

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

CHARLES E. MOODY,

TIMOTHY L. TALLENTIRE, and

DAVID C. CREPS,

On behalf of themselves and on behalf  
of all others similarly situated,

plaintiffs,

v.

THE TURNER CORPORATION, *et al.*,

Defendants.

Case No. 1:07-cv-692

Judge Beckwith

Magistrate Judge Hogan

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO SET  
ASIDE AND/OR MODIFY THE MAGISTRATE JUDGE'S MAY 12, 2010 ORDER  
GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL  
COMPLIANCE WITH THEIR REVISED FIRST SET OF DOCUMENT REQUESTS**

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Defendants, THE TURNER CORPORATION and THE EMPLOYEES' CASH BALANCE RETIREMENT PLAN OF THE TURNER CORPORATION (collectively, "defendants" or "Turner"), by their attorneys, respectfully submit this Response in Opposition to Plaintiffs' Motion to Set Aside and/or Modify the Magistrate Judge's May 12, 2010 Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel Compliance with Their Revised First Set of Document Requests ("Plaintiffs' Motion").

## **I. INTRODUCTION**

Plaintiffs' Motion is the latest step in their prolonged effort to bog down Turner and this Court in discovery minutia rather than finally move forward to the merits of what is now an almost three-year-old case. Defendants have already produced approximately 47,000 pages of hardcopy documents and another 40,000-plus pages of emails and attachments (4.1 gigabytes of electronic data). (Abrams Decl., ¶ 4). Rather than depose a single witness, as suggested by Magistrate Judge Hogan during the hearing on this motion to compel (Doc. No. 98, Tr. p. 68), or submit any expert reports in support of their position, plaintiffs run from the merits in favor of this coercive, one-sided discovery sideshow – one designed to impose huge costs and burden on Turner, particularly with respect to electronic discovery.

Plaintiffs' Motion here, a 35-page appeal of Magistrate Judge Hogan's two-page Order, is the latest example of this strategy. Judge Hogan is certainly the most familiar with the discovery issues that plaintiffs have raised. He has already issued two orders addressing plaintiffs' various discovery objections (Doc. Nos. 75, 101); has held three teleconferences with the parties (Doc. Nos. 78, 85, 97); and has heard two rounds of oral argument (Doc. Nos. 78, 97). Plaintiffs now seek a *third* bite at the apple after Judge Hogan twice rejected the excessive discovery demands plaintiffs make here. Plaintiffs' Motion also misrepresents the history of discovery in this matter

– the true picture of which illustrates plaintiffs’ unreasonableness – and fails to satisfy plaintiffs’ heavy burden to set aside a Magistrate Judge’s ruling under Federal Rule of Civil Procedure 72.

As explained more fully below (*infra*, § II, G), the discovery plaintiffs sought to compel in their January 27, 2010 Motion far exceeded the narrow set of facts plaintiffs could possibly need to prosecute their case. The reason Judge Hogan has (twice) found plaintiffs overreaching in their discovery demands is that plaintiffs’ two claims in this case simply cannot justify plaintiffs’ discovery demands. The first claim, the “whipsaw” claim, concerns whether Turner should have performed a so-called whipsaw calculation for those who elected lump sum distributions from Turner’s cash balance plan (“the Plan”) (and, if so, how to make such calculations). The second claim concerns whether plaintiffs are entitled to Earnings Credits under the Plan based on plaintiffs’ (incorrect) interpretation of the terms of the various Summary Plan Descriptions (“SPDs”), instead of the actual terms of the Plan. Resolution of these claims does not require the extensive documentary discovery plaintiffs seek, and documents relevant to these claims have been produced.<sup>1</sup>

Recognizing the fact that this case, although complex, does not implicate an extensive document record, Judge Hogan correctly stated in his May 12, 2010 Order that “[t]his case is about mathematics, the proper interest crediting rate and the proper projection rate applicable to retirement accounts.” (May 12 Order, Doc. No. 101, p. 1). Nonetheless, plaintiffs “ask for the sky and express disbelief when the Court does not order everything for which they ask.” (*Id.*). Therefore, Judge Hogan ordered defendants, to the extent they had not already done so, only to produce “the Plan, Summary Plan Description, other documents explaining the plan, raw data

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<sup>1</sup> Defendants previously explained in their opposition to plaintiffs’ class certification motion (Doc. No. 106, § II, B) that which SPD a participant received, and whether the participant read the SPD, are individualized issues, as reflected in the deposition testimony of the three named plaintiffs.

upon which calculations are based, projection and crediting rates used, payments made under the Plan, and retirement dates for the beneficiaries under the Plan.” (*Id.*, p. 2). Judge Hogan recognized that such documents are all that is necessary to fully litigate plaintiffs’ claims. Even before Magistrate Judge Hogan’s Order, defendants had complied with these discovery obligations, and the time to move forward to the merits was, finally, at hand.

