis regarding the types of sanctions which are justified when a party destroys evidence. Specifically, "[t]he determination of an appropriate sanction, if any, is confined to the sound discretion of the trial judge and is assessed on a case-by-case basis."[53]

The special master in this case determined that the destruction of the hard drives prejudiced the defendants' case and interfered with the judicial process. The finding was that the spoliation was willful "in the sense that Plaintiff was aware of its responsibilities to preserve relevant evidence and failed to take necessary steps to do so."[54] The defense was unable to show that the plaintiff was acting in bad faith or that the spoliation was the result of any action "other than what [Plaintiff] would do in the ordinary course of business."[55]The Court held that the conduct was negligent rather than intentional.[56]

On a motion to modify the order, Judge Mix upheld the order for adverse inference instruction:

> The negative inference instruction imposed by the Special Master is suited to accomplish by general terms what Defendants seek to accomplish by specific terms. In other words, the jury may very well conclude, as a result of being instructed that they may infer that the destroyed hard drives contained evidence which is unfavorable to Medcorp.[57]

Furthermore, the Court awarded reasonable costs in the case in the amount of $89,395.88. Judge Mix determined that the jury instruction adequately addressed defendants' concerns, the magistrate judge denied defendants' request to have facts admitted into evidence "indicating that Plaintiff's spoliation was intentional and knowing." The Court rejected a dismissal as too harsh of a punishment that was beyond the "least harsh" threshold laid out in *Pension Committee.*

[53] *Medcorp v. Pinpoint,* p.2
[54] Id., p.1
[55] Id., p.3
[56] Id., p.4
[57] Id., p.4

Victor Stanley II

Victor Stanley, Inc. v. Creative Pipe, Inc., et al. (D.MD, Sept. 9, 2010)

On September 9, 2010, Magistrate Judge Paul W. Grimm of the U.S. Fourth Circuit (D.MD) issued an 89-page opinion in the ongoing spoliation saga in *Victor Stanley v. Creative Pipe.*

Judge Grimm, in light of egregious spoliation, used the opinion to review the current state of spoliation and how it should be sanctioned which he states is his "attempt to synthesize" opinions.[58]

To summarize, the CEO of Creative Pipe, Mark Pappas, precipitated this civil action for intellectual property infringement when he went to his competitor's web site, downloaded their proprietary product design drawings and specs for office and public furnishings. He took these plans, manufactured them and then sold them in direct competition to Victor Stanley, Inc., the originator of the designs.

Once Victor Stanley discovered this conduct on Pappas' party, the company sued Creative Pipe for copyright infringement, patent infringement, unfair competition and Lanham Act violations. Realizing that he was going to be caught red-handed, Pappas began purposefully destroying and overwriting files in order to obfuscate incriminating evidence.

He went to great lengths to do so, and enlisted co-conspirators to help him destroy electronic records. He deleted files, defragged disks, replaced servers, used "scrubbing" programs – and then he lied about it to the Courts. Even after two *acknowledged* court orders to preserve data, Pappas continued to attempt to hide his actions.

Judge Grimm characterized what he saw this way:

> Collectively, they constitute the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench.[59]

Following Pappas' prodigious attempts to cover up information, years of e-discovery effort and countless hours invested by attorneys and experts on both sides, in the end not much key evidence was lost. As Judge Grimm humorously put it, they were "the gang that couldn't spoliate straight."[60] Any information that was actually irretrievably lost was acknowledged as prejudicial by the Defendants.

Judge Grimm focused on what were the most appropriate sanctions since the bad-faith efforts ultimately failed to prejudice the case. Judge Grimm noted that "[r]ecent decisions…have generated concern…regarding the lack of uniform national standard governing" preservation and spoliation issues.[61]The judge continues:

> I will attempt to synthesize and provide counsel with an analytical framework that may enable them to resolve preservation/spoliation issues with greater level of comfort.[62]

In particular, he acknowledges that the courts are struggling with the following specifics:

- To know when the duty to preserve attaches,
- The level of culpability required to justify sanctions,
- The nature and severity of sanctions, and
- The scope of the duty to preserve and whether it is tempered by proportionality[63]

First of all, the opinion accepts that companies must issue a legal hold but he bristles at the different standards. He suggests that this causes concern among corporations, business and governments that operate in different jurisdictions because they have to

[58] *Victor Stanley II,* p.38
[59] Id., p.34
[60] Id., p.5
[61] Id., p.36-7
[62] Id., p.38
[63] Id., p.36-7

design a preservation policy that complies with the most demanding standard.[64]

Judge Grimm cites examples about what courts deem information under their "control" but some Districts extend that duty to preserve information held by third parties while others do not.[65] He also cites the fact that "courts differ in the fault they assign when a party fails to implement a legal hold."[66] He compares *Pension Committee's* automatic ruling of gross negligence versus *Haynes v. Dart* (N.D. Ill, Jan. 11, 2010) that a failure to implement a legal hold is relevant to the court's consideration but in and of itself is not sanctionable.

Judge Grimm expresses how the failure to preserve is a huge burden on the courts and a significant concern in both *Pension Committee* and *Rimkus.* Citing *Metropolitan Opera Association v. Local 100,* 212 F.R.D. 178, 228 (S.D.N.Y. 2003):

> For the judicial process to function properly, the court must rely "in large part on the good faith and diligence of counsel and the parties in abiding by these rules [of discovery] and conducting themselves and their judicial business honestly."[67]

Adding the following:

> The truth cannot be uncovered if information is not preserved. That the duty is owed to the court, and not to the party's adversary is subtle, but consequential, distinction.[68]

Judge Grimm is adamant that the failure to preserve also injures civil justice by putting focus on e-discovery rather than merits of the case and that it is "frustrating to the courts that there is no way to sanction for the courts time."[69]

The Court's conundrum in *Victor Stanley II* is how to match the appropriate sanction to the spoliating conduct.[70] What's worse: intentional spoliation that results in no prejudice, or simple negligence that results in "total loss of evidence essential to an adversary?" Clearly, the judicial process is damaged more by the latter than the former.

In the end, Judge Grimm metes out some harsh sanctions, but he does it thoughtfully. His approach to sanctions is captured in this statement: "In fashioning spoliation sanctions, Courts must strive to issue orders that generate light, rather than heat."[71] He grants default judgment on the account of copyright infringement, but not on others since the spoliation did not result in "irreparable or substantial prejudice."[72] The remaining claims will be "tried to the Court."[73] Similarly, he issued a permanent injunction on the copyright violation which the Defendant did not oppose.[74]

Finally, Judge Grimm granted reasonable attorney's fees and costs since the Court believes the Defendant may avoid payment, he will hold him in prison for civil contempt for up to two years until the fees are paid. As a final note, Judge Grimm admitted that Pappas' conduct was likely criminal, but is not referring for criminal prosecution due to the burden it would place on the overstretched criminal system.

To see the "Spoliation Sanctions by Circuit" chart that Judge Grimm appended to Victor Stanley II, *visit "Further Reading" on page 40 to learn how to download an electronic version.*

[64] Id., p.51
[65] Id., p.51-2
[66] Id., p.53
[67] Id., p.56
[68] Id., p.56-7
[69] Id., p.59
[70] Id., p.57
[71] Id., p.74
[72] Id., p.83
[73] Id., p.84
[74] Id., p.85

Orbit One v. Numerex

Orbit One Communications, Inc. v. Numerex Corp., 2010 WL 4615547 (S.D.N.Y., Oct. 26, 2010)

In late October 2010, Magistrate Judge James C. Francis issued an opinion that continued the judicial debate about preservation.

The case centers on an acquisition that went bad after Numerex acquired satellite communications provider Orbit One Communications. As part of the acquisition, Numerex offered $6 million worth of performance incentives for Orbit One executives to stay and run their former company as a standalone division. However, when sales were falling well short of earning those big bonuses, the executives alleged that the acquirer was mismanaging them and undermining their ability to earn incentives, thus devaluing the deal. Orbit One's shareholders and executives brought a suit and were then countersued by Numerex.

As the case went through discovery, Numerex's attorneys probed on preservation and a few discrepancies were discovered. In general, the legal team acted reasonably well in issuing timely legal holds, especially given the standards of 2007 when this was taking place. They suspended routine destruction of back-up media and saved equipment. However, Judge Francis noted some issues around preservation actions by Orbit One's CEO David Ronsen including the following:

- He archived some of his corporate email at the urging of the IT department as part of a documented ISO-driven information management initiative. Ronsen did delete some files at that time, but they predated the Numerex litigation and were mainly personal items. At that point there was no trigger event about the Numerex case.
- At the time of his archiving, Ronsen failed to alert the IT administrator that he was on a legal hold for an unrelated IP case which may have changed how the information was handled.
- He also had under his personal control several external hard drives, including the back-up media from the server that had been stored in his safe, as well as his original desktop computer. When requested, Ronsen turned over the external hard drives and the veracity of the data on those media may have been checked (a forensic expert did review other ESI) but no mention is made in the opinion.[75]

In light of these issues around preservation, the defendants sought an adverse inference instruction from Judge Francis for spoliation and an award of attorneys' fees and costs. Judge Francis denied the motion despite acknowledging the failure to "engage in model preservation"[76] because there was insufficient evidence that any lost ESI was relevant to the case.

Judge Francis took the opportunity to weigh the facts of *Orbit One* against the recent body of case law including *Pension Committee, Rimkus,* and *Victor Stanley II.* The nuance in this opinion focuses on relevance and culpability. He observes that:

> It is cold comfort to a party whose potentially critical evidence has just been destroyed to be told that the spoliator did not act in bad faith.[77]

Judge Francis takes a contrarian view to Judge Scheindlin in his interpretation of *Pension Committee.* In Judge Francis's opinion when spoliation occurs, he will start by evaluating whether the lost information was even relevant for discovery. Based on his reading, that is not how Judge Scheindlin wrote *Pension Committee:*

> Some decisions appear to omit such a requirement. In *Pension Committee,* for example, the court stated that '[r]elevance *and* prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.' (emphasis added) Indeed, the court drew a distinction between

[75] *Orbit One v. Numerex,* p.13-5
[76] Id., p.15
[77] Id., p.10

> the types of sanctions available based on whether information had in fact been lost at all.[78]

He goes on to add:

> The implication of *Pension Committee,* then, appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there have been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of *Pension Committee,* then I respectfully disagree.[79]

Judge Francis takes a position, similar to other members of the judiciary, about how to sanction spoliation. His litmus test is whether the spoliation prejudiced the opposition, regardless of what behavior led to the spoliation in the first place. As he notes, "It is difficult to see why even a party who destroys information purposefully or is grossly negligent should be sanctioned where there has been no showing that the information was at least minimally relevant."[80]

He continues with his position that it is not the purpose of the courts to enforce preservation practices, which he sees in *Pension Committee,* but rather to evaluate and punish losses that prejudice a case:

> Nor are sanctions warranted by a mere showing that a party's preservation efforts were inadequate… But, depending upon the circumstances of an individual case, the failure to abide by such standards does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost… Indeed, under some circumstances, a formal litigation hold may not be necessary at all. [81]

Judge Francis's *Orbit One* opinion is an alternative perspective from the Southern District of New York, arguably the epicenter of electronic discovery among the Federal Judiciary. The *Orbit One* opinion may offer a counterbalance to *Pension Committee,* but the facts of the case in which sanctions were being sought when little actual spoliation occurred adds another voice in this constantly evolving area of case law.

[78] Id., p.12 (citations omitted)
[79] Id.
[80] Id.
[81] Id., p.13

Potential Impact on FRCP

Referenced from "Reshaping the Rules of Civil Procedure for the 21st Century" by Lawyers for Civil Justice, et al., submitted to the 2010 Conference on Civil Litigation, Duke Law School, May 2, 2010. Available at www.civilconference.uscourts.gov.

In May, a white paper was submitted at the 2010 Conference on Civil Litigation (Duke Law School, May 10-11, 2010) on behalf of the Lawyers for Civil Justice, DRI, Federation of Defense & Corporate Counsel, and International Association of Defense Counsel. In this paper, the authors articulate the "need for clear, concise and meaningful amendments to key rules of civil procedure."

The authors make an interesting case for reevaluating the existing Federal Rules, including:

> [A]ttempting to redefine and balance the interrelationship of pleading and discovery, reevaluating the premises and focus of discovery, further refining the treatment of ediscovery, developing clear preservation standards, and deterring runaway litigation costs by reasonable cost allocation rules.

They propose changes to Rule 26 and Rule 34 to limit the scope of discovery "on the claims and defenses in the action" as asserted in pleadings, and to explicitly invoke the principle of proportionality (e.g., limiting the number of document requests, relevant timeframe, number of custodians and data sources; and identifying specific categories of ESI that should not be discoverable absent a showing of substantial need and good cause).

They also propose changes to specifically address preservation issues. As discussed in the paper, ancillary litigation ("discovery about discovery") has risen at an alarming rate, and existing litigation hold procedures have been created on an ad hoc basis by the courts. More guidance is required, including a proposal to permit spoliation sanctions "only where willful conduct for the purpose of depriving the other party of the use of the destroyed evidence results in actual prejudice to the other parties."

Finally, the authors point directly to the runaway discovery costs and the inability of current rules to create effective controls. The paper calls for amending Rule 26 to require each party to pay for the costs of the discovery it seeks. Such "a requester-pays rule will encourage parties to focus the scope of their discovery requests on evidence that is reasonably calculated to produce relevant information from the most cost-effective source."

As the authors describe, "preservation has developed into one of the most vexing issues affecting civil litigation in today's federal courts." All too often, organizations fear a conundrum of "damned if you do, damned if you don't" when it comes to deciding when a preservation duty attaches and what will constitute reasonable and good faith preservation efforts. Clearly, greater clarity and consistency from rules-making bodies is warranted. Yet just as critical is the need for organizations to develop a well-founded, consistently-applied, and proportional approach to recognizing and responding to a duty to preserve.

The Sedona Conference® Updated Guidelines for Legal Holds

The Sedona Conference® published an update to *The Sedona Conference Commentary on Legal Holds* in September 2010 in which recent case law was contemplated. The full text of this Commentary is available free for individual download from The Sedona Conference® web site at www.thesedonaconference.org.

GUIDELINE 1

A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.

GUIDELINE 2

Adopting and consistently following a policy or practice governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.

GUIDELINE 3

Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

GUIDELINE 4

Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.

GUIDELINE 5

Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made.

GUIDELINE 6

The duty to preserve involves reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.

GUIDELINE 7

Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

GUIDELINE 8

In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

(a) Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective
(b) Is in an appropriate form, which may be written
(c) Provides information on how preservation is to be undertaken
(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and

(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

GUIDELINE 9

An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

GUIDELINE 10

Compliance with a legal hold should be regularly monitored.

GUIDELINE 11

Any legal hold policy, procedure, or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organization can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.

Legal Hold Best Practices

What constitutes "reasonable and good faith" efforts when responding to a preservation obligation continues to be a moving target. Both the judiciary, organizations like The Sedona Conference, and commentaries such as "Reshaping the Rules of Civil Procedure" will no doubt continue to call for greater clarity and consistency to control the burgeoning costs of e-discovery. In the meantime, here are some suggested best practices culled from *Pension Committee* and the other decisions we have discussed:

BEST PRACTICE	BENEFIT
1. Establish and follow a process	Having a well-defined process in place ensures greater repeatability, timeliness and defensibility
2. Issue timely, written legal holds	Writing it down fosters greater consistency and clarity, and creates a fact record
3. Communicate your expectations clearly	Having clear and detailed instructions facilitates greater understanding and follow-through by recipients
4. Follow-up to ensure understanding and compliance	Communication is a two-way street – requiring confirmation ensures receipt, understanding and acceptance of legal hold obligations
5. Have a process to issue periodic updates	Legal holds should be living documents, evolving as new information is gained over the life of the preservation obligation
6. Send periodic reminders	Recipients of legal holds should be periodically reminded of a continuing obligation to preserve information in their custody, possession or control
7. Document your actions	Keep track of your actions – Who was notified? What was communicated? When? How did they respond?

Perspectives on Pension Committee

The opinions expressed in the following commentaries are solely those of the individual author and should not be attributed to his/her firm or its clients. The comments should not be construed as legal advice or opinion and are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation.

Reflections on Pension Committee

By Craig Ball

Pension Committee is a bracing slap in the face of lawyers complacent in their failure to preserve electronic evidence. But, instead of saying, "Thanks, I needed that" and resolving to cultivate the skill and judgment needed to manage ESI, some still seek loopholes and rules changes to excuse incompetence. Are we really content to ignore or lose probative evidence rather than gut up and deal with it in cost-effective ways?

Judge Scheindlin's frustration fairly leaps from the page. She's mad as hell (at those who won't meet their duty to preserve ESI), and she's not going to take it anymore. Hurrah, Shira!

Pension Committee has its flaws, but Judge Scheindlin has mended some and (in public discourse) has cautioned against reading the decision in support of absurd results. Persistent concerns center on the dictate that a failure to issue a written legal hold is gross negligence per se, as well as the court's imposition of severe sanctions without proof that materially relevant information was lost. These concerns have prompted other influential jurists to (respectfully) distance themselves from the case as precedent.

Further, *Pension Committee's* unfortunate emphasis on the written legal hold as more document than process is prompting lawyers to spew deluges of boilerplate hold notices at clueless clients on the theory that if it moves, you hand it a hold notice, and if it doesn't move, you hold onto it. Hold directives that fail to communicate specific, relevant steps for custodians to follow are merely window dressing.

Despite all, Judge Scheindlin's message is clear and compelling: a proper litigation hold demands prompt, deliberate action by parties coupled with strong, skilled guidance from counsel. Preservation is a duty, and the negligent failure to preserve will be met with remedial or punitive sanctions geared to the gravity of the failure.

Justice Oliver Wendell Holmes famously observed, "Hard cases make bad law." Perhaps because it's still so hard for litigants and courts to grasp electronic evidence, the e-discovery case law is plagued by decisions that are rife with sense and sagacity within the cauldron of the case, but smack of bad policy and law on the cold pages of the reporter. Judge Scheindlin's holdings in *Pension Committee* were measured and wise vis-à-vis the case before her, but could drive draconian outcomes if applied too literally. Handle with care.

Even if *Pension Committee* proves an outlier, its enduring value flows from the spotlight it shines on preservation and the impetus it supplies to act swiftly and decisively to guard against spoliation of ESI.

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Rekindling the National Debate on Preservation Best Practices

By Kevin F. Brady, Connolly Bove Lodge & Hutz LLP

The legacy of Judge Scheindlin's decision in *Pension Committee* will not be the substance of what is contained in the 88-page scholarly analysis on issues about whether there should be a bright line test for negligence, gross negligence or bad faith behavior or whether there should be a requirement for written legal holds. Instead, *Pension Committee* will be seen as the spark that reignited a national debate regarding best practices for handling ESI and refocused the attention of the legal community on the issue of preservation and the need for effective policies and procedures for preserving ESI irrespective of the circuit where the lawsuit is pending.

Judge Scheindlin's decisions in *Zubulake* starting in 2003 are largely credited with launching the discussion about the best practices for handling ESI. Her *Zubulake* decisions are still regarded as the seminal decisions on many of those topics. Indeed, the 2006 changes to the Federal Rules of Civil Procedure track in large part or are significantly influenced by those decisions. But after seven years of judicial decisions as well as federal and state rule changes, the landscape of electronic discovery is best described as the "land of confusion."

I recently heard one state court judge, from a very sophisticated business court, say that the majority of the lawyers who appear before him are not competent when it comes to preservation and ESI. That speaks volumes as to the scope of the problem that still exists. Lawyers who once feared the phrase "electronic discovery" now openly admit that they don't know very much about e-discovery and they are not interested or motivated to learn about it. We are in a slow-moving state of transition but unfortunately it is not clear where we are, how far we have come or how far we have to go.

Thankfully *Pension Committee* came along and the debate has begun anew with judicial heavyweights like Judges Rosenthal, Facciola, Grimm and Francis all weighing in on the subject in 2010.

Old favorites like preservation, legal holds and spoliation continue to garner much of the attention in the judicial decisions, however, new topics like transparency, cooperation and proportionality are helping to sharpen and refine the debate. Now the discussion includes questions like "Should there be a federal (or state) rule of procedure regarding preservation?" "Is self-collection or self-preservation ever a reasonable approach to handling ESI?" and "Does a company set its policies and procedures regarding retention and preservation of ESI to meet the standard of a certain circuit?"

While much work still needs to be done to educate the lawyers, clients and judges in order to reduce the uncertainty and ambiguity regarding ESI, the movement to effectuate change is now back in full swing due in large part to *Pension Committee*.

