

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MAYERS, HEATHER PIERCE, and
KATHERINE WILKINSON, on behalf of
themselves and all others similarly situated,

Plaintiffs,

Case No. 11-cv-1279

vs.

PUBLICIS GROUPE SA and
MSLGROUP,

Defendants.
-----X

**DEFENDANT MSLGROUP'S OPPOSITION TO PLAINTIFFS' RULE
72(A) OBJECTION TO MAGISTRATE JUDGE PECK'S MAY 7, 2012
RULINGS**

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PRELIMINARY STATEMENT

This Court previously cautioned the parties that Magistrate Judge Peck's rulings would be given "great deference" in light of the broad latitude afforded to magistrate judges on discovery issues. *See Da Silva Moore v. Publicis Groupe*, 2012 U.S. Dist. LEXIS 58742, *10 (S.D.N.Y. April 26, 2012) (Carter, J) ("The Court reminds the parties that it affords Judge Peck's non-dispositive rulings great deference and that magistrate judges generally have broad latitude with respect to discovery issues"). Plaintiffs, continuing their "scorched earth" litigation strategy, have ignored this warning, filing yet another objection to Magistrate Judge Peck's discovery rulings, now specifically challenging Magistrate Judge Peck's decision to exclude from the "seed set" a *single-page e-mail* containing five lines of text that does not refer to any named Plaintiff or evince any alleged discriminatory policy.¹ It is not a critical e-mail, but instead is routine correspondence between an employee, the Human Resources Department, and the CFO regarding a raise.

Plaintiffs' Objection should be denied. Plaintiffs make no showing that this single page is so critical to their case that failure to include it satisfies their "heavy burden" of establishing that Magistrate Judge Peck's decision was "clearly erroneous" or "contrary to law." Magistrate Judge Peck correctly applied Fed. R. Civ. P. 26(b)(2)(C) and Fed. R. Civ. P. 1, which require the Court to apply a rule of proportionality, weighing the importance of the discovery against the burdens imposed by its production. Here, Magistrate Judge Peck offered Plaintiffs the opportunity to *include* the marginally relevant e-mail in the seed set, but required Plaintiffs to acknowledge and agree that, by including the marginally relevant e-mail in the seed set, the number of documents identified by the computer-assisted review may be unreasonably

¹ Asking this Court to re-review and second-guess the determinations of Magistrate Judge Peck regarding what documents should be included in the seed set only creates further delay, increased cost, and results in the imprudent use of judicial resources in this case.

expanded, which might affect the number of documents ultimately subject to review because of the cost. They refused, wanting to have their cake and eat it too, *i.e.*, demanding the inclusion of any document, no matter how marginally relevant, and if the result of including it is the exponential increase in the number of documents identified by the computer-assisted review as responsive, so be it, and that should be reviewed too.

Plaintiffs' claim that the exclusion of the e-mail will hinder their ability to obtain relevant discovery is nonsense. Defendant has already produced, *outside the ESI Protocol*, documents describing the implementation of the "salary freeze" and produced copies of numerous "mission critical" reports identifying individuals for whom exceptions to the salary freeze were made.² In addition, there are hundreds of documents *already included* in the seed set that discuss the "salary freeze" or "mission critical" requests. There are currently 343 documents containing the term "freeze" and 286 documents containing the term "mission critical" in the documents comprising the seed set. Thus, the ESI Protocol will capture documents relating to these concepts. But the inclusion of every document with the word "freeze" or "mission critical" would result in too many documents being produced; there are over 6,000 documents with the word "freeze" and almost 4,000 with the term "mission critical."

