

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>CHARLES E. MOODY</b>	:	<b>Case No. 1:07 CV 692</b>
	:	
<b>TIMOTHY L. TALLENTIRE and</b>	:	<b>Judge Beckwith</b>
	:	
<b>DAVID C. CREPS,</b>	:	<b>Magistrate Judge Hogan</b>
	:	
<b>On behalf of themselves and on</b>	:	
<b>behalf of all others similarly situated,</b>	:	
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>THE TURNER CORP., et al.,</b>	:	
	:	
<b>Defendants.</b>	:	
	:	

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**MOTION TO ENFORCE THIS COURT'S SEPTEMBER 30, 2009 ORDER,  
TO COMPEL COMPLIANCE WITH PLAINTIFFS' REVISED RFP'S,  
AND FOR RELATED RELIEF, AND MEMORANDUM IN SUPPORT**

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## INTRODUCTION

Pursuant to Fed. R. Civ. P. 37, Plaintiffs, through counsel, respectfully move this Court for an order compelling Defendants – The Turner Corporation (“Turner”) and The Employees’ Cash Balance Retirement Plan of the Turner Corporation (the “Turner Plan,” “Turner Cash Balance Plan” or “the Plan”) – to immediately come into compliance with this Court’s Order of September 30, 2009 (Doc. 75) that granted in part Plaintiffs’ January 30, 2009 motion to compel Defendants to produce electronically stored information (“ESI”) and other documents. The Court should also compel compliance with all outstanding aspects of Plaintiffs’ September 12, 2008 First Set of Discovery Requests, consisting of requests for production of documents (“RFPs”) Nos. 1-20, as Plaintiffs have revised and narrowed them as detailed below, following the issuance of the Court’s Order.<sup>1</sup>

Plaintiffs’ original motion to compel (Doc. 43) was necessitated by, among other things, Defendants’ stubborn refusal to acknowledge their obligation to search for and produce relevant, responsive ESI – a position this Court rightly denounced as “not supportable.” 9/30/09 Order at 3. Incredibly, in the four months since the Court ordered Defendants to search for and produce their relevant, responsive ESI, *see* 9/30/09 Order at 3-4, **Defendants have yet to produce any.** This, despite Defendants’ express acknowledgement of their obligation to do so as to a considerable amount of data Defendants collected **one year ago** (only after Plaintiffs filed their original motion to compel) as to more than two dozen Turner and/or Plan “custodians of interest” that Defendants themselves identified as having potentially discoverable materials in their files, and despite Defendants’ own repeated assurances since the Court issued its Order that their first

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<sup>1</sup> As set forth herein, undersigned counsel certifies that he has repeatedly and in good faith conferred with Defendants in an effort to obtain the discovery sought herein without court action. *See* Fed. R. Civ. P. 37(a)(1); Local Rule 37.2. Those efforts have been unsuccessful, as the instant motion demonstrates.

production was just around the corner and that Plaintiffs would be in possession of *all* of Defendants' relevant, responsive ESI by now. *See* Statement of Facts ("SOF") below ¶¶ 11, 21.<sup>2</sup>

But this is not just another case of foot-dragging and delay for the sake of depriving Plaintiffs of the time Defendants know Plaintiffs will need to review Defendants' documents and prepare for and take depositions (which Defendants' withholdings have prevented Plaintiffs from commencing). This is a case of defiance of the Court's Order and the Federal Rules. It is now confirmed, through Defendants' responses to the interrogatories that during the parties' December 1, 2009 status conference with the Court that the Court authorized Plaintiffs to serve, that Defendants, despite being ordered to turn over *all* of their relevant ESI four months ago, are refusing to even *collect* and electronically search their *non-email* ESI for responsive, relevant materials. *See* SOF ¶¶ 34-45. In other words, Defendants are studiously – and contumaciously – ignoring the vast amounts of relevant letters, draft letters, memoranda, meeting minutes, meeting agendas, spreadsheets, presentations, and databases residing on their electronic systems. *Id.* Not that in this day and age, and under the 2006 amendments to the Federal Rules, this should even be necessary to mention, but Plaintiffs have already demonstrated how vitally important non-email ESI as well as email is to the discovery process in this case, and how much of it likely exists. *See* Pl. Mtn. to Compel Memorandum (Doc. 43-2) at 14; Pl. Mtn. to Compel Reply Br. (Doc. 50) at 7-8.<sup>3</sup>