Nevertheless, plaintiffs request that this Court set aside Judge Hogan’s Order because, apparently, Judge Hogan – who is most familiar with the dispute at issue – has twice gotten it wrong. In particular, plaintiffs ask this Court to overrule Judge Hogan and compel defendants to produce the following: (1) documents related to Turner’s alleged intent when choosing the crediting rate formula (Pls.’ Mot., pp. 4-5), even though Judge Hogan made clear that intent is irrelevant, as ample case law likewise holds; (2) documents in the possession of law firms that advised Turner regarding the Plan dating as far back as the early 1990s (*id.*, p. 5), even though, as Judge Hogan noted, “[t]his material is almost certainly to be privileged and in addition, imposes a significant burden on entities who are non-parties to this litigation” (May 12 Order, p. 2); and (3) even *more* of Turner’s electronically stored information (“ESI”), on top of the tens of thousands of electronic documents that have already been produced at a cost to Turner in the hundreds of thousands of dollars.

Plaintiffs’ Motion falls well short of meeting the Rule 72 standards. Turner is not obligated to produce the additional materials plaintiffs demand, let alone is Judge Hogan’s decision on these items so far beyond the pale that it must be set aside. Plaintiffs have had their opportunity to be heard on their discovery concerns, and Judge Hogan – to whom such issues were referred – has made clear how discovery should proceed. Plaintiffs have all written

discovery they are entitled to. Their Motion to Set Aside and/or Modify Judge Hogan's ruling should be denied.

## **II. PROCEDURAL/DISCOVERY BACKGROUND**

The history of discovery in this matter is set forth in detail in Turner's Opposition to Plaintiffs' January 27, 2010 Motion to Compel. (Doc. No. 93, pp. 3-16). Turner briefly recounts these events.

### **A. Plaintiffs Served Discovery Requests Disproportionate To The Claims In This Case.**

As plaintiffs acknowledge in one of the 35 pages of their Motion (Pls.' Mot., p. 6), there are only two claims in this case. The first (raised in plaintiffs' original and first amended complaints) is the "whipsaw" claim, which alleges that when plaintiff Charles Moody and other participants in Turner's Plan "requested a lump sum distribution of their Plan benefit prior to that date, their account balances had to be projected to normal retirement age using a rate that did not understate the value of the future interest credits they would have received had they left their account balances in the Plan until that date." (Pls.' Jan. 27, 2010 Mot. to Compel, Doc. No. 89, pp. 7-8). Plaintiffs maintain that Turner "severely understated the value of their future interest credits."<sup>2</sup> (*Id.*) Although plaintiffs contend that far-ranging discovery is necessary to resolve "the complex, fact-intensive question of damages" (*id.*, p. 9), they are wrong. Indeed, Judge Hogan ruled in his September 30, 2009 Order on plaintiffs' first motion to compel that, with respect to the whipsaw claim, plaintiffs were seeking irrelevant information: "[T]he Court agrees that to the extent the requests seek information about defendants' motivation or intent, these issues are not relevant." (Doc. No. 75, p. 5).

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<sup>2</sup> Charles Moody is the only plaintiff with a pending whipsaw claim. This Court dismissed Timothy Tallentire's whipsaw claim on statute of limitations grounds. (Doc. No. 84). David Creps has not taken a lump sum distribution from the Plan. (Sec. Am. Compl., Doc. No. 44, ¶ 13).

Plaintiffs' second claim is that there is a conflict between the language in the SPD and the Plan itself with respect to the definition and calculation of the Earnings Credit. (Sec. Am. Compl., Doc. No. 44, ¶¶ 29-30). According to plaintiffs, as a result of a purported conflict between the SPD and the Plan, the SPD controls, and plaintiffs should receive the allegedly higher Earnings Credit described in the SPD. (*Id.*, ¶ 30). As Judge Hogan recognized, resolution of this conflict claim should require little by way of document discovery beyond the Plan, the various SPDs published over time, and other communications to participants about their benefits.

Nonetheless, plaintiffs' first set of requests for production asked for 18 different categories of electronic documents. (Pls.' First Req. for Prod., Doc. No. 43-4, RFP Nos. 1-2). With respect to hard-copy documents, plaintiffs sought, among many other categories of documents, such items as "[a]ll draft Form 5300's or constituent parts thereof, whether or not finalized" and "[a]ll documents concerning the benefits anticipated and/or actually realized from converting the Plan to a cash balance design." (*Id.*, RFP Nos. 10-11).

By December 2008, in response to plaintiffs' discovery requests, Turner had produced approximately 44,000 pages of hard copy documents to plaintiffs. (Dfs.' Resp. to Pls.' Jan. 30, 2009 Mot. to Compel, Doc. No. 48, pp. 3-4). These documents included multiple versions of the Plan, Summary Plan Descriptions, a full list of Plan participants including those who took a lump sum distribution, the date of that distribution and the amount of the lump sum, the annual interest crediting rate and the method by which it was determined, Plan financials and annual valuation reports. (*Id.*, pp. 3-4). Turner also engaged a vendor (at its cost) to process the electronically stored information. (*Id.*, p. 4). Plaintiffs' proposed search terms for culling this ESI into a manageable number were ineffective, as they resulted in 51 gigabytes of data, or approximately 3,855,000 pages of documents. (*Id.*, p. 13) With respect to non-email ESI (that is, ESI that is

not embodied in emails), Turner searched through the pertinent shared network drive to which any material concerning the Plan is typically stored. (Dfs.' Resp. to Pls.' Jan. 27, 2010 Mot. to Compel, Doc. No. 93, Ex. X, Sibley Decl., ¶ 5). Any documents pertaining in any way to the Plan on this shared drive, as well as materials that the Benefits Department searched for in individual (non-shared) network hard drives, were collected and forwarded to defendants' counsel for review and, if relevant, were produced. (*Id.*, Sibley Decl., ¶¶ 6-7). This non-email ESI collected by Turner in response to plaintiffs' original document requests were produced as TIFF images. On February 9, 2010, at plaintiffs' request, Turner subsequently produced non-email ESI in native format (that is, an original file) with original metadata included in a native load file, comprising 244 MB of data. (Doc. No. 93, Ex. E, ¶ 47).