² Additionally, Plaintiffs' claim that Magistrate Judge Peck has held he would "not permit class-wide discovery in this case" until after Plaintiffs' motion for certification is decided is wholly untrue and is belied by the transcripts of Magistrate Judge Peck's extensive discovery conferences with the parties. The Court has permitted Plaintiffs with substantial class-wide discovery. Plaintiffs have been provided information regarding every putative class member (and comparator) from MSL's human resources database—including but not limited to every raise they received; every promotion they received; and every time they went on a leave, including a maternity leave. They also have been provided performance evaluation data for every putative class member (and comparators). And they have been provided with hundreds of documents identifying or relating to MSL's policies, and alleged policies, relating to compensation, promotions, performance evaluations, and leave, including documents concerning the alleged "reorganization" and the alleged "centralized decision-making," which are their alleged class theories. What they have not been given is individual discovery relating to every potential class member—*i.e.*, they have not been given the personnel file of every female public relations employee who ever worked for MSL or every e-mail regarding the work performed by every public relations employee (which would likely constitute many millions of e-mails, because it would include nearly every e-mail generated at MSL). Even Plaintiffs conceded they were not seeking such individual discovery. *See* January 4, 2012, Tr. p. 25 ("THE COURT: Are you doing individual discovery for absent class members? MS. WIPPER: No. We're just interested in specific instances of discrimination.....").

Plaintiffs fail to accept that, given the volume of e-mail (approximately 2.4 million documents after dates ranges have been applied), the system must be trained to identify documents that pertain to the issues in this case. The e-mail in question was excluded because it was of only marginal relevance. While it contained the term “freeze” and “mission critical,” it did not involve a named Plaintiff or opt-in and did not identify any allegedly discriminatory policy or practice. It was routine correspondence in which an employee questioned whether she was eligible for a raise; it does not even contain the answer that was given to the employee. The Court properly denied the request and excluded the document from the seed set under Rule 26(b)(2)(C), and Plaintiffs’ Objection to Magistrate Judge Peck’s ruling should be denied.

FACTUAL BACKGROUND

After lengthy discussions between the parties and numerous conferences with Magistrate Judge Peck, on February 22, 2012, Magistrate Judge Peck so-ordered an ESI Protocol setting forth the procedures that would be applied in reviewing more than three million e-mails that have been collected in response to Plaintiffs’ discovery requests. *See* DKT No. 92. On February 24, 2012, Magistrate Judge Peck issued a written opinion describing the ESI Protocol and the Court’s reasoning in approving the use of computer-assisted review:

In this case, the Court determined that the use of predictive coding was appropriate considering: (1) the parties’ agreement, (2) the vast amount of ESI to be reviewed (over three million documents), (3) the superiority of computer-assisted review to the available alternatives (i.e., linear manual review or keyword searches), (4) the need for cost effectiveness and proportionality under Rule 26(b)(2)(C) and (5) the transparent process proposed by MSL.

Da Silva Moore, 2012 U.S. Dist. LEXIS 23350, *35-36. Plaintiffs filed objections to Magistrate Judge Peck’s decision on March 19, 2012, but this Court overruled the objections, holding Judge

Peck's rulings "well reasoned" because they considered the "potential advantages and pitfalls of the predictive coding software." *Da Silva Moore*, 2012 U.S. Dist. LEXIS 58742, *5.

As it relates to the Plaintiffs' May 22 Objection, the ESI Protocol required the creation of a "seed set" that would be used to train the predictive coding software and enable it to identify responsive documents. *Id.* at *16. The "seed set" was created based on searches of various keywords provided by Plaintiffs and MSL. This process required the parties to identify the relevant and non-relevant documents and, where a dispute arose, submit the dispute for resolution by the Court. After an initial review by both parties of the more than 15,000 documents used to create the seed set, there were approximately 3,300 documents in dispute. *See* April 25, Tr. p. 17. The parties subsequently applied several rulings and guidance provided by Magistrate Judge Peck and reduced the documents in dispute to approximately 800, which number was further reduced to less than 100, not including documents pertaining to jurisdictional discovery. The parties presented some of these disputes at the conference held on May 7, 2012.