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Judge Scheindlin Upholds Fairness to Non-Spoliating Parties

By William P. Butterfield, Hausfeld LLP

I have a question for those who complain about Judge Scheindlin's decision in *Pension Committee*. Have you ever tried to prove that your client was adversely impacted by the loss of evidence that clearly should have been preserved by the opposing party? I have. Without knowing the content of the information that has been lost, how do you establish that it would have helped you prove your case? How do you respond to the other side's typical defense of a spoliation claim ("So what? No litigation hold program is perfect. Show us how our loss of evidence prejudiced your client.")? Isn't discovery supposed to be about finding the truth? And, as Judge Grimm notes in *Victor Stanley II*, "The truth cannot be uncovered if information is not preserved."[82]

In my opinion, the most important objective Judge Scheindlin sought to achieve in *Pension Committee* was simply fairness to the non-spoliating party. She recognized the unfairness of requiring the innocent party to show how it was impacted by the loss of evidence, when the very evidence that would facilitate that proof is gone:

> It is often impossible to know what lost documents would have contained. At best, their content can be inferred from existing documents or recalled during depositions. But this is not always possible. Who then should bear the burden of establishing the relevance of evidence that can no longer be found? And, an even more difficult question is who should be required to prove that the absence of the missing material has caused prejudice to the innocent party.[83]

Judge Scheindlin's decision in *Pension Committee* does two important things to restore fairness: 1) it provides a roadmap of the actions required of a preserving party and attempts to link the failure to carry out defined litigation hold tasks (written hold notice, identification and notification of key players, follow-up, adequate collection, etc.) with concepts of negligence and gross negligence; 2) where the spoliation results from bad faith or gross negligence, it provides a rebuttable presumption that the innocent party was prejudiced. Reasonable people can differ about where the lines should be drawn between conduct that is acceptable, negligent or grossly negligent (and the debate on that issue is far from over), but where spoliation occurs because a preserving party's conduct so greatly departs from the ordinary care expected, it seems eminently fair that the innocent party should not be required to take on the difficult – if not impossible – task of proving that it was prejudiced.

Some judicial thought-leaders take the position that in determining sanctions, the court should look to the degree of prejudice to the innocent party, rather than the degree of fault by the spoliating party. See, e.g., *Orbit One* at 11, *Victor Stanley* II, 269 F.R.D. at 526. In other words, they ask whether the material that was lost was relevant, and whether that information would have assisted the non-spoliating party in proving its claims. While that approach seems logical, here is the problem: if there has been complete spoliation (*i.e.*, there are no duplicate records or no other way to tell what information has been lost), it is difficult, if not impossible, for the innocent party to prove that the lost information was relevant or would have favorably assisted its cause. For that reason, I believe that Judge Scheindlin got it right. If the conduct of the spoliating party was in bad faith or grossly negligent, the inference is that lost information was relevant, and there is a *rebuttable* presumption that the innocent party was adversely affected. Note that the presumption is rebuttable. If the spoliating party

[82] *Victor Stanley II* at 56.
[83] *Pension Committee* at 466-7.

can show that the innocent party was not prejudiced by the absence of the missing information, then severe sanctions can be avoided.[84]

There is much merit to the call for nationwide litigation hold standards and there are many issues yet to be determined. But even if you disagree with where Judge Scheindlin draws the lines, she deserves much credit for starting the debate in *Zubulake*, and refining it in *Pension Committee*.

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"Even if you disagree with where Judge Scheindlin draws the lines, she deserves much credit for starting the debate in *Zubulake*, and refining it in *Pension Committee*."

— William Butterfield

[84] *Pension Committee* at 468-9.

Pension Committee: A Catalyst for a Change in the Federal Rules?

By Maura R. Grossman, Wachtell, Lipton, Rosen & Katz

Before the opinion in *Pension Committee* was issued, it was sometimes a challenge to convince attorneys, or their clients, that preservation obligations – which can be onerous and costly at times – were serious business. No longer is that the case. The shift in attitude has been noticeable. Since January 2010, the legal community has been placing a far greater emphasis on preservation activities.

The question no longer is, "Should we send out a legal hold?" Now, litigants are asking, "Have we sent out the hold yet?" Judge Francis recently took the position in *Orbit One* that a *written* legal hold may not be necessary in *every* case. While there can be exceptions to the general rule, in the vast majority of civil litigation, a corporate litigant would likely be hard pressed to walk into a federal court today and state that it was unaware that it had an obligation to implement a legal hold when it reasonably anticipated litigation.

Pension Committee may have dictated the standards applicable to legal holds for much, if not all of the U.S., because most corporations operate in multiple jurisdictions and do not typically know in advance where they will be sued, so the safest course may be to apply the strictest standard, which is the standard in the Southern District of New York. Moreover, Judge Scheindlin is a highly prominent and influential jurist in the area of e-discovery and courts in other jurisdictions have looked to her for leadership in this area.

One of the things we observed in 2010 is that the Circuits were all over the map on the applicable standard for the imposition of sanctions, a point that was brought home in Judge Grimm's *Victor Stanley II* opinion. Similar to the preservation context, the impact on a multi-jurisdictional company is often that it is impossible to know in advance exactly which standard will apply. As a practitioner, it is challenging to know how to advise a client when you don't know where the litigation may end up.

It seems fairly obvious at this point that the most likely consequence of this inconsistency and uncertainty is that there will be some changes to the Federal Rules, most likely to Federal Rule of Civil Procedure 37. What the revised rule will say, however, and how far it will go remains to be seen, but there is clearly a growing cry for movement in the direction of uniformity, driven by the desire for greater predictability. This will take time because the rules process requires careful consideration and the opportunity for dialogue and feedback. It would probably be fair to say that *Pension Committee* and its progeny – particularly, *Rimkus* and *Victor Stanley II* – have served as the catalyst for this change.

The continuum of views on the necessity of prejudice to the requesting party in spoliation opinions by lower courts, even in the same jurisdiction, has ranged from Judge Scheindlin's rejection of the "pure heart, empty head" defense, to the "no harm, no foul" approach taken by Judge Francis in *Orbit One.* These cases are obviously very fact-dependent, and naturally, the law can vary by jurisdiction, but all of this variability has led some lawyers (and their clients) to throw up their hands in frustration. One option in situations where there has been a willful effort to destroy evidence, but where has not been prejudice to the requesting party, would be to shift the punitive consequence away from spoliation sanctions, per se, towards contempt. That way, the courts can differentiate the "mistake-makers," where case management may be the more appropriate response, from the "wrongdoers," where a more punitive and deterrent approach may be warranted.

Regardless of how the judiciary or Rules Committee chooses to resolve these thorny issues, the impact today is that expectations – and those actions that constitute basic competence – have irrevocably changed. Until any revision to the Federal Rules is made, organizations and their outside counsel need to take a hard look at preservation issues because

the stakes are much higher than they were merely a year ago.

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Lessons from the Frontlines

By John J. Jablonski, Goldberg Segalla LLP

To the uninitiated the focus on litigation holds in 2010 seems overblown. For those in the trenches, 2010 certainly added to the collective angst highlighting the risks and consequences litigants face whenever a litigation hold is contemplated. Cases like *Pension Committee* and *Rimkus* confirmed that a defensible litigation hold business process is more important now than at any other point in the United States. 2010 is also notable because there is a very real possibility that help may be on its way in the form of a new federal rule addressing preservation. The specific form of help, however, is still in the works and likely years away.

As an author, commentator and practicing attorney devoted to helping organizations with litigation hold issues I was able to participate in all aspects of litigation holds in 2010 – from helping companies struggling with developing a defensible preservation business process; helping implement litigation holds; defending litigation holds during litigation; explaining emerging case law to judges, practitioners and clients; and authoring two significant submissions to the Federal Rules Advisory Committee seeking a preservation amendment to the Federal Rules of Civil Procedure. I am drawing from these experiences to offer a few lessons for companies, attorneys and judges.

COMPANIES

The number one lesson for companies is simple. Be sure to document the good faith efforts taken to preserve evidence. The best way to do this is to issue a written litigation hold and then memorialize the steps taken to enforce the litigation hold. An email, memorandum or litigation hold software notice is a valuable first step toward avoiding sanctions. Developing even a basic litigation hold business process will create a significant return on investment. The process does not need to be complex, merely repeatable. Accusing a company of spoliation is a common tactic. The costs associated with defending against spoliation accusations can eclipse any actual sanctions. Spending a little time, effort and money early should take this argument away from your opponents.

ATTORNEYS

Two important lessons gleaned for attorneys. First, attorneys need to understand what it means to their clients to implement a litigation hold. For companies with complex computer systems, it is not as simple as flipping a switch to preserve "any and all ESI related to the facts and circumstances relevant to the Smith case." Be sure to speak with your clients about any internal processes already in place and work with your clients to efficiently implement a

litigation hold. Second, stop sending your clients litigation hold "advice" letters seemingly more designed to prevent legal malpractice then to actually alert your clients to their duty to preserve ESI. You need to be a friend in the process, not an adversary. Offer guidance to help implement a litigation hold, develop its scope and enforce it.

JUDGES

Judges (although some are trying) continue to apply outdated legal concepts like spoliation to litigation hold issues. This has forced some companies to spend millions of dollars preserving ESI in a legally defensible way – despite the absence of a written rule directly requiring litigation holds. Well intentioned companies are jumping through judicially created hoops to demonstrate good faith with uncertain results. The gotcha game of testing the reasonable limits of preservation to gain a tactical advantage in litigation continues to grow. In the digital age information is fluid – not static. In other words, the very benefits of ESI (the speed at which it is created, shared, stored and destroyed) make it extraordinarily difficult to identify and preserve. Yet, many judges believe that the solution is to simply buy more storage capacity. This misses the point.

The need for change is well documented in *Preservation – Moving the Paradigm* (Lawyers for Civil Justice, Nov. 10, 2010) and submitted to the Federal Rules Advisory Committee. Judges need to focus on the evidence that exists in a case and not the evidence that was lost. Adverse inferences and other harsh sanctions should only be granted when ESI is intentionally destroyed with the intent to prevent its use in litigation. In most cases a significant amount of evidence remains and a missing email or two should be no different than a faded memory. A new way of thinking about preservation must emerge to meet the demands of the 21st century. The current preservation—spoliation paradigm must change. A change in the Federal Rules may be coming, but any change is years away.

This past year will always be known to me as the year of the litigation hold. Hopefully it will also be known as the year that tipped the scales toward finding solutions and not just a sign of spoliation cases to come.

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"Cases like *Pension Committee* and *Rimkus* confirmed that a defensible litigation hold business process is more important now than at any other point…"

— John Jablonski

Disagreement with Pension Committee Requirement that All Hold Notices be in Writing

By Ralph C. Losey, Jackson Lewis, LLP

One of the most controversial requirements in *Pension Committee* is that litigation hold notices must always be in writing. At least one judicial opinion expressly disagrees with this requirement: *Orbit One Communications, Inc. v. Numerex Corp.*[85] Magistrate Judge James Francis opined in *Orbit One* that verbal hold notices may be appropriate, maybe even better than written hold notices in some circumstances. Others agree with Judge Scheindlin and argue that a verbal hold notice is not worth the paper it is written on.

Judge Francis and others imagine many circumstances where exceptions to written to notice should apply. For instance, they would not necessarily require notices to be in writing where small enterprises are involved. In the words of Judge Francis:

> Nor are sanctions warranted by a mere showing that a party's preservation efforts were inadequate. … But, depending upon the circumstances of an individual case, the failure to abide by such standards does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost. **For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all.** (emphasis added)[86]

I am inclined to agree with Judge Scheindlin in *Pension Committee* on the issue of written notice. I think that preservation notices should always be in writing, even for "small enterprises." The only exception I can see is the where the only notice would be from the sender to him or herself. In this not uncommon situation a written notice would be an empty gesture and should not be required. But still, even in that situation, the attorney representing such a solo defendant or plaintiff should advise their client of their duty to preserve in writing.

Judge Francis and others disagree with the writing requirement primarily because they oppose the automatic imposition of at least some sanctions from such an omission, and contend that this is inevitable under *Pension Committee*. They recognize, correctly I think, that in some occasions this omission of a writing could be minor error. They object to automatically assuming the omission to be gross-negligence with resulting presumptions of destruction of relevant evidence. This is the stated rationale of Judge Francis' objection at *11 of *Orbit One*:

> The implication of *Pension Committee*, then, appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there have been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of *Pension Committee*, then I respectfully disagree.

This is not a fair reading of *Pension Committee. Pension Committee* does not require the *automatic* imposition of sanctions when only verbal notice is given. It requires a finding of gross negligence, to be sure, but that does not in turn require a presumption of harm.

[85] *Orbit One Communications, Inc. v. Numerex Corp.,* 2010 WL 4615547 (S.D.N.Y., Oct. 26, 2010)
[86] *Id.* at 811.

> Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.[87]

The key word here is "may." The holding "*may* be presumed" is far different from "*shall* be presumed." Judge Scheindlin emphasizes this point when she goes on to state in the same paragraph that:

> Although many courts in this district presume relevance where there is a finding of gross negligence, application of the presumption is not required.[88]

Judge Francis' reading of *Pension Committee* ignores this important distinction. It also ignores Judge Scheindlin's emphasis on the importance of the total facts and the judge's "gut reaction" to them.

> *First*, I stress that at the end of the day the judgment call of whether to award sanctions is inherently subjective. A court has a "gut reaction" based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply. *Second*, while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case.[89]

The paramount role of judicial discretion and fact-finding should not be overlooked. The presumption of gross negligence established in *Pension Committee* for a variety of omissions, including written notice, is just the beginning of sanctions analysis. All of the facts must still be considered and carefully examined before any court determines that sanctions are warranted, and if so, what remedy is appropriate.

Ralph C. Losey *is a partner of Jackson Lewis where he leads the firm's Electronic Discovery practice group. He is the author of four books on electronic discovery in the last four years, published by West Thomson and the ABA. His latest book, Adventures in Electronic Discovery, will be published by West in Spring 2011. Ralph is also the publisher and principle author of the e-Discovery Team Blog at http://e-discoveryteam.com, and the online training program http://e-discoveryteamtraining.com. Ralph is also an Adjunct Professor of Law at the University of Florida where he teaches both introductory and advanced electronic discovery.*

[87] *Pension Committee*, 685 F.Supp.2d at 467.
[88] *Id.*
[89] *Id.*

It's Up to Us to Right-Size Our Preservation Efforts

By Browning Marean, DLA Piper

No doubt about it: When I look back on 2010 *Pension Committee* was certainly one of the most significant cases of the year. And it's interesting to note that more ink has been spilled on this case than perhaps any other, including those out of the U.S. Supreme Court. Judge Scheindlin's proclamations certainly were noteworthy, and reflect a growing recognition that pre-litigation actions need to be considered in the Rules that guide discovery.

The *Pension Committee* provides a lot of useful guidance to practitioners. However, one of the challenges that we face, and one not discussed in this opinion, is the issue of proportionality. A lack of clear and uniform standards complicates this further, and although many in the industry may have seen Judge Francis' opinion in *Orbit One* recently as a breath of fresh air, the fact remains that we must look to the strictest standard when uncertain what jurisdiction may ultimately apply to our cases. Without question, the *Pension Committee* is now that gold standard for preservation.

In practical terms, we need to figure out how we're going to right-size our litigation holds to address reasonableness and proportionality in a given case. Since it isn't clear what may pass muster, we must continue to rely on opinions that have come before, and magistrate judges to help interpret them going forward.

Achieving greater consistency and predictability through changes in the Rules is a noble goal, and one that we need to strive toward. However, it's important to remember that consistency at the Federal level is just one aspect. When one considers that an estimated 97 percent of all litigation is handled in the state courts, the issue of uniformity is certainly not likely to get resolved anytime soon.

In the meantime, approaching the challenge laid out by Judge Scheindlin and others requires reasoned thought, flexibility and some degree of risk-taking. In the same way that "no battle plan survives its first contact with the enemy," one should expect that a litigation hold will rarely survive its first contact with the data. A legal hold is not a "fire-and-forget" missile -- you have to not only aim carefully, but keep control of it from beginning to end. You also have to have the courage to decide when it is reasonable not to go out with "all your guns blazing" (i.e., preserve everything forever), taking instead a reasoned and proportional response to the litigation threat.

The *Pension Committee*, and the opinions that followed, reinforce some fundamental best practices that should already be in place. First, ensure that you have a process to follow when responding to a duty to preserve. And second, keep an audit trail. Maintain a database anytime a triggering event is considered, and keep track of the analysis done in determining if and when a duty to preserve has arisen. Keep track of the process of determining scope. Keep track of your legal holds, and what steps the organization took in response. Consistency, transparency and documentation always make it easier to defend your actions later.

The *Pension Committee* didn't set any new precedent, nor is it the law of the land, but given the same facts, I believe most jurisdictions would have reached the same exact conclusion. Courts have and will continue to take lawyers to task for organizations not doing what they should have done to preserve data. So there's no turning back, and over time such opinions will undoubtedly be ratified by the law.

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Pension Committee Renews Focus on Education and Execution

By Jonathan Redgrave, Redgrave LLP

When Judge Shira Scheindlin issued her decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, in January of 2010, many observers (including me) predicted that the case would be widely-cited. That prediction has proven true, with multiple citations in cases, briefs and articles in the past twelve months. Each of those citations have their own story for why and how they refer to the *Pension Committee* decision and certainly some take issue with parts of the opinion while others cite it as governing authority.

Stepping away from the specific facts and holdings of the case, the *Pension Committee* decision is perhaps most notable for the way in which it has galvanized dialogue on three core issues that impact cases across the country in different Circuits and in state courts:

(1) the criteria for evaluating whether certain discovery failings constitute harmless conduct, negligence, gross negligence or willfulness;
(2) the interplay between any prejudice suffered by a requesting party and the applicable burden of proof necessary to establish the basis for any sanctions; and
(3) identifying the possible sanction remedies appropriate and proportional to the demonstrated culpability and the actual prejudice suffered.

The ensuing discussion of these issues in academic literature and in 2010 decisions such as *Rimkus*, *Victor Stanley* and *Orbit One* confirms that the law remains unsettled in many respects and that variation between federal Circuits on spoliation issues is significant.

Importantly, however, Judge Scheindlin's *Pension Committee* opinion has once again (like the *Zubulake* progeny) helped frame the debate across the board.

In terms of immediate impact, Judge Scheindlin's opinion in *Pension Committee* made clear that, at the end of the day, litigants in other cases must realize that they will need to think through and be prepared to explain why the efforts in their cases were reasonable, appropriate and in accordance with accepted practices at the time those efforts were undertaken. Significantly, even with the guidance provided in the *Pension Committee* opinion and in other cases, this reckoning does not look to a talismanic checklist because, in Judge Scheindlin's words, "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite." Moreover, Judge Scheindlin explicitly (and correctly in my view) recognized that "[c]ourts cannot and do not expect that any party can meet a standard of perfection."

Thus, the *Pension Committee* opinion hammered home the fact that parties and counsel have to exercise reasonable, good faith judgments in discovery matters and, not surprisingly, be able to defend that exercise of judgment down the road. Indeed, Judge Scheindlin described her after-the-fact role as making "a judgment call" where the court will employ "'a gut reaction' based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply." While perhaps stating the obvious, Judge Scheindlin's description of her role has renewed the focus of parties and counsel on the need for education, execution and documentation with respect to acceptable and defensible practices for discovery matters, which is a benefit for all.

Jonathan Redgrave *is a partner at Redgrave LLP. He serves many Fortune 500 clients and also represents numerous clients involved in litigation and government investigations and has worked as an expert witness and with special masters. He is internationally recognized for his work, has authored, co-authored and edited numerous publications in the area of electronic discovery, privacy and data security, and has spoken around the world on these issues. Jonathan has extensive experience in all areas of complex litigation in state and federal courts, and focuses his practice on Information Law matters. Jonathan has been recognized for exceptional standing in the legal community (Band 1) in* Chambers USA: America's Leading Lawyers for Business for 2010 *for eDiscovery. Jonathan helped found, was the first Chair of and is currently Chair Emeritus of the renowned Sedona Conference Working Group on Electronic Document Retention and Production. He is also a co-chair of the acclaimed Georgetown University Law School eDiscovery Institute.*

The Importance of Being Transparent

By Denise J. Talbert, Shook Hardy & Bacon LLP

I have a confession: When I first read *Pension Committee,* I was taken aback. As someone who spends most of the day partnering with clients to ensure compliance with document preservation, collection and production obligations, it was bracing to me because of the potential implications it had on me and my clients. I can't say that I agree with all of the positions that Judge Scheindlin wrote in her opinion, but after I had time to digest it, I have been able to identify some helpful practical implications.

It's interesting to reflect back on the last year. The *Pension Committee* didn't really prompt a lot of changes in how I counseled my clients from the standpoint of understanding all discovery-related actions would be judged in the rear-view mirror and the importance of documentation, documentation, documentation. But I believe *Pension Committee* has provided the catalyst for proactive discussions with some clients about why legal holds and the whole preservation process continues to be so very important and more complicated than it would seem at first blush. Following *Pension Committee,* more and more clients are receptive to having a dialogue around legal hold practices that includes, for instance, a representative from the IT department, a representative from human resources, etc. As a result, we have more of an "interdisciplinary" group of individuals working together to avoid some of the really bad things that could happen.

I think a second outcome from *Pension Committee* is reinforcing the import of mutual transparency. The old school of keeping your cards close to the vest when it comes to data preservation, collection and production efforts just won't cut it. The value of cooperation, collaboration and communication with both opposing counsel and the courts is clear. This requires greater documentation – keeping track of every interaction and each decision along the way to both manage expectations and create that all-important audit trail for defensibility. By doing so, we've overcome spoliation motions or avoided them altogether. It's not perfection, but good faith, reasonableness and proactive steps that are the standard (and, hopefully, Judge Scheindlin would agree).

As an aside, I've also seen success in using cases like *Pension Committee* and its progeny to help inside counsel make the business case for investing the time and money in records management process improvement and other information management initiatives. The business team can better understand the value, and the real consequences of failing to act.

I do have concerns. The lack of uniformity across jurisdictions that requires responding to the harshest standards in multi-jurisdictional litigation. The rather cavalier attitude that comes

across in some of these opinions when looking at our actions through the benefit of hindsight. The uncertainty of self-collection as a reasonable and proportional response to many litigation claims. Seeming to equate preservation with collection and not allowing parties to "preserve in place". But in the end, when faced with opinions like *Pension Committee,* we need to counsel our clients to adopt consistent and defensible procedures and remain actively engaged, ask more questions, validate the outcomes, and document the steps along the way. We also become stronger advocates for the adoption of practical, reasonable and proportional e-discovery rules. And that's a good thing.

