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 SIHAM NURHUSSEIN IN SUPPORT OF PLAINTIFFS' RULE 72(a) OBJECTION TO THE MAGISTRATE'S MAY 7, 2012 DISCOVERY RULINGS

SIHAM NURHUSSEIN, 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 A" is a true and correct copy of the relevant excerpts from the transcript of the May 7, 2012 conference before the Honorable Andrew J. Peck.
3. Annexed to this declaration as "Exhibit B" is a true and correct copy of document NR_0020532.
4. Annexed to this declaration as "Exhibit C" is a true and correct copy of the November 3, 2011 letter from Brett Anders to Janette Wipper.

5. Annexed to this declaration as "Exhibit D" is a true and correct copy of the relevant excerpts from the transcript of the January 4, 2012 conference before the Honorable Andrew J. Peck.
6. Annexed to this declaration as "Exhibit E" is a true and correct copy of the relevant excerpts from Plaintiffs' First, Second, Fourth, and Fifth Document Demands to Defendant MSLGroup.
7. Annexed to this declaration as "Exhibit F" is a true and correct copy of the relevant excerpts from the July 21, 2011 conference before the Honorable Richard J. Sullivan. This transcript is also on the case docket as Document No. 33.
8. Annexed to this declaration as "Exhibit G" is a true and correct copy of Plaintiffs' April 27, 2012 letter to the Honorable Andrew J. Peck, without enclosures.
9. Annexed to this declaration as "Exhibit H" is a true and correct copy of the relevant excerpts from the transcript of the April 25, 2012 conference before the Honorable Andrew J. 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 21, 2012
New York, New York

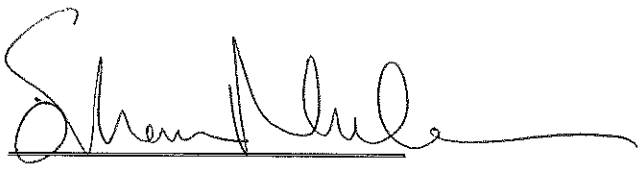

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Exhibit A

C57LMOOC Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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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

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.

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

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

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

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.

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.

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

Exhibit B

(Sent to the Court Under Separate Cover)

Exhibit C

jackson lewis
Attorneys at Law

Direct Dial: 973-451-6305
Email Address: andersb@jacksonlewis.com

Jackson Lewis LLP
90 State House Square
8th Floor
Hartford, Connecticut 06103
Tel 860 522-0404
Fax 860 247-1330
www.jacksonlewis.com

November 3, 2011

VIA ELECTRONIC MAIL
Janette Wipper, Esq.
Sanford Wittels & Heisler LLP
555 Montgomery Street
Suite 820
San Francisco, CA 94111

Re: da Silva Moore v. Publicis Groupe SA, *et al.*
Case No. 11-CV-1279

Dear Janette:

We are writing in response to your October 13, 2011 letter seeking additional information regarding the sources of electronically stored information ("ESI") discussed during our conference call on October 12, 2011, as well as your October 25, 2001 letter regarding the discovery of ESI.

I. Defendant MSL's Response To Plaintiffs' Follow-Up Questions To October 12, 2011 ESI Conference Call.

As you will recall, we participated in a nearly two-hour teleconference with you on October 12, 2011, at which John Grantman, Global Services and Operations Manager for Resources, was available to answer questions posed by you and your e-discovery consultant, Gene Klimov of DOAR Consulting. Following that teleconference, you sent a letter on October 13, 2011 with 34 follow-up questions, in addition to a list of 22 questions that you asked us to answer with regard to each system identified in your questions. In response to this extensive inquiry, Defendant MSL provides the following information:

- As it relates to Adium, a free and open source instant messaging client for Mac OS X, we have confirmed that Defendant MSL supports that application for the limited number of Mac OS X users. Adium is a substitute for the Mac platform since Pidgin (discussed below) does not have a compatible offering for non-Windows, Linux and other UNIX operating systems.

- As it relates to other "social media" or instant messaging systems, MSL provides Pidgin as part of its standard desktop to employees. As explained on the Pidgin

webpage, "Pidgin is a chat program which lets you log in to accounts on multiple chat networks simultaneously." (See http://pidgin.im/about/) We have been advised that the content of any chat message will reside with the messaging provider (e.g., AIM, Yahoo!, Google Talk, MSN Messenger, etc.).

- Since 2008, MSL utilized a performance management program provided by Halogen to conduct performance evaluations. Halogen houses the system and the data resides on Halogen's servers. Upon an employee's separation, the employee's account is deactivated, but any employee data will remain on the Halogen servers.

- MSL utilizes PeopleSoft to record employee data such as date of hire, date of termination, promotions, salary increases, transfers, etc. Such information is retained indefinitely.

- MSL does not utilize any database servers.

- MSL does not utilize any "systems" to manage corporate forms. Rather, commonly used personnel forms are stored on the network on the "North America HR Drive."

- With the exception of Halogen (performance management application) and Vurv/Taleo (talent recruitment application), MSL does not utilize any third-party systems to store data for the Company.