One of the disputed documents was NR_0020532, a five-line document containing an e-mail from an employee to Valerie Morgan, the Director of Human Resources, asking whether the employee would be considered for raise even though a "raise freeze" was in place. *See* Nurhussein Declaration, dated May 21, Exh. B.³ Ms. Morgan forwarded the e-mail to Maury Shapiro, the CFO of the Americas, asking whether he thought Ms. Morgan should have included employee in a request for an exception to the salary freeze. *Id.* The e-mail does not include a response by Mr. Shapiro, nor does it contain any reply to the employee's question. The

³ The e-mail was marked confidential pursuant to the Stipulation "so ordered" by the Court because it identifies the salary of an employee who is not a named Plaintiff, opt-in, and who has not brought any claim in this case. Clearly, an employee has a legitimate interest in preventing public disclosure of her salary and that disclosure should not be dependent on whether Plaintiffs in this case decide to disclose it. Thus, the documents should remain sealed. *See SEC v. NYSE, Inc.*, 273 F.3d 222, 229 (2d Cir. 2001) (court should not modify protective order absent showing of impropriety in the grant of the order or some extraordinary circumstance or compelling need); *Kelly v. The City of New York*, 2003 U.S. Dist. Lexis 2553, *10 (S.D.N.Y. 2003) (Court must balance privacy concerns against public interest in obtaining access to records).

employee in question is not a Named Plaintiff in this case, is not an opt-in Plaintiff, and has not been identified as a comparator or individual who claims to have been subjected to any form of discrimination. Moreover, Ms. Morgan is not part of the “centralized” team of male executives that Plaintiffs appear to contend made decisions that were discriminatory on the basis of gender. Finally, MSL has produced many documents already that pertain to the “raise freeze,” so that the existence of the “freeze” is not disputed. The e-mail was simply a request by an employee about the timing of a raise, which MSL argued should be excluded from the seed set because if every individual question asked by an employee were included, the software would likely return far too many non-responsive documents involving individual employment decisions:

MS. CHAVEY: This also is an individualized employment decision . . . 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.

May 7, Tr. p. 81. After listening to argument, the Court explained that, although the document was marginally relevant, including it had the potential to expand the scope of documents generated to include many documents that are not relevant; this expansion, in turn, might have the effect, depending on the size of the final set of documents identified by the predictive coding software, of disadvantaging Plaintiffs because of the cost of reviewing the ESI; and ultimately, because the proportionality concept in Rule 26(b)(2)(C) may lead to a limit to the number of documents reviewed, it would be best not to have the seed set populated with such marginally relevant e-mails. *Id.* at 82-88 (“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"). Thus, the Court was attempting to *assist* the Plaintiffs in obtaining a group of the most relevant documents, rather than clogging the system with documents that truly are marginally relevant. Plaintiffs either failed to appreciate Magistrate Judge Peck's caution, or ignored it. Because Plaintiffs refused to acknowledge and agree that their actions could result in diminishing the quality of the ultimate ESI production, the Court held, consistent with the interests of the absent class members, that the document should be excluded.⁴

At the conference held on May 14, 2012, Plaintiffs' counsel began the conference by asking to address the Court and then renewed an earlier request that Magistrate Judge Peck recuse himself. In support of Plaintiffs' allegation of the alleged appearance of bias, and accusation of actual bias, they cited his decision to exclude the document at issue here. *See* May 14, 2012 Tr. pp. 2-9. Magistrate Judge Peck denied the recusal request, and once again explained the basis for his ruling relating to that document:

"THE COURT: Here is what I ruled. At some point in this case, as with any other case under Rule 26(b)(C)(2), you will not be able to get every single responsive document regardless of the cost. What I said to your associates, as I had said on one of the documents or more when you were here, that I was concerned that if that was