Defendants' failure to even **collect** their non-email ESI data, in the two-and-a-half years since this case was filed, also obviously raises spoliation concerns – concerns Plaintiffs have raised before, *see* Doc. 50 at 10-11 & n.11, and which they intend to pursue this issue once they

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<sup>2</sup> "SOF" paragraph numbers begin under Section II.B of the Statement of Facts, beginning on page 12.

<sup>3</sup> Defendants' evident "justification" for exempting themselves from their non-email ESI responsibilities pursuant to the Court's Order and under the Rules is frivolous, as detailed below. *See* SOF ¶¶ 34-45.

obtain the ESI to which they are entitled, that is, to the extent such material has not yet been altered or destroyed as a result of Defendants' grossly negligent failures to preserve. Indeed, Defendants are guilty of not just a continuing failure to *collect* perishable ESI, but of inexcusably not even bothering **for 14 or 15 months after suit was filed** to send out litigation-hold or preservation notices to Turner personnel and third-party Plan service providers. *See* SOF ¶ 7 n.9.

In contrast to Defendants' clear affronts to the Court's directives and their obligations under the Rules, Plaintiffs have gone the extra mile in narrowing both their ESI and their hard copy requests, as the Court directed. *See* 9/30/09 Order at 4-5. Indeed, it is because of Plaintiffs' consistently reasonable and cooperative conduct that the parties actually reached an agreement more than two months ago regarding how Defendants would search for ESI responsive to RFP Nos. 1-20, resolving concerns that the keyword search terms contained RFP Nos. 1 & 2 were too broad or too numerous (even with the filters ensuring that documents containing those terms pertained to the Turner Cash Balance Plan). *See* SOF ¶¶ 8, 11, 18. The parties also now agree that there are 36 custodians whose ESI should be searched, consisting of the 26 custodians that Defendants determined *last year* had potentially discoverable ESI documents; 4 additional custodians to whom Defendants (belatedly) sent preservation notices (their existence is something else Defendants failed to disclose until compelled to do so via Plaintiffs' December interrogatories), *see* SOF ¶¶ 2, 7 & n.9, 35; and 7 custodians Defendants left off their list and since identified by Plaintiffs and subsequently agreed to by the Defendants in early November. *See* SOF ¶ 7. **Yet to this day Defendants have produced no ESI whatsoever**, nor results of the searches Defendants agreed to execute to come into compliance with the Court's Order. *See* SOF ¶¶ 8, 15, 17, 23; Declaration of David N. Sharpe ("Sharpe Decl.") ¶ 19.

Even as regards traditional, “hard-copy” documents, Defendants are stonewalling and withholding relevant documents despite the fact that the record shows that the parties are largely in agreement as to Defendants’ obligations under the revised RFPs after Plaintiffs substantially trimmed the hard copy document requests in RFP Nos. 3-20. *See* SOF ¶¶ 9, 10, 24. Even though Plaintiffs have dropped 4 RFPs entirely and reduced the scope of 9 others, and on December 1 sent a second round of revised requests to bridge the remaining divide, **Defendants have released none of the documents they are withholding responsive to Plaintiffs’ admittedly unobjectionable requests** and will not even respond to Plaintiffs’ December 1 proposed compromise which eliminates any possible basis for further objections or excuses for not turning over the documents to which Plaintiffs are entitled. *See* SOF ¶ 24.