Denise Talbert *chairs SHB's eDiscovery, Data & Document Management Practice (eD3) and is a partner in the Global Product Liability Group and Business Records Management & Consultation Practice. She has over 14 years of experience in cost-effective discovery management in complex litigation, including the preservation, collection, organization, review, and production of documents. She has represented business interests in the chemical, communications, insurance, pharmaceutical, retail, tobacco, and transportation industries. Denise has published materials on eDiscovery law and routinely offers CLE presentations on this topic. She is also a member of The Sedona Conference Working Group on Electronic Document Retention and Production, and has been appointed to the LexisNexis Advisory Board.*

E-Discovery Is Here to Stay!

By Paul D. Weiner, Littler Mendelson PC

Once again, the Legal Community owes Judge Scheindlin a debt of gratitude for issuing a landmark opinion on e-discovery. Just like the *Zubulake* line of cases that laid the groundwork for what has become a multibillion-dollar-a-year subspecialty of the law, *Pension Committee* once again establishes a baseline set of contemporary standards for the preservation, collection, review and production of electronically stored information ("ESI") in litigation. The impact of this decision is felt most strongly in three key areas:

1. E-Discovery is not a paper tiger

There is no question that we live in a digital world and the volume of ESI is staggering. By way of example only: billions of e-mails are sent and received by U.S. businesses everyday; a single laptop computer can store the equivalent of 40 million typewritten pages of paper documents; Facebook users collectively spend 6 billion minutes a day on Facebook; in the United States alone, 3.5 billion cell phone text messages are sent everyday; there are about 50 million "tweets" on Twitter everyday; and over 1.5 billion people use the Internet worldwide. Amazingly, however, some clients, lawyers and judges still do not view e-discovery as a serious issue in litigation or view it as something that "other parties in other cases" have to deal with.

The *Zubulake* cases served as a proverbial wake-up call that squarely put "parties and their counsel . . . fully on notice of their responsibility to preserve and produce [ESI]," in accordance with "rapidly evolving" guidance and developing standards. *Pension Committee* had the same awakening effect. It made clear that 6 years later, at least in the Second Circuit, certain duties are so well established that they have become the contemporary standards of the day, and failure to follow those standards – even if not done willfully or in bad faith – will result in serious consequences, including an adverse inference instruction. (It should be no surprise to anyone that shortly after the adverse inference rulings were issued in *Pension Committee*, the case promptly settled.)

Thus, *Pension Committee* reinforces that, in today's digital world, when a duty to preserve has been triggered, activities like issuing written litigation holds, identifying key players and

preserving their electronic and paper records, and preserving the records of former employees, especially in the Second Circuit, are not optional. While this may not seem like an eye-opening proposition to those of us who "live and breathe" e-discovery, it is often difficult medicine to swallow for clients and counsel that are not familiar with those processes, especially when coupled with challenging (and oftentime consuming, disruptive to day-to-day business, and expensive) recommendations about what needs to be done to properly meet e-discovery obligations in complex cases.

2. E-Discovery is a two-way street

Simply stated, e-discovery is a two-way street. Preservation, search, and production burdens, as well as sanctions for improper conduct, apply to plaintiffs as strongly as defendants, even in asymmetrical (*e.g.*, single plaintiff v. corporation) cases. *See, e.g., Leon v. IDX Sys. Corp.,* 2006 WL 2684512 (9th Cir. Sept. 20, 2006) (affirming spoliation sanction and dismissal of plaintiff's ADA/discrimination lawsuit because plaintiff wiped the unallocated space on his laptop's hard drive before turning it over to defendant's expert for examination); *Kvitka v. Puffin Co., LLC*, 2009 WL 385582 (M.D.Pa. Feb. 13, 2009) (dismissing plaintiff's lawsuit because plaintiff threw away "old" laptop upon purchasing a new one, after the duty to preserve had been triggered).

Yet, in my experience, there is still a perception among litigants, counsel and some judges that e-discovery obligations somehow apply only or with greater force to defendants. *Pension Committee* makes clear that all parties on each side of the "versus" in a lawsuit have duties and responsibilities with respect to e-discovery, and that failure to abide by them could have serious consequences. Indeed, in *Pension Committee*, Judge Scheindlin not only sanctioned the plaintiffs for e-discovery misconduct, but she also instructed that: "[a] plaintiff's duty is more often triggered before litigation commences, in large part, because plaintiffs control the timing of litigation." *See also*, *Rimkus v. Cammarata* ("The alleged spoliators are the plaintiffs in an earlier-filed, related case.")

This issue is particularly important as the sources of ESI that plaintiffs control, *e.g.*, home/personal e-mails and computers, text messages, social networking communications, blog postings, "tweets," etc., continue to emerge as technology develops and expands.

3. Defining the contours for potential national standards

Finally, decisions like *Pension Committee* and its progeny define the contours of the many unsettled questions that still remain in the e-discovery world, and set the stage for discussions around whether national standards are warranted, and if so, what those standards should be. See, e.g., *Rimkus v. Cammarata* (noting that unlike the Second Circuit where *Pension Committee* was decided, the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits all require some showing of "bad faith," severe prejudice or intentional misconduct before severe sanctions like an adverse inference instruction may be imposed); *Victor Stanley II,* "Spoliation Sanctions by Circuit" Chart/Appendix (column 1, addressing the "Scope of Duty to Preserve," and noting while some jurisdictions require actual "control" over data for preservation/sanctions purposes, others jurisdictions expand the duty to non-party data over which a party has the "right, authority or practical ability" to obtain); *Is It Time For a Federal Rule on Preservation*, *Litigation News,* Aug. 1, 2010, *available at* http://www.abanet.org/litigation/litigationnews/top_stories/080210-e-discovery-preservation-new-rule.html (last visited Jan. 4, 2011).

Paul Weiner *serves as Littler's National e-Discovery Counsel. He is a nationally recognized thought leader in the area of electronic discovery and has lectured and published extensively in the area of e-discovery, including publishing several articles in the American Bar Association's Journal of Litigation. Paul's work has served to educate lawyers, judges and business people about the technical and legal issues governing electronic discovery. His work was cited by the landmark Zubulake opinion. Paul's work on e-discovery is also referenced in the Federal Judicial Center's database on significant cases and articles. He has also served as a Court-appointed E-Discovery Special Master for the United States District Court for the Eastern District of Pennsylvania.*

FURTHER READING

Allman, Thomas, "The 2010 Conference on Civil Litigation at Duke Law School: A Focused Appraisal," Georgetown University Law Center Advanced E-Discovery Institute, November 18-19, 2010.

Ball, Craig, "To Have and To Hold," *Law Technology News,* May 2010.

Conference on Civil Litigation 2010, Proceedings of the 2010 Conference at the Duke Law School, May 10-11, 2010 (civilconference.uscourts.gov).

Evans, Gareth T., et al., "2010 Mid-Year Electronic Discovery and Information Law Update," Gibson Dunn & Crutcher LLP, July 13, 2010.

Georgetown University Law Center, Proceedings of the 2010 Advanced E-Discovery Institute, November 18-19, 2010 (www.law.georgetown.edu/cle/).

Harris, Brad, *12 Myths about Legal Holds,* Zapproved Inc., January 2010.

Harris, Brad and Craig Ball, "The Enlightened Legal Hold," Zapproved Inc., August 2010.

Harris, Brad and John Jablonski, "The Pension Committee Opinion: Judge Scheindlin's Call to Action for Effective Legal Holds," Zapproved Inc., February 2010.

Isaza, John and Jablonski, John, 7 Steps for Legal Holds of ESI and Other Documents, ARMA International, 2009.

Lawyers for Civil Justice, et al., "Reshaping the Rules of Civil Procedure for the 21st Century," submitted to the 2010 Conference on Civil Litigation, Duke Law School, May 2, 2010 (civilconference.uscourts.gov).

Lawyers for Civil Justice, et al., "Preservation – Moving The Paradigm," submitted to the 2010 Conference on Civil Litigation, Duke Law School, November 10, 2010 (civilconference.uscourts.gov).

Scheindlin, Shira A., et al., "Elements of a Preservation Rule," submitted to the 2010 Conference on Civil Litigation, Duke Law School, May 2, 2010 (civilconference.uscourts.gov).

Scheindlin, Shira A., et al., *Electronic Discovery and Digital Evidence: Cases and Materials,* The Sedona Conference®, West Publishing, 2009.

Working Group on Electronic Document Retention and Production, *The Sedona Conference Commentary on Legal Holds,* The Sedona Conference®, 2010.

"Spoliation Sanctions by Circuit" Poster

We have created a poster of Judge Paul W. Grimm's addendum to *Victor Stanley II* that reviews the standards across every U.S. Circuit. Download an electronic copy at the following URL:

www.legalholdpro.com/pensioncommittee

"In her recent opinion in *Pension Committee,* Judge Scheindlin has again done the courts a great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery."

U.S. District Judge Lee H. Rosenthal
Rimkus v. Cammarata
(SDTX, February 19, 2010)

Exhibit LL

E-Discovery ESI (Electronically Stored Information) 01-30-2012

E-Discovery Judges in Charlotte: Post-CLE Summary

Judges Facciola, Grimm, and Peck at the Charlotte CLE Event

Part 1 of 2
Read Part 2

Last week I had the pleasure of attending a CLE in Charlotte, NC, featuring three of the preeminent Judges in the e-discovery space as well as a deep bench of ESI practitioners in the field. Judges Facciola, Grimm and Peck spoke on the most pressing issues facing practitioners today. Using the context of a mock case (and its attendant meet and confer and Rule 16 conferences) the panel analyzed best and worst practices, and looked to the future of litigation and government investigation in a post-ESI world.

Panel Judges:
Hon. John M Facciola (US Magistrate Judge, DC)
Hon. Paul W. Grimm (Chief US Magistrate Judge, US District court, MD)
Hon. Andrew J. Peck (US Magistrate Judge, SDNY)

Also Featuring:
Hon. Shiva Hodges (Magistrate, NC)
Hon. David Kessler (Magistrate, WDNC)
Craig D. Cannon (Bank of America Discovery Counsel)
Ralph Losey (Partner Jackson Lewis)
… and other e-discovery specialists

Why do we, as Legal Practitioners, Need to Care About e-Discovery?

At the outset of the program, the moderator posed the question, “Why should we be concerned about this subject” to the Big Three, and they offered key insights into the view from the bench. For Grimm, the concern broke down to three major legal fictions that society and the legal community are currently laboring under: 1) that computers are secure, know they are not and know how easy they are to access, manipulate, 2)

the fiction of privacy, via digital media we have greatly sacrificed privacy and 3) the myth that we can control and manage our data, we know intellectually that we cannot do this. New technologies have rapidly been adopted integrated into the way we do business.

Grimm explained that lawyers need to recognize that the disputes legal practitioners are now called upon to deal with are operating with this information and the resolution of these disputes will evolve with this technology. He went on to say that many courts are looking to reign in preservations via key word search limitation or application of cost effective search. Ultimately, the solution cannot be a 17th century concept of technology applied to current technologies.

For Facciola, the question of proportionality in this brave new world of mega volumes of ESI took ultimate significance. The effort required for e-discovery is not proportional to the scale of cases; this is interrupting the docket and taking disproportionate amount the courts of time. Increasingly mid-sized companies and the middle class are being driven out of federal courts by the growing costs to handle ESI.

Peck focused on embracing technology, saying that unless we're prepared to abandon pretrial discovery, we must be versed in e-discovery; there is no paper anymore. Even in slip and fall matters, the defense counsel is using Facebook as a tool to disprove the claims of plaintiffs. In every sort of case need to know enough to be able to effectively represent your client. Otherwise, we will not live up to Federal Rules of Civil Procedure (FRCP) (the just, speedy, and inexpensive determination of every action and proceeding), ensuring that e-discovery is not used as blackmail to make a defendant settle the case.

Problems With the Current Practices

For all of the Judges and the practitioners represented in the mock case, a glaring concern is the adversarial "*I want it all you get nothing*" approach that is being taken in 26 (f) conferences and throughout the lifetime of a case.

Problem #1: The Preservation Question

There is a common law duty to preserve when litigation is reasonably anticipated. This is easy to say, but not so easy to decide. What is the trigger? Often, this means the defendant must decide what to preserve even before a preservation letter. In-house and outside counsel need to determine what is reasonable. Peck said that while we are hearing a lot about amendments, the inclination to over preserve is not reasonable; practitioners must make the decision based upon what is known and amend it as you go forward. Preservation can help establish parameters if done the right way. If it is a "save everything and a pony" request, judges may adversely infer when that becomes exhibit one.

Problem #2: Records Management Systems

There is also the question of whether the records management system is reasonable or if it needs to be disrupted. In normal operation is it sufficient to yield the docs? This assists with getting to the Sedona ideal set forth in the Cooperation Proclamation. Remember that this is at a stage without the court to be a referee; a response looking to reasonableness is the best start. Peck also suggested documenting everything you do. Cases take a long time! An associate involved at the beginning of a case may or may not be there or even remember at later stages.

It was noted that many times lawyers are like children- if there are not consequences we will not follow rules. When both sides have data there is a greater likelihood of cooperation… the problems arise when the plaintiff has less information- it is an uneven playing field. This is especially true in some 26(f) conferences and general gamesmanship throughout cases. Magistrate Judge Karla Spaulding wrote an opinion in Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 2009 WL 546429 (M.D. Fla. Mar.

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4, 2009)[1] highlighting this matter. Two attorneys at a BigLaw firm are personally sanctioned for a series of blunders and unnecessary fights over metadata. The court found the plaintiff's lawyers were to blame for stripping metadata from the native files that the client had properly collected. The attorneys refused to produce in native as requested; instead, producing 200,000 unsearchable Tiff files.

> *In the opinion: When attorneys have engaged in a pattern of withholding and concealing information concerning discoverable material and misrepresenting to the court and opposing counsel material facts about numerous failures to comply with discovery requests and Court orders–including falsely blaming a lack of third-party cooperation and fabricating a false story about the form in which ESI was gathered and stored–courts in this circuit have not hesitated to impose significant sanctions against the law firms that employed the attorneys responsible for this sanctionable conduct.*

Judge Facciola cited the Fannie Mae securities litigation[2] as another example highlighting flaws with the current system. Here, an agency within Fannie Mae got the subpoena as a third party and they spent 9%of their annual budget (six million dollars) to produce a massive amount of data, and it's all useless. In Response to 9 motions for enlargement in scope of discovery requests, the government kept saying "we can do this", ultimately spending an in inexcusable $9.09 per document. The agency then tried to cost shift after they had done all the expense and was completely denied. Parties need to know that without due diligence up front do not count on cost shifting. You must make the best case up front. When it comes to keywords: don't agree to someone else's list without doing your own due diligence.

For Judge Facciola another massive concern is that data is ever expanding. When dealing with this new breed of Big Data, limiting to 5 keywords is not a viable solution… it will diminish precision in search and veracity of recall.

Government Investigation: Do you see Parties Seeking Relief for ESI?

Craig Cannon, Discovery counsel for Bank of America noted that he has seen regulators and other agencies like the Department of Justice (DOJ) and Federal Trade Commission (FTC) are more receptive to minimizing e-discovery costs. They are not incented to squeeze a corporation for unnecessary documents; they want to get to the crux of the matter. Many in these agencies are open to using technology to reduce data sets and intelligent review.

The judges noted that recent additions to these government agencies (i.e. the DOJ's Alison Stanton) have brought a new expertise and willingness to cooperate. It is a function of intelligence and understanding. Intelligent review technology is being used in these government investigations.

Continued…

In the next post, I'll discuss the Judges' recommendations on action-items for e-discovery practitioners, utilizing technology solutions, and the recognition of e-discovery as a highly specialized practice area.

Citations

[1] *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 2009 WL 546429 (M.D. Fla. Mar. 4, 2009) and more analysis from Ralph Losey on the matter at http://e-discoveryteam.com/interviews/interview-of-judge-shira-scheindlin-and-ralph-losey/

[2] Fannie Mae Securities Litigation, _ F.3d _, 2009 WL 21528 (C.A.D.C., Jan. 6, 2009). United States Court of Appeals,. District of Columbia Circuit.

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Exhibit MM

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SEARCH, FORWARD

Will manual document review and keyword searches be replaced by computer-assisted coding?

First, there was manual review — the "traditional" method of document review. As a young associate at a major New York law firm in the late 1970s, I reviewed boxes of files for relevance, "hot documents," and privilege. To gather the paper documents, you went to the client and asked where they kept files about "X" ("X" being the issue(s) involved in the lawsuit). Often there was a central file labeled "X," and employees kept their own working files as well. Occasionally, you had to go to the dreaded warehouse, where boxes might not be indexed, and working conditions always were less than ideal.

Review was linear. There was no way to deduplicate documents or organize them by types. You reviewed whatever box landed on your desk; colleagues might be reviewing a carbon copy of the same file. Hopefully, you both coded it the same. (Even today, it is not unusual for a document to be produced while another copy is on the privilege log.)

When associate billing rates became too high, firms turned to paralegals, staff attorneys, or contract attorneys. Whether this had any effect on the quality of the review was beside the point; economics drove the change.

Despite its flaws, many senior lawyers (and some clients) still consider manual review to be the "gold standard" against which other review techniques are compared. While the volume of electronically stored information (and concomitant expense) has largely eliminated manual review as the sole method of document review, manual review remains used along with, for example, keyword screening. Let us consider whether manual review as the gold standard is myth or reality.

Two recent research studies clearly demonstrate that computerized searches are at least as accurate, if not more so, than manual review. Herb Roitblatt, Ann Kershaw, and Patrick Oot, of the Electronic Discovery Institute, concluded that "[o]n every measure, the performance of the two computer systems was at least as accurate (measured against the original review) as that of human re-review." ("Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review," Journal of Am. Society for Information Science & Technology, 61(1):70-80 (2010).)

Likewise, Wachtell, Lipton, Rosen & Katz litigation counsel Maura Grossman and University of Waterloo professor Gordon Cormack, using data from the Text Retrieval Conference Legal Track, concluded that "[T]he idea that exhaustive manual review is the most effective — and therefore the most defensible — approach to document review is strongly refuted. Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort. ("Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review," Richmond J. of Law & Tech., Vol. XVII, Issue 3, 1-48 (2011)).

Grossman and Cormack note that "not all technology-assisted reviews . . . are created equal" and that future studies will be needed to "address which technology-assisted review process(es) will improve most on manual review."

KEY WORDS

Because the volume of ESI has made full manual review virtually impossible, lawyers have turned to keywords to cull ESI (particularly e-mail) for further (manual) review. A basic problem is that absent cooperation, the way most lawyers engage in keyword searches is, as Ralph Losey suggests, the equivalent of "Go Fish." The requesting party guesses which keywords might produce evidence to support its case without having much, if any, knowledge of the responding party's "cards" (i.e., the terminology used by the responding party's custodians). Indeed, the responding party's counsel often does not know what is in its own client's "cards."

The problems with keyword search are well known. Lawyers are used to doing keyword searches in "clean" databases, such as Westlaw and Lexis, which use full sentences, full words (not abbreviations), and largely the same words to describe the same concept. E-mail collections are not clean databases. People use different words to describe the same concept; even business e-mails are informal, rampant with misspellings, abbreviations, and acronyms.

The object of search is to produce high recall and high precision. Recall is the fraction of relevant documents identified during a review, i.e., a measure of completeness. Precision is the fraction of identified documents that are relevant, i.e., it is a measure of accuracy or correctness.

When keywords return false positives — documents that have the keywords but are not relevant — the responding party has to use expensive manual review to find the truly relevant documents. It is not uncommon for a poorly chosen keyword to return more "junk" than responsive documents, i.e., low precision. The goal of search is to produce high recall and high precision (in a cost-effective way).

How effective is keyword searching? In 1985, scholars David Blair and M.E. Maron collected 40,000 documents from a Bay Area Rapid Transit accident, and instructed experienced attorney and paralegal searchers to use keywords and other review techniques to retrieve at least 75% of the documents relevant to 51 document requests. Searchers believed they met the goals, but their average recall was just 20%. This result has been replicated in the TREC Legal Track studies over the past few years.

Judicial decisions have critiqued keyword searches. Important early decisions in this area came from magistrate judges John Facciola (District of Columbia) and Paul Grimm (Maryland). See *United States v. O'Keefe*, 37 F. Supp. 2d 14, 24 (D.D.C. 2008) (Facciola, M.J.); *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008) (Facciola, M.J.); and *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, 262 (D. Md. 2008) (Grimm, M.J.).

I followed their lead with *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (Peck, M.J.).

"This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search

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terms or 'keywords' to be used to produce e-mails or other electronically stored information ('ESI')," I wrote.

My opinion concluded: "Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives.' It is time that the Bar — even those lawyers who did not come of age in the computer era — understand this."

Despite these (and other) judicial criticisms of the use of keywords without sufficient testing and quality control, many counsel still use the "Go Fish" model of keyword search. Cooperation is important, but without testing and quality control cooperation alone is not the answer.

COMPUTER-ASSISTED SEARCH

Even with keyword searching, lawyers have turned to certain computer-assisted approaches to further reduce review cost. Boolean connectors can be used (such as "and," "or," "w/in," "but not"). In addition, deduplicating the ESI (either within a single custodian or across the entire production) greatly reduces both volume and the chance of the same e-mail being coded differently by different reviewers. Grouping "near duplicates" takes that a step further. Threading e-mail chains is another useful technique.

