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.	)	

PLAINTIFFS' RULE 72(a) OBJECTION TO THE MAGISTRATE'S MAY 7, 2012 DISCOVERY RULINGS

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I. INTRODUCTION

On May 7, 2012, Magistrate Judge Peck considered the relevance of certain documents that comprise the seed set of the parties' ESI Protocol. Despite the clear relevance of most of the documents (which Judge Peck himself conceded) and without any showing of burden on the part of Defendants MSLGroup ("MSL") and Publicis Groupe S.A. ("Publicis"), Judge Peck repeatedly threatened to invoke Rule 26 proportionality to prevent Plaintiffs from receiving discovery. *See* May 7, 2012 Tr. at 19-22, 29-32, 36-38, 81-88 (attached as Ex. A). In one particularly glaring example, Judge Peck initially agreed to the relevance of a document regarding "mission critical" requests for exceptions to Defendants' global raise freeze (NR_0020532 or "Document") – one of the discriminatory policies and practices at issue in the case.[1] However, mere minutes later, after Plaintiffs refused to agree to waive all future objections to Defendants' proportionality and cost-shifting arguments in exchange for the Document, Judge Peck revoked his relevancy determination regarding the Document.

Judge Peck's analysis would be improper under any circumstances. Here, however, the stakes are especially high because the Court has adopted an ESI Protocol that employs predictive coding. Because predictive coding relies on the coding of the seed set to "train" the system to find other relevant documents, it is particularly critical that the proper relevancy determinations are made for the seed set. Miscoding relevant documents as "not relevant" threatens the reliability and accuracy of the entire ESI Protocol because the system will not be trained to locate documents involving similar concepts (e.g., centralized decision-making; raise freeze; mission

[1] *See* Document NR_0020532, filed under seal as Exhibit B. Plaintiffs do not agree that this document should be filed under seal but have done so in order to comply with the parties' confidentiality agreement. It is Defendant's burden to articulate why this document should remain under seal.

critical requests), despite their clear relevance to Plaintiffs' claims.[2] As a result, Plaintiffs will likely be deprived of hundreds or perhaps even thousands of relevant documents. Such an outcome directly contradicts the well settled principle that Plaintiffs – especially those in employment discrimination cases – are entitled to liberal discovery under Rule 26.[3]

Although Judge Peck granted Plaintiffs' request for a stay of the ESI Protocol on May 14, 2012, neither a stay nor a ruling on Plaintiffs' Motion for Conditional Certification of Collective Action will cure the damage caused by Judge Peck's erroneous discovery rulings. Judge Peck has repeatedly stated that he will not permit class-wide discovery in this case until Plaintiffs' collective action or class certification motion is granted. However, the Document in question was relevant even under Judge Peck's more restrictive rulings, as it addressed centralized decision-making and mission critical requests for exceptions to the raise freeze..

Plaintiffs recognize that "[this Court] affords Judge Peck's non-dispositive rulings great deference, and that magistrate judges generally have broad latitude with respect to discovery issues." (Doc. No. 175 at 5.) However, Magistrate Judge Peck's revocation of a relevancy determination in response to Plaintiffs' refusal to barter away their rights is clearly erroneous and contrary to law. Therefore, pursuant to Federal Rule of Civil Procedure 72(a), and to preserve their objection for appellate consideration, Plaintiffs object to this ruling. *See Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1155 (2d Cir. 1993).

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[2] Indeed, as early as the January 4, 2012 conference, Plaintiffs' counsel expressed concern that the cost issue was "impacting the [predictive coding] methodology." Jan. 4, 2012 Tr. at 49 (attached hereto as Exhibit D). Plaintiffs further expressed their concerns in a letter to Judge Peck regarding inconsistent coding applied by Defendant MSL. Apr. 27, 2012 Pltf. letter to Judge Peck (attached hereto without enclosures as Exhibit G).

[3] Judge Peck has repeatedly stated – contrary to Rule 26 and Second Circuit law – that Plaintiffs are not entitled to liberal discovery: "that's called **blackmail** to convince the defendants to settle." Apr. 25, 2012 Tr. at 9 (attached hereto as Exhibit H).