**B. Plaintiffs Filed Their First Motion To Compel, Which Judge Hogan Granted In Part And Denied In Part, Making Clear That Plaintiffs Were Overreaching In Their Discovery Demands.**

On January 30, 2009, plaintiffs filed their first motion to compel, seeking to force Turner to produce millions of pages of ESI beyond what had already been produced and to enforce their document requests as written. (Doc. No. 43). On September 30, 2009, Judge Hogan granted in part and denied in part plaintiffs' motion to compel, issuing an Order that plaintiffs' discovery demands as written were "unreasonable," and directing the parties to work together to reach a reasonable compromise on any ongoing discovery issues. (Sept. 30, 2009 Order, Doc. No. 75, pp. 4-5). Judge Hogan specifically stated that "to the extent Plaintiffs seek documents detailing the history and motivation involved in establishing the crediting rate, these requests are overbroad and/or irrelevant." (*Id.*, p. 4). Judge Hogan further ruled that "whether an investment advisor or Plan consultant assumed in 1995, 2000 or 2005 that the rate would be one rate versus another has no bearing on the case." (*Id.*). In conclusion, Judge Hogan directed the parties to

report back to him on October 28, 2009 via conference call to update him on the progress of discovery. (*Id.*, p. 5).

**C. Plaintiffs Ignored Judge Hogan’s September 30, 2009 Order And Instead Continued To Insist On Unreasonable ESI And Other Discovery Demands.**

Despite Judge Hogan’s admonition, plaintiffs thereafter continued to make unreasonable discovery demands, particularly with respect to electronic discovery. Defendants attempted to work with plaintiffs to provide the information and data requested. At each step, however, plaintiffs rejected reasonable attempts to compromise and continued to insist that Turner track down irrelevant information, such as the history of Turner’s computer systems dating back to the 1990s. Contrary to plaintiffs’ assertion in their second Motion to Compel, plaintiffs’ First Revised Set of RFPs did not “suggest[] a reasonable accommodation of the parties differences.” (Doc. No. 89, p. 21, No. 24). To the contrary, plaintiffs held fast to their overbroad requests for such items as “[a]ll communications” concerning “[a]ll versions of the Plan document (including all amendments, all appendices and/or tables or attachments thereto[]);” the recreation of websites that may have previously been in existence; “[a]ll draft Form 5300’s or constituent parts thereof”; and “all” demonstrations showing compliance or non-compliance with various ERISA and/or IRS accrual, backloading, and non-discrimination standards. (Doc. No. 93, Ex. T, Nos. 3, 7, 10-12). Although defendants invited plaintiffs’ counsel to contact them at their earliest convenience to discuss the Requests that remained overbroad or sought irrelevant information, plaintiffs did not do so until the morning of December 1, 2009, just hours before the parties were to appear via teleconference to report on the status of discovery. (Doc. No. 93, p. 19 and Ex. S).

**D. At The Parties' December 1, 2009 Teleconference With The Court, Judge Hogan Directed Plaintiffs To Serve A Limited Set Of Interrogatories On E-Discovery And Information Technology Issues.**

On October 28, 2009 and again on December 1, 2009, the parties held teleconferences with Magistrate Judge Hogan. (Doc. Nos. 78, 85). At the December teleconference, plaintiffs' counsel represented that there were certain "core questions" to which they still sought answers from defendants. (Doc. No. 93, p. 2). The Court therefore directed plaintiffs to serve interrogatories to obtain answers to these core questions, so that the parties could finally move past discovery issues and address the merits. (*Id.*, pp. 2-3).

**E. Plaintiffs Ignored Judge Hogan's Direction And Instead Served Yet Another Set Of Overbroad Discovery Requests.**

Unfortunately, plaintiffs ignored Judge Hogan's instructions at the parties' December 2009 teleconference and instead served another set of overbroad interrogatories *and* requests for production. These discovery requests, including subparts, comprised 47 separate requests for information or documents, including the following:

- From 2001 to the present, with respect to 33 separate current or former Turner employees, a description of what data was migrated from an earlier electronic platform used by Turner to its current systems, and the criteria upon which that decision was made. (Doc. No. 93, Ex. V, Interrog. No. 1).
- A description of the network share drives to which 33 custodians had access at any time from 2001 to the present. (Doc. No. 93, Ex. V, Interrog. No. 1).
- An identification of all steps, and who took such steps, from June 2001 through the present "to modify, cease or alter any information systems document retention policies, practices or processes or destruction policies, practices or processes and the dates on which those steps were taken and the specific directions or guidelines they were provided in order to ensure that relevant data which otherwise would have been deleted was not deleted." (Doc. No. 93, Ex. V, Interrog. No. 2).
- In answering this interrogatory, Turner was instructed to address "all possible sources of ESI including email servers, file share servers, shared drives, archive servers, PCs, workstations, mainframes, CDs, DVDs, thumb drives (a.k.a. flash drives, USB drives, etc.), external hard drives, floppies (3.5 inch, 5.25 inch or other), iPods (and other devices that can function as an external hard drive), Blackberry and/or other handheld PDA-style devices,

externally hosted repositories, document management systems (if any, e.g., Microsoft SharePoint, OpenText Hummingbird, Interwoven's iManage), personal web-mail and home computers." (Doc. No. 93, Ex. V, Interrog. No. 2).