If the hot topic in 2010 conferences was proportionality, this year it is computer-assisted coding, often generically called "predictive coding." By computer-assisted coding, I mean tools (different vendors use different names) that use sophisticated algorithms to enable the computer to determine relevance, based on interaction with (i.e., training by) a human reviewer.

Unlike manual review, where the review is done by the most junior staff, computer-assisted coding involves a senior partner (or team) who review and code a "seed set" of documents. The computer identifies properties of those documents that it uses to code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer's coding. (Or, the computer codes some documents and asks the senior reviewer for feedback.)

When the system's predictions and the reviewer's coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents. Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer.

Some systems produce a simple yes/no as to relevance, while others give a relevance score (say, on a 0 to 100 basis) that counsel can use to prioritize review. For example, a score above 50 may produce 97% of the relevant documents, but constitutes only 20% of the entire document set.

Counsel may decide, after sampling and quality control tests, that documents with a score of below 15 are so highly likely to be irrelevant that no further human review is necessary. Counsel can also decide the cost-benefit of manual review of the documents with scores of 15-50.

To my knowledge, no reported case (federal or state) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving of computer-assisted review.

Perhaps they are looking for an opinion concluding that: "It is the opinion of this court that the use of predictive coding is a proper and acceptable means of conducting searches under the Federal Rules of Civil Procedure, and furthermore that the software provided for this purpose by [insert name of your favorite vendor] is the software of choice in this court." If so, it will be a long wait.

Judicial decisions, including *Victor Stanley*, *O'Keefe* and *Gross*, are highly critical of the keywords used by the parties. These decisions did not "endorse" or "approve" of keyword searching. Nevertheless, lawyers seem to believe that the judiciary has signed off on keywords, but has not on computer-assisted coding.

In addition to reluctance to be the guinea pig for a decision on predictive coding, lawyers perhaps are concerned that they will have to go through a *Daubert* hearing as to the "admissibility" of the results of predictive coding. Perhaps this fear comes from *O'Keefe*, where Judge Facciola said that opining on what keyword is better "is truly to go where angels fear to tread," and is a topic "beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence," dealing with expert opinions.

Lawyers' fears in this regard seem largely misplaced. First, Facciola's comments were directed at keywords, but everyone is using keywords, and I know of no decision after *O'Keefe* requiring expert testimony as to the use of keywords.

Second, with due respect to Facciola, I do not think *Daubert* applies — it applies when an expert will testify at trial in order to admit into evidence opinions or results (e.g., the result of DNA testing reveals a match).

Here, the hundreds of thousands of e-mails produced are not being offered into evidence at trial as the result of a scientific process. Rather, whether the handful of e-mails offered as trial exhibits is admissible is dependent on the document itself (e.g., whether it is a party admission or a business record), not how it was found during discovery.

That said, if the use of predictive coding is challenged in a case before me, I will want to know what was done and why that produced defensible results. I may be less interested in the science behind the "black box" of the vendor's software than in whether it produced responsive documents with reasonably high recall and high precision.

That may mean allowing the requesting party to see the documents that were used to train the computer-assisted coding system. (Counsel would not be required to explain why they coded documents as responsive or non-responsive, just what the coding was.) Proof of a valid "process," including quality control testing, also will be important.

Additionally, counsel can point to the TREC study and other reported studies that generally show that computer-assisted coding technology works at least as well if not better than keywords or manual review.

Of course, the best approach to the use of computer-assisted coding is to follow the Sedona Cooperation Proclamation model. Advise opposing counsel that you plan to use computer-assisted coding and seek agreement; if you cannot, consider whether to abandon predictive coding for that case or go to the court for advance approval.

Until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on this article as a sign of judicial approval. In my opinion, computer-assisted coding should be used in those cases where it will help "secure the just, speedy, and inexpensive" (Fed. R. Civ. P. 1) determination of cases in our e-discovery world.

Andrew Peck is a United States magistrate judge for the Southern District of New York. E-mail: Andrew.Peck@nysd.uscourts.gov.

Exhibit NN

An Interview with The Honorable Andrew J. Peck – Part One

posted by Mikki Tomlinson at 6:04pm on Feb 2nd, 2012

posted by
Mikki Tomlinson
eDJEXPERT

Role: Consultant
Size: Small (less than 50)
Years of Experience: 21
Certifications/Licenses: ACEDS

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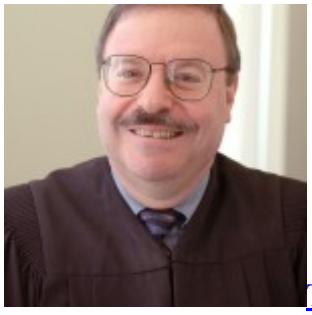
The Honorable Andrew J. Peck, United States Magistrate Judge for the Southern District of New York, graciously allowed me to interview him after the LTNY *Man vs. Machine: The Promise/Challenge of Predictive Coding & Other Disruptive Technologies* session in which he participated as a panelist. Judge Peck shared the panel with industry luminaries Maura Grossman and Ralph Losey, and moderator Dean Gonsowski. Overall, the session was excellent – very educational, and well organized.

When I reached out to Judge Peck last week to request the interview, my intention was to write a review of the session. I prepared questions and took fast and furious notes during the session. However, between the time the session was over and the time we sat down for a bite to eat and proceed with the interview, I realized that a session review is not really what will benefit the eDiscovery community the most. I decided, instead, to open up a discussion with the community. Directly below are some of my insights and questions on the session, my post-session discussion with Judge Peck, and the hot topic of Predictive Coding/Technology Assisted Review ("PC-TAR"). Do you agree, disagree, have something to add? Did you attend this or other PC-TAR sessions? What did you think? Please post your comments.

Key Word Searches Don't Work? While I waited for Judge Peck after the session, I had an opportunity to visit with my friend and industry veteran Chuck Kellner. Chuck disagrees with blanket comments that key word searches simply don't work and the insinuation that service providers are in favor of the key word method for purposes of profit. While a strong advocate of PC-TAR as a major improvement over search through the use of iterative key word development, Chuck was focusing his comments on the intent and recommendations of responsible service providers. He expressed that: (1) experienced, quality, ethical service providers have been motivated by client need to reduce the overall size of review and cost of discovery, and (2) the method of iterative development of key words can be and has been useful and defensible in the past when done properly. Chuck went on to discuss how to develop iterative workflows, sampling,

and processes to use key words as a means of locating and managing ESI in the discovery process. We discussed the difference between a solid, iterative process versus "guessing" at key words and simply trudging forward down that path. That kind of "guessing" is what drew the attention of Judge Peck in the Gross decision (*William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 22903 (S.D.N.Y. Mar. 19, 2009)).

This brings me to my next question…

Will PC-TAR Force the Industry Into Better Workflows? The reality of the state of our industry is that there are still a lot of attorneys and litigants that are not subscribing to well-designed (or any) workflows. Judge Peck told a story during the session that highlights this very fact. If you find yourself before Judge Peck, you will be required to complete a Joint Electronic Discovery Submission and Proposed Order, which is Exhibit "B" to the Judge's Rule 16 IPTC Scheduling Order. In his story, Judge Peck spoke of a case where the parties agreed that they would print all of their ESI and exchange it in paper form. After he denied the proposal, one of the parties filed a motion to reconsider. Unbelievable? Not really – I still see this in practice a lot. More commonly than the paper scenario, I see parties blindly selecting key words without anything to back up the selection of them (such as asking custodians), followed by not sampling them, or processing all data with no filtering at all (such as applicable date range). Neither of these methods demonstrate efficient and effective (or any) workflows.

One of the most common statements we are hearing in discussions surrounding PC-TAR is that if you want to be able to defend its use, you must have a well developed and solidly documented process that includes appropriate levels of sampling and QC. Wouldn't you agree that this should apply to all ESI review projects, no matter what technology or approach is being used?

Despite evidence (*see*, e.g., TREC, eDiscovery Institute, JOLT) that proponents of PC-TAR argue demonstrates otherwise, there are many attorneys and litigants that are concerned about the use of such advanced technology and continue to find an "eyes on every document" approach superior. There are also many that believe that PC-TAR may be superior, but would like to see some caselaw on the topic before they are willing to attempt it. (Note: in the session, Judge Peck hinted that he may have a ruling related to PC-TAR in the near future. We will keep a lookout for it and post as soon as we hear more.)

I am hopeful that as a result of these defensibility discussions, those that are not willing to make the leap to PC-TAR at this point might at least begin to develop improved workflow and processes (such as sampling, iterations, filtering , and QC) to their current processes if they are not already doing so. This is the Pollyanna in me. However, the devil's advocate in me asks the question: if you are choosing not to apply well developed and solidly documented processes in seemingly more simple approaches to collection and review now, why would the PC-TAR discussions motivate you to do it now? After all, the same discussions took place over key word search and there is published caselaw on the topic. What do you think?

Please use the comments section to post your thoughts and questions on this topic and stay tuned for *An Interview with The Honorable Andrew J. Peck – Part Two*, which will include discussion on the paradigm shift required for PC-TAR, and community education (bench, bar and client).

More Stories

A few notes on Email Architecture, Backup and Archiving
X1 Social Discovery Collects Data in Social Networks

Exhibit OO

1c20sasc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MONIQUE DA SLIVA MOORE,

Plaintiff,

v. 11CV01279

PUBLICIS GROUPE,ET AL,

Defendant.

----------x

New York, N.Y.
December 2, 2011
5:00 p.m.

Before:

HON. ANDREW J. PECK,

Magistrate Judge

APPEARANCES

SANFORD WITTELS & HEISLER
Attorney for Plaintiff
BY: STEVEN WITTELS
SIHAM NURHUSSEIN

JACKSON LEWIS
Attorney for Defendant
BY: VICTORIA WOODLIN CHAVEY
JEFFREY BRECHER

MORGAN LEWIS & BOCKIUS, LLP
BY: GEORGE STOHNER
Attorneys for Defendant Publicis Groupe

THE CLERK: All rise.

THE COURT: Be seated. Okay. What discovery issues are still in dispute based on the most recent letters that Judge Sullivan has not ruled on.

MR. WITTELS: Your Honor, good afternoon. Steven Wittels and Siham Nurhussein the plaintiffs. Ms. Nurhussein is going to address the main disputes, as far as we're concerned in response to the question.

THE COURT: All right. And what I will want to do, once you give me a little bit of background, if you think I need it -- and I have read the pleadings and Judge Sullivan's orders -- just take each discovery request one at a time, hear from one side, then the other as to where things stand, and then rule.

MS. NURHUSSEIN: So, your Honor, just a little bit of very quick general background. I represent the plaintiffs in the matter, gender discrimination class action filed on behalf of female public relations professionals against MSL Group and Publicis. And our clients are alleging pattern and practice discrimination based on pay, promotion, assignment, as well as pregnancy discrimination.

One of the common policies or practices at issue in this case is a companywide reorganization that began early 2008, with the promotion of Jim Tsonakos to the position of president of the America of MSL Group. As part of this

reorganization, women were disproportionately pushed out, demoted, and suffered a number of other adverse employment actions. And on the flip side, the majority of new hires and promotions, particularly into leadership positions, were disproportionately awarded to men. And these employment decisions and practices were made by an almost entirely male leadership team put in place by Jim Tsonakos' centralized leadership team that was put in place as part of the company wide reorganization. And I should add this is a company that is approximately 75 percent female.

By way of background, we had an initial scheduling conference before Judge Sullivan in May. And the Court set a June 3, 2012 fact discovery deadline in this case.

Since then, the parties have each served a number of discovery requests, deposition notices. Unfortunately, you know, discovery has been very one sided, in our view, which has, you know, really prejudiced the plaintiffs.

THE COURT: Which is to say the defendants have all of the documents and you have nothing.

MS. NURHUSSEIN: Exactly.

THE COURT: So let's cut to the chase. Let's get to where we're going.

THE COURT: Okay, so.

MS. NURHUSSEIN: Okay. So, really, I mean the two main issues that we -- we that are raised in our letter, first,

NSR's failure to produce core discovery relating to a number of issues that are central to the case, number of basic documents such as group policies, but in particular the companywide reorganization, which is the focus of our letter.

THE COURT: The focus seems to be that you view everything that happened after Mr. Tsonakos was hired as quote/unquote a reorganization, and defendants don't. And that seems to be, at least from the letters, creating the confusion that this is not like the usual wrist case or something where there is, you know, a plan, we're going to reduce the workforce by 10 percent, and then the question is did they reduce that across the board, or did it a heavier hand against a protective class or whatever. So --

MS. NURHUSSEIN: One thing I should --

THE COURT: Is there a way, now, to get this so that you all understand what you mean by the reorg, so that they can respond appropriately.

MS. NURHUSSEIN: Right. And your Honor, we spent a fair amount of time explaining what we view as the reorg to defense counsel. We have spent three meet and confers. We've put it in writing in various e-mails and letters. And they continued to maintain they didn't understand what we were talking about, not even they considered it a request, they didn't understand. Which we find disingenuous.

THE COURT: Let me hear from the defendant, briefly,

about why they still don't understand.

MS. NURHUSSEIN: And your Honor, one more thing I want to add, if I may. Just to one thing I neglected to mention at the outset, is this is a discovery dispute that went to Judge Sullivan. He compelled production of reorganization documents. I think the request as written is clearly worded, so.

THE COURT: Okay, thank you.

MS. CHAVEY: Yes. Good afternoon, your Honor, Victoria Chavey for defendant MSL Group. I think your Honor has hit the nail on the head in describing the essence of the dispute about the reorganization. And that is that the reorganization that plaintiff seeks to focus on is one that began on January 1, 2008 and is continuing today. And does appear to encompass, according to plaintiff's definition, everything that happened in the meantime, whether it is a practice-related change, a personnel-related change, an office-related change, geographic related change, a name change for example from Manning Selvage and Lee to MSL Group.

THE COURT: Somehow I suspect that they don't care about the name change, but I could be wrong.

MS. CHAVEY: According to our discussions, your Honor, I believe that they are interested in this name change. So the difficulty is at least twofold here. One is there is a lack of definition to the reorganization, and that the key part of this your Honor which goes back to many discussions that we have had

with plaintiff's counsel is this alleged reorganization which they claim to be an event, it's a concrete event, is at the core of their class claim. This is the event --

THE COURT: Does it matter if the issue is all of the promotions and other activity that have taken place since January 1 of '08, up to either now or whenever we put a stop to the discovery may not be a reorganization in the traditional sense, it may not be what you would otherwise understand as a reorg, but you made the -- you objected to document request number 11. Previously Judge Sullivan said, no, you have to produce it. So now other than making sure everyone is on the same page, the ship has sailed to a large extent.

MS. CHAVEY: Right. And I guess that brings me to my second point, your Honor, which is we have produced significant materials relating --

THE COURT: Doesn't matter. What matter is whether you have completed production. Yes, I understand that as the defendant in an employment case, they're going to have virtually nothing, you have everything, and it is more expensive, et cetera, et cetera. That's what happens when you work for Jackson Lewis, you represent defendants. I am being facetious, but the question is not how much you have produced, but what haven't you produced.

MS. CHAVEY: So what we have produced is --

THE COURT: What haven't you produced?

THE WITNESS: What we haven't produced, I guess, is every document relating to every decision made at MSL Group in the last 4 years.

THE COURT: Can I have someone give me a copy of document request number 11, which I have read previously. I don't have it at my fingertips.

Okay. Well, being as -- not that I disagree with Judge Sullivan, but being as he has ruled on this and overruled your objections, the question is now, how do you and the plaintiff get on the same page and get material produced.

MS. CHAVEY: We understand that. And we take our obligation to comply with the Court order serious. And we have tried to do that one way. In which we have tried to do that is through the electronic discovery protocol that we have been discussing with plaintiff's counsel. And we put forward a significant proposal, and are continuing to work through that.

THE COURT: Well, how much of the documentation is e-mail or other forms of ESI, and how much is paper, that no matter what do you with ESI protocol, is not going to pick up the paper.

MS. CHAVEY: This is a company that generally exchanges documents via e-mail. We think that e-mail is the most significant resource for all documents, both relating to a reorganization and otherwise.

THE COURT: All right, so where -- where are you all

on that protocol.

MS. CHAVEY: If I may, I'll refer to Bret Anders, who has been working on --

THE COURT: If somebody has a copy of the --

MS. CHAVEY: Protocol.

THE COURT: -- ESI proposal that you are working on.

MS. CHAVEY: Okay.

MR. ANDREWS: Your Honor, if I can explain. It's not yet in a single document proposal form. We have had a series of discussions trying to flesh out the, you know, manner in which the parties are going to locate what's relevant. And I think right now there are two core disputes as relates to discovery.

The first is plaintiff's reluctance to utilize predictive coding to try to cull down the 2.6 million documents that are in our data base, and what will likely be close to 3 million when we obtain the remaining 5 to 10 custodians.

The second is the list of custodians where there is, you know, apparent disagreement where I thought there was agreement.

On the predictive coding issue, the way defendants --

THE COURT: You must have thought you died and went to Heaven when this was referred to me.

MR. ANDREWS: Yes, your Honor. Well, I'm just thankful that, you know, we have a person familiar with the

predictive coding concept.

What we have done, is partnered with Recombine, and we're using Accelerate software for review. And our proposal for how to go about culling down the 2.6 million documents that are currently there, was to use the predictive coding feature. Where we are right now, is we had developed a preliminary list of key words that we would test. And the second letter I gave you, I believe that is the November 18th letter we sent to plaintiff's counsel, that is our preliminary list of key words. But there is charts to show how we test it. We took the key words, we combined them with other key words. We reviewed a number of documents. And we showed plaintiff, of the documents we reviewed, of the 50 we reviewed in this category, these were how many were responsive. And we explained in the comments section what we were generally finding. And one of the reasons why we did this, your Honor is, again, plaintiffs have been resistant to the predictive coding, the way we view this happening, is once all of the custodians are loaded, is to take a seed set, we'll review them, we'll let the program pull back responses. We'll then review those. And through an interim process hopefully winnow it down. And our goal is to take the 2.6 million, get it down to approximately 40,000 that would then be reviewed manually. We're looking at a -- per document review cost of $5 a document. And MSL at this point has committed to spending $200,000 in attorney review time to

review that 40,000. That is in addition to the 169,000 that they have already spent in vendor costs, as well as the $15,000 a month that they are spending in hosting costs.

While we understand this is a class action, that there obviously is a difference of opinion as to whether or not a class will ever be certified in this case, and the defendants' position is we think this is a reasonable, at least first approach to try to winnow down those documents. And we believe based on the custodians we have identified, which is very similar and very close to the Class A group that plaintiff has provided, this is where the lions share of the relevant documents should reside. Our custodians include Jim Tsonakis, his --

THE COURT: Lets slow down. Is there an agreement on custodians?

MS. NURHUSSEIN: If I may comment for a couple of minutes. I think the parties -- if I can take the podium for a minute.

I think the parties are coming close to reaching agreement on custodians. I would say it is not the biggest area of dispute with regard to ESI. There are a number of issues where the parties have, you know, some disagreement on ESI in terms of the methodology and the burden. However, ESI is a complete red herring when it comes to the topic of the sanctions letter. We have been working cooperatively with the

other side on ESI protocol. We just sent them a very detailed letter on I believe it is November 29th and are still waiting for responses. So we're continuing to discuss that.

The issue is, even when we have identified specific documents related to ESI, documents that are not e-mails, other documents, we've identified them and brought them to MSL's attention multiple times, even though it isn't our burden to do it, even though we're operating at a very severely informational disadvantage, and MSL has not even addressed them.

If I may your Honor, I have a couple here, if I may approach the bench, just to give you a couple of examples. Or explain the sort of examples --

THE COURT: Hold on. Because if we do too many things at once, things get lost.

If you have got certain documents that you have that they have produced, or your clients have that refer to other core, what you think are core documents --

MS. NURHUSSEIN: Right.

THE COURT: -- there is absolutely no reason why they shouldn't search for them.

However, if you are saying that the reorganization is largely everything that happened at the company since 2008, they're telling me that most company material is computerized ESI, and therefore that the fight about request number 11 may

be putting the cart before the horse because once you agree on an ESI protocol, you'll get responsive documents. So I don't really know, you know, whether it is because I'm coming to this case late, and whether it is because it's 4:30 on a Friday or whatever, but I can't quite figure out where you are in agreement and disagreement on anything.

MS. NURHUSSEIN: If I may, your Honor, I think the -- the area -- I think what prompted us to bring this to the Court's attention is the fact that we served requests relating to reorganization back in May. We have been conferring with defense counsel for several months. We pointed them to specific documents that are not covered by ESI protocol and we have not received them.

THE COURT: Assuming I order them to give you the documents that are referenced in the documents you have given to them promptly, and that I give you all a deadline to agree on the ESI protocol so this doesn't eat up your entire discovery period, is there anything else you need?

MS. NURHUSSEIN: Beyond just the specific documents we have identified. Because as I mentioned, your Honor, because there is only so much information we have, I think what we would like is for MSL to represent that they have conducted a comprehensive thorough search of all, you know, not e-mail. I understand that that is going to take time, but --

THE COURT: A search of what?

MS. NURHUSSEIN: Of other documents. Restructuring plans, paper --

THE COURT: Stop, stop, stop. Come on, this really is a problem that you and they are not speaking the same language.

As I understand it from what they are saying, there was no restructuring or reorganization. Am I correct, defense counsel, whichever firm it is on that side.

MS. CHAVEY: There was global reorganization of MSL in November of 2009. It was publicly announced, it's mentioned on the website. That was a major reorganization across the world. And the company went from MS&L to MSL Group. And there was that. But in terms of a reorganization that occurred when Jim Tsonakos was promoted in January of '08 and continues today, no.