The Court should not forget that these are the same Defendants, Plaintiffs’ unrebutted August 2009 supplement to their motion to compel (Doc. 69) shows, which improperly withheld directly on-point correspondence between Turner and the IRS regarding Defendants’ failures to correctly credit and project interest credits – *i.e., the exact claims raised here* – a fact of which to this day Plaintiffs would not have been aware had their counsel not happened to receive this correspondence from the IRS in response to a Freedom of Information Act request, *see* Doc. 69-2 at 1. Moreover, Defendants have *still* failed to produce a complete set of that correspondence to Plaintiffs, even after their misconduct was exposed in Plaintiffs’ August filing. *See* Doc. 69; SOF ¶ 32.

The Court knows from the conferences held and papers filed since it entered its September 30 Order the lengths to which Plaintiffs have gone to avoid having to file the instant motion. Indeed, on December 1, the Court itself suggested that Plaintiffs move for sanctions based on what it heard from the parties during the last status call. Plaintiffs, however, were

hopeful that Defendants, hearing this, might come into compliance voluntarily and so merely sought the Court's leave to issue the interrogatories and related discovery requests which now confirm the extent to which Defendants are thumbing their nose at the Court, the Rules and Plaintiffs. At this point, Defendants have left Plaintiffs with no choice. Their unconscionable delays have already eaten into the time Plaintiffs need to review documents and prepare and take fact witness depositions. The deadlines for Plaintiffs to file their class motion and for the completion of fact discovery are already closing in.

Accordingly, the Court should:

1. Order Defendants to immediately produce all relevant and responsive ESI (email and non-email) in Defendants' possession, custody or control using the keyword search terms already agreed to by the parties (listed in Ex. 1), in accordance with the best-practices production specifications (contained in Exs. 2 and 3), and located in all relevant and appropriate ESI datasets (identified in Ex. 4<sup>4</sup>). Specifically with respect to non-email ESI located in business unit folders on Defendants' network shared drives, Plaintiffs must be allowed to see a "directory tree" of these folders to determine which data populations should be searched.
2. Order Defendants to immediately produce all hard-copy documents in Defendants' possession, custody or control responsive to Plaintiffs' narrowed RFP Nos. 3-20.
3. Produce, within one week of the production of documents, a Rule 26(b)(5)-compliant privilege log covering the Bates range of the documents providing sufficient detail, including each document's date, number of pages, title, attachments, names of the document's author(s), recipient(s), cc'd and bcc'd individual(s), and a brief description of the document, so as to allow Plaintiffs to make an independent assessment of the stated basis for the claim of privilege as to each document.<sup>5</sup>
4. Provide to Plaintiffs and file with the Court, within one week of the production of the privilege log, a certification from a person with knowledge of the steps taken to comply with this Order that all elements of this Order have been complied

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<sup>4</sup> All exhibits ("Ex. \_\_\_") referenced herein are attachments to the Sharpe Decl.

<sup>5</sup> The Court will recall that the only privilege log Defendants have produced was four months late (provided on March 13, 2009 in connection with productions in November and December 2008), and that it was woefully inadequate under the standards of Fed. R. Civ. R. 26(b)(5). *See* Doc. 50 at 16-18.

with.

5. Impose such further order as the Court deems appropriate in accordance with Rule 37 and its inherent authority over the discovery process.

### **GOVERNING STANDARDS**

Fed. R. Civ. P. 26(b) provides for broad discovery, allowing discovery of “any matter, not privileged, that is relevant to the claim or defense of any party.” Rule 26(b) elaborates on the meaning of “relevant,” providing that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” “Relevance” in this context “has been construed broadly to encompass any matter that bears on, or that could conceivably lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Rule 34 requires a party to produce relevant documents in response to discovery requests to the extent the materials are within the party’s “possession, custody or control.” Fed. R. Civ. P. 34(a). The requirement to produce documents is construed broadly, consistent with civil procedure principles of disclosure of facts as a means of resolving disputes. *See Société Internationale v. Rogers*, 357 U.S. 197, 206 (1958); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 657 (6th Cir. 1976) (“The Federal Rules of Civil Procedure ... authorize ‘extremely broad’ ... discovery”). One of the “primary objectives” of these broad discovery requirements is to avoid “surprise” in civil proceedings. *Erskine v. Consol. Rail Corp.*, 814 F.2d 266, 272 (6th Cir. 1987).