- MSL utilizes ServiceNow as its Help Desk application. This system covers a wide variety of requests by employees computer-related assistance (e.g., troubleshoot incidents, install software, etc.) Logs generally are maintained for seven years.

- MSL does not utilize any mainframes.

- MSL does not utilize any audio recording systems.

- MSL employees do not use unified messaging.

- As it relates to the Lotus Notes database, and as explained by Mr. Grantman during the October 12, 2011 teleconference, all email data is archived to the EMC SourceOne archive system. Any folder structure created by the user is not part of the archived data.

- Hard copy documents concerning personnel matters generally are stored in the employee's personnel file.

Defendant MSL will supplement its response to Plaintiffs' request for follow-up information if and when additional information becomes available.

As to your request that, for each "system" identified, we provide specific information about each system for the time period of 2001 to the present, we object. The specific information requested is delineated in subparts (a) through (v), and seeks information such as the software type and version, the database type, the time zone and geographic location, whether external access is available, etc. This request is overly broad and it would be unduly burdensome to gather the requested information, for the requested time period, for each and every system identified in good faith by Defendant MSL. This is especially true because not every system is believed to possess ESI reasonably related to Plaintiffs' claims and because Defendant MSL has already produced, or will produce, information from a number of the systems identified. Notwithstanding this objection, if there are specific systems that we have identified for which you believe you require additional information, please identify the system as well as the specific additional information requested, along with an explanation as to why the additional information is necessary.

II. Defendant MSL's Response To Plaintiffs' October 25, 2011 Letter Regarding the Collection And Review of ESI.

As you know, the search and retrieval of potentially relevant ESI in an enterprise of this size requires careful thought, quality control, and testing. We began this planning, search, and culling process months ago, not only in email, but, as we have explained, in other areas and types of ESI as well. Based on our initial inventory and assessment of the client's ESI architecture, we knew that the search and culling of the email collections would be the most difficult and expensive of all ESI sources, and the most useful. We also assumed that the Plaintiffs would want production of emails in their discovery requests. We have focused our efforts and planning accordingly.

The development of appropriate search and information retrieval protocols in a case like this not only requires careful thought, quality control and testing, it also requires cooperation of opposing counsel. The requesting party's disclosure of the specifics of the information desired is especially important for the process to work. The producing and requesting parties need to have a common understanding of relevance to the claims and discovery requests. We attempted to involve Plaintiffs in this process early on, and scheduled our first e-discovery specific conference on June 10, 2011 for that purpose.

You had already disclosed your e-discovery expert and we advised you that we had requested that Ralph Losey of our firm, a nationally recognized expert in this area, to assist us. Mr. Losey prepared for and participated in the June 10th phone conference. He began

disclosures at that time on our preservation efforts and our overall e-discovery plan. We were prepared and expected to have a detailed discussion and disclosure, but you explained that you were not yet ready for such a conference (even though that was the advance stated purpose of the call). You also did not have your expert present for the meeting. We were thereafter forced to go it alone on preservation and e-discovery planning, even though, after the *Dukes* decision, you changed your theory of the case. You have also declined to provide specific guidance on exactly what you are looking for in Defendant MSL's email collection. You advised us during the June 10, 2011 call that Plaintiffs had not yet made any significant requests relating to e-mail, but would be serving a supplemental request relating to e-mail shortly. When you did in the second request specify emails, most of the categories were very broad and general in scope. Hopefully you are now ready to focus on the specifics of what you want us to search for in the email collections of Defendant MSL's key players and we can begin to cooperate in earnest. This is the kind of cooperation that we need to improve the efficacy of our search and relevancy calls.

To facilitate our dialogue regarding collection and review of ESI, we will now provide more detailed disclosures of our efforts in this regard and our proposal for going forward. Please be advised that the disclosures are made to facilitate cooperation and settlement of our discovery issues. These disclosures are not intended as a blanket waiver of our work-protect protections.

As of October 27, 2011 we have loaded into the Axcelerate search and review platform 2,353,327 emails and attachments. This number is after *deNisting* and *deduplication*, both vertical and horizontal. This number is still growing. We are still loading additional custodians to try to accommodate your requests for more expansive first-phase email review. This does not mean that we agree with your requests, but Defendant MSL is paying for their processing, loading, and ongoing hosting charges so that we can analyze the ESI in additional custodian email stores and be ready to make production.

Although we negotiated very favorable rates for Defendant MSL, in view of the broad scope of your ongoing demands for e-discovery, and the volume of information involved, the costs for these services are substantial. Our primary e-discovery vendor, Recommind, Inc., has as of September 30, 2011, billed our client $166,900. This is for their copying and exemplification of client email onto the Axcelerate search and review platform. The $166,900 in costs continue daily with hosting fees and grow in amount each month. The monthly hosting costs are now approximately $15,000 and this charge increases in amount as new data is added.