THE COURT: Okay. Have you produced all of the material about that 2009 reorganization. Because that, there is no definitional problem on.

MS. CHAVEY: We have produced material relating to that announcement. I don't know that we have produced everything, because we have not gone all of the way into everything held in the electronic data base.

THE COURT: Other than electronic, have you produced all of the pieces of paper about the 2009 reorg.

MS. CHAVEY: Your Honor, we've produced the core documents. I -- you know, I -- I don't know that I can

represent --

THE COURT: That is not a concept under the federal rules.

MS. CHAVEY: I know. And as we have told plaintiff's counsel, we are continuing to produce documents as we get them. We have certainly produced everything that we have. We have made diligent searches, interviewed multiple times key players. We have done what we think is everything we can do to date. If there is another piece of paper we have not found yet, then we'll supplement.

And I also want to address the one example that plaintiffs have mentioned to us, is there is an e-mail involving the Atlanta office of MSL that makes reference to a reorganization. Whether there was a reorganization in the Atlanta office, I didn't know. We have not -- we have actually looked for that e-mail. But it is not that that e-mail refers to a document. It just uses the word "reorganization." And we appreciate plaintiff's counsel's effort to inform us as to what the reorganization is that we're talking about. And we're trying to track all of these things down at this point, but --

THE COURT: Okay. Back to the plaintiff.

MS. NURHUSSEIN: Okay. Your Honor, may I approach the bench? I think it would help clarify what we are talking about.

THE COURT: If you have documents, give them to Mike.

MS. CHAVEY: May I see what you are showing him?
MS. NURHUSSEIN: I actually brought copies --
THE COURT: Okay.
MS. NURHUSSEIN: I'm getting a copy for defense counsel.
THE COURT: Why don't you all look on with one set, if that's what you need to do. Let's go.
MS. NURHUSSEIN: I apologize, your Honor. I don't have that one in front of me, since Ms. Chavey --
THE COURT: E-mail, first of all, which means things like it will be picked up by the ESI search.
MS. NURHUSSEIN: Right.
THE COURT: And, yes, it is referring to some sort of plan, which looks like it may have to do with the Atlanta issue that you have already raised, and that is what the defendants are saying they're looking for it.
MS. NURHUSSEIN: Right. But if I recall correctly, if I -- if I recall what Ms. Chavey said, is that she asked -- you know, she's looking into whether -- she didn't mention -- she neglected to mention is that e-mail specifically references a plan that Rob Baskin presented. I don't know understand why --
THE COURT: That could be an oral plan, that could be written, it could be electronic.
MS. NURHUSSEIN: Uh-huh.
THE COURT: You know, don't get hung up on one

document when you haven't had the ESI search.

MS. NURHUSSEIN: And, your Honor, just to clarify though, we have requested clarification or asked them to respond to that e-mail and to produce the plan or documents relating to it. We have asked multiple times. They have neglected to even address our question. So I don't know if they even asked Rob Baskin about the plan.

Do you have an answer to that?

THE COURT: Ms. Chavey, have you looked for this so-called plan?

MS. CHAVEY: Yes, we have.

THE COURT: Have you found it? Have you talked to Rob, whoever Rob is.

MS. CHAVEY: He is no longer employed, so we have not.

THE COURT: Have you talked to any of the people on this e-mail that -- particularly, I guess, Ms. Ivana, is she still employed?

MS. CHAVEY: She is not.

THE COURT: Okay. Keep looking. And report back promptly to plaintiff's counsel.

MS. NURHUSSEIN: Your Honor, one additional point I wanted to make, regarding that e-mail, that's an he e-mail dating back to 2008. You know, defense counsel have consistently maintained that no reorganization --

THE COURT: Counsel, with all due respect, one of the

search terms, in quickly looking at the letter I was just given is reorganization. And I'm sure when you do it, the right way, you'll get reorg and, you know, all of the various roots and extensions. You know, you can't say they haven't given you anything when you are taking a very amorphous position on what the reorganization is. And there may be certain plans. This looks like it has something to do with staffing of the Atlanta office.

Move on.

MS. NURHUSSEIN: Okay.

And one additional point, if I may very quickly, your Honor. I understand that it may appear, at first glance, to be an amorphous, you know, request. But MSL's own corporate documents, I mean that's in e-mail. Their own corporate documents refer over and over again to this reorganization.

THE COURT: What reorganization?

MS. NURHUSSEIN: I can show you.

THE COURT: And, again, if they've searched the paper documents, and they say that they have made a good faith search, and you're about to get anything quote/unquote reorg related in the ESI search, what is it you want me to order them to produce? If I don't understand the request at this point, how can I order it enforced any more than it already has been.

MS. NURHUSSEIN: Uh-huh. Well, I guess one thing I should add, your Honor. I mean in the documents, limited

universe of documents we have seen, I mean we have already seen decisions regarding pay tied to reorganization, we have seen highering decisions tied to the reorganization. I can show you documents --

THE COURT: But all of those are discrete. Look, you can do one thing that would be helpful, is give them a list of every type of decision you are looking for.

I assume from looking at some of the things in the ESI protocol, that that is something you all have already discussed.

MS. NURHUSSEIN: We have discussed it at some length. And the response we have gotten, you know, are comments about, you know, whether this would encompass every employment decision --

THE COURT: You define what you want --

MS. NURHUSSEIN: Uh-huh.

THE COURT: -- in specific detail. Either via the ESI route or through the paper route, and then I can deal with it. At the moment, what you have given me is too vague for me to say that they're not in compliance. So I'm returning your document set to you.

MS. NURHUSSEIN: Your Honor, would it be possible to revisit the issue after, you know, in a few weeks if we have not been able to reach agreement on whether they actually have conducted --

THE COURT: You keep, for better or for worse, you are in front of me for general pretrial supervision until the cows come home or the case is over. So we can have conferences daily, weekly, monthly; whatever makes sense. But if I don't understand what you are looking for, it's gonna be very hard for me to come out on your side. Particularly --

MS. NURHUSSEIN: Uh-huh.

THE COURT: -- when, if most of the documentation is in the form of electronic documents. And even the letters you handed me, I would bet, are on the company server's word or, the federal government's word perfect documents. So it's likely all to be electronically searched.

MR. WITTEL: May I address one thing, all right. The documents that we had to give you, and which we got specific requests to the defendants say things like -- that we gave them and they're on their own Bates stamped documents -- restructuring plan being discussed in each region. This is an October document from 2010. They have not given us any of the restructuring plans. It is fine for defendant to say, look, it is in my e-mail. But if they haven't searched their e-mail at all, we gave them specific --

THE COURT: Stop, stop, stop.

MR. WITTEL: Yes, your Honor.

THE COURT: You don't search e-mail multiple times willy nilly. Not cost effectively. So, yes, it may be an

iterate process and something may come up later. But I'm not going to have them do an e-mail search because you have two or three documents that refer to various types of reorg when, in a week or two, if you all get your act together -- and if you don't, you know, you may wind up with a special master or me choosing your e-Discovery plan. Just get the e-Discovery plan done. Get all of the ESI. And then figure out what is missing. And that's the Court's ruling.

Now, if you want any more advice, for better or for worse on the ESI plan and whether predictive coding should be used, or anything else, if the case -- I will say right now, what should not be a surprise, I wrote an article in the October Law Technology News called Search Forward, which says predictive coding should be used in the appropriate case.

Is this the appropriate case for it? You all talk about it some more. And if you can't figure it out, you are going to get back in front of me. Key words, certainly unless they are well done and tested, are not overly useful. Key words along with predictive coding and other methodology, can be very instructive.

I'm also saying to the defendants who may, from the comment before, have read my article. If you do predictive coding, you are going to have to give your seed set, including the seed documents marked as nonresponsive to the plaintiff's counsel so they can say, well, of course you are not getting

any reorganization related documents, you're not appropriately training the computer.

MS. CHAVEY: We understand.

THE COURT: Okay.

MS. NURHUSSEIN: And, your Honor, just one point of clarification.

I think defense counsel, what they said before about our second over simplified or our stance on predictive coding, we expressed multiple concerns to defense counsel on the way in which they plan to employ predictive coding. We asked for a lot of clarification. We can give you a copy of our last letter.

THE COURT: Well, unless you are all telling me that it is ripe for judicial resolution, I'm willing to give you certain advice. I don't think it is useful for me to give any rulings. And while I have been handed two very thick letters from the defendant, all I did was sort of take a look at some of the words that they were talking about using. Whether that is within predictive coding or just within a pure key word, I don't know.

MS. NURHUSSEIN: So you don't want our response.

THE COURT: No. And, in fact, if it will make you feel better, I'll give plaintiff and defendant back their two letters before we end the conference. We'll leave it here for now, just pick it up at the end of the conference, okay,

even-steven.

MS. NURHUSSEIN: And, your Honor, one final point, we had also --

THE COURT: You know, there is -- well, look, if you all want to go to a special master on this limited point then, you know, who cannot just rule on anything, but who can help you all perhaps put your ESI plan together, but yes, somebody has to pay that person's freight. You know, I know enough people in the industry that I can recommend some, or you all can get your vendors to recommend somebody or whatever it is going to be. If you are perfectly happy, you know, arm wrestling over it and bringing back the issue, once you have finished your meet and confer, which will be some date we'll pick, which will be before Christmas so this is ready to run over the Christmas holiday or whatever, we'll get this moving. If you want a master, either side, tell me. If you don't, that's fine, too.

MS. NURHUSSEIN: Okay, your Honor. That sounds good to us, your Honor.

The additional point I wanted to make --

THE COURT: What sounds good, my general speaking or you want a master, or you don't.

MS. NURHUSSEIN: I think to have a follow-up conference to try to bring some closure to the dispute we have been having about ESI. But the related point I wanted to make

is that we also raised the issue of deposition scheduling.

THE COURT: You really want to schedule depositions before you have documents?

If you do, I'll order a schedule now, picking specific dates. Or, tell you all to go back to your office and, within a week, have a deposition schedule. I'm not sure it makes sense to have the depositions schedule before you have the documents because you only get the witness once, but whatever you want, you --

MS. NURHUSSEIN: And I agree with that, your Honor. And that's the reason we have had to reschedule plaintiff's depositions on numerous occasions, because we haven't received any documents. But the only point I wanted to bring to your attention is the fact that defense counsel, they are taking the position that we can't receive any of our depositions until they have deposed all of the defendants.

THE COURT: It's not going to happen that way. While as Judge Sullivan's order said there is no priority, and while there is something usual about, you know, you serve notices that gives you a quasi priority, we're going to do it much more evenhandedly. Because as a practical matter, plaintiffs can't serve notices until they have the documents.

So that is the Court's ruling on that. You are going to sit down, anyone wants to take depositions now, can do so. Anyone who wants to wait for the documents, can wait. And as

soon as we have a deadline for the production of the documents, you're going to sit down and come up with a relatively fair schedule -- take "relatively" out of that sentence. A fair schedule that, you know, might be two for one, might by one for one, might depend on witness availability. But you are going to start cooperating more, and you're going to get a schedule done.

MS. NURHUSSEIN: Okay, thank you, your Honor, we'll discuss the deposition schedule with defense counsel.

Thank you.

THE COURT: Any issues from the defense, and any view from the defense on a special master or not?

MS. CHAVEY: Your Honor, it sounds like you don't want to go further into the deposition issue?

THE COURT: Not unless you really think that I am so wrong that you are going to say something that is going to change my mind.

MS. CHAVEY: We do think that, by virtue of serving the notices for the plaintiff's depositions --

THE COURT: Are you ready to take the plaintiff's depositions?

MS. CHAVEY: We are. We had -- we have been ready since September to take the plaintiff's depositions. We have three depositions scheduled for next week. A fourth is scheduled for the week after. Because of scheduling, those

four happened to be two of the lower-level named plaintiffs and two opt-in plaintiffs. So the three named plaintiffs who were at higher levels have not been scheduled yet.

THE COURT: You have all the plaintiff's documents?

MS. CHAVEY: No.

THE COURT: And you realize that you don't get a second bite at the apple.

MS. CHAVEY: We do.

And one of the issues that we had presented to Judge Sullivan, which I would like to address with your Honor, is the issue of the plaintiffs' medical records or any documents supporting their claim for emotional distress damages.

THE COURT: All right. So let's first deal with the last issue on depositions. It's not a question of priority, but readiness. I see no reason why they can't start deposing your plaintiffs. Any reason not to?

MS. NURHUSSEIN: Your Honor, if I may retake the podium?

THE COURT: Yes.

MS. NURHUSSEIN: Your Honor, we have -- even though we don't have all of the documents relating to the case from defense counsel, we've agreed to go forward with the four that are scheduled within the next week and a half. All we are saying is they shouldn't be allowed to put a complete stop on our depositions --

THE COURT: Then everybody is on the same page, good. Okay. Okay, so this is the emotional distress issue?

MS. CHAVEY: Right.

THE COURT: Do we have a -- this is coming back to me. Is this the garden variety versus --

MS. CHAVEY: Yes.

THE COURT: All right. The general rule on garden variety is, one, it's a damage amount of 25,000 or less.

Is that understood by the plaintiffs.

MR. WITTELS: Your Honor, I did a lot of research on this and, actually, was up in White Plains on this very issue. When you say 25,000, there are many cases that garden variety can encompass up to a hundred thousand. If you say that --

THE COURT: All right, then. I'm going to give them discovery on it. Look, not that 25,000 is peanuts. But as I understand the case law, the argument is, you know, I was annoyed, distressed, hurt by the way I was treated. That's garden variety and it's somewhere in the zero to 25 range.

If you're going for amounts higher than that and you are not prepared, for any or all plaintiffs to limit it to 25,000 or less, then I think they're perfectly entitled to discovery on whether you are claiming, you know, a hundred thousand dollars because you didn't get a promotion here, or you were fired, isn't it also true that you broke up and your marriage dissolved during that same time period, or whatever

else is a cause of emotional distress. And then the jury figures it all out. So that's your choice.

MR. WITTELS: Well, your Honor, is what you are suggesting that the plaintiff is to stipulate in advance of trial as to what --

THE COURT: Yes, or --

MR. WITTELS: -- limit would be?

THE COURT: -- yes, or --

Counsel?

MR. WITTEL: I'm sorry.

THE COURT: Yes. Or, keep your options open and -- but then he they get the discovery. Because if you don't so stipulate, they're entitled to the discovery. You could change your mind later, but you can't change your mind the other way, because then they won't have the discovery.

MR. WITTELS: As I understand the ruling, your Honor, I'm certainly happy to be informed about it because we briefed it, was that if you are not claiming -- if you are claiming garden variety damages and not relying on medical damages, that's the issue, not so whether a jury awards you 75 or 25 or a hundred, that is -- the Court then says, well, is that a fair amount for garden variety. As I understood it the test, again, was are you claiming medical damages. We're not relying on medical damages --

THE COURT: That's not the way I understand the law,

and that's not the way I am enforcing it. So, that is your choice.

MR. WITTELS: Well --

THE COURT: And obviously --

MR. WITTELS: Which -- I mean, we have not briefed that. May we have a two-page letter on that? Because as I -- not to be disagreeable. But we have briefed that extensively and another magistrate judge and the judge affirmed that, came down very differently on that issue. So I just ask permission to address that, only because it is something I have never heard before and I have not seen it in a case.

I know the Second Circuit case didn't say -- didn't have a bright line 25,000 or you have to give medical damages. I didn't understand that to be the rule. That's -- I'm only asking permission on it.

MS. CHAVEY: We presented this issue to Judge Sullivan. And both parties briefed it before Judge Sullivan in the -- in the letters that we submitted to Judge Sullivan, and he ruled on September 14 that the plaintiffs were required to produce these documents. These were specifically ordered by Judge Sullivan. And so our motion, our --

THE COURT: And then, you know, then I can't even revisit that if I wanted to.

MS. NURHUSSEIN: Your Honor, I think what you neglected to mention, we did send a joint discovery letter,

five-page discovery letter to Judge Sullivan.

THE COURT: Did Judge Sullivan rule against you?

MS. NURHUSSEIN: He didn't specifically address the issue of garden variety damages.

THE COURT: Okay, I have got --

MS. NURHUSSEIN: And -- and --

THE COURT: Stop.

I have got his order. I think, at least from my crib sheet notes, all he just said is you have to respond to these various interrogatories. Let me get the order out again but, you know, you can't keep briefing issues repetitively. If the issue came up, and you didn't raise whatever argument you are making now, but the issue was should those discovery requests be enforced or not, I don't see any reason to revisit the issue.

MS. CHAVEY: If I may direct the Court's attention to the parties joint letter to Judge Sullivan dated August 26 of 2011. It contains the plaintiff's statement: Discovery into plaintiff's medical psychological treatment is not only premature but irrelevant as applies to those plaintiffs seeking only garden variety damages. And then they cite the case.

And this relates specifically to requests that are within the enumerated requests that Judge Sullivan ordered plaintiffs to comply with. And then when we filed a letter with Judge Sullivan seeking permission to have a conference

with regard to motion for sanctions for plaintiff's failure to comply with this, we submitted our letter, the plaintiffs responded by letter, and that was the request that Judge Sullivan denied without prejudice, and then referred all matters to this Court.

But as far as we're concerned, Judge Sullivan has ruled on that. And, incidentally, Judge, we had asked the plaintiffs if they would propose a stipulation to us, because we would certainly entertain a stipulation if they would be able to do so. They declined to do that, indicating that by stating in their supplemented initial disclosures that they were only seeking garden variety damages, that's really all we needed. But this is discovery, this is the only chance we have.

THE COURT: All right. Give me a copy of your Request for Production. And which request is it?

MS. CHAVEY: Interrogatories 2 and 3, and Request for Production 7 and 8. There may be some other numbers, but those are the central ones. And it's listed as Exhibit B to the document that we just handed up.

THE COURT: Judge Sullivan ordered you to produce it, produce it.

MS. NURHUSSEIN: Your Honor.

THE COURT: The only way I will reverse that order is if you stipulate, as I have already indicated. And even that

may be technically more than I'm allowed to do, but Judge Sullivan and I are friends.

MS. NURHUSSEIN: Yes, your Honor.

And we did we, we did say that we would be willing to put it in writing, we did put it in supplemental disclosures, we asked if there was any reason why that wasn't sufficient --

THE COURT: Now, you have received my response. You have the choice of 25,000 or less, or producing the documents.

How soon can you talk to your client and make that decision?

MS. NURHUSSEIN: We'll try to reach out to them as soon as possible. I mean -- yeah, I mean we have several clients and we'll need to -- I mean they'll need some time to make the decision.

THE COURT: Just give me a date. Give me a date.

MR. WITTELS: Two weeks from today, your Honor?

THE COURT: My only concern is four people being deposed next week. Because, in a way, they have to make that decision before their deposition or they're going to be asked questions about their mental health treatment.

MR. WITTELS: Your Honor, I -- with all due respect on this issue --

THE COURT: We all know what "with all due respect" means, if the lawyer says it.

MR. WITTELS: I have never seen a case that limited

emotional or garden variety damages to $25,000.

THE COURT: This is not the first case I have tried or had discovery on in this area. But, fine, you're right, I take it back.

You can't stipulate out of it. Judge Sullivan ordered you to produce it. I'm ordering you to produce it. Period, end of discussion. Makes life simple for me and takes away the "all due respect" argument.

You want to get me to change my mind, you can think about stipulating in a way that I have said would be something I would take my chances on, in essence reversing Judge Sullivan on. Otherwise, he ruled, not my problem. That's the Court's ruling. End of discussion on this.

What else do we need to do besides set a date for our next conference?

MS. CHAVEY: We don't have any other issues, your Honor.

THE COURT: Anything else from the plaintiff?

MS. NURHUSSEIN: Well, again, with all due respect --

THE COURT: You would think you would learn.

MS. NURHUSSEIN: No. We --

MR. WITTELS: We are going to have depositions next week. The issue was never brought up. We're in a very bad situation.

THE COURT: Life is tough.

MR. WITTELS: But they -- we came down here because defendants had not produced documents that they were ordered to do.

THE COURT: What relief are you asking for? A minute ago, your associate or colleague said it's fine for depositions to go next week, so I know longer know what you want.

MR. WITTELS: Well, I would like an opportunity to be able to -- I think the depositions shouldn't go until we have had an opportunity to discuss this issue with them, we're in a very -- we have not even --

THE COURT: You have known this issue since September 14th, or whatever date it was that the judge ruled.

MR. WITTELS: We understood -- as I understood it from co-counsel, they had withdrawn their request. It wasn't an issue coming down here, in terms of the garden variety.

MS. NURHUSSEIN: Not that they had withdrawn the request, per say, they had agreed -- they said if we had agreed that our clients were only seeking garden variety, they were not seeking the documents, as far as I was aware.

MR. WITTELS: Right, in other words --

MS. NURHUSSEIN: So perhaps this is something we need to discuss more with defense counsel.

THE COURT: You want a week extension on depositions to discuss it?

MS. NURHUSSEIN: Your Honor, we're going to have to

check with our clients to see. I think some of them have already made travel arrangements, so --

THE COURT: You know, then the depositions -- look, here is the deal. For any of them that can't switch it, are you all available the week of the 12th instead of the week of the 5th, whoever is taking these depositions?

MS. CHAVEY: We can make those arrangements, yes.

THE COURT: Good. So you will find out quickly. And any of your clients who could be deposed the week of the --

How about listening to me, instead of talking to each other?

MR. WITTELS: Sorry.

THE COURT: Any one of them that can be deposed the week of the 12th, instead of the week of the 5th, that's great. Anyone already off to Florida or wherever it may be, then the date sticks for the next week, unless you work out some accommodation in writing with the defendants.