II. BACKGROUND

Since the early stages of discovery, before Defendants had even produced any ESI in this case or demonstrated any real burden, Judge Peck has indicated that he intends to invoke Rule 26 proportionality and shift some of the discovery costs to Plaintiffs.[4] To say that this is putting the cart before the horse is an understatement. Ex. D, Jan. 4, 2012 Tr. at 49. In fact, even Judge Peck acknowledged at the January 4, 2012 conference that the burden on Defendants was minimal because once Defendants reached a certain document or cost limit, they could simply turn over the remaining documents to Plaintiffs – in effect, allowing Plaintiffs to bear the burden of completing the review. [5] Plaintiffs have expressed their willingness to take on this burden, effectively mooting any proportionality and cost-shifting arguments.

Nevertheless, at the May 7, 2012 conference, while reviewing various documents from the seed set, Judge Peck again informed Plaintiffs that he intended to enforce Rule 26 proportionality. Even though Judge Peck agreed with Plaintiffs that many of the documents were relevant, he held – without conducting any burden analysis – that Plaintiffs would have bear the discovery costs after the parties had reached some arbitrary cost limit. In particular, Judge Peck acknowledged that an e-mail about the global salary freeze was highly relevant, but refused to allow Plaintiffs to maintain that designation unless they waived their right to object to cost-shifting if the predictive coding system returned a lot of "garbage":

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[4] Defendant MSL has also advocated cost-shifting, without any basis, since the early stages of this case. In a November 3, 2011 letter to Plaintiffs, MSL unilaterally set an arbitrary cap of $200,000 for the review and production of ESI, arguing that "[i]f the plaintiffs insist on email discovery requiring greater fee expenditures than that, then they should pay for it." Nov. 3, 2011 Anders Ltr. at 9 (attached hereto as Exhibit C). MSL reiterated its position to the Court during the January 4, 2012 conference while discussing the ESI Protocol: "[W]e have agreed or proposed reviewing the top 40,000 rank documents… we estimate it will cost approximately $200,000 using a five-dollar a document cost estimate… We understand that plaintiffs take issue with some of our vendor costs… 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." Ex. D, Jan. 4, 2012 Tr. at 47-48.

[5] Judge Peck noted: "It may also 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." *Id.* at 49-50.

- "...**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.**"

- "...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 you are willing to say you agree to that now, I'll mark this as responsive.**"

- "**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?"

- "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.**"

Ex. A, May 7, 2012 Tr. at 81-88.

Plaintiffs informed the Court that they were unwilling to waive their right to file a Rule 72 Objection or other appeal in exchange for a relevancy determination. In response, Judge Peck changed his relevancy determination:

COURT: **If you agree, there's no objection possible**. So stop the double talk, confer –

MS. NURHUSSEIN: Your Honor, in that case, **I can't agree.**

COURT: **Okay, the document is not relevant.**

Id. at 87-88.

III. LEGAL STANDARD

Rule 72(a) provides that "a district judge in the case must consider timely objections (to a nondispositive order) and modify or set aside any part of the order that is clearly erroneous or contrary law." Fed. R. Civ. P. 72(a). Similarly, "the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A), provide[s] that a district court shall reverse a magistrate judge's ruling regarding a non-dispositive matter only where the order is 'clearly erroneous or contrary to law.'" *In re Consol. RNC Cases*, [No Number in Original], 2009 U.S. LEXIS 40293, at *16 (S.D.N.Y. Jan. 8, 2009) (quoting 28 U.S.C. § 636(b)(1)9A)).

"A ruling is 'clearly erroneous' if the reviewing court is 'left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). "A ruling is 'contrary to law' 'when it fails to apply or misapplies relevant statutes, case law or rules of procedure.'" *Id.* (quoting *Thompson v. Keane*, No. 95 Civ. 2442 (SHS), 1996 U.S. Dist. LEXIS 6022, at *1 (S.D.N.Y. May 6, 1996) (internal quotation marks omitted)).