The Recommind charges are all for e-discovery production related expenses. Our client is incurring other significant costs and expenses related to preservation and collection activities. Obviously, our client also incurred substantial attorney fees related to the preservation and collection issues, and the search process. These fees, currently estimated to be in excess of $80,000, are also not included in the stated $166,900 costs incurred with Recommind.

As you probably know, more and more courts are now awarding external vendor costs to prevailing parties under 28 U.S.C. §1920(4) and Rule 54(d)(1) *FRCP*. *See, e.g., In re Aspartame Antitrust Litigation*, No. 2:06-CV-1732, 2011 (E.D. Penn. Oct. 5, 2011) ($500,000 e-discovery costs award to defendants); *Race Tires America v. Hoosier Racing Tire Corp.*, 2011 WL 1748620 (W.D. Pa. May 6, 2011) ($400,000 award); *Tibble v. Edison International*, 2011 Lexis 94995 (C.D. Cal., July 8, 2011) ($370,000 award that more than offset the plaintiffs' judgment on one of nine counts).

You can expect that if Defendant MSL prevails in this action, it will seek an award of all costs incurred, including the substantial e-discovery expenses incurred with Recommind. We ask that you bear this in mind, and temper your e-discovery demands, knowing that someday your clients may be required to personally pay for the expenses that your demands now necessitate.

The 2,353,327 emails and attachments in Axcelerate now are comprised of the emails stores (after processing, including deduplication) of the following twenty-two custodians:

	Custodian	**Unique Item Count**
1.	Lund, Wendy	311,820
2.	Fite, Vickie	265,930
3.	Wilson, Renee	232,382
4.	Brennan, Nancy	227,051
5.	Lilien, Tara	218,347
6.	Masini, Rita	185,011
7.	Dasilva, Monique	181,508
8.	Miller, Peter	173,032
9.	Perlman, Carol	153,626
10.	Tsokanos, Jim	147,028
11.	O'Donohue, MaryEllen	132,441
12.	Mayers, Laurie	128,088
13.	Wilkinson, Kate	84,439

14.	Shapiro, Maury	46,190
15.	Kashanian, T	45,176
16.	Pierce, Heather	33,420
17.	Hubbard, Zaneta	5,088
18.	Branam, Jud	28,532
19.	Orr, Bill	12,269
20.	Dhillon, Neil	12,000
21.	Euston, Greg	24,442
22.	Hannaford, Donald	14,909

The custodian imports of Branam, Orr, Dhillon, Euston and Hannaford in the list above also have been date range limited. No date range was imposed for any of the other custodians on the list. In fact, we are updating to the present the ESI collected for the *Class A Key Custodians:* Tara Lilien, Jim Tsokanos, Peter Miller, and Maury Shapiro. The particulars of the date range limitation imposed are as follows:

1. Branam (from 7/1/09 to 5/31/10).

2. Orr (from 8/1/06 to 1/1/08).

3. Dhillon (from 9/9/08 to 1/31/09).

4. Euston (from 1/1/08 to 12/31/08).

5. Hannaford (from 6/1/07 to 3/1/08).

We have collected (or are in the process of collecting) the following eight additional custodians with date range restrictions, but their emails have not yet been loaded into the Axcelerate system. When they are added, the 2,353,327 count will increase. We do not have the total counts for these custodians yet, but will share them when we do. The particulars of the date range limitation imposed are as follows:

1. Jordan, Megan (from 2/1/08 to 12/31/09).

2. Rogers, Lisa (from 2/1/08 to 12/31/09).

3. Dencker, Kelly (from 1/1/07 to 2/8/10).

4. O'Kane, Jeanine (from 2/8/10 to present).

5. McLean, Sheila (from 1/1/08 to 12/31/08).

6. McDonough, Jenni (from 1/1/08 to 12/31/08).

7. Baskin, Rob (from 1/1/08 to 12/31/08).

8. Curran, Joel (from 7/1/09 to 5/31/10).

To assist the parties in focusing their search efforts, it will be helpful if Plaintiffs can rank the custodians identified by the parties in order of general importance (e.g., Class A Custodians, Class B Custodians and Class C Custodians). It is our hope that this exercise will enable the parties to reach an agreement as to the true key players in this matter and the individuals most likely to possess relevant ESI.

Further, we want you to know what we believe the top-six issues are that a document, if it is relevant, would relate to. We base relevance broadly on your theory of the case, as we understand it, including, but not limited to, the many general document requests you have made. Please note that even when using subject matter experts for review, as we are now doing for the current analysis and predictive coding seeding, five categories is ideal, and it is not realistic to use more than nine categories, as I think you will find most experts in the field agree. After much work we were able to boil it down to six inclusive issue categories. Further, the artificial intelligence of the Axcelerate software, which is often referred to as the computer-assisted coding functions, has the same issue count limitations. The software bases its predictive coding on the classifications made by the human reviewers on the sample document reviews, the seed sets. Here are the issue codes that we propose to use:

1. **Reorganization** [Documents relating to the formation of MSLGroup and any other alleged "reorganization"]

2. **Promotion** [Documents concerning the decision to grant or deny an employee a promotion]

3. **Work/Life Balance** [Documents relating to workplace flexibility, alternate work arrangements, and complaints, if any, regarding lack of work/life balance]

4. **Termination** [Documents relating to the termination of employees]

5. **Compensation** [Documents relating to initial starting salaries, raises, bonuses, and other compensation]

6. **Maternity** [Documents relating to employees who have taken a maternity leave]

We invite your input on this and look forward to your early comments and suggestions on the proposed codes. We do not purport to impose a particular deadline, but would appreciate your prompt attention to this. Our ongoing efforts to train the computer on relevance will be facilitated by our having a common understanding on the issues that relevant documents may fall into. Such training by review of sample sets of documents is an essential part of modern predictive coding practice using Axcelerate software.