Under Rule 37, courts are invested with wide discretion in compelling discovery, imposing sanctions for refusals to cooperate in discovery, or failing to comply with a court order to provide or permit discovery. *See* Fed. R. Civ. P. 37(a)-(d). Recalcitrant parties may be subject to monetary sanctions, be precluded from introducing certain evidence or, in egregious

circumstances, have judgment entered against them. *See, e.g., Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990). Even where Rule 37 does not apply by its terms, courts possess broad and inherent powers which allow them to prevent discovery abuses and forestall unnecessary delays. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-66 (1980); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 510-14 (6th Cir. 2002).

## STATEMENT OF FACTS

Below, Plaintiffs provide a brief review of the nature and procedural posture of this case and then detail what has occurred and not occurred between the issuance of the Court's Order on September 30, 2010 and today that necessitated the filing of this motion.

### **I. Nature of the Case – Proceedings to Date.**

As the Court will recall, this putative ERISA “cash balance” pension plan class action presents two basic claims: (1) a “Summary Plan Description” (“SPD”) or “correct interest crediting rate” claim; and (2) a “whipsaw” or “correct projection rate” claim.

#### **A. The “SPD” (or “Correct Interest Crediting Rate”) Claim.**

In a nutshell, the SPD claim is that Defendants have been crediting participants' notional accounts with interest at the wrong rate. More specifically, Plaintiffs allege that instead of crediting participants with the only rates ever disclosed to them (via the SPD) – *i.e.*, either the rate earned by the Plan on its investments but never less than 4.5% per annum *or* the rate generated by a hypothetical 65% S&P 500 Index, 35% Lehman Brothers Intermediate Government/Corporate Bond Index investment but never less than 4.5% per annum (depending on which SPD was then in effect) – Defendants have been crediting participants' accounts according to a less valuable crediting rate formula. *See* Second Amended Complaint (“Compl.”) (Doc. 44) ¶¶ 29-30. This less valuable crediting formula is based on a highly complicated

algorithm (the “algorithm rate”), some of which is described in the formal Plan document and the remainder of which is (evidently) described in the Plan actuary’s files or workpapers. *Id.* ¶ 30. The algorithm rate has never been disclosed to participants and is flatly inconsistent with the terms of the operative SPDs. *Id.* It is well-settled that, where the SPD and the plan document conflict and the SPD is more favorable to participants, the SPD governs. *See, e.g., Haus v. Bechtel Jacobs Co., LLC*, 491 F.3d 557, 564-65 (6th Cir. 2007).

**B. The “Whipsaw” (or “Correct Projection Rate”) Claim.**

The SPD claim affects both current and former participants. By contrast, the “whipsaw” or projection rate claim only concerns participants who have previously received lump sums. The whipsaw claim asserts that, because participants had accrued the right to receive future interest credits (whether the SPD rate or the algorithm rate) through normal retirement age (age 65 under the Plan), when they 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. Compl. ¶¶ 22-27. Plaintiffs claim that Defendants severely understated the value of their future interest credits by, in effect, equating their value with that of the 30-year Treasury bill rate – the relatively low rate that Congress set as the maximum rate that employers could use to discount employees’ age 65 annuity benefits to a present lump sum value. *Id.* ¶ 28. Indeed, Plaintiffs contend that the evidence will show that the Plan’s interest crediting rate, with its 4.5% annual “floor” and significant equity upside (whichever rate is used: SPD or algorithm rate) is and was designed to be far more valuable than the 30-year Treasury rate. *Id.* ¶¶ 22-26. It is settled law that an impermissible forfeiture occurs if a plan uses a projection rate that understates the value of future interest credits, as the 30-year

Treasury rate does here. *E.g., West v. AK Steel Corp. Ret. Accum. Pension Plan*, 484 F.3d 395, 409 (6th Cir. 2007).<sup>6</sup>