⁴ It is ironic, of course, that the Plaintiffs, who presumably represent the best interests of the absent putative class members, are taking actions antagonistic to class members. It would have been more reasonable for Plaintiffs to have argued for the exclusion of the document, and of other marginally relevant documents, so that the documents that *are* ultimately reviewed for production are the most highly relevant documents. Rule 26(b)(2)(C) expressly empowers the Court to limit discovery where, *inter alia*, "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues." As Magistrate Judge Peck has made clear, Rule 26(b)(2)(C) may eventually be invoked in this case, if the sheer number identified by the software as responsive is high enough. It appears possible that Plaintiffs' position on such marginally relevant documents could be designed to ensure that the predictive coding software produces such a large and unfocused set of documents as responsive that the Plaintiffs would then declare predictive coding to have been ineffective, thereby justifying their objections to using it. *See* May 7, Tr. p. 24 ("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").

used to seed the predictive coding set as a relevant document, that too many documents of marginal relevance would get put at the top of the queue in terms of what the predictive coding software might return as the relevant set. That in doing so, whenever the Court decided, which I have not decided where the cutoff is as I've said repeatedly, but that there will likely be a cutoff under 26(b) (C) (2), and Federal Rule of Civil Procedure 1, I said I was concerned that you were then going to argue that instead of going hypothetically to X number of documents that the defendants would have to spend the money to review, because so many of the top documents would be of this marginal, marginal, barely relevant category, that I wanted you to understand and your associates after you left to understand, that if they were going to say, okay, we want to see in the jargon of the industry move like this out of the predictive coding set, that they were running the risk that that would be near the top of the pile, and when there was a cutoff, wherever that number was, that you would be losing other potentially relevant documents. And I didn't want to hear an argument later that said, well, because so many of the top, let's say 40,000, although that is not my cutoff but I'm using it as an example instead of X, that 10,000 of the 40,000 were repetitive, marginally relevant documents about somebody's maternity leave or whatever that particular document was that was barely relevant, that I didn't want to hear an argument that the defendants would have to go from hypothetically 40,000 to 50,000 because there was so much of that coming out. And I will say if you want this, you got to tell me that you are not going to make that argument later on.

I said that with you; I said that with your associate when you left. When your associate was not prepared to acknowledge that that risk was a factor, I said we would not use that document as a relevant document for the seed set."

See May 14, Tr. pp. 7-9. Magistrate Judge Peck's ruling is fully supported by the Federal Rules of Civil Procedure and the case law applying it.

ARGUMENT

I. Standard of Review

Magistrate Judges have broad discretion in resolving discovery matters and a party seeking to overturn a discovery order of a magistrate judge bears a heavy burden. *Gibbs v. Bank of America Corp.*, 2011 U.S. Dist. LEXIS 136013, *3 (E.D.N.Y. Nov. 28, 2011); *In Re Agent Orange Product Liability Litigation*, 517 F.3d 76, 103 (2d Cir. 2008). A non-dispositive order of a Magistrate Judge is afforded “substantial deference” and, pursuant to Rule 72(a), may be set aside only if the order is clearly erroneous or is contrary to law. *Graves v. Deutsche Bank Securities, Inc.*, 2011 U.S. Dist. LEXIS 140429 (S.D.N.Y. December 5, 2011); *RMED Int’l, Inc. v. Sloan’s Supermarkets, Inc.*, 2000 U.S. Dist. LEXIS 4892, *4 (S.D.N.Y. May 10, 2010). Indeed, in affirming a prior order of Magistrate Judge Peck this Court explained that the standard of review is “highly deferential,” that magistrate judges are afforded “broad discretion,” and reversal is appropriate only if their discretion is “abused.” *Da Silva Moore*, 2012 U.S. Dist. LEXIS 58742 at *4 (citing *AMBAC Fin. Servs., LLC v. Bay Area Toll Auth.*, 2010 U.S. Dist. Lexis 127736 (S.D.N.Y. Nov. 30 2010); see also *Gibbs*, 2011 U.S. Dist. LEXIS 136013 at *2 (noting that the standard of review is “highly deferential”); *287 Franklin Ave. Residents’ Assn. v. Meisels*, 2012 U.S. Dist LEXIS 72855, *9-10 (E.D.N.Y. May 24, 2012) (“A party seeking to overturn a discovery ruling [by a magistrate judge] generally bears a heavy burden”) (internal quotations and alterations omitted).