On the issue of predictive coding, based on our prior letters we think there may be some miscommunications on this issue. We are not using the term in this context to speak about the final review and production stage where the use of computer-assisted coding can speed up review. We are speaking of computer-assisted coding to identify relevant documents. We are speaking about the use of so called *concept* type searches and other artificial intelligence techniques to improve the precision and recall of the culling process. It is that search and retrieval process that we were referring to in our prior discussions by use of the generic term of *computer assisted coding* or predictive coding.

It has always been our plan to use the power of the Axcelerate software to assist us in coding or identification of potentially relevant documents for review. This is also in the best interests of your clients because this will allow us to find and produce more relevant documents for the dollar. The extent of the efforts are, of course, always constrained by the costs and the factors enumerated in Rule 26(b)(2)(C). Obviously we all agree that it is not reasonable to have the Defendant MSL review all 2,353,327 documents (or more as the database increases) for relevance. We understand that you are not asking us to do that. What we are proposing is the use of advanced software that can be trained to identify relevant documents to assist in the automated review and culling of the final set of documents, including quality control and testing of the culling process. The final culled-set would then be reviewed by our lawyers, as usual, for relevance, privilege, confidentiality, and the like. In this final review stage we will also use predictive coding and other techniques to speed up the review and improve quality. But that is not what we are discussing now.

The computer-assisted culling process we are using is based on advanced techniques, such as predictive coding, and concept searches, but it also still uses keyword search as an important tool. Indeed, keyword search is just an early, some might say, simplistic, sleepy tool for computer-assisted culling. Still, it is part of the process, and we will soon provide you with detailed reports on the metrics of many of the keywords that we have already tested, and invite your participation in refinement of the terms, including suggestions for testing of additional terms, and Boolean connector limitations. We would like for this to be a collaborative process and are interested in your input.

Although keywords are a part of the process, we want to be clear that we do not think that keyword searches alone are adequate. We hope that you will change you position on this. We want to be cooperative, which our disclosures and invitation to participate here confirm, but if you will not agree to the use of computer-assisted coding in the general manner here described, we will have no choice but to apply to the court for advance approval.

To repeat, it is in your clients', and our client's, best interest to employ the most advanced search systems possible, so if you really are inclined to *agree to disagree* on this issue, we urgently request a telephone conference to include our respective experts on these issues. We know of no rational argument to rely on keywords alone and must assume any continued opposition on your part is based on misunderstandings and miscommunications that discussions should be able to resolve. Still, if we cannot agree, we can at least focus and clarify the exact issues, so that we can make the court's adjudication less burdensome.

There is one other issue that we feel needs to be addressed and clarified at this time, and is also, for us, a non-negotiable threshold item. That pertains to our assessment of proportionality under Rule 26(b)(2)(C) and related case law for first phase email review and production in this case. Simply put, our client is willing to expend up to $200,000 in fees for review and production of emails in first phase of discovery, but no more. In our evaluation this is a not only a reasonable offer, it is a very generous one. If the plaintiffs insist on email discovery requiring greater fee expenditures than that, then they should pay for it.

Please note that the stated $200,000 review fee budget does not include the $166,900 in costs incurred with Recommind, and additional anticipated expenses. The total anticipated costs with Recommind are expected to exceed $200,000. Thus the offer to spend $200,000 in fees for review, when coupled with the $200,000 in costs represents total expenditures for email production alone of $400,000. Again, this does not include fees for other discovery, and it does not include fees and costs for the extensive preservation efforts made, and still being made. Finally, and this is very important, it does not include the at least $50,000 in fees incurred and projected to complete the analysis, planning, quality control, testing and attempted cooperation with you as generally described above to locate the most relevant documents in the 2,353,327, and growing, email/attachment collection. In total this amounts to an offer by Defendant MSL to spend $450,000+ for the efforts to search, locate and produce to plaintiffs the relevant email for the judge of jury to decide this case.

In Defendant MSL's view this is a very generous offer, which is made reluctantly to move this case along and avoid further delay. Defendant MSL is confident that the email, once found, will show Plaintiffs' case to be without merit. This is not an opening offer. We do not have time at this point for any further delays and posturing. This is Defendant MSL's bottom line, one which we jump to immediately as a gesture of our good will and cooperation. We would be happy to clarify this offer and discuss the specifics of the future $200,000+ fee spend, or address any other questions you may have. But Defendant MSL not willing to increase the $450,000 spend amount offered.

jackson lewis
Attorneys at Law

Again, if you if you really are inclined to *agree to disagree* on this important cost issue, we again urgently request a telephone conference that includes our respective e-discovery experts for a full discussion. We think it is in everyone's best interest to proceed with the email related discovery and not waste more time and money on motion practice. Still, if we cannot agree, we could at least focus and clarify the exact issues, so that we can make the court's adjudication less burdensome.