- An identification of all persons from June 2001 through the present who had responsibility for implementing and executing backup policies and procedures, their job titles, job descriptions, business address and telephone number, period of service and role in preserving "any and all ESI arguably relevant to this case." (Doc. No. 93, Ex. V, Interrog. No. 3(c)).

- A production of a "any and all company organizational and policy information in its entirety in reference to [Turner's] backup and archiving policies/systems, including but not limited to organizational charts, corporate policy and procedure manuals, policy memoranda, system schematics, network topology, system restart procedures, e-mail retention policies, Year 2000 Plan, Disaster Recovery Plan, and other related items." (Doc. No. 93, Ex. V, Req. for Prod. No. 22(c)).

- An identification of all individuals who acted as a "Collection Supervisor," defined by plaintiffs as "any individual, whether acting alone or as a member of a team, who at any time during the Relevant period took any of the following steps in response to either this lawsuit or any similar lawsuit that Defendants had reason to believe might be filed:

- (a) identify or explain Defendants' IT systems regarding the location(s) and/or format of potentially responsive ESI data;

- (b) search Defendants' IT systems for potentially relevant ESI;

- (c) identify potentially relevant documents according to any criteria whatsoever;

- (d) actually assess the relevance of individual documents or groups of documents according to any criteria whatsoever; or

- (e) modify, copy, move, or otherwise handle selected ESI with a view to possible production in this or any other similar litigation." (Doc. No. 93, Ex. V, Interrog. No. 5(e) and p. 4 (providing definition of "Collection Supervisor")).

Even though plaintiffs disregarded Judge Hogan's instructions to address only "core" issues, Turner spent more than 60 hours communicating with multiple information technology personnel at Turner, reviewing documents, and preparing responses to the latest requests. (Doc. No. 93, Ex. E, ¶ 31). On December 23, 2009, Turner served detailed and thorough responses to plaintiffs' discovery requests which included, *inter alia*:

- A description of Turner's implementation of the Microsoft Exchange system for e-mail in 2001, Turner's Windows operating system, Turner's e-mail systems from *before* 2000,

the migration of electronic data from pre-2000 systems to Turner's current system, and an identification of the hire date and earliest e-mail collected for the e-mail custodians.

- An explanation of the archiving of Tuner's e-mail system on Microsoft Outlook and of the retention and preservation of electronic data.
- A description of Turner's backup policies and retention schedules, including an explanation of the software used and the persons responsible for implementing backup policies and procedures.
- An explanation of Turner's previous e-mail and non-email ESI collection, along with a declaration from the person who coordinated these efforts.<sup>3</sup> (Doc. No. 93, Ex. W).

**F. Turner Devoted More Than A Thousand Hours Of Additional Time To Plaintiffs' Electronic Discovery Demands.**

Turner has continually produced electronic documents to plaintiffs. Turner completed its search, review and production of these documents, which total the equivalent of more than 40,708 pages of email ESI.<sup>4</sup> (Abrams Decl., ¶ 4). Turner searched the emails available from 33 custodians *requested* by plaintiffs and utilized 23 search terms proposed by plaintiffs. (*Id.*, ¶ 5). These efforts comprised approximately one thousand hours of contract attorney time plus some 300 hours of Turner's counsel's time to review and produce these documents. (Doc. No. 98, Tr. pp. 24-25).

**G. On January 27, 2010, Plaintiffs Filed Their Second Motion To Compel.**

After Turner responded to these production requests, which plaintiffs served in order to address what they represented were the issues upon which they still required answers insofar as discovery was concerned, plaintiffs' counsel did *not once* contact Turner's counsel to discuss these responses. (Doc. No. 93, p. 17). Instead, on January 27, 2010, after more than a month of

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<sup>3</sup> In addition to these interrogatory responses, on January 11, 2010, Turner produced documents responsive to these requests. (Doc. No. 93, Ex. E, ¶ 35).

<sup>4</sup> 40,708 pages of ESI is the most conservative estimate, as several spreadsheets were produced in native format given their size, which means that a spreadsheet that would have amounted to more than 100 pages if produced in TIFF format is counted as only one page in Turner's estimation.

silence, plaintiffs filed their second motion to compel.<sup>5</sup> (Doc. No. 89). Plaintiffs' motion to compel was substantially similar to the instant motion before this Court: arguing that defendants did not search for non-email ESI to their satisfaction, that defendants were obligated to produce additional hard-copy documents plaintiffs believed could exist, and that documents must be obtained from the various law firms who advised the Plan over the past 15 years. (*Compare* Pls.' Mot. to Doc. No. 89, pp. 10-12). Plaintiffs also referred to the "Proposed ESI Production Agreement" they issued to Turner on October 21, 2009, which, among other demands, would require that Turner detail the "tree structure" for storing electronic data (where applicable), and "[f]or each class of backup and archive (daily, weekly, monthly, yearly), the rotation schedule, the type of media used, and the approximate number, size and location of each class of media on hand at any one time." (Doc. No. 93, Ex. F, Nos. 3, 9).