Because I don't want to hear misunderstandings or whatever. If there is a written letter signed, you know, one now e-mail, you e-mail them and say, you know, how about we do it on the 19th instead of the 12th. If they say yes in writing, then you're fine. If there is no response or whatever, the deposition goes forward next week as previously scheduled.

Clear? Clear. Date to come back? By which point you

must have your ESI plan in place, or very specific and very targeted, you know, we agree to these 50 custodians, or agree to X custodians, we're fighting over Y custodians, we agree on these key words, we're fighting over these. If you give me amorphous stuff, it's very hard for me to rule.

When do you want to come back?

MS. CHAVEY: Something like December 23, would work for us.

MR. WITTELS: How about Tuesday, the 20th or 21 --

THE COURT: Tuesday is the 20th. Does that work for the defendants?

MR. ANDREWS: I'm sure I can make it work, I don't have a calendar with me. It's locked up downstairs.

THE COURT: The sooner -- you are all local, Morristown, I don't know, whatever. But if you are quote/unquote New York lawyers, get the New York State Bar card, get a federal bar card, whatever we call it. That let's you bring your cell phone in. In any event --

MR. WITTELS: How about the Wednesday, your Honor, give us some time to work out the --

THE COURT: Fine, December 21 at 2:00. Does that work?

MR. ANDREWS: We can make it work. That is the date of deposition scheduled in Atlanta, but I guess you know, they're enough lawyers on both sides, we can make that work.

THE COURT: If there is another day early that week that you want that works better for everyone, you know, I'm trying to accommodate you all here.

MR. STOHNER: Your Honor, while they are trying to talk about dates, my name is George Stohner, I represent Publicis Groupe. I have never been to a discovery conference where I have not uttered a word. But just a point of clarification. I came today because I was uncertain as to the scope of this hearing. There is no dispute at this time. Hopefully, never, vis-a-vis Publicis Groupe. And I do have a New York Bar card, but I am not local. And if it's possible for Publicis Groupe to be excused, I would ask that, unless there is some reason for them to be here.

THE COURT: Are you talking about the next conference?

MR. STOHNER: The next conference.

THE COURT: All right. Does anyone need them at the next conference? You, certainly from California, can appear telephonically if it's useful, to let you off the hook completely.

MS. CHAVEY: It's fine with us.

MR. WITTELS: We also have a counsel, my co-counsel in and partner Janette Wipper, if she could be on the phone as well, that would be helpful, your Honor.

THE COURT: That's fine. But the question is do you want Publicis on the phone for the next conference, or are we

only dealing with disputes with MSL?
MR. WITTELS: Well beyond the correspondence, if they feel they need to be here then, or on the phone, that would be appropriate. If not, I don't see any need to.
THE COURT: All right. And I don't know what the -- how close the relationship is between the two defendants. If you're not here and something comes up, you run the slight risk that you are relying on your co-defendant to protect your interest.
MR. STOHNER: I'll read the correspondence, your Honor.
THE COURT: Okay. And if you are going to be on the phone and the plaintiffs in San Francisco, counsel, you two need to coordinate on one call calling in, and we put you on the magic speakerphone in the sky, et cetera. But you have to be on one phone for that purpose.
MR. STOHNER: Okay.
THE COURT: Have you all figured out what date you really want? Wednesday, the 21st?
MS. NURHUSSEIN: Yes, your Honor.
MS. CHAVEY: Yes, your Honor.
THE COURT: Okay, the 21st at 2:00, which also is beneficial to the Californians.
MR. STOHNER: Thank you, your Honor.
THE COURT: All right, it is my practice to have the

parties, since the only orders you get out of these conferences are what you have heard and what the court reporter transcribes, and unless there is an economic or other objection, I require that the parties to split the cost 50/50, based on each side of the table. Any problem with that?

MS. CHAVEY: No.

MR. WITTELS: No, your Honor.

THE COURT: Okay. Make your arrangements with the reporter.

(Adjourned)

Exhibit PP

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April 27, 2012

VIA FACSIMILE
Honorable Andrew J. Peck
U.S.D.C. – Southern District of New York
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Re: *da Silva Moore, et al. v. Publicis Groupe SA, et al.*, Civ. No. 11-CV-1279

Dear Judge Peck:

Plaintiffs respectfully submit this letter to clarify certain issues that were discussed at the April 25, 2012 conference.[1] Because Defendants did not comply with the ESI protocol's meet and confer requirement for coding disputes before seeking Court intervention, Plaintiffs did not have an opportunity to fully respond to defense counsel's characterization of the e-discovery disputes – in particular, the coding discrepancies in the seed set. Now that Plaintiffs have notice of Defendants' disputes, Plaintiffs seek to supplement the record with this letter.

1. MSL's Failure to Code Relevant Documents in the Seed Set

At the April 24, 2012 conference, the Court issued a sanctions order based on MSLGroup's presentation of two out of 3,000+ documents that Plaintiffs believed Defendants miscoded and mistagged. Specifically, the Court ordered Plaintiffs to re-review the 3300 seed set documents for which there were coding discrepancies and "for every document that violates my ruling that I have to read… there will be sanctions under Rule 37… starting at a hundred dollars a document." April 25, 2012 Tr. at 29. Your Honor also held that Defendants had no obligation to review the coding discrepancies, much less be sanctioned for any coding errors no matter how egregious, despite Plaintiffs' presentation of multiple relevant documents with duplicates that Defendants had, for reasons unknown, coded as "relevant" in some instances and "non-relevant" in other instances. *Id.* at 19-20.

[1] Plaintiffs called chambers on 4/27/12 and received special permission to fax this letter, even though it exceeds the page limits in Your Honor's Individual Rules of Practice.

As a preliminary matter, Plaintiffs note that, consistent with the Federal Rules of Civil Procedure and the ESI protocol in this case, the parties were scheduled to meet and confer regarding the coding differences on April 27, 2012. Fed. R. Civ. P. 37(a)(1); Doc 96 at 37-38; 48 ("To the extent the parties disagree regarding the coding of a particular document, they will meet and confer in an effort to resolve the dispute *prior* to contacting the Court for resolution." (emphasis added)). Indeed, in arguing for acceptance of the ESI Protocol, Defendants stated that "Plaintiffs may take the position that a document coded as 'not relevant' is, in fact, relevant and, *if agreement cannot be reached between the parties*, the issue of relevance can be resolved by the Court as it would any other discovery dispute." Doc 104 at 4. However, rather than confer with Plaintiffs, defense counsel presented the Court with two documents that Plaintiffs had (in MSLGroup's view) improperly coded as relevant, and proposed that Plaintiffs re-review all 3300 seed set documents that were in dispute. The Court issued its sanctions ruling based solely on defense counsel's representations and these two documents cherry-picked by MSL; Plaintiffs were not notified by MSL about these issues, had no opportunity to learn more about how the system would be trained by these documents such that Plaintiffs might consider changing their coding, and had no opportunity to present the Court with their extensive list of MSL's coding errors.

Moreover, Your Honor denied Plaintiffs' explicit request that the Court allow them the time to meet and confer with Defendants, review the disagreements remaining, and return to the Court in the manner set forth in the ESI protocol and Rule 37(a)(1). April 25, 2012 Tr. at 34-37. Instead, Your Honor stated that the protocol's deadlines took priority over this meet and confer process set forth in the ESI protocol. *See id.* Such inflexible deadlines, however, appear to contradict Your Honor's previous acknowledgment that this case is "the first in which a Court has approved of the use of computer-assisted review," Doc. 96 at 25, and that therefore the parties needed to be flexible. *See* February 8, 2012 Tr. at 83 ("Let's try it this way, we'll see where it goes."); *see also id.* at 87 ("Let's see how it works."). Accordingly, Plaintiffs request that Your Honor reconsider this position in the future.

As a meet and confer session would have revealed, many of the coding changes were necessary to correct MSL's errors. In fact, most of Plaintiffs' coding changes involve documents that directly relate to the allegations in the Amended Complaint, are responsive to Plaintiffs' document requests, and in some cases, have even been compelled by the Court. *See* Doc. No. 96 at 16 ("Relevance is determined by plaintiffs' document demands.") Among the documents that MSL coded as non-relevant are MSL's own policy manual, numerous documents relating to the seven plaintiffs, e-mails showing a centralized team of decision-makers granting exceptions to the salary and hiring freeze imposed by Publicis Groupe, and documents relating to the Company-wide reorganization (a category of documents compelled by the Court more than seven months ago). Even more egregious, many of these are documents that MSL (with the Court's approval) had previously refused to search for, claiming they would eventually be produced as part of the ESI Protocol; in a bait-and-switch, MSL now claims (again, with the Court's approval) that the documents are beyond the scope of discovery.

Following are just a few examples of "non-relevant" documents that MSL apparently intends to withhold:

- MSL U.S. Employee Handbook, NR_0015406-NR_0015573; NR_0056585-NR_0056642; NR_0059975-NR_0060032; NR_0060144-NR_0060201 (attached as Ex. A – Plaintiffs only included the first page of these four documents, in order to limit the number of pages faxed to chambers, full versions are available to the Court)

- MSL CFO spreadsheet of restructuring costs, including compensation and severance pay for Named Plaintiffs Monique da Silva Moore and Mary Ellen O'Donohue (along with other members of the class), NR0019150 (attached as Ex. B)

- E-mail announcing promotion of Jim Tsokanos to President of the Americas (the starting point of the Company-wide reorganization at the center of Plaintiffs' allegations), NR0005125-5126 (attached as Ex. C)

- E-mail communications between Publicis CFO, Publicis General Secretary, and MSL CFO regarding exceptions to raise freeze for, *inter alia*, "2 senor individuals assuming new roles with the reorganization of the MS&L Group," NR0014990-14992 (attached as Ex. D)

- Separation agreement for opt-in Plaintiff Carol Perlman, NR0002667-2680 (attached as Ex. E)

- E-mail communication regarding filing of *da Silva Moore v. Publicis* lawsuit, NR0019749 (attached as Ex. F)

- Information regarding Atlanta office employees on FMLA/disability/maternity leave, including opt-in Plaintiff Zaneta Hubbard, NR0044722 (attached as Ex. G)

MSL's failure to mark not just responsive but *core* documents as relevant is far more egregious than any supposed infractions on Plaintiffs' part. By withholding core discovery, MSL undermines Plaintiffs' ability to prosecute their case and disregards well settled law regarding the broad scope of discovery for Plaintiffs in Title VII cases. *Vuona v. Merril Lynch Co.*, No. 10 Civ. 6529, 2011 U.S. Dist. LEXIS 131491, at *9 (S.D.N.Y. Nov. 15, 2011) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (noting that courts in employment discrimination cases have traditionally favored "'liberal civil discovery rules,' giving plaintiffs 'broad access to employers' records in an effort to document their claims.'")).

In light of the above, Plaintiffs request that Your Honor reconsider sanctioning Plaintiffs for making good faith changes to the coding of the seed set or, at the very least, apply the sanctions in an equitable manner.

2. Impact of MSL's Coding Errors on Reliability and Accuracy of ESI Protocol

Plaintiffs' e-discovery experts have expressed concern that MSL's unduly restrictive relevancy determinations will impact the reliability and accuracy of the ESI Protocol. This is precisely why Plaintiffs had proposed that the parties develop a comprehensive, stable, and well-documented definition of relevance as part of the ESI Protocol – a proposal that MSL rejected. Neale Dec. in Support of Rule 72 Objection (Doc. No. 95) ¶ 36. *See also* Doc. No. 93 at 14.

As set forth in the ESI Protocol, "the software uses each seed set to identify and prioritize all *substantially similar* documents . . . ." Doc. 96 at 38. MSL, however, marked as non-relevant hundreds of documents regarding pay, promotion and other employment decisions that, although "substantially similar" to documents marked as relevant, did not involve the Named Plaintiffs. Defense counsel argued that such documents were properly excluded from the seed set because the Court had limited the scope of class discovery. This argument might have some merit if the parties were conducting a manual review and simply coding documents for production, consistent with Rule 26 and the Court's discovery rulings. Here, because the coding of the seed set is not just an end in itself, but a means of training the system to locate relevant documents, such coding is guaranteed to confuse the system by indicating that the same concept is both relevant and non-relevant.

For example, under MSL's coding scheme, e-mails regarding salary increases for the Plaintiffs are relevant, but e-mails regarding salary increases for non-Plaintiffs are (in most cases) marked non-relevant. The system being used by Defendants is not sophisticated enough to make such fine distinctions. Accordingly, when MSL marks a number of documents regarding pay, promotions and pregnancy non-responsive, the system is being trained to overlook documents regarding Plaintiffs' pay, promotion, and pregnancy claims – even when the documents relate to the Plaintiffs themselves.

3. Transparency

Finally, Plaintiffs note that the ESI Protocol was premised on the notion that the entire process would be transparent. Indeed, Defendants argued in support of the process, "Here, the ESI Protocol entered by Judge Peck is wholly transparent, provide Plaintiffs with ample opportunity to participate in both the seed set creation phase . . . ." Doc. 104 at 12; *see also* Doc. 175 at 3-4; Doc. 104 at 14, 15 ("Plaintiffs . . . will have an opportunity to challenge the coding designation (including the coding as to issue tags)"), 16 ("based on the transparent nature of the process, Plaintiffs will be able to verify that the keyword hits were coded correctly"); Doc. 96 at 37-38. In objecting to the ESI Protocol, Plaintiffs raised concerns regarding the lack of an "agreed-upon standard of relevance that is transparent and accessible to all parties." Doc. No. 93 at 14. In the February 24, 2012 ESI opinion, the Court dismissed these concerns, noting that "The issue regarding relevance standards might be significant if MSL's proposal was not totally transparent. Here, however, plaintiffs will see how MSL has coded every email used in the seed set (both relevant and not relevant), and the Court is available to quickly resolve any issues." Doc. 96 at 16. Despite these assertions, Plaintiffs fear that their participation in the ESI process is merely illusory, particularly with the threat of sanctions for any small misstep made by the Plaintiffs, and seemingly no consequences for potentially purposeful miscoding on the part of the

Defendants. Strategically, Defendants could purposefully miscode documents, knowing that the burden will be on Plaintiffs to fix Defendants errors and that only Plaintiffs will suffer Court-ordered punishment should they fall short of perfection.

Respectfully submitted,

/s/ Steven L. Wittels

Steven L. Wittels

cc: Judge Andrew L. Carter (via electronic mail)
Counsel of Record (via electronic mail)

Enclosures

Exhibit A

MS&L

Advisors. Advocates. Activists.

MS&L 2008
U.S. Employee Handbook

Employee Policy Handbook
United States

Company Confidential
Revised March 2009

Employee Policy Handbook
United States

Company Confidential
Revised March 2009

Employee Policy Handbook
United States

Company Confidential
Revised March 2009

Exhibit B

Appendix A

Local Currency '000

Restructure Costs

Severance Costs

Location: MS&L HQ-New York **MS&L-HQ, NY**

Prepared by Maury Shapiro **Maury Shapiro**

Employee	Male /Female	Date of Birth	Years of Service	Base Salary	Redundancy Entitlement /Weeks	Total Severance
Wendy Lund	Female	4/20/62	12.00	405,000	26.00	202,500
MaryEllen O'Donohue	Female	8/5/63	24.00	220,500	26.00	110,250
Monique DaSilva-Moore	Female	5/24/67	18.00	220,000	26.00	110,000
Sara Donaldson	Female	6/7/81	6.00	70,000	9.00	12,115
Rachel Gil	Female	12/14/75	9.00	78,500	17.00	25,663
Sheila McLean	Female	8/8/60	9.00	235,000	17.00	76,827
Total Severance Costs						**537,356**

Exhibit C

From: Jim Tsokanos

Sent: 12/06/2007 16:55:25
To: Susan Tyndall
Subject: Re: Fw: North America President Appointed

btw, i owe some hkn contacts. stay tuned.

jim

Susan Tyndall/MSL/CA/AMERICAS/PUBGROUPE

Susan Tyndall/MSL/CA/AMERICAS/PUBGROUPE 12/06/2007 12:29 PM	To	Jim Tsokanos/MSL/US/AMERICAS/PUBGROUPE@PUBGROUPE
	cc	
	Subject	Fw: North America President Appointed

Jim, congratulations on this well-deserved promotion! This is very exciting news, giving us the opportunity to work w/ you. I look forward to our continued success. Cheers, S.

----- Forwarded by Susan Tyndall/MSL/CA/AMERICAS/PUBGROUPE on 12/06/2007 12:27 PM -----

Gayla Brock-Woodland /MSL/CA/AMERICAS/PUBGROUPE 12/05/2007 12:41 PM	To	"Susan Tyndall" <susan.tyndall@mslpr.ca>, "Krista Webster" <krista.webster@mslpr.ca>, "Robert Eakins" <robert.eakins@mslpr.ca>, "Martha Mckimm" <martha.mckimm@mslpr.ca>, "Paul Keable" <paul.keable@mslpr.com>, "Lisa Morlock" <lisa.morlock@mslpr.ca>, "Shane Dolgin" <shane.dolgin@mslpr.com>, "Linda Zanetti" <linda.zanetti@mslpr.ca>
	cc	
	Subject	Fw: North America President Appointed

Important and great news. Very confidentially (not for sharing outside our SM group,) I am travelling to New York next week to meet with Jim. He has asked for my input regarding priorities for NA moving forward. Was talking with Mark yesterday and underscored that I was excited about Jim's vision and energy.

----- Original Message -----
From: Mark Hass
Sent: 12/05/2007 12:06 PM EST
To: Ed Cafasso; Jim Tsokanos; Donald Hannaford; Rob Baskin; Nancy Brennan; Jud Branam; Kelly Kolhagen; Bill Orr; Vickie Fite; Gayla Brock-Woodland; Global Leadership Team
Cc: PUBLIC RELATIONS_MSLNYC_DEPARTMENT_USA; ORALB_MSL_TEAM_USA
Subject: North America President Appointed

All: I am very pleased to announce that Jim Tsokanos has been promoted to President, North America, effective January 1, 2008. Jim will retain his current role as managing director of MS&L New York and continue as a member of the agency's Global Leadership Team, but take on the added responsibility of maximizing business performance across our key North America region.

In the past two years, under Jim's leadership, the New York office has grown nearly 25 percent, while maintaining strong profit margins. In 2007 alone, the office added $5.25 million in new revenue compared to 2006, adding key clients such as Heineken USA and Heidrick & Struggles and growing some of the agency's largest clients including Procter & Gamble and Eli Lilly. New York has also brought the wider MS&L network a series of new practices, such as our excellent influencer marketing program and insight-creation process, that have distinguished us among our top competitors. Jim's personal involvement in our digital public relations practice has helped us expand MS&L's industry-leading efforts from Ann Arbor to New York and, in 2008, across the network.

I believe his enviable financial performance, his previous experience running our Atlanta office, and his commitment to staff, client relationships, innovation and change, make Jim a natural choice to lead the firm's strategy and business development in North America.

So, please join me, first in congratulating Jim on this well-deserved promotion, and then in working with him in 2008 and beyond to achieve our aggressive goals in North America.

A public announcement of this news will be made later this week, but in the meantime please share this e-mail internally with the appropriate people in your organization.

Best regards.

mark

Exhibit D

From: Peter Miller

Sent: 01/15/2010 09:34:27
To: Tara Lilien, Valerie Morgan
Subject: Fw: Request for raise exception: MS&L Group

Here are the approvals from Paris

----- Forwarded by Peter Miller/MSL/US/AMERICAS/PUBGROUPE on 01/15/2010 09:33 AM -----

From:	Jean-Michel Etienne/PUBGROUPE/FR/EMEA/PUBGROUPE
To:	Mathias Emmerich/PUBGROUPE/FR/EMEA/PUBGROUPE@PUBGROUPE, Peter Miller/MSL/US/AMERICAS/PUBGROUPE@PUBGROUPE
Date:	01/15/2010 03:49 AM
Subject:	Re: Request for raise exception: MS&L Group

OK for me too . We are unsecure on a little more than the revenue unfortunately for 2010 .

Best

Jean-Michel

Jean-Michel Etienne

Publicis Groupe

EVP - Chief Financial Officer

133, Champs Elysées. 75008 Paris

Mathias Emmerich

----- Message d'origine -----

De : Mathias Emmerich

Envoyé : 01/15/2010 09:02 AM CET

À : Peter Miller

Cc : Jean-Michel Etienne

Objet : RE: Request for raise exception: MS&L Group

Ok for me,

But please let's keep a cautious position, we are still insecure about the revenue growth

Mathias

Mathias Emmerich | Senior Vice President, General Secretary

Publicis Groupe | 133 Avenue des Champs Elysées | 75008 Paris | France
Tél: +33 1 44 43 66 19 | Mob:+33623764423 | Fax: www.publicisgroupe.comPlease consider the environment before printing this email.

Peter Miller---14/01/2010 23:02:22---Dear Mathias & Jean-Michel, We request exceptions on the raise freeze for the following individuals:

De : Peter Miller/MSL/US/AMERICAS/PUBGROUPE

A : Mathias Emmerich/PUBGROUPE/FR/EMEA/PUBGROUPE@PUBGROUPE, Jean-Michel Etienne/PUBGROUPE/FR/EMEA/PUBGROUPE@PUBGROUPE

Date: 14/01/2010 23:02

Objet : Request for raise exception: MS&L Group

Dear Mathias & Jean-Michel,

We request exceptions on the raise freeze for the following individuals: 2 senior individuals assuming new roles with the reorganization of the MS&L Group, and 2 mid-level individuals key to client business.