IV. MAGISTRATE PECK'S DECISION TO REVERSE HIS OWN RELEVANCY DETERMINATION IN RESPONSE TO PLAINTIFFS' REFUSAL TO WAIVE PROPORTIONALITY OBJECTIONS IS CLEARLY ERRONEOUS AND CONTRARY TO LAW

At the May 7 Conference, Judge Peck considered the relevance of the Document, an email from a class member covered by Plaintiffs' Title VII claims, as well as their FLSA EPA claims, for which Plaintiffs have already moved for conditional certification [redacted]

[redacted]

A. Magistrate Peck's Ruling that the Document is Not Relevant is Clearly Erroneous

Magistrate Judge Peck's revocation of his own relevancy determination for the Document was clearly erroneous. At the May 7 Conference, Plaintiffs argued that the Document is relevant because: (1) it relates to the global salary freeze and exceptions thereto, a policy Plaintiffs allege was discriminatory against female class members (Plaintiffs allege that exceptions were made for many male employees, while many female employees were told increases were prohibited; *see* Pltfs.' Mot. For Cond. Cert. at 14 (Doc. No. 134); Proposed SAC ¶ 29 (Doc. No. 147).);[6] (2) it involves mission critical requests, which are compiled at MSL's corporate headquarters in New York and sent to Publicis in Paris for approval, thus demonstrating centralized decision-making of the sort not present in *Wal-mart v. Dukes*; (3) it demonstrates that MSL made decisions not to submit mission critical requests for Publicis's approval for female employees; and (4) it demonstrates that MSL's North American HR Director and CFO made decisions regarding the pay of local class members, again showing centralized decision-making. Ex. B, May 7, 2012 Tr. at 81-87.

After considering Plaintiffs' arguments, Judge Peck found that the Document was relevant because it demonstrated centralized decision-making by MSL's CFO with respect to a

[6] Earlier that day, Judge Peck found a document to be relevant because **"the issue of the pay freeze and the exceptions to the freeze being done in ways that prejudice the plaintiffs is a relevant issue."** Ex. B, May 7, 2012 Tr. at 12. Judge Peck also ruled several other documents to be relevant because they related to the Publicis Groupe-wide pay and hiring freeze. *See id.* at 33-34, 57-61.

potential class member's salary.[7] Ex. B, May 7, 2012 Tr. at 86-87. Seconds later, however, Magistrate Judge Peck attempted to condition his finding of relevance on Plaintiffs' waiver of any objections to a prospective order by Magistrate Judge Peck on proportionality, apparently because he thought that the predictive coding mechanism would not be sophisticated enough to distinguish between relevant and non-relevant documents. *See id.* at 81-88.

For reasons that are self-evident, Plaintiffs' counsel could not agree to waive objections to a decision on a prospective order regarding proportionality, particularly given the highly relevant nature of the document at issue. *Id.* As a result, Magistrate Judge Peck immediately deemed the Document not relevant, a finding that was clearly erroneous and contrary to the decision he had made minutes earlier (and with respect to several other documents earlier that day) based on the merits.[8] *Id.* at 88.

B. Magistrate Peck's Ruling that the Document is Not Relevant is Contrary to Law

In addition, Magistrate Judge Peck's decision to mark the Document as not relevant is contrary to law. Rule 26 allows parties to "obtain discovery regarding any matter...that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26. The Second Circuit has recognized that Rule 26 relevance is an "obviously broad rule" that is "liberally construed." *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1997). Indeed, discovery is relevant if there is "any possibility that the information sought may be relevant to the subject matter of the action," a much less rigorous standard than that of relevance at trial. *Goodyear*

[7] Judge Peck had similarly found a document involving decision making by MSL CFO Maury Shapiro to be relevant on the same grounds earlier that day. Ex. B, May 7, 2012 Tr. at 63.

[8] It is also not plausible that the Document is not responsive to Plaintiffs' discovery requests. *See* Plaintiffs' First Set of RFPs to MSL Nos. 8, 9, 12; Plaintiffs' Second Set of RFPs to MSL Nos. 1, 11, 16, 20, 23; Plaintiffs' Fourth Set of RFPs to MSL Nos. 11, 12; Plaintiffs' Fifth Set of RFPs to MSL Nos. 13, 16, 17, 18 (excerpted and attached hereto as Exhibit E).

Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc., No. 02 Civ. 0504 (RCC), 2003 U.S. Dist. LEXIS 15917, at *5 (S.D.N.Y. Sept. 10, 2003).

i. **Invoking Proportionality at This Early Juncture, Without Any Burden Analysis, is Contrary to Law.**

It is improper for a Court to force a party to trade relevance for proportionality, especially in civil rights cases. The relevancy and proportionality inquiries are "two distinct steps" that should not be bartered. *During v. City U niversity of New York*, No. 05 Civ. 6992 (RCC), 2006 U.S. Dist. LEXIS 53684, at *7 (S.D.N.Y. Aug. 1, 2006) (granting defendant's Rule 72(a) objections to magistrate ruling quashing a subpoena for documents relevant to its defense in a Title VII case). As noted by the Honorable Shira A. Scheindlin:

> "[c]ourts must remember that **cost-shifting may effectively end discovery**, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the **frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases**. This will both **undermine the 'strong public policy favoring resolving disputes on their merits,'** and may ultimately deter the filing of potentially meritorious claims."