On March 17, 2010, the parties appeared before Judge Hogan for oral argument. (Doc. No. 97). In Judge Hogan's view at the hearing, in contrast to plaintiffs' claim that they be entitled to troll through 15-plus years of electronic records, "[t]he expert is going to testify on their rationale, why this calculation is correct, why this one is correct, and that's it." (Doc. No. 98, Tr. p. 9). Judge Hogan suggested that, perhaps, one approach to the discovery plaintiffs sought "that might be far simpler is to simply find out, with a 30(b)(6) deposition, I suppose, about who is most knowledgeable about the plan inception, and then let them testify." (*Id.*, p. 68). As Judge Hogan explained, "[i]f he gives information that the plaintiffs consider favorable to them, they may not want to search for any more data. If he gives information that they don't like, then the next level would be to look for something that you can impeach him with, which

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<sup>5</sup> Plaintiffs suggest that Turner kept them in the dark before plaintiffs filed their January 27, 2010 motion to compel. It was in fact plaintiffs who, for over a month before they fled their motion to compel, failed to once call Turner. (Doc. No. 93, p. 17).

would be where we are now ... [s]o I'm not all sure that, even if the information [plaintiffs] seek is pertinent, that this is the way to get it." (*Id.*).

**H. Judge Hogan Issued His Second Order On Plaintiffs' Motion To Compel, Intending To Finally Resolve Plaintiffs' Discovery Complaints.**

On May 12, 2010, Judge Hogan issued his decision on plaintiffs' January 27, 2010 Motion to Compel. (Doc. No. 101). By that point, Judge Hogan had already been presented with two rounds of full briefing on plaintiffs' motions to compel and two rounds of oral argument. (Doc. Nos. 43, 48, 50, 69, 78, 89, 93, 95, 97). Judge Hogan denied plaintiffs' sweeping demands and limited plaintiffs to what was *actually* material to this case: "the Plan, Summary Plan Description, other documents explaining the plan, raw data upon which calculations are based, projection and crediting rates used, payments made under the Plan, and retirement dates for the beneficiaries under the Plan." (May 12 Order, p. 2). To defendants' knowledge, all such documents had already been produced by the time the Court issued its ruling. Dissatisfied with Judge Hogan's two decisions over the past eight months, plaintiffs now file the instant motion seeking the same discovery that Judge Hogan has already rejected.<sup>6</sup>

**III. ARGUMENT**

**A. Plaintiffs Cannot Meet Their Burden Under Rule 72 Because Magistrate Judge Hogan's Decision Was Not Clearly Erroneous Or Contrary To Law.**

Magistrate judges' orders on discovery may be set aside by the District Court only if they are "clearly erroneous" or "contrary to law." *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P.

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<sup>6</sup> Plaintiffs complain that Judge Hogan declined to adopt their "clear[] but succinct[]" proposed order. (Pls.' Mot., p. 20). Plaintiffs' proposed order demanded Turner comply with all instructions laid out in a separately submitted Declaration of David Sharpe, which attached 24 exhibits that would have required Turner to comply with each of plaintiffs' RFPs as written, and, among other items, include 37 separate fields of metadata on all ESI produced, search the email and non-email ESI of an additional three custodians beyond the 33 previously-agreed upon, and, for each of the 36 custodians, identify every drive, share-file, local file and/or storage device to which that custodian had access. (Decl. of David Sharpe, Doc. No. 90 and Exs. 1-24).

72(a); *U.S. v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001). District Courts must “pay more deference to the factual findings of judicial officers who have heard the evidence rather than having merely reviewed a cold record.” *Brown v. Wesley’s Quaker Maid, Inc.*, 771 F.2d 952, 956 (6th Cir. 1985) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985)).

This is particularly true with respect to discovery rulings. Because the nondispositive review standard is highly deferential, magistrate judges have broad discretion to regulate nondispositive matters, and reversal is warranted only if that discretion is abused. Although legal authority may support an objection, the critical inquiry is whether there is legal authority that supports the magistrate’s conclusion, in which case there is no abuse of discretion. That reasonable minds may differ on the wisdom of a legal conclusion does not mean it is clearly erroneous or contrary to law. *See e.g., Carmona v. Wright*, 233 F.R.D. 270, 276 (N.D.N.Y. 2006). *See also Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 438 (D. Md. 2005) (“Courts have consistently found discovery motions to be non-dispositive within the meaning of Rule 72(a). A district court owes substantial deference to a magistrate judge in considering a magistrate judge’s ruling on a non-dispositive motion.”); *American Rock Salt Co., LLC v. Norfolk S. Corp.*, 371 F.Supp. 2d 358, 360 (W.D.N.Y. 2005) (“The party seeking to reverse a magistrate judge’s ruling concerning discovery bears a heavy burden, in part because the magistrate judge is afforded broad discretion in these matters.”); *Estates of Ungar & Ungar, ex rel. Strichman v. Palestinian Auth.*, 325 F. Supp. 2d 15, 25 (D.R.I. 2004) (“In conducting ... [its] review, the district court must refrain from second guessing the magistrate judge’s pre-trial discovery rulings.”); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 405 (E.D.N.Y. 2004) (“A magistrate judge’s resolution of discovery disputes deserves substantial deference and is overruled only if there is an abuse of discretion.”); *Lithuanian Commerce Corp., Ltd. v. Sara Lee*