2 Senior Level Individuals

- Karlenne Trimble. She has taken on the role of Director of New Business for MS&L Group North America effective January 1, 2010. This is a critical position for us due to the considerable new business targets we need to achieve. Karlenne will be travelling extensively in her new role, including weekly trips to NY. Previously she was in charge on Client Internal Communications in the Atlanta office. We ask to increase her salary from $260,000 to $285,000 effective January 1, 2010.
- Philip Maravilla. He has taken over the role of Managing Director of the new MS&L combined group in Frankfurt also effective January 1, 2010. With the termination of the MS&L CEO in Frankfurt in December, Philip has taken over the responsibility. Philip is currently making 6900€/month todaywith Publicis Consultants-Germany.We would like to increase this to 9200€/month. Though substantial, he is currently on a freelancer contract, which was beneficial to him tax wise, but risky to the firm. We want to eliminate this freelancer contract and put him on a regular employee contract, requiring a higher pay for the both the tax effect and the new responsibilities. We would like this effective January 1, 2010 as well.
- Rachel Weiss. She was promoted to Account Supervisor in September 2009 without an increase. She is currently making $55,000. We would like to increase her to $65,000

effective February 1, 2010, which is still low for this position (if we went external it would cost us $80,000). She is currently assigned to the Sanofi business, is 100% billable and a go-to-person for the client. Competitors have tried to poach her.

- Robyn Finker. She was promoted to Senior Account Supervisor in October 2009 without an increase. She is currently making $76,000. We would like to increase her to $87,000 also effective February 1, 2010, which is still low for this position (if we went external it would cost us $90k-$95k). She is exceptionally valuable on the P&G Oral Care business. Competitors have tried to poach her.

2 Mid-level Staff

Thanks,

Peter

Exhibit E

June 30, 2011

Carol Perlman
910 Park Ave., Apt #5N
New York, NY 10075

SUMMARY OF BENEFITS AT SEPARATION

Provided you execute the enclosed General Release and ADEA Agreement (the "Release") and do not revoke it, the following is a summary of the termination process and the benefits you will receive as a result of your separation of employment with MSL New York (the "Company").

Effective Date:
The effective date of your separation from service is July 1, 2011 the "Separation Date" or "Termination Date").

Salary Separation Allowance/Salary Bridging:
You will receive salary bridging payments at the rate of $220,000 per annum, payable semi-monthly, from the Separation Date through September 1, 2011 (the period of the Separation Date through September 1, 2011 is referred to as the "Bridging Period"). Your salary bridging payments will begin in the payroll period following the Company's receipt of your executed Release. During the Bridging Period, you are expected to make diligent efforts to obtain alternative employment. If you obtain employment before or during the Bridging Period, your salary bridging will be discontinued or reduced effective on the first day of your new employment. Your salary bridging payments will be mailed to your home. If you have direct deposit, your paystub(s) will be mailed to your home, except for the last payment, which will be a check. You agree to immediately inform the Company of any employment (including consultancy, freelancing, and self-employment) that you obtain before or during the Bridging Period. You also agree to provide the Company with all documentation (which may include earnings stubs, tax returns, new employer verification) that the Company may reasonably request relating to your employment and compensation during the Bridging Period. In the event you fail to supply such information, the obligations of the Company to you under this paragraph shall terminate.

Benefit Options Summary

Medical, Dental and Vision Benefits

To the extent you are eligible on your last day of employment, your medical, dental and vision benefits will continue through the end of the month in which your employment is terminated.

COBRA Coverage

Effective the 1st of the month following your termination, you will have the ability to continue medical, dental and/or vision insurance coverage for up to eighteen (18) months under COBRA. COBRA is the federal legislation giving Qualified Beneficiaries this continuation right due to a "Qualifying Event," such as the termination of employment.

Each Qualified Beneficiary has an independent right to elect coverage continuation. Employees and their dependents covered under the plan(s) on the day before the Qualifying Event are considered Qualified Beneficiaries.

You will receive a continuation information package from ADP Benefit Services, our COBRA administrator within 45 days of the last day of your employment (your "coverage end date"). You will have 60 days from your coverage end date to decide if you would like to continue your medical, dental and/or vision coverage. If you choose to continue coverage under COBRA, you will be reinstated in your plan(s) retroactive to your coverage end date.

2011 COBRA Rates (monthly)

	Single	Dependent (EE +1)	Family (EE + Family)
BCBS PPO	$443.82	$887.62	$1,331.44
BCBS EPO	$417.49	$834.95	$1,252.44
Delta Dental			
-Comprehensive Plan	$39.57	$79.12	$118.69
-Basic	$26.20	$52.40	$78.60
Vision VSP			
-VSP Low Plan	$7.95	$15.90	$23.84
-VSP High Plan	$12.19	$24.33	$36.48

If you have any questions regarding your COBRA coverage options, please contact ADP Benefit Services at (800) 526-2720.

Healthcare Flexible Spending Account

Your participation in the Healthcare Flexible Spending Account will end on your termination date. You then will receive a continuation information package from ADP Benefit Services, our COBRA administrator within 45 days of the last day of your employment. You will have 60 days from your participation end date to decide if you would like to continue your participation in your Healthcare Flexible Spending Account.

You will have until March 31st of next year to submit claims for the current plan year. Claims must have been incurred between your first day of participation in the plan and your last day of participation in the plan for the current year.

 If you have questions regarding your account, please contact HealthHub powered by PayFlex at (800) 284-4885.

Dependent Care Flexible Spending Account

Your participation in the Dependent Care Flexible Spending Account will continue through the end of the month in which your employment is terminated. Continued participation is not an option under these plans.

You will have until March 31st of next year to submit claims for the current plan year. Claims must have been incurred between your first day of participation in the plan and your last day of participation in the plan for the current year.

 If you have questions regarding your account, please contact HealthHub powered by PayFlex at (800) 284-4885.

Transportation and Parking Flexible Spending Account

Your participation in the Transportation and/or Parking Flexible Spending Account will continue through the end of the month in which your employment is terminated. Continued participation is not an option under these plans.

You have until March 31st of next year to submit claims for the current plan year. Claims must have been incurred between your first day of participation in the plan and your last day of participation in the plan for the current year.

 If you have questions regarding your account, please contact HealthHub powered by PayFlex at (800) 284-4885.

Group Legal Plan
Your participation in the Group Legal Plan will end on your termination date. Continued participation is not an option under this plan.

Voluntary Benefits
Although payroll deduction for Voluntary Benefits will no longer be available to you upon termination, you can opt for checking account deduction or home billing.

Please contact Marsh Voluntary Benefits as soon as possible after termination in order to continue your coverage without interruption (800) 621-2356.

Basic Life Insurance
Your life insurance will end on your termination date. Securian offers a conversion option that will allow you to continue your coverage.

If you are interested in continuing your coverage please contact Securian at (800) 815-7636, within 31 days of termination date.

Supplemental Life Insurance
Your supplemental life insurance will end on your termination date. Securian offers a portability option that will allow you to continue your coverage for yourself and your dependents at group rates.

If you are interested in continuing your coverage please contact Securian at (800) 815-7636, within 31 days of termination date.

Accidental Death and Dismemberment Insurance
Your accidental death and dismemberment insurance will end on your termination date. Securian offers a portability option that will allow you to continue your coverage for yourself and your dependents at group rates.

If you are interested in continuing your coverage please contact Securian at (800) 815-7636, within 31 days of termination date.

Long Term Disability
Your Long-Term Disability insurance will end on your termination date. A conversion option is not available for the long-term disability plan.

Short-Term Disability
Your Short-Term Disability insurance will end on your termination date. Continued participation is not an option under this plan.

Business Travel Accident Insurance
Your coverage under The Publicis Groupe Business Travel Accident Insurance policy will end on your termination date. Continued participation is not an option under this plan.

401(k) Plan
Your participation in the Publicis Benefits Connection 401(k) Plan ends on your termination date. You have the option of taking a distribution/roll-over from the 401(k) Plan or you can elect to leave your account balance with Fidelity.

Upon termination, the unpaid principal or interest on any outstanding loan will become immediately due, except if you elect not to take a distribution of your account. If you leave your account balance in the Plan, you may continue repaying your loan in monthly payments to Fidelity. Within the first month of your separation, you will automatically receive a loan coupon book from Fidelity with instructions for continuing to make repayments. Coupon payments may be made via personal check, certified check, money order or electronically if your banking information is on file with Fidelity. If you do not repay the loan in full or set up continued payments with Fidelity within 90 days after you terminate employment, the loan will be treated as a taxable distribution.

Note: If your account balance is less than $1000.00 you will automatically receive a distribution payout. This process occurs on a quarterly basis.


Please contact Fidelity at (800) 835-5095 to request your distribution or if you have any questions.

Vacation:
Any remaining days of unused, accrued 2011 vacation time have been included in the bridging paid out through September 1, 2011.

Company Property
You are required to return, in good working order, any company issued property loaned to you to perform work-related job duties. This consists of, but is not limited to: fax machines, copying machines, computers and laptops, credit cards, cellular telephones, identification and security cards, building, desk and file keys. Bridging payments will not be released until all items have been returned. Please contact Tara Lilien if assistance is needed in shipping items back to the Company.

No Other Benefits:
Except as expressly set forth herein, you will not be entitled to any other compensation or benefits from, or in connection, with your employment with MSL New York.

In consideration of the separation entitlement discussed above, you agree to execute the attached Release Agreement, which among other things, releases any claims you may have against MSL New York relating to your employment or the termination of your employment.

If you have any questions regarding your benefits or would like to receive benefit conversion information, please contact Kendra Daughtry in Corporate Benefits at 212-468-4055.

Sincerely,

Jeanine O'Kane
SVP, NA Healthcare Practice Director

Accepted and Agreed:_____ Date: _____
Carol Perlman

VERY CONFIDENTIAL

SEPARATION AGREEMENT, WAIVER AND RELEASE

This Agreement is between Carol Perlman ("Employee") and MSL New York on behalf of itself, and each of its respective predecessors, parents, successors, divisions, assigns, affiliates and subsidiaries and their respective current and former employees, officers, directors and agents (collectively referred to as "Company").

WHEREAS, Employee has rendered services to the Company as an employee; and

WHEREAS, the parties hereto wish to terminate Employee's employment amicably and in appreciation for Employee's services to the Company; and

THEREFORE, in consideration of the monies, mutual promises, and mutual covenants contained herein, the parties agree as follows:

1. Acceptance Period. Employee acknowledges that Employee is receiving this Agreement on June 30, 2011, and Employee shall have forty-five (45) days from Employee's receipt of the Agreement (August 14, 2011) to consider and sign it ("Acceptance Period"). Employee also acknowledges that any changes or modifications to this Agreement do not restart or otherwise extend the Acceptance Period. Employee shall have seven (7) calendar days following execution of the Agreement to revoke the Agreement by giving notice to the Company of such revocation; and, to be effective, such notice must be received by the Company no later than the seventh (7^{th}) calendar day following Employee's execution of this Agreement (if such day is a Saturday or Sunday, or a legal holiday then such notice must be received on the first day thereafter that is not a Saturday, Sunday, or legal holiday).

2. Employment Status. Employee's last day of employment will be July 1, 2011 ("Employment End Date").

3. Salary Bridging. The Company agrees to make eight weeks and four days of "Salary Bridging" payments to Employee based on base salary in the amount of $220,000 per annum, less any necessary and customary withholdings or taxes. While receiving Salary Bridging, Employee is expected to make diligent efforts to obtain alternative employment. If Employee obtains employment before or during the Salary Bridging period, Employee's salary bridging will be discontinued or reduced effective on the first day of Employee's new employment. Employee agrees to immediately inform the Company of any employment (including consultancy, freelancing, and self- employment) that Employee obtains before or during the Salary Bridging period. Employee also agrees to provide the Company with all documentation (which may include earnings stubs, tax returns, new employer verification) that the Company may reasonably request relating to Employee's employment and compensation during the Salary Bridging period. In the event Employee fails to supply such information, the obligations of the Company

to Employee under this paragraph shall terminate. Salary bridging payments will be paid in semi-monthly payments on the Company's regular payroll dates, commencing on the Company's next regular payroll date following the receipt of this signed Agreement. Employee's salary bridging payments will be mailed to his home. If Employee has direct deposit, his paystub(s) will be mailed to his home, except for the last payment, which will be a check.

4. Benefits During Salary Bridging. Employee's dental, medical, or vision coverage (if any coverage in place) will continue until the last day of the month in which Employee is employed by the Company. Employee's participation in all other benefits and programs (including but not limited to 401(k), cash balance, and disability) will end on Employee's last day of employment.

5. Release. Employee releases the Company and its predecessors, successors, assigns, divisions, affiliates, parents and subsidiaries (including but not limited to Publicis Groupe SA), and each of their respective past, present and future owners, directors, employees, agents, and fiduciaries of employee benefit plans, from any and all claims, obligations, or causes of actions, of whatever kind, arising out of or in any way connected with any acts, omissions, practices, or policies which were or could have been asserted in connection with a civil action or administrative action under the New York Human Rights Law, New York Executive Law § 290 et seq., the New York City Charter and Administrative Code, Title VIII, § 8-107 et seq., the New York Civil Rights Law, New York Civil Rights Law § 1, the New York Equal Pay Law, New York Labor Law § 194-198, the New York Whistleblower Law, New York Labor Law § 740 et seq., the New York Legal Activities Law, New York Labor Law § 201-d, Title VII of the Civil Rights Act of 1964, as amended (including as amended by the Civil Rights Act of 1991), 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act, as amended (including as amended by the Older Workers Benefit Protection Act), 29 U.S.C. § 621 et seq., the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 793 et seq., the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq., 42 U.S.C. §§ 1981-1988, the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, et seq., the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, et seq., the Occupational Safety and Health Act, 15 U.S.C. § 651 et seq., the Sarbanes-Oxley Act of 2002 (including the "whistleblower" provisions, 18 U.S.C. § 1514A, et seq.), and/or any other federal, state, or local statute, law, constitution, ordinance, regulation, or order, or common law, in any way resulting from Employee's employment with or separation of employment from the Company. Employee acknowledges that Employee has received or will receive pursuant to this Agreement all compensation to which Employee may be entitled. This release is not intended to waive any claim for failure to provide vested benefits under an employee benefit plan sponsored by the Company, to which Employee is legally entitled, if any, nor does it waive Employee's right to enforce this Agreement.

EMPLOYEE HEREBY AGREES THAT THIS RELEASE IS GIVEN KNOWINGLY AND VOLUNTARILY AND ACKNOWLEDGES THAT:

(a) THIS AGREEMENT IS WRITTEN IN A MANNER UNDERSTOOD BY EMPLOYEE;

(b) THIS RELEASE REFERS TO RIGHTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, AS AMENDED;

(c) EMPLOYEE HAS NOT WAIVED ANY RIGHTS ARISING AFTER THE DATE OF THIS AGREEMENT;

(d) EMPLOYEE HAS RECEIVED VALUABLE CONSIDERATION IN EXCHANGE FOR THE RELEASE OTHER THAN AMOUNTS EMPLOYEE IS ALREADY ENTITLED TO RECEIVE; AND

EMPLOYEE HAS BEEN ADVISED TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT

6. Covenant Not To Sue the Company. Employee shall not file any suit, claim or complaint in a court of law or in an adjudicative agency against the Company arising out of, or relating to, Employee's employment with the Company, or employment decisions made by the Company. Employee and the Company expressly consent that this Agreement shall be given full force and effect according to each and all of its terms and provisions. Employee and the Company acknowledge and agree that this covenant not to file any suit, claim or complaint is an essential and material part of this Agreement and that without its inclusion, this Agreement would not have been reached by the parties. Employee affirms that Employee has not filed, caused to be filed, or presently is a party to any claim, complaint, or action against Employer in any forum or form. Employee further affirms that Employee has reported all hours worked as of the date of this Agreement and has been paid and/or has received all leave (paid or unpaid), compensation, wages, bonuses, commissions, and/or benefits to which Employee may be entitled and that no other leave (paid or unpaid), compensation, wages, bonuses, commissions and/or benefits are due to Employee, except as provided in this Agreement. Employee furthermore affirms that Employee has no known workplace injuries or occupational diseases and has been provided and/or has not been denied any leave requested under the Family and Medical Leave Act.

7. No Admission of Liability. Employee acknowledges and agrees that the promises and consideration provided by the Company, as set forth above, are sufficient for the release and other promises of Employee that are contained in this Agreement. Employee further acknowledges and agrees that by entering into this Agreement, the Company does not admit that it is engaging in or has engaged in any wrongdoing or unlawful act or that it is violating or has violated any federal or state statute, law, ordinance, regulation or other applicable law. Rather, Employee understands that the Company is entering into this Agreement solely for the purpose of avoiding the time and expense involved in defending any litigation or other legal proceedings Employee might otherwise be inclined to commence against the Company.

8. Confidentiality. Employee shall keep the terms, conditions and existence of this Agreement strictly confidential at all times and shall not disclose them to anyone; provided, however, that this Agreement may be disclosed to Employee's attorneys and Employee's immediate family and financial advisor. Employee further agrees not to disclose or to use for Employee's own purposes or the purpose of any third party any confidential or proprietary information of the Company and/or its existing or former clients.

9. No Disparagement. Employee shall not engage in conduct or disclose any information to the public or any third party which (i) directly or indirectly discredits or disparages the Company, and/or their respective officers, directors, shareholders or clients; or (ii) is detrimental to the reputation, character, or standing of the Company and/or any of their respective officers, directors, shareholders or clients. The officers of the Company shall not engage in any conduct or disclose any information to any third party which (i) directly or indirectly discredits or disparages Employee or (ii) is detrimental to the reputation, character or standing of Employee.

10. No Solicitation. Employee will not, for a period of two years commencing on Employee's last day of employment, directly or indirectly solicit, on Employee's own behalf or on behalf of any other person or entity, the business of any person or entity engaged in doing business with the Company at any time during the 12 months prior to the last day of employment. Employee also agrees that Employee will not attempt, either directly or indirectly, to induce or otherwise persuade any employee of the Company to terminate his or her employment with the Company for a period of 24 months following the last day of employment. Employee acknowledges and agrees that the provisions of this section are reasonably necessary to protect the legitimate interests of the Company and that Employee's observance of them will not work any undue hardship on Employee or Employee's interests.

11. Cooperation. Employee agrees to fully cooperate with, and to assist the Company in connection with any regulatory or other legal actions which are pending, or which may be filed, by or against the Company by third parties relating to circumstances in which Employee may have been involved during Employee's employment with the Company, or as to which Employee otherwise may have personal knowledge, including without limitation, consulting with the Company, or its attorneys in such actions or proceedings, or serving as a witness for the Company therein; provided that Employee's assistance with such matters shall not unreasonably interfere with Employee's subsequent employment or his efforts to obtain such employment. The Company will reimburse Employee for Employee's out-of-pocket expenses incurred in providing any such assistance.

12. Remedies. In the event that the Company believes that Employee is in breach of this Agreement, the Company preserves all remedies which it may have at law or in equity including without limitation injunctive relief, and reserves the right to demand repayment of all financial and other benefits to be provided by the Company pursuant to this Agreement. In any action brought, the Company shall be automatically entitled to recover attorneys' fees in the event the Company prevails except that any challenge to the validity of the waiver and release under the Age Discrimination in Employment Act shall be governed by the provisions of that statute.

13. Entire Agreement. Except as to any agreement pertaining to confidentiality or non-solicitation, this Agreement sets forth the entire agreement between the parties and supersedes any written or oral understanding, promise, or agreement directly or indirectly related to it, which is not referred to and incorporated here. Employee acknowledges that Employee is legally competent to execute this Agreement and accepts full responsibility for this Agreement. This Agreement shall be final and binding upon the parties, their predecessors, successors, and assigns, as to all past, or present disputes referred to herein which may have existed, or now exist between them. Any changes in this Agreement may only be made in a writing that is signed by both parties.

14. Return of Property. Upon Employee's last day of work, Employee shall account for and return to the Company all property belonging to the Company, which is in Employee's possession. This property includes (but is not limited to), laptop and personal computers (and related equipment and software), pda's, offices keys, key cards, correspondence, files, reports, minutes, plans, records, surveys, diagrams, computer print-outs, floppy disks, manuals, and client/customer information and documentation. Additionally, Employee acknowledges that Employee is in compliance with the Company's travel and expense policy, and Employee agrees that Employee will eliminate any outstanding balances on Employee's Company credit card (if any) within forty five days of separation.

15. Notices. Notices shall be in writing and shall be addressed in the following manner:

If to Employee, to the address shown here:

Carol Perlman
910 Park Ave., Apt #5N
New York, NY 10075

And if to the Company, to the address shown here:

Tara Lilien
SVP, Director of N.A. Human Resources
MSLGROUP
1675 Broadway
New York, NY 10019

With a copy to the address shown here:

Re:Sources USA, Inc.
35 W Wacker Dr FL 20
Chicago IL 60601
Attn: John R. Spitzig,
Assoc. General Counsel, Employment

16. Reformation and Severability. In the event that any provision of this Agreement, with the exception of the paragraphs entitled "Release" or "Covenant Not to Sue," is held to be illegal, invalid or unenforceable, then it is the parties' express intention that the court modify such provision as necessary to render it enforceable to the maximum extend deemed reasonable by the court; if such provision is incapable of modification and continues to be held illegal, invalid or unenforceable in a final, unappealable order or judgment, then such provision shall be severed from this Agreement and shall be inoperative, and the remaining provisions of this Agreement shall continue to be binding on the parties.