An order is “clearly erroneous” when the reviewing court, based on the entire record, is left with the definite and firm conviction that a mistake has been committed. *In Re Consolidated RNC Cases*, 2009 U.S. Dist. LEXIS 40293, *16 (S.D.N.Y. Jan. 8, 2009). An order is “contrary to law” when it fails to apply or misapplies relevant statutes, case law or rules of procedure. *Id.*

Plaintiffs have not met their “heavy burden” of establishing that Magistrate Judge Peck abused his discretion such that his ruling was clearly erroneous or contrary to law. Indeed, Plaintiffs do not cite a *single* case in support of their argument that Magistrate Judge Peck’s application of Rule 26(b)(2)(C) was “clearly erroneous” (*see* Plfs’ Mem. p. 7-8) and the cases cited by Plaintiffs in support of their argument that Magistrate Judge Peck’s decision was “contrary to law” merely set forth basic principles regarding the scope of discovery under Rule 26 (*see e.g., Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1997) or general principles governing cost-shifting under Rule 26(c) (*see e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317-18 (S.D.N.Y. 2003); Plfs’ Mem. p. 8-9), but fail to explain how his decision did not properly apply Fed. R. Civ. P. 26(b)(2)(C), let alone that he abused his discretion in doing so.

II. Judge Peck’s Decision To Exclude A One-Page Five Line E-Mail Not Concerning Any of the Named Plaintiffs Was Neither Clearly Erroneous Nor Contrary to Law

Under Rule 26(b) of the Federal Rules of Civil Procedure, parties may obtain discovery of any non-privileged matter that is relevant to any party’s claim or defense. Fed. R. Civ. P. 26(b)(1). While Rule 26 is construed broadly, it is not unrestricted. *287 Franklin Ave. Residents’ Assn.*, 2012 U.S. Dist. LEXIS at *10. Rather, Rule 26(b)(2)(C) establishes a rule of proportionality limiting discovery that is tailored to the needs of the case. *Da Silva Moore v. Publicis Groupe*, 2012 U.S. Dist. LEXIS 23350, * 34 (S.D.N.Y. Feb. 24, 2012), *aff’d*, 2012 U.S. Dist. LEXIS 58742 *10 (S.D.N.Y. April 26, 2012) (Carter, J.); *Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (“Rule 26(b)(2) imposes general limitations on the scope of discovery in the form of a ‘proportionality test’”); *Tamburo v. Dworkin*, 2010 U.S. Dist. LEXIS 121510, *7 (N.D. Ill. Nov. 17, 2010) (“The ‘metrics’ set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably

proportional to the value of the requested information, the needs of the case, and the parties' resources") (*quoting*, The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 Sedona Conf. J. 289, 294 (2010)).

Under Rule 26(b)(2)(C), courts "must" limit discovery when it determines, whether by motion or *sua sponte*, that (1) the discovery is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Fed. R. Civ. P. 26(b)(2)(C).

The rule of proportionality is intended to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry and may be used to exclude "marginally relevant evidence." *Bowers v. NCAA*, 2008 U.S. Dist. LEXIS 14944, *15 (D. N.J. Feb. 27, 2008). In short, the rule protects a party against having to produce voluminous documents of questionable relevance. *Wood v. Capital One Services, LLC*, 2011 U.S. Dist. LEXIS 61962, *10 (N.D.N.Y. April 15, 2011) (denying request for discovery where the "minimally relevant" information sought was outweighed by the burden associated with the requested search and production); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 167-68 (S.D.N.Y. 2004) (denying request for discovery based on proportionality given the "marginal value" of the materials to the litigation). As Judge Peck explained to Plaintiffs (which they refused to accept): "you don't get every single relevant document regardless of the cost." May 14, 2012 Tr. p. 13.