* * * * *

We look forward to speaking with you regarding these issues.

Very truly yours,

JACKSON LEWIS LLP

Brett M. Anders /jc

Brett M. Anders

BMA:jg

cc: Siham Nurhussein, Esq. (via electronic mail)
Paul C. Evans, Esq. (via electronic mail)
Victoria Woodin Chavey, Esq. (via electronic mail)
Jeffrey W. Brecher, Esq. (via electronic mail)

Exhibit D

1214KDASC CONFERENCE

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

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

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

Exhibit E

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 (RJS)
PLAINTIFFS,	**PLAINTIFFS' FIRST SET OF DOCUMENT DEMANDS TO DEFENDANT MSLGROUP**
v.	
PUBLICIS GROUPE SA and MSLGROUP,	
DEFENDANTS.	

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs Monique da Silva Moore, MaryEllen O'Donohue, Laurie Mayers, Heather Pierce, and Katherine Wilkinson, by and through their counsel, Sanford Wittels & Heisler, LLP, hereby request that Defendant MSLGroup produce for inspection and copying all of the documents and tangible things described in the requests below. Defendant MSLGroup is required to serve a written response, in full compliance with the applicable rules of procedure and within thirty days of service.

GENERAL INSTRUCTIONS

1. If you claim that any document which you are required to identify or produce in response to any of these Requests is privileged, you must:

(a) identify the portion of the Request to which the document is responsive;

employment applicable to both MSLGroup and Publicis Groupe SA employees, including interviewing, supervision, management, and discipline of employees.

RESPONSE:

REQUEST FOR PRODUCTION 6: Any organizational charts or other documents showing the corporate structure and management hierarchy of the Company, including the relationship among its parents, subsidiaries and/or affiliates, and the categories of jobs, job functions and departments within the Company.

RESPONSE:

REQUEST FOR PRODUCTION 7: Any documents reflecting or relating to the amount of revenue Publicis Groupe SA receives from MSLGroup by region for each year from 2008 to the present.

RESPONSE:

REQUEST FOR PRODUCTION 8: All documents that discuss, refer or relate to any Publicis Groupe SA directive, statement, act or involvement that has dictated, affected, influenced and/or ratified the employment policies, practices and/or decisions at MSLGroup.

RESPONSE:

REQUEST FOR PRODUCTION 9: All documents that constitute or are otherwise sufficient to show the language of any standardized or commonly used provision or

clause in any contract or agreement that grants Publicis Groupe SA any power, authority or discretion over employment policies, practices or decisions at MSLGroup.

RESPONSE:

REQUEST FOR PRODUCTION 10: All documents concerning any common, interrelated, and/or shared operations of Publicis Groupe SA and MSLGroup, including:

i. common offices;

ii. common business registrations;

iii. common accounting services;

iv. common payroll services;

v. common timekeeping systems;

vi. common recordkeeping systems;

vii. common employee benefits;

viii. common human resources departments;

ix. common insurance;

x. common administrative services; and

xi. common bank accounts.

RESPONSE:

REQUEST FOR PRODUCTION 11: All documents relating to the Company's restructuring or reorganization of its Public Relations practice under the MSLGroup network, beginning in or around 2008.

RESPONSE:

REQUEST FOR PRODUCTION 12: Any documents reflecting Company policies or procedures regarding compensation, benefits, promotion, performance evaluation, leave, discipline, or termination of MSLGroup and/or Publicis Groupe SA employees.

RESPONSE:

REQUEST FOR PRODUCTION 13: All documents contained in Plaintiffs' personnel files, and any other documents relating to Plaintiffs' compensation, promotion, evaluation, discipline, leave and/or termination.

RESPONSE:

DATED: May 13, 2011

SANFORD WITTELS & HEISLER, LLP
/s/ Janette Wipper
Janette Wipper Esq.
Deepika Bains, Esq.
Steven L. Wittels, Esq.

Attorneys for Plaintiffs and the Class

UNITED STATES DISTRICT COURT

SOUTHERN DISTRCT 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 (RJS)**
Plaintiffs,	**PLAINTIFFS' SECOND SET OF DOCUMENT DEMANDS TO DEFENDANT MSLGROUP**
v.	
PUBLICIS GROUP SA and MSLGROUP,	
Defendants.	

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs Monique da Silva Moore, MaryEllen O'Donohue, Laurie Mayers, Heather Pierce, and Katherine Wilkinson, by and through their counsel, Sanford Wittels & Heisler, LLP, hereby request that Defendant MSLGroup produce for inspection and copying all of the documents and tangible things described in the requests below. Defendant MSLGroup is required to serve a written response, in full compliance with the applicable rules of procedure and within thirty days of service.