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317-318 (S.D.N.Y. 2003) (quoting *Pecarsky v. Galaxiworld.com, Inc.*, 249 F.3d 156, 172 (2d Cir. 2001) (setting forth a seven-factor test to be used in analyzing cost-shifting under Rule 26(b)(2)'s "proportionality test") (emphasis added). Despite Judge Scheindlin's admonition, Magistrate Judge Peck has repeatedly and forcefully indicated that he intends to shift discovery costs to Plaintiffs if they do not agree to withdraw relevancy designations from clearly relevant documents – a perverse form of bargaining that runs counter to the Federal Rules. *See* Ex. B, May 7, 2012 Tr. at 19-22, 29-32, 36-38, 81-88.

Moreover, Judge Peck assumed cost-shifting was appropriate without even doing an analysis of the burden. "[W]hether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format." Here, all of MSL's

documents are kept in an accessible format. *Zubulake*, 217 F.R.D. at 318. MSL's burden is also illusory because Plaintiffs have already expressed their willingness to take on the review of any remaining documents beyond the limit imposed by the Court.

Judge Peck's rulings regarding proportionality and cost-shifting are particularly problematic here because the parties are bound by an ESI Protocol that involves predictive coding. His decision to deem relevant documents "not relevant" based solely on external factors – i.e., Plaintiffs' unwillingness to agree to proportionality/cost-shifting – will inevitably impact the reliability and accuracy of the system. For example, if documents from the seed set are improperly coded, the system will not be properly trained to locate other relevant documents. In addition, by repeatedly warning Plaintiffs that they will have to bear the costs if relevant documents from the seed set bring back a lot of "junk," Judge Peck is, in effect, punishing Plaintiffs for limitations in Defendants' predictive coding system – a system that was adopted over Plaintiffs' objections.

In denying Plaintiffs' Rule 72(a) Objection to Judge Peck's February 8, 2012 rulings regarding the ESI Protocol, Your Honor noted: "At this stage, there is insufficient evidence to conclude that the use of the predictive coding software will deny Plaintiffs access to liberal discovery." Doc. 175 at 4. However, as discussed above, Judge Peck's May 7 proportionality rulings have already served to dramatically narrow the scope of discovery in this case. For example, designating the Document at issue "not relevant" will make it difficult for the predictive coding system to locate other documents regarding mission criticals and exceptions to the raise freeze – documents that directly relate to the common policies and practices that Plaintiffs are challenging in this case. By denying Plaintiffs core discovery – based on an

illusory burden, no less – Judge Peck is making it virtually impossible for Plaintiffs to meet their burden on class certification and on the merits.

ii. Judge Peck's Ruling Undermines Plaintiffs' Ability to Meet Their Burden on Class Certification

Discovery related to centralized decisions about class members' pay in a pay discrimination case is not only unequivocally relevant but necessary for class certification. *See, e.g., Wal-mart v. Dukes*, No. 10-277, 2011 U.S. LEXIS 4567 (June 20, 2011); *Rossini v. Ogilvy & Mather*, 798 F.2d 590, 598 (2d Cir. 1986) (evidence that employment decisions were made by the same, central group of people could indicate that the Company discriminated "in the same general fashion" against plaintiff and other class members, supporting commonality and typicality under Rule 23); *Hnot v. Willis Group Holdings, Ltd.*, 228 F.R.D. 476, 485 (S.D.N.Y. 2005)(evidence that compensation decisions were subject to review and oversight by human resources and a top level officer was sufficient to sustain a finding of a common practice). Almost a year ago, Judge Sullivan acknowledged that a centralized management team making employment decisions could be evidence of a common policy or practice in this case. July 21, 2011 Tr. at 8-9 (attached hereto as Exhibit F). Because such discovery is needed to support Plaintiffs' class certification motion under Rule 23, Judge Peck's decision could hamstring Plaintiffs' ability to certify the class.