*Hosiery*, 177 F.R.D. 205, 214 (D.N.J. 1997) (The deferential standard of review under Rule 72(a) is “especially appropriate where the magistrate judge has managed [a] ... case from the outset and developed a thorough knowledge of the proceedings”).

Plaintiffs have fallen well short of satisfying their burden. As explained below, there was no abuse of discretion. Rather, plaintiffs simply hope that a new judge, reviewing only a “cold record,” will disagree with the findings of Judge Hogan and allow plaintiffs’ burdensome approach to discovery to continue unabated. Yet over the past two years, Judge Hogan has become intimately familiar with plaintiffs’ discovery demands, through numerous briefs, conference calls and two oral arguments. He has determined more than once that the documents and information plaintiffs seek are not relevant or marked by burden that would far outweigh their probative value. Judge Hogan made no clear error of law or fact. *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985) (“The question is not whether the finding is the best or only conclusion that can be drawn from the evidence, or whether it is the one which the reviewing court would draw.”). There was no abuse of discretion, and plaintiffs’ Motion should therefore be denied.

**B. Judge Hogan’s May 12, 2010 Order Should Not Be Modified Or Set Aside.**

Plaintiffs point to three principal elements of Judge Hogan’s May 12 Order that they believe should be modified or set aside (Pls.’ Mot., pp. 27-36): (1) Judge Hogan determined (for the second time) that discovery into Turner’s motivation and intent in choosing the interest crediting rate and/or projection rates are not relevant to plaintiffs’ claims; (2) Judge Hogan found that the documents in the possession of the law firms that advised Turner over the years are beyond Turner’s power to obtain and likely to be privileged in any event, and, therefore, the burden upon Turner of acquiring and reviewing these documents would outweigh their probative

value; and (3) although Judge Hogan directed Turner to make sure that certain documents relevant to plaintiffs' claims were produced (which they have been), he did not specifically and separately address each and every one of the 20 Requests for Production over which plaintiffs filed their Motion to Compel. None of these rulings were clearly erroneous or contrary to law. There was no abuse of discretion.

**1. The Intent Of The Plan Designers In Choosing The Interest Crediting Rate And Projection Rate Is Irrelevant, As Judge Hogan Has Twice Determined.**

In response to plaintiffs' first motion to compel, Judge Hogan ruled on September 30, 2009 that the intent of the Plan's designers was irrelevant to plaintiffs' claims. Specifically, Judge Hogan stated that "to the extent Plaintiffs seek documents detailing the history and motivation involved in establishing the crediting rate, these requests overbroad and/or irrelevant."<sup>7</sup> (Doc. No. 75, pp. 4-5). As Judge Hogan further stated, "whether an investment advisor or Plan consultant assumed in 1995, 2000 or 2005 that the rate would be one rate versus another has no bearing on the case." (*Id.* at 4). Nonetheless, plaintiffs sought again in their January 27, 2010 Motion to Compel to obtain discovery into the intent and motives of the Plan's designers. Judge Hogan again denied plaintiffs' motion insofar as "document requests detailing the history and motivation involved in establishing the crediting and/or projection rates are irrelevant." (May 12 Order, p. 1).

Plaintiffs offer no basis for overruling Magistrate Judge Hogan's decision. Most of plaintiffs' argument for delving into the motivation behind the establishment of the Plan more than 15 years ago is based simply on generic discovery principles under Rule 26. (Pls.' Mot., pp.

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<sup>7</sup> Plaintiffs did not timely appeal that decision and have therefore waived their challenge to Judge Hogan's determination on this issue. Fed. R. Civ. P. 72(a). Plaintiffs cannot revive their untimely challenge by making the same arguments a second time to Magistrate Judge Hogan in their section motion to compel.

27-28). But Magistrate Judge Hogan is well familiar with Rule 26 and managed discovery in this case accordingly. Indeed, the reason why discovery matters are, and here were, referred to a magistrate judge was so that discovery can be managed in a reasonable fashion by someone with the time and ability to sift through individual discovery issues and reach a reasonable balance on the scope of discovery. There is no reason to think that Judge Hogan did not understand Rule 26 standards or had a “flawed understanding of the case.” (Pls.’ Mot., p. 28).