GENERAL INSTRUCTIONS

1. If you claim that any document which you are required to identify or produce in response to any of these Requests in privileged, you must:

   (a) identify the portion of the Request to which the document is responsive;

regions, areas**,** affiliates, parents, subsidiaries, attorneys and other persons acting or purporting to act on behalf of MSLGroup.

11. The term "Company" shall mean MSLGroup and all of its predecessors in interest, divisions, regions, areas**,** affiliates, parents, and subsidiaries.

SPECIFIC REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION 1: All documents concerning complaints or concerns (whether internal or external, formal or informal, verbal or written) raised with MSLGroup by any female employee in the U.S. about her employment, including but not limited to issues concerning compensation, job assignment, promotions, demotions, transfers, job duties, performance reviews, discipline, maternity or other leave, flexible schedules, termination, or any form of gender discrimination or harassment. Please include all documents showing the identity of the individual reporting; the nature of the conduct being alleged; the identity of the victim(s), perpetrator(s), and/or witness(es); any investigation undertaken and by whom; the result of the investigation; and the ultimate resolution of the matter, if any.

RESPONSE:

REQUEST FOR PRODUCTION 2: To the extent not already produced in response to Request for Production 1, all documents concerning complaints (whether internal or external, formal or informal, verbal or written) about any discrimination or harassment involving MSLGroup or any of its employees in the U.S.. Please include all documents showing the identity of the individual reporting; the nature of the conduct being alleged; the identity of the victim(s),perpetrator(s), and/or witnesses; any investigation undertaken and by whom; the result of the investigation; and the ultimate resolution of the matter, if any.

RESPONSE:

RESPONSE:

REQUEST FOR PRODUCTION 9: All surveys, questionnaires, and other documents relating to or reflecting employee impressions regarding MSLGroup's work environment, including but not limited to concerns regarding discrimination and/or harassment.

RESPONSE:

REQUEST FOR PRODUCTION 10: Any documents reflecting or relating to the composition, duties and decision-making authority of Publicis's "P12" Board Executive Committee since January 1, 2008.

RESPONSE:

REQUEST FOR PRODUCTION 11: Any documents reflecting or relating to the composition, duties and decision-making authority of MSLGroup's executive-level team in the U.S., including but not limited to President of the Americas Jim Tsokanos and Chief Financial Officer Maury Shapiro, since January 1, 2008.

RESPONSE:

REQUEST FOR PRODUCTION 12: Any documents reflecting or relating to the composition, duties and decision-making authority of MSLGroup's regional management team in the U.S., including but not limited to the individuals referenced in ¶ 17 of the Amended Complaint, since January 1, 2008.

RESPONSE:

REQUEST FOR PRODUCTION 13: Any documents reflecting or relating to the identities, duties and decision-making authority of the Managing Directors of MSLGroup's offices in the U.S. since January 1, 2008.

RESPONSE:

REQUEST FOR PRODUCTION 14: Any documents reflecting or relating to the duties and decision-making authority of Karlenne Trimble since January 1, 2008.

RESPONSE:

REQUEST FOR PRODUCTION 15: Any documents reflecting or relating to the duties and decision-making authority of HR Director Rita Masini since January 1, 2008.

RESPONSE:

REQUEST FOR PRODUCTION 16: All documents, including but not limited to e-mails, memoranda, and meeting minutes, reflecting or relating to personnel decisions made by MSLGroup since January 1, 2008, including but not limited to hiring, job assignment, pay, promotion, leave, discipline, and termination of any potential, current or former PR professionals in the U.S. Please include in your response all documents reflecting, *inter alia*, who suggested and approved each personnel decision.

RESPONSE:

REQUEST FOR PRODUCTION 17: All documents, including but not limited to e-mails, memoranda, reports, and meeting minutes, concerning MSLGroup's budget since January 1, 2008, including but not limited to components of the budget, changes to the budget, individuals responsible for reviewing the budget, the budget approval process, and any communications regarding the budget.

RESPONSE:

REQUEST FOR PRODUCTION 18: All documents (PowerPoint presentations, Excel spreadsheets and others) reflecting or relating to national plans, regional plans, office plans, practice plans, or other plans prepared for, distributed during, or otherwise relating to MSLGroup

Americas' annual plan and budget submitted to MSLGroup headquarters, including but not limited to plans relating to revenue, employee compensation, and other employment issues.

RESPONSE:

REQUEST FOR PRODUCTION 19: All documents (PowerPoint presentations, Excel spreadsheets and others) reflecting or relating to MSLGroup's national sales meetings in the United States, including but not limited to plans relating to revenue, employee compensation, and other employment issues.

RESPONSE:

REQUEST FOR PRODUCTION 20: All documents concerning any salary freeze at MSLGroup during the period Plaintiffs were employed by Defendants.

RESPONSE:

REQUEST FOR PRODUCTION 21: All documents that will be used by MSLGroup in denying allegations made in Plaintiffs' Amended Complaint.