See McBride v. Halliburton Co., 272 F.R.D. 235, 240 (D.D.C. Jan. 24, 2011) (“All discovery, even if otherwise permitted by the Federal Rules of Civil Procedure because it is likely to yield relevant evidence, is subject to the court’s obligation to balance its utility against its cost”); *Rodriguez–Torres v. Gov’t Dev. Bank of P.R.*, 265 F.R.D. 40, 44 (D. P.R. 2010) (court must prevent requesting party from using ESI search for the purpose of conducting a fishing expedition). Of course, this is not unique to electronic discovery, and applies to all discovery. *See e.g.*, Fed R. Civ. P. 30 (limiting depositions to 10 and 7 hours per deposition); Fed. R. Civ. P. 33 (limiting interrogatories to 25).

Here, Magistrate Judge Peck correctly applied Rule 26(b)(2)(C) when he excluded the e-mail from the “seed set” because, as he explained at the May 14, 2012 conference, the burden of including the document in the seed set—a expansion of the number of documents identified by the predictive coding software to including individual employment decisions regarding employees who were not named plaintiffs, opt-ins, or comparators, and which might reduce the number of more highly relevant e-mails that are ultimately produced—exceeded the potential benefit in including it given its marginal relevance. *See e.g., In Re: National Assn. of Music Merchants, Musical Instruments and Equipment Antitrust Litigation*, 2011 U.S. Dist. LEXIS 145804, *24 (S.D. Cal. Dec. 19, 2011) (denying Plaintiffs’ request to expand search terms where the inclusion of the additional search terms would reveal more responsive documents, but the number would be small and the cost great). This is particularly true where the Court had already included several documents discussing the “salary freeze” and “mission critical” requests (thus equipping the predictive coding software to capture core e-mails discussing these issues). Moreover, MSL has already produced, outside the ESI Protocol, documents identifying the

implementation of the “salary freeze” and has produced numerous “mission critical” requests identifying the reasons which employees were selected for an exception, and why.

Finally, their claim the document should be included because they have “expressed willingness” to “take on the burden” of reviewing a large set of documents (Plfs. Mem. p. 3) does not address the burden imposed *on MSL* and they have not offered to pay for the cost of MSL’s review. MSL will not turn over thousands of documents that have not been reviewed for relevancy and privilege, and it obviously would have to review any produced documents to determine how or whether they might be used by any party to support their position. And even if Plaintiffs were willing to pay the attorneys’ fees and costs incurred by MSL in expanding the size of the production set, such willingness still would not justify unlimited discovery. *See Cognex Corp. v. Electro Scientific Industries, Inc.*, Case No.01-CV-10287 (D. Mass July 2, 2002) (discovery master) (affirmed, see DKT, July 29, 2001) (“There is something inconsistent with our notions of fairness to allow one party to obtain a heightened level of discovery because it is willing to pay for it. There are limits on the number of depositions and interrogatories even though more might well produce relevant documentation. There is no exception to those limitations based upon one party’s willingness to pay. The sense of fairness underpinning our system of justice will not be enhanced by the courts participating in giving strategic advantage to those with deeper pockets. In the cases discussed above where cost-shifting was deemed appropriate, the specific circumstances justifying the discovery appear to be stronger than presented here.”).⁵

⁵ A copy of the decision is attached hereto.

CONCLUSION

Plaintiffs' Objection to Magistrate Judge Peck's decision to exclude a single document from the "seed set" consisting of over 15,000 documents should be denied. Magistrate Judge Peck's decision correctly applied the discovery rules, including Fed. R. Civ. P. 26(b)(2)(C), and Plaintiffs have not satisfied their heavy burden of establishing his ruling, which is given great deference, is clearly erroneous or contrary to law.

Respectfully submitted,

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DATED: June 4, 2012

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CERTIFICATION OF SERVICE

I hereby certify that on June 4, 2012, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/
Jeffrey W. Brecher

4850-4817-3071, v. 1