17. Binding Authority. The Company is authorized to enter into this Agreement on behalf of the aforementioned parties.

IN WITNESS WHEREOF, the Employee named below, having read and fully understood each of the provisions of this Agreement, and the Company, have executed this Agreement as of the dates set forth below:

Employee:	**MSLGROUP:**
By (sign):	**By (sign):**
Print Name:	**Print Name:**
Date:	**Its (title):**
	Date:

NOTICE

Before you sign the attached General Release Agreement, the Company advises you to consult with your attorney. The offer to accept the terms of the General Release Agreement is open for 45 days from the date you receive the General Release Agreement. You may sign it sooner if you decide to do so.

****

I hereby acknowledge that I have received and read the above notice and fully understand its meaning.

Please execute this Notice below and return it to Tara Lilien. Please keep a copy of the Notice for reference.

Print Name: _____

Signature: _____

Date: _____

DO NOT WRITE BELOW THIS LINE

Received By:_____ Date: _____


MSLGROUP
AMERICAS

Exhibit F

From: Renee Wilson

Sent: 02/24/2011 18:04:57
To: "Tara Lilien" <tara.lilien@mslgroup.com>, "Peter Miller" <peter.miller@mslgroup.com>, Tony Cofone
Subject: Fw: PRWeek Article re: Monique daSilva lawsuit

Team - fyi; Reuters calledTrudi Harris ----- Original Message ----- From: Trudi Harris Sent: 02/24/2011 06:09 PM CET To: Ryan Dennis Curtis Cc: Arjan Timmermans; Jim Tsokanos; Karlenne Trimble; Renee Wilson Subject: RE: PRWeek Article re: Monique daSilva lawsuitI've just taken calls from Reuters and PR Week. Reuters have sent the note to Publicis Groupe. I assume that the Groupe new about this? Normally i'm warned when there's a lawsuit coming but haven't this time around by the Groupe. Please can you clarify?bests, TTrudi HarrisChief Communications Officertrudi.harris@mslgroup.comM: +33 (0)6 13 73 83 02mslgroup.com | twitter.com/msl_group |http://blog.mslgroup.com/| MSLGROUP on YouTubeA Publicis Groupe CompanyClick here to check out MSLGROUP's social predictions for the conversation age: 2011Ryan Dennis Curtis---24/02/2011 18:01:33---Jim, Renee and Trudi: The article below just ran in PRWeek US. I've also included the link.De :Ryan Dennis Curtis/MSL/US/AMERICAS/PUBGROUPEA :Jim Tsokanos/MSL/US/AMERICAS/PUBGROUPE@PUBGROUPE, Renee Wilson/MSL/US/AMERICAS/PUBGROUPE@PUBGROUPE, Trudi Harris/MSL/FR/EMEA/PUBGROUPE@PUBGROUPECc

:Karlenne Trimble/MSL/US/AMERICAS/PUBGROUPE@PUBGROUPE, Arjan Timmermans/MSL/US/AMERICAS/PUBGROUPE@PUBGROUPEDate:24/02/2011 18:01Objet :PRWeek Article re: Monique daSilva lawsuitJim, Renee and Trudi:The article below just ran in PRWeek US. I've also included the link.http://www.prweekus.com/former-employee-files-lawsuit-against-publicis-mslgroup/article/196971/Former employee files lawsuit against Publicis, MSLGroupPRWeek USFebruary 24, 2011Jaimy LeeNEW YORK: Monique da Silva, a former global healthcare director at MSLGroup, filed a class action gender discrimination lawsuit on February 24 against Publicis Groupe and MSLGroup.Da Silva, an EVP and head of the North America healthcare practice at Ogilvy PR Worldwide since February 2010, alleges that she and other female employees were wrongfully terminated after returning from maternity leave. She worked for MSLGroup for more than 10 years.The lawsuit, including other gender discrimination allegations, was filed in US District Court in the Southern District of New York.Visit www.prweekus.com for continued coverage.Ryan Dennis CurtisCorporate Communications Account ExecutiveMSLGROUP Americasa:

1675 Broadway, Fl. 9, New York, NY 10019 United Stateso:

212-468-3616e:

ryandennis.curtis@mslgroup.comw:

mslgroup.com

Exhibit G

UPDATED AS OF: 6/10/08

HR Contact: Jenni McDonough & Susan Stewart
Business Unit: MS&L - GA

ARTW - Anticipated Return To Work Date.

Employee				STD Elim.	STD Salary Contin.	STD	STD	Expected STD	Actual STD	* Is EE taking	FMLA	FMLA	Additional FMLA Time Taken Immediately Following STD Return Date				Paid Personal	Paid Personal	Unpaid Personal	Unpaid Personal	Actual Return
Name	Date of Hire / CSD	WK ST	Last Day Worked	Paid - Y or N	Effective Date	0% Pay Eff. Date	0% Pay End Date	Return Date	Return Date	add'tl time?	Eff. Date	Entitled Thru Date	Paid FMLA Start Date	Paid FMLA Return Date	Unpaid FMLA Start Date	Unpaid FMLA Return Date	Leave Start Date	Leave Return Date	Leave Start Date	Leave Return Date	To Work Date
ACTIVE DISABILITY / LEAVE -																					
Hubbard, Zaneta	02/01/08	GA	05/30/08		06/09/08			07/14/08			NOT ELIGIBLE										
RETURNED FROM DISABILITY / LEAVE -																					
Euston, Greg	10/26/99	GA	05/02/08		05/12/08			05/19/08	05/19/08												
Howze, Lelia	06/05/07	GA	10/17/07	Y	10/25/07			10/26/07	10/26/07												
Leish, Rebecca	10/27/03	GA	11/27/07		11/28/07			01/17/08		Yes	11/28/07	02/19/08	01/17/08	01/21/08	**01/22/08**	**02/20/08**	02/28/08	02/29/08	**02/21/08**	**02/27/08**	03/03/08
McDonough, Jenni	06/27/2000	GA	08/23/07		09/01/07			10/22/07		Yes	08/24/07	11/16/07	10/23/07	11/12/07	**11/13/07**	**11/16/07**			**11/17/07**	**01/02/08**	01/02/08
Wolter, Renae	08/28/07	GA	12/03/07								12/03/07	02/25/08	12/03/07	01/13/07	**01/14/08**	**02/25/08**	***TERMINATED 2/8/08**				
Timmermans, Johannes (Arjan)	02/25/08	GA	05/22/08		05/30/08			06/02/08	06/02/08												

*** If employee is requesting additional time off (paid vacation time or unpaid leave of absence) past STD return date this must be approved and coordinated with the immediate supervisor, Human Resources Rep and the Corporate Benefits Department in advance.**

Exhibit QQ

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MONIQUE DA SILVA MOORE, et al.,

Plaintiffs,

v. 11 CV 1279(RJS)(AJP)

PUBLICIS GROUPE, MSL GROUP,

Defendants.

----------x

New York, N.Y.
December 5, 2011
5:15 p.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES (Via Telephone)

SANFORD WITTELS & HEISLER
Attorneys for Plaintiffs
BY: STEVEN L. WITTELS
JANETTE LYNN WIPPER
JACKSON LEWIS LLP
Attorneys for Defendant MSL GROUP
BY: JEFFREY W. BRECHER
VICTORIA WOODIN CHAVEY

(In chambers)

THE COURT: Counsel, this is Judge Peck.

Needless to say, I am delighted to hear from you since I saw you just a few days ago.

In any event, let's get a roll call of counsel on the line for the court reporter's transcript, and each time you speak, let me know who is speaking.

MR. WITTELS: Yes, your Honor. Thank you.

Steven Wittels for the plaintiff, and Janette Wipper is here.

MS. WIPPER: Janette Wipper for the plaintiff.

MS. CHAVEY: Victoria Chavey for defendant MSL Group.

MR. BRECHER: Jeffrey Brecher for defendant MSL Group.

THE COURT: You all have to speak louder.

I don't know what phones you are on -- hopefully not cell phones -- but it is hard to hear some of you so, hopefully, the principal speaker on each side will be the one I can hear.

My gut reaction on reading this is certainly for the plaintiff who has flown in along with California counsel. That deposition either will go forward as scheduled or defendant will pay costs, including lawyer billing rates for travel. And, frankly, I am most inclined to have the deposition go forward.

So since I am leaning towards the plaintiff, why don't

I hear from whoever on the defendants' side is going to be speaking.

MS. CHAVEY: Thank you, your Honor.

This is Victoria Chavey.

After the conference with you on Friday afternoon, we sought on Saturday to contact plaintiffs' counsel to suggest that we get together and do as you directed, which is to devise a deposition schedule --

THE COURT: Counsel, that is not what I directed. You were insistent on taking the depositions of the two or three witnesses scheduled for this week.

My memory is that the only thing I said is that it might be possible to move it to the week of December 12th but nobody knew the witnesses' schedule. I said, once that is out of the way and once plaintiffs are ready to start taking depositions, then they could do so without priority.

It frankly seems to me, reading the emails that were attached to Ms. Chavey's letter, that defendants are still trying to retain a priority that doesn't exist.

MS. CHAVEY: Your Honor, this is Victoria Chavey.

What we were seeking to do was to develop a schedule with plaintiffs' counsel, as we understood you to direct us to do, that would allow us to take some depositions then allow the plaintiffs to take some depositions and so on.

What we didn't want to do is have the plaintiffs

unilaterally choose which depositions would be first and then have them depose our witnesses. So although the depositions were obviously already scheduled just for a few days hence, we suggest that either we postpone the depositions and get together and figure out a schedule that we all agree is fair or we proceed with the depositions that were scheduled, just given kind of late date of it, but then have that not be with prejudice to us deposing what are really the more senior level, the more long-tenured employees, including Monique Da Silva Moore and Maryellen O'Donohue -- both of whom seem to be very unavailable. We have gotten no dates for Maryellen O'Donohue. She lives in New York City as far as I understand or in the New York area. We just don't want the plaintiffs to have the choice as to which plaintiffs are deposed before our witness are deposed.

THE COURT: At the rate you are going with document production, I suspect you will be able to take all the plaintiffs before they take you. But, in any event, the problem is this: For better or for worse, the witness for tomorrow's deposition and counsel Wilkinson -- whoever the lawyer is from San Francisco -- got on a plane and are here. It seems to me, at least as to those two, why shouldn't you be taking them tomorrow or paying their expenses?

MS. CHAVEY: Your Honor, we sought to avoid that by contacting them on Saturday. It is our understanding, based on

a conversation earlier that both Ms. Wilkinson with Ms. Wipper flew out yesterday. So this was after we had proposed what we had proposed in the email on Saturday afternoon and offered to schedule a call about it, even though it was over the weekend.

THE COURT: Yes, I understand, but since nobody had figured this out -- if they didn't get on the plane and you didn't have an agreement, I am sure there would have been an application by defendants to draw and quarter the plaintiffs for not showing up for the deposition as I ordered. So whoever's fault it is, as a practical and money-saving matter, why shouldn't the deposition go forward tomorrow?

MS. CHAVEY: The last thing I guess I will say on that -- again, this is Victoria Chavey -- is that plaintiffs did agree over the weekend that they would produce the plaintiffs who are scheduled for this week's deposition, they would produce them again because they had insisted that we not ask the plaintiffs about anything relating to emotional distress damages other than what they would characterize as garden variety. And so they said that they would re-produce these plaintiffs if they needed to for us to ask them more questions about the full gamut of emotional distress damages. So they have already agreed to re-produce these plaintiffs.

THE COURT: Let me hear from the plaintiffs as to whether that was indeed agreed or not.

MS. WIPPER: Yes, your Honor.

This is Janette Wipper speaking.

We did agree to that, pending the Court's decision concerning -- if the Court decided that the medical records had needed to be produced --

THE COURT: With all due respect, both Judge Sullivan and I already decided that. So I don't know what you --

MS. WIPPER: Your Honor, after the Friday conference, we had drafted a letter that we were to submit to you regarding the range of reasonableness for garden variety of damages in the Second Circuit --

THE COURT: Counsel, you were not here.

MS. WIPPER: No, I wasn't. I will defer to my colleague if you would prefer.

THE COURT: What I would prefer is that parties raise issues once. I have been on trial all day. It has been a long day. I saw you all on Friday. I ruled on Friday that, having nothing to do with the amount of damages, Judge Sullivan ordered you to produce that material, and I was not changing that order.

Yes, I also said that I thought garden variety damages were limited under the case law and Title 7 and related types of action to 25,000.

But even putting that aside, Judge Sullivan ruled -- and I am not reversing Judge Sullivan, that would sort of be backwards, so that ship has long since sailed.

I also ruled that these depositions were to go forward. So all of you need to stop pseudo cooperating and pretending you are going to go cooperate in the future and start cooperating.

What are the parties' pleasures with respect to Wilkinson and Wipper as to tomorrow? Let's deal with that and that alone.

MS. WIPPER: This is Janette Wipper speaking.

We would like to proceed with Kay Wilkinson's deposition tomorrow who flew out from California, as well as Heather Pierce who is traveling from D.C. on Tuesday. We would be willing to reschedule the Thursday deposition of Carol Coleman because she is local in New York and it would not be as disruptive and as expensive with respect to rescheduling.

THE COURT: Has Pierce bought a ticket?

MS. WIPPER: Yes. And also made hotel reservations that I believe aren't refundable.

THE COURT: Are or are not?

MS. WIPPER: Are not.

THE COURT: Ms. Chavey.

MS. CHAVEY: Thank you, your Honor.

Just on that last point, we did, as you may have seen in the email that we attached to our letter, we advised plaintiffs yesterday that the depositions were cancelled. So to the extent that there was a hotel reservation that still is

on -- I don't know how hotels' reservation policy works, but it certainly doesn't seem to me that a hotel reservation should drive what we feel is a fundamental --

THE COURT: If the hotel reservation is indeed nonrefundable, and that may be the situation with certain reservations made through companies like Expedia and the online booking companies, are you prepared to pay with respect to that deposition, Ms. Pierce, whatever the losses are on the hotel reservation which, presumably, is no more than one night and whatever is the loss on the airfare, to the extent that the airline ticket will have a penalty if it is exchanged for a later trip?

(Pause)

THE COURT: Hearing nothing, does that mean that you are thinking?

MS. CHAVEY: Yes. I am thinking about it, your Honor.

I guess we could do that if that's what the Court told us to do.

THE COURT: You are missing my point. I can tell you to do everything and anything, including that you can't have these depositions at all. That wasn't what I was asking. I am asking if, to avoid the Court ruling on whether Ms. Pierce's deposition goes forward, since there is no legal fees involved, it is just airline and hotel cancellation which may be expensive or may not, are you willing to voluntarily reimburse

for those expenses, yes or no?

MS. CHAVEY: I guess the answer is yes, as long as those expenses are within reason. If it is more than $1,000 or something, then I think, in our view, it would be unreasonable. But we would agree to do that because the issue of the order of the depositions and whether we intend to depose the more significant plaintiffs before our witnesses are deposed is something that we consider to be fundamental to our defense strategy, and we don't want to be in the position of putting our witnesses forward --

THE COURT: Then why is it, Ms. Chavey --

MS. WIPPER: Your Honor, if I may, before you rule -- this is Janette Wipper for the plaintiff -- it is not a matter --

THE COURT: You are about to win. I would keep quiet if I were you.

MS. WIPPER: OK.

THE COURT: The Wilkinson and Pierce depositions will go forward. The Perlman deposition is adjourned, as is the Hubbard deposition for dates the parties will work out. That is the Court's ruling.

MS. WIPPER: Janette Wipper again for the plaintiff.

With respect to the Hubbard deposition, it is scheduled for Atlanta because our client is pregnant and has a high risk pregnancy and can't travel. There is a

possibility -- she has made travel arrangements already. It is on the 21st of this month. It may be that she hasn't, but counsel have made arrangements for that deposition already.

THE COURT: Where is she located?

MS. WIPPER: She is in Atlanta.

THE COURT: So the issue is, she would be flying to New York or she would be deposed in Atlanta?

MS. WIPPER: Our counsel has made travel arrangements to fly to Atlanta. She cannot travel because she has a high risk pregnancy and she basically is not allowed to travel.

THE COURT: Are your reservations nonrefundable?

MS. WIPPER: It is just hotel.

And, also, your Honor, we would propose that that deposition go forward because we have a concern, given the health complications of our plaintiff because she is not on bed rest yet, but she may be on bed rest soon, given her high risk pregnancy, so if we don't proceed with the deposition on the 21st, we are concerned that she is not going to be available for the remainder of the discovery period. So we would ask that you reconsider your ruling concerning plaintiff Hubbard.

THE COURT: Ms. Chavey, if Hubbard is postponed, you run the risk with pregnancy complications, even though six months are left on the fact discovery period, but you do run the risk that something could happen and she might not be able to be deposed.

What is your pleasure with respect to that?

I am not going to drag her out of the hospital or soon after giving birth, I am not making her take a deposition.

MS. CHAVEY: Of course.

This is Victoria Chavey again.

What I guess I would say to that is that we will either take her deposition as scheduled on the 21st, or I don't know when she is scheduled to be due, but if there would be a period of three months or so after she gives birth before the close of the discovery period in June, maybe we could fit it in, but we can work that out after we talk with plaintiffs' counsel.

THE COURT: With all due respect, so I don't get another one of these emergency calls, let's work it out now.

When is she due, Ms. Wipper?

MS. WIPPER: She is in her first trimester now. She is at the end of her first trimester so her pregnancy will cover the entire discovery period.

THE COURT: I was not quite understanding what you were saying then. Is there any complication as of now, or is this one of these, anyone who is pregnant might have complications?

MS. WIPPER: No. She has complications. We had originally scheduled the deposition for the 16th of this month in New York and she went to the doctor due to conditions that

she had in her previous pregnancy. She is not on bed rest yet, but he believes she might be. So we had to reschedule or rearrange with defense counsel to have the deposition scheduled in Atlanta because she couldn't fly. So, essentially, if we don't move forward on the 21st, there is a possibility we won't be able to move forward at all with her deposition.

THE COURT: Let's take the conservative approach and take her deposition on the 21st in Atlanta. So the only one cancelled of the four that were scheduled is Perlman.

I see there is also an offer of Da Silva Moore for the week of January 9, who I take it is one of the priority ones for the defendants?

MS. CHAVEY: Yes.

THE COURT: So are you agreeable to finding a date the week of January 9 that works?

MS. WIPPER: Yes, your Honor.

MS. CHAVEY: This is Victoria Chavey.

In conversation with plaintiffs' counsel earlier today, I indicated that I have an arbitration on January 11th and have a few days tied up that week, but we are hopeful that Ms. Da Silva Moore will be available on the 12th and the 13th.

THE COURT: All right.

MR. BRECHER: Jeffrey Brecher on behalf of the defendant.

One other issue, I just want to make clear so that we

don't need to call you tomorrow, during Ms. Wilkinson's deposition, is your ruling regarding the emotional distress damages that we are free to ask questions regarding any physicians that she is seeing and --

THE COURT: Say that again, Mr. Brecher, the reporter lost you.

MR. BRECHER: I'm sorry.

Is it your ruling regarding the emotional distress damages that to avoid having to call you tomorrow to rule on this issue, that we would be entitled to ask her questions regarding her emotional distress damages which would include physicians that she has seen, any psychologist or psychiatrist that she has seen, and that we would have the right to question her once plaintiffs provide the documents ordered by Judge Sullivan and answer the interrogatories that Judge Sullivan ordered that they respond to?

MR. WITTELS: Your Honor, Steven Wittels.

May I address that very briefly?

THE COURT: Yes.

MR. WITTELS: Your Honor, as I understand it, when Judge Sullivan ruled --

THE COURT: Now, counsel, I am not revisiting this issue at all.

MR. WITTELS: Judge, there is a case called In Re: RNC that I just ask your Honor --

THE COURT: Counsel, this is the third or fourth bite of the apple. Answer: No. Judge Sullivan ruled. I cannot reverse Judge Sullivan. If he is wrong, you will appeal him to the Second Circuit when the case is over.

MR. WITTELS: Judge, the damages will be too late at that point.

THE COURT: Life is tough. And you are really trying my patience.

MR. WITTELS: I understand.

THE COURT: Now as to the questioning on it, I certainly have no problem with the defense questioning any of the plaintiffs as to what psychiatrists, social workers, psychologists, any of the mental health professionals. If you are going to reserve to redo the deposition on emotional distress once you get the medical records, however, it seems to me that you are getting two bites at the apple if you ask substantive questions about it now. So if you want to ask substantive questions, you don't get a second deposition. If you don't want to ask substantive questions, you can ask the who questions as to who treated and what time period, merely so that appropriate authorizations and subpoenas can be issued as may be necessary.

Anything else from either side?

MS. CHAVEY: Your Honor, this is Victoria Chavey again.

Just to try to avoid needing to confer with you further on the deposition schedule, if we do proceed with the four depositions that we have discussed -- two this week, the one in Atlanta and then Monique Da Silva Moore in January -- are we understanding correctly that you would then expect the parties to work out a mutually agreeable schedule as to the other depositions?

THE COURT: Yes. And that you work it out before the conference we have on the 21st so that if there are problems, I can do this in an orderly fashion as opposed to when you create emergencies.

Is everybody clear?

MS. CHAVEY: Thank you.

THE COURT: The transcript constitutes the Court's rulings pursuant to 28, U.S. Code, Section 636 and Federal Rule 6 and 72. Anyone who feels the need to take objections to Judge Sullivan, you have 14 days to do it, otherwise, all objections are waived. The 14 days starts immediately, since you have heard my rulings on this telephone conference, regardless of how soon you obtain the transcript, but I am also ordering both sides to purchase the transcript.

I will now adjourn us but leave the line open so the court reporter can give you instructions as to ordering.

o 0 o