Defendants recently succeeded in dismissing one of the claims of one of the named Plaintiffs on statute of limitations grounds (the whipsaw claim of Mr. Tallentire).<sup>7</sup> However, Plaintiffs' SPD and whipsaw claims are otherwise fully viable and, as noted above, Judge Beckwith has already found that Defendants violated ERISA with respect to the whipsaw claim, *see* Doc. 25 (Order of August 6, 2008) at 7-10. This still leaves open the complex, fact-intensive question of damages, *i.e.*, the proper rate at which Defendants should have projected the value of future interest credits (without understating that value) for purposes of correctly computing pre-age 65 lump sums. Similarly, as to the SPD claim, Judge Beckwith turned back Defendants' efforts to have aspects of that claim dismissed. *See* Doc. 54 (Order of May 12, 2009) at 3.

Thus, discovery-wise, matters are essentially unchanged from Fall 2008 when Defendants explicitly agreed that the proper subjects of discovery include liability, damages, class certification, and statute of limitations. *See* Joint Rule 26(f) Report, Doc. 35 (parties jointly agreeing that the proper subjects of discovery include "(a) the correct projection rate; (b) the applicable Earnings Credit; (c) class cert.; (d) the applicable limitations period; [and] (e) whether period tolled/defense estopped").

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<sup>6</sup> There is another type of forfeiture claim of which Defendants are aware from correspondence they recently received from the IRS (which Defendants improperly withheld and indeed continue to improperly withhold from Plaintiffs, who received the documents directly from the IRS, *see* Doc. 69 at 3-5, and which appear viable on the facts as Plaintiffs understand them. However, this separate forfeiture claim is not a basis upon which Plaintiffs seek disclosure of the withheld material sought via the instant motion.

<sup>7</sup> That dismissal, via an order granting Defendants partial summary judgment (Doc. 84), is the subject of Mr. Tallentire's pending motion for reconsideration or alternatively for related relief (Doc. 86).

## **II. Defendants' Refusals/Failure to Produce ESI and Hard Copy Documents to which Plaintiffs are Entitled.**

### **A. Summary.**

Notwithstanding Defendants' agreement last Fall as to the nature and number of topics that were proper subjects of discovery, Defendants took the untenable position in response to Plaintiffs' basic document requests (the September 12, 2008 First Set of Discovery Requests, Doc. 43-5), that they had no obligation to conduct any searches of even their readily-accessible ESI or to produce documents (whether in hard-copy or ESI form) in the physical possession of third parties but within the custody or control of one or both Defendants (even when Defendants' initial disclosures expressly included such documents among those Defendants stated that they intended to possibly use in support of their defenses at trial). *See* Doc. 43-2 at 26.<sup>8</sup> Having already exhausted efforts at engaging Defendants in any real meet-and-confer (Defendants refused to even discuss the matter once by telephone, *see* Doc. 50 at 9), Plaintiffs were left no option but to seek leave from this Court in December 2008 to move to compel. *See* Doc. 43. The Court granted Plaintiffs leave and following briefing and argument earlier in 2009, on September 30, 2009, granted Plaintiffs' motion to compel in substantial part. *See* Doc. 75 at 3-4. But as outlined above and detailed below, regrettably little has changed since then.

The facts set forth further below show, more specifically, that the state of affairs currently is as follows:

- **Email ESI.** Defendants collected, in February 2009 (only after Plaintiffs filed their motion to compel), approximately 111 GB of email from 26 custodians of

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<sup>8</sup> Defendants also responded to Plaintiffs' requests with meaningless boilerplate that allowed them to avoid making any commitment to produce anything other than that which it pleased them to produce. *See* Doc. 43-8 (10/14/08 Def. Resp. & Obj. to Pl. 1<sup>st</sup> Set of Disc. Req.). That alone justifies an order of immediate and full compliance. *See* Doc 43-2 (Pl. Mtn. to Compel Memorandum) at 27-28; Doc. 50 (Pl. Mtn. to Compel Reply Br.) at 16-19.