RESPONSE:

REQUEST FOR PRODUCTION 22: All documents, including all e-mails, instant messaging or other electronic communications, reflecting or relating to policies and implementation of policies and decisions about recruitment, hiring, appointments and promotions at MSLGroup in the U.S.

RESPONSE:

REQUEST FOR PRODUCTION 23: All documents, including all e-mails, instant messaging or other electronic communications, reflecting or relating to policies and implementation of policies and decisions about compensation for PR professionals at MSLGroup in the U.S.

RESPONSE:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRCT 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 (RJS)**
Plaintiffs,	**PLAINTIFFS' FOURTH SET OF DOCUMENT DEMANDS TO DEFENDANT MSLGROUP**
v.	
PUBLICIS GROUP SA and MSLGROUP,	
Defendants.	

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs Monique da Silva Moore, MaryEllen O'Donohue, Laurie Mayers, Heather Pierce, and Katherine Wilkinson, by and through their counsel, Sanford Wittels & Heisler, LLP, hereby request that Defendant MSLGroup produce for inspection and copying all of the documents and tangible things described in the requests below. Defendant MSLGroup is required to serve a written response, in full compliance with the applicable rules of procedure and within thirty days of service.

GENERAL INSTRUCTIONS

1. If you claim that any document which you are required to identify or produce in response to any of these Requests in privileged, you must:

(a) identify the portion of the Request to which the document is responsive;

RESPONSE:

REQUEST FOR PRODUCTION 7: All policies, protocols and/or practices concerning annual performance appraisals of Public Relations employees at MSLGroup, as referenced in MSL000805.

RESPONSE:

REQUEST FOR PRODUCTION 8: All documents, drafts of documents, notes, communications, policies, protocols and/or practices regarding "Commitment v5 letters," as referenced in MSL000808.

RESPONSE:

REQUEST FOR PRODUCTION 9: All documents, drafts of documents, notes, communications, policies, protocols and/or practices regarding the attachment referenced in MSL000810.

RESPONSE:

REQUEST FOR PRODUCTION 10: All documents related to the Employee Referral Bonus Program, as referenced in MSL001512.

RESPONSE:

REQUEST FOR PRODUCTION 11: All documents, drafts of documents, notes, communications, policies, protocols and/or practices regarding "Mission Critical," as referenced in MSL002214.

RESPONSE:

REQUEST FOR PRODUCTION 12: All documents, drafts of documents, notes and/or communications related to any policies, protocols and/or practices to which "Mission Criticals Requests," as referenced in MSL002214-002337, was made pursuant.

RESPONSE:

REQUEST FOR PRODUCTION 13: All documents posted by or about Olivier Fleurot, Jim Tsokanos, any Region President, or any Managing Director at MSLGroup regarding the allegations in the Amended Complaint or any matter at issue in the case, on any websites, web logs ("blogs"), online forums, social networking websites (e.g., www.linkedin.com, www.facebook.com, www.twitter.com or www.myspace.com), or any other location on the Internet.

RESPONSE:

REQUEST FOR PRODUCTION 14: A copy of any retainer agreement between MSLGroup and Jackson Lewis LLP in this matter.

RESPONSE:

REQUEST FOR PRODUCTION 15: All documents from the personnel file of Demitrious Tsokanos.

RESPONSE:

REQUEST FOR PRODUCTION 16: All documents received from Plaintiffs' employers other than MSLGroup in response to third-party subpoenas served by MSLGroup.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRCT 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 (RJS)**
Plaintiffs,	**PLAINTIFFS' FIFTH SET OF DOCUMENT DEMANDS TO DEFENDANT MSLGROUP**
v.	
PUBLICIS GROUP SA and MSLGROUP,	
Defendants.	

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs Monique da Silva Moore, MaryEllen O'Donohue, Laurie Mayers, Heather Pierce, and Katherine Wilkinson, by and through their counsel, Sanford Wittels & Heisler, LLP, hereby request that Defendant MSLGroup produce for inspection and copying all of the documents and tangible things described in the requests below. Defendant MSLGroup is required to serve a written response, in full compliance with the applicable rules of procedure and within thirty days of service.

GENERAL INSTRUCTIONS

1. If you claim that any document which you are required to identify or produce in response to any of these Requests in privileged, you must:

(a) identify the portion of the Request to which the document is responsive;

REQUEST FOR PRODUCTION 8: For all PR professionals employed at MSLGroup since 2005, all job applications, resumes, and other documents reflecting work experience and education prior to employment with MSLGroup.

RESPONSE

REQUEST FOR PRODUCTION 9: All biographies of Plaintiffs written by anyone at MSLGroup for websites, publications, press releases, or any other purpose.

RESPONSE

REQUEST FOR PRODUCTION 10: All documents regarding the management hierarchy, reporting structure and decision-making authority of employees working in specialized business units, including: PBJS, Publicis Meetings, TMG Strategies, MS&L Digital (AA), Schwartz MSL and Winner & Associates.