Plaintiffs argued to Magistrate Judge Hogan, and now to this Court, that plaintiffs “must be entitled to explore why Turner went to the lengths it did to engineer such a unique financial instrument, what goal or goals it sought to achieve (including what age 65 annuity benefit it intended the Earnings Credit to assist participants achieve), and what evidence it had that this design would achieve and/or was achieving those design objections once the Plan was put into operation.” (Pls.’ Mot., pp. 27-30). As Judge Hogan has already found however, *why* Turner created this “unique financial instrument,” the goals it sought to achieve, and whether it was achieving those objectives could have no bearing on determining what future projection rate should be applied to any whipsaw calculation – whether the IRS requires using the interest rate that applied in the year in question or if some other rate is more appropriate. Plaintiffs cite no authority that such intent or motives is relevant. *See Ruppert v. Alliant Energy Cash Balance Pension Plan*, No. 08 CV 127, 2010 WL 2264954, at \* 6 (W.D. Wis. Jun. 3, 2010) (in whipsaw case, holding “[b]ecause intent is irrelevant, [the Court] will disregard those proposed facts related to whether defendant was attempting to comply with the law by following the advice of a ‘reputable’ actuary, attempting to get away with under-payment or attempting to give its participants a particularly high interest rate (and a lower benefit credit) through its design”) (emphasis added).

Judge Hogan's Order denying discovery into the intent or motives of those who designed Turner's interest crediting rate was not an abuse of discretion and should not be set aside.

**2. Turner Should Not Be Obligated To Collect Documents From The Law Firms With Which It Has Worked On The Plan.**

Plaintiffs' Motion also contends that Judge Hogan should have ordered Turner to produce documents from four of its law firms (three former law firms and one current law firm) that have worked with Turner on the Plan over the last 15-plus years.<sup>8</sup> Plaintiffs' attempt to force Turner to step into the shoes of four other entities (including those with whom Turner no longer has any relationship) is wasteful and an unduly burdensome exercise in harassment. Plaintiffs would have *Turner* probe these law firms' electronic systems going as far back as the 1990s and offer detailed information on these systems protocols and operating methods, identify the custodians whose hard drives should be seized for review, conduct full-blown email and non-email ESI searches, and inspect the firms' files for hard-copy documents responsive to each of the massive discovery requests plaintiffs previously levied on Turner. There is no justification for this extraordinary burden.<sup>9</sup> Magistrate Judge Hogan rightly concluded that "defendants have no obligation to continue to solicit the cooperation of these firms in complying with plaintiffs' discovery demands." (May 12 Order, p. 2).

Nor is there any reason to suggest that Judge Hogan did not understand what the attorney-client privilege means. (Pls.' Mot., p. 33). It is the rare case indeed where a party seeks discovery from not only the opposing party but its attorneys as well. The reason is obvious: it

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<sup>8</sup> These four law firms are Fried, Frank, Harris, Shriver & Jacobson LLP; Rogers & Wells LLP (now Clifford Chance LLP); Winstead PC; and Fulbright & Jaworski LLP.

<sup>9</sup> Plaintiffs maintain that Turner did "not even ask[] the Magistrate Judge to order them not to produce non-privileged responsive hard copy documents in their lawyers' possession." (Pls.' Mot., p. 5). This accusation is completely false. Turner explained why it should not be compelled to engage in this exercise in its opposition brief. (Doc. No. 93, pp. 21-22).

would be a wasteful exercise to force discovery from an entity whose sole purpose is to provide legal advice. Moreover, it is highly unlikely that material in these law firms' possession could have any relevance to the actual claims plaintiffs pursue.

Given these facts, Magistrate Judge Hogan's Order denying plaintiffs' Motion to Compel documents from Turner's legal counsel was not an abuse of discretion and should not be set aside.

**3. The Fact That Judge Hogan Did Not Specifically Address Each Of Plaintiffs' Individual Document Requests Does Not Require Setting Aside His Ruling, And Turner Has Fully Complied With Its Discovery Obligations.**

Truly elevating form over substance, plaintiffs seek to set aside Judge Hogan's Order simply because he did not explicitly parse through each of plaintiffs' discovery requests individually. (Pls.' Mot., pp. 34-35). Plaintiffs cite three areas that they believe require further explanation: (1) whether Turner "must perform searches using the terms Defendants told Plaintiffs they were willing to run against the email files of all 33 custodians the parties had identified jointly as those to be included in the search as being 'custodians of interest'"; (2) whether Turner must perform even further "systematic searches for non-email ESI"; and (3) whether plaintiffs could enforce its requests for production with respect to hard copy documents. (*Id.*, p. 35). The fact that Judge Hogan's Order did not enumerate each of these issues cannot leave this Court with a definite and firm conviction that a mistake has been committed, and is irrelevant in any event as Turner has complied with its obligations.

**a. Turner Has Conducted Searches For Email-Based ESI On 33 Custodians Requested By Plaintiffs Using The Agreed-Upon Search Terms For Each Custodian.**

Plaintiffs express concern that "defendants did not clearly say whether they had performed the searches they said ... they would perform." (Pls.' Mot., p. 21). But Turner has

confirmed with plaintiffs' counsel that each agreed-upon search term was applied to 33 custodians requested by plaintiffs. (Abrams Decl., ¶ 5). Turner has produced every responsive, non-privileged document obtained through the email ESI searches that related to the Plan;<sup>10</sup> these comprise 4.1 GB, or more than 40,708 pages of documents. (*Id.*). Turner also has produced to plaintiffs a privilege log detailing which documents were withheld and upon what grounds. (*Id.* at ¶ 6). Magistrate Judge Hogan correctly ruled that nothing more should be required.<sup>11</sup>

**b. Judge Hogan Properly Found That Turner Need Not Conduct Any Further Non-Email ESI Searches.**

With respect to non-email ESI, Judge Hogan was again fully briefed and heard arguments from plaintiffs' counsel that Turner did not adequately search for and produce ESI that are not part of emails. But as previously detailed (*see supra* § II, A, F), Turner has been more than

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<sup>10</sup> To be clear, Turner's search and production of the email ESI included all attachments to those emails, including but not limited to Microsoft Word documents, PDFs, and Microsoft Excel spreadsheets.