Indeed, recognizing the importance of discovery for class certification, Judge Sullivan concluded last year that MSL's attempt to dismiss Plaintiffs' class action or strike class claims in advance of class discovery was "a loser at this stage." *Id.* at 9. It is well-settled that "a court ordinarily must wait until after class discovery has been completed and a plaintiff has moved for class certification before declining to certify a class on the grounds that Rule 23 has not been

satisfied." *Hendricks v. J.P. Morgan Chase Bank,* No. 3:08-cv-613 (JCH), 2008 U.S. Dist. LEXIS 99788, at *6 (D. Conn. Nov. 21, 2008).[9]

In deeming the Document not relevant, Judge Peck also seemed to assume that anecdotal evidence is "useless" "junk" in a Title VII case – a finding that is clearly contrary to law. *See* Ex. B, May 7, 2012 Tr. at 83 ("when… 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**…"); ("[Y]ou 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."). *Id.*

As the Supreme Court has made clear, anecdotal evidence is necessary for class certification of Title VII cases. *See Dukes*, 131 S. Ct. at 2549, 2556 (on commonality analysis, finding presentation of anecdotal evidence from only120 of approximately 1.5 million female employees, or .008% (less than one-ten thousandth) of the class, insufficient to indicate a standard operating procedure – i.e. a "*general policy*" – of discrimination); *id.* (noting that in *Teamsters*, anecdotal evidence from 40 class members was "significant"). Critical components of Plaintiffs' evidentiary burden are to produce anecdotal and statistical evidence which together show a "pattern or practice" of gender discrimination – that is, that intentional discrimination

[9] *See also, e.g., Patel,* 2009 U.S. Dist. LEXIS 66512, at *29-30; *Ironforge.com v. Paychex*, 747 F. Supp. 2d 384, 404 (W.D.N.Y. 2010); *Indergit v. Rite Aid Corp.*, 08 Civ. 9361 (PGG), 2009 U.S. Dist. LEXIS 42739, at *5 (S.D.N.Y. May 4, 2009); *Chenensky v. N.Y. Life Ins. Co.*, 07 Civ. 11504 (WHP), 2011 U.S. Dist. LEXIS 48199, at *4 (S.D.N.Y. April 27, 2011); *Schaefer v. GE*, No. 3:07-CV-0858 (PCD), 2008 U.S. Dist. LEXIS 5552, at *14 (D. Conn. Jan. 22, 2008); *Cholakyan v. Mercedes-Benz United States*, No. CV 10-05944 MMM (JCx), 2011 U.S. Dist. LEXIS 72584, at *68 (C.D. Cal. June 30, 2011); *Artis v. Deere & Co.*, No. C10-5289 WHA (MEJ), 2011 U.S. Dist. LEXIS 69849, at * 5-6 (N.D. Cal. June 29, 2011) ("to deny discovery where it is necessary to determine the existence of a class or set of subclasses would be an abuse of discretion.").

amounts to Defendant's "standard operating procedure." *See, e.g., Robinson, Metro-North Commuter R.R.*, 267 F.3d 147, 158-59 (2d Cir. 2001) (citing *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977)); *Velez v. Novartis*, 244 F.R.D. 243, 256-68 (S.D.N.Y. 2007) (applying *In re IPO* to commonality and typicality analyses); *Hnot.*, 241 F.R.D. at 208-11 (same). Anecdotal evidence may often be at least as important as statistical evidence. *See, e.g., Robinson*, 267 F.3d at 158-59; *Ottaviani v. SUNY New Paltz*, 875 F.2d 365 (2d Cir. 1989) (declining to set a specific threshold at which statistical disparities automatically give rise to a rebuttable presumption of discrimination; nothing that without such presumption, statistics are "persuasive" rather than "dispositive" evidence); *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1267-69 (10th Cir. 1988) (totality of evidence, including statistics, supported verdict where disparities did not rise to level of statistical significance).

C. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse Magistrate Judge Peck's May 7, 2012 ruling that Document NR_0020532 is not relevant.

DATED: May 21, 2012

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CERTIFICATE OF SERVICE

I, Michelle Glienke, hereby certify under penalty of perjury that on this 21st day of May 2012 true and correct copies of the foregoing Rule 72(a) Objection to Magistrate Rulings were served on all counsel of record by operation of the Court's ECF system and via electronic mail.

/s/ Michelle Glienke

Michelle Glienke