RESPONSE

REQUEST FOR PRODUCTION 11: All spreadsheets or other documents submitted to the Global CFO, the Americas CFO, Global HR in Paris, the Americas HR, leadership or payroll for approval regarding any change in pay, job title, status (e.g., part-time), or other terms and conditions of employment.

RESPONSE

REQUEST FOR PRODUCTION 12: All documents relating to the distribution, acknowledgement or training of EEO policies to MSLGroup employees.

RESPONSE

REQUEST FOR PRODUCTION 13: All documents reflecting or relating to policies and/or practices dictating MSLGroup's Mission Critical Requests.

RESPONSE

REQUEST FOR PRODUCTION 14: Any document regarding a "forecast," as referenced in MSL002234, which reads, "This promotion was budgeted in the forecast."

RESPONSE:

REQUEST FOR PRODUCTION 15: All documents regarding North American Evaluations scores, as referenced in MSL002230.

RESPONSE:

REQUEST FOR PRODUCTION 16: All documents regarding salary scales/ranges for MSLGroup positions, including but not limited to the Vice President salary scale referenced in MSL002229 and the Managing Director salary range referenced in MSL002247.

RESPONSE:

REQUEST FOR PRODUCTION 17: All documents regarding any hiring, salary, or promotion freeze (referenced in MSL002228) at MSLGroup.

RESPONSE:

REQUEST FOR PRODUCTION 18: All documents regarding the "compensation and retention strategy," referenced in MSL002221.

RESPONSE:

REQUEST FOR PRODUCTION 19:

All documents regarding quarterly agency performance bonuses, as referenced in MSL002235.

Exhibit F

17ledasc

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

MONIQUE DA SILVA MOORE, on behalf of herself and all others similarly situated, et al.,

Plaintiffs,

v. 11CV 1279(RJS)

PUBLICIS GROUPE, et al.,

Defendants.

----------x

July 21, 2011
3:04 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES (via telephone)

SANFORD WITTELS & HEISLER, LLP
Attorneys for Plaintiffs
BY: JANETTE LYNN WIPPER
SIHAM NURHUSSEIN
STEVEN LANCE WITTELS

JACKSON LEWIS LLP
Attorneys for Defendants
BY: JEFFREY W. BRECHER
VICTORIA WOODIN CHAVEY

The two things that identified a centralized management team in a reorganization, that's not a policy that's discriminatory. What about the centralized management team is discriminatory? What about the reorganization is discriminatory? You can't say that there's a classwide discriminatory policy because there was a reorganization. What about it was discriminatory? You have to identify what the discriminatory policy is, other than subjectivity, which the Supreme Court says is insufficient.

MS. WIPPER: Again, this is Janette Wipper again, responding.

With respect to that point, I think it only emphasizes that class discovery is necessary before the Court should decide these issues.

I also would direct the Court to the Ogilvie case in the Second Circuit, which clearly says that a centralized team making the decisions at issue satisfies commonality and typicality at the certification stage.

So Wal-Mart does not disturb that ruling. Actually, Wal-Mart relies on Balkin, which is the same case that the Ogilvie court relied on.

THE COURT: It seems to me, Mr. Brecher, I think you're overreading Wal-Mart. I mean, Wal-Mart didn't reject the plaintiffs' complaint or the argument underlying the complaint per se. It seemed to me they decided that the

Wal-Mart plaintiffs had provided insufficient proof showing a common mode of exercising discretion that pervades the entire company. I mean, that was a determination based on what had been demonstrated. I don't think it was -- it wasn't based on the facts alleged in the complaint.

So I think here the plaintiffs have alleged various facts that, if true, might be able to prevail if we get that far. I don't know what the facts are, but what's alleged in the complaint seems to me not per se inadequate under Wal-Mart.

And I think some of the other allegations in the complaint about systemic patterns and practices of gender discrimination are ones that, if true, would be enough to assert a claim. So I don't think this is a winner at this stage.

I mean, I do think clearly the Wal-Mart case is a momentum shift in this area, and nobody can read it and say that it's not that. But I don't think that it means that defendants get to bring motions at this stage and knock complaints out of the box because of the allegations when they're phrased the way the ones are in this complaint. I just don't think that this is an invitation to be doing class cert at the motion to dismiss or 12(c) stage before there's been any discovery and no indication as to what the facts are.

So I think that's a loser at this stage. And it seems to me that if the class cert arguments or the class -- what are

Exhibit G

SANFORD WITTELS & HEISLER, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
(646) 723-2947
Fax: (646) 723-2948
Email: swittels@swhlegal.com
www.swhlegal.com

1666 Connecticut Avenue
Suite 300
Washington D.C.
(202) 742-7777
Fax: (202) 742-7776

440 West Street
Fort Lee, NJ 07024
(201) 585-5288
Fax: (201) 585-5233

555 Montgomery Street
Suite 1206
San Francisco, CA 94111
(415) 391-6900
Fax: (415) 391-6901

April 27, 2012

VIA FACSIMILE
Honorable Andrew J. Peck
U.S.D.C. – Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007
Fax No. 212-805-7933

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 H

C4p9mooc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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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

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.