<sup>11</sup> Plaintiffs maintain that Turner should be compelled to produce the metadata for the email ESI it has produced because otherwise they allegedly "cannot know whether Defendants have searched all 33 custodians' email files" and "cannot confirm whether any email files were electronic in origin (rather than printouts of emails) or determine whose files they came from." (Pls.' Mot., p. 24). However, as discussed, Turner has confirmed that they have indeed searched these custodians' email files and that they were collected electronically from each custodian. In any event, parties are generally not required to produce the metadata of their data sets. *See Wyeth v. Impax Labs., Inc.*, No. 06-222, 2006 WL 3091331 at \*2 (D. Del. Oct. 26, 2006) (metadata is widely regarded as being of "limited evidentiary value, and reviewing it can waste litigation resources," and "[e]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata") (internal citations omitted); *Michigan First Credit Union v. Cumis Ins. Soc'y, Inc.*, No. 05-74423, 2007 WL 4098213, at \*3 (E.D. Mich. Nov. 16, 2007) (holding that "the production of [] metadata would be overly burdensome with no corresponding evidentiary value"); *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138, 2006 U.S. Dist. LEXIS 92028, at \*24 (E.D. Ky. Dec. 18, 2006) (in "most cases and for most documents, metadata does not provide relevant information"). The production of Tagged Image File Format ("TIFF") files, which lack the metadata of the file's native format, is an appropriate form for producing electronic documents, and plaintiffs have identified no special need for production of documents in native format. *See Wyeth*, 2006 WL 3091331, at \*2 (producing PDF or TIFF files are the default format for production; only "if the requesting party can demonstrate a particularized need for the native format of an electronic document" should a court require it). Turner has produced all ESI in TIFF format, except for Excel spreadsheets which were produced in native format given the substantial size of many of the spreadsheets (which, if in TIFF format, may print across hundreds of pages). Judge Hogan therefore rightfully declined to compel Turner to produce any additional metadata.

reasonable in addressing plaintiffs' endless ESI demands. Turner conducted a full search of the shared network drive where any material concerning the Plan is typically stored, and further searched non-shared, individual H-drives collected from the Benefits Department. These platforms were searched because they were deemed to be most likely to contain any relevant information concerning the Plan. Turner also explained at oral argument the burden and cost that would be incurred if plaintiffs' additional searches were required: Turner maintains a host of different electronic networks that are not all connected; Turner does not have the capacity to do the kind of word searches on these systems that plaintiffs demand; and hard copy documents produced would have included whatever documents still exist regarding the Plan's design from that period of time. (Doc. No. 98, Tr. pp. 30, 62). Plaintiffs' contention that some 107 separate file extensions must be searched (Doc. No. 93, Ex. U, ex. 3 attached thereto) is not only unreasonable but also, as Turner's counsel explained, simply not feasible in light of the expansive electronic searches that plaintiffs demand and the nature of Turner's electronics systems. (Doc. No. 98, Tr. p. 30).

Judge Hogan recognized that Turner should not be compelled to probe through the recesses of its internal electronic systems for even *more* ESI on top of the 47,000-plus hard copy documents and the 40,000-plus pages of ESI it has produced – because those additional searches are not likely to lead to the discovery of any evidence relevant to plaintiffs' claims. Judge Hogan was presented with the gory history of Turner's efforts to search through "shared network drives" and "non-shared drives," emails and backups. He found these efforts to be sufficient, and rightly rejected plaintiffs' demand for additional ESI.

**c. Judge Hogan Properly Found That Turner Has Complied With Its Obligations To Produce Hard Copy Documents.**

Finally, with respect to locating and producing *additional* hard-copy documents, Turner believes all hard-copy documents in its possession regarding plaintiffs' two narrow claims were produced to plaintiffs months ago. Therefore, Judge Hogan decided not to order more (beyond the categories he identified and Turner has already produced) based on his intimate familiarity with this dispute and his judgment as to the proportionality of the discovery plaintiffs seek. There was no abuse of discretion.

**IV. CONCLUSION**

For the foregoing reasons, Turner respectfully requests that this Court deny Plaintiffs' Motion to Set Aside and/or Modify the Magistrate Judge's May 12, 2010 Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel Compliance with Their Revised First Set of Document Requests, and award Turner the attorneys' fees incurred in responding to this Motion.

Respectfully submitted,

Dated: July 28, 2010

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**CERTIFICATE OF SERVICE**

I, Gregory P. Abrams, an attorney, hereby certify that on July 28, 2010 I electronically filed DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO SET ASIDE AND/OR MODIFY THE MAGISTRATE JUDGE'S MAY 12, 2010 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH THEIR REVISED FIRST SET OF DOCUMENT REQUESTS with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following:

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