interest that Defendants themselves determined had potentially discoverable documents. In the wake of the Court's September 30 Order, on October 20, Plaintiffs provided Defendants with substantially narrowed RFP Nos. 1 & 2 keyword search terms. By October 27, Defendants had explicitly agreed that Plaintiffs' search terms were reasonable and explicitly agreed to execute the required searches and to produce all relevant, responsive documents yielded by them. Yet, in defiance of the Court's Order, four months later, Plaintiffs have still not received a single email document from the files of any of the defense-identified custodians or from the files of any of 7 other custodians identified by Plaintiffs from whom Defendants agreed Plaintiffs have the right to seek relevant, responsive ESI.

- **Non-email ESI.** As Plaintiffs demonstrated in their motion to compel, reply and supplemental filing in support of their motion to compel, there is every reason to believe that a great volume of ESI still has not been produced. *See* Doc. 43-2 at 26, & 31-32; Doc. 50 at 15-16; and Doc. 69 at 2-6. Defendants have now confirmed this in their responses to Plaintiffs' 12/01/09 Second Set of Discovery Requests. Defendants' responses show that, when they conducted searches in February 2009, they completely ignored the non-email ESI of at least 12 active employees and all business-unit files outside the Benefits Department. Even though the Court explicitly overruled their blanket ESI objections as "insupportable" and held their search for responsive materials inadequate, Defendants stubbornly refuse to go back and perform the collection that they should have performed correctly the first time. Defendants' position that they have no obligation to produce any non-email ESI beyond the smattering of files that one Benefits Department employee looked at according to undisclosed/subjective criteria (as opposed to the terms of Plaintiffs' RFPs) was frivolous in February 2009 and is today contempt of court.
- **Hard copy.** The parties were very close to agreeing on a set of revised, narrowed RFP Nos. 3-20 that would have defined once and for all the scope of Defendants'

hard copy obligations, yet Defendants have never responded to Plaintiffs' December 1 letter offering Plaintiffs' second set of revised RFP Nos. 3-20 and have no legitimate grounds to refuse Plaintiffs' eminently reasonable proposed compromise of the few outstanding matters dividing the parties. It is that compromise that Plaintiffs request the Court now enforce.

- **Third party documents.** Here too there was substantial apparent agreement between the parties on how to settle their differences, with Plaintiffs agreeing to subpoena documents from Turner and Plan service providers Plaintiffs believe are within Defendants' possession, custody or control, in exchange for Defendants' agreement to assist Plaintiffs' efforts and to secure all relevant, responsive, nonprivileged documents within the physical possession of Defendants' law firm service providers. Again, however, Plaintiffs have Defendants' assurances but not a single document from any of the subpoenaed sources or Defendants' outside counsel.

**B. Events between the Court's Order and Defendants' Response to Plaintiffs' Second Set of Discovery Requests.**

Further details of how matters have reached this point are outlined below.

1. In an effort to obtain that to which Plaintiffs are plainly entitled under the Court's Order, between the Court's 9/30/09 Order and December 23, 2009 (the date Plaintiffs received Defendants' responses to Plaintiffs' Second Set of Discovery Requests, focusing on what discoverable material Defendants have and what they have and have not done to date to collect, search for and produce it), Plaintiffs wrote at least 26 emails and 9 letters to defense counsel; engaged in 3 conference calls; and, in letters or attachments to letters, offered a framework to govern the entire e-discovery process; offered two sets of revised RFP Nos. 3-20; presented a framework for agreeing on the scope of RFP Nos. 1 & 2 in relation to RFP Nos. 3-20; and set forth an arrangement for obtaining documents from third parties. *See Sharpe Decl.* ¶ 4. These

efforts have resulted in one concrete achievement: Defendants agreed to run Plaintiffs' search terms against the email files of their own 26 custodians plus the additional 7 custodians identified by Plaintiffs. **Nothing more.** Empty promises – *no documents*.

2. In October 2009, Plaintiffs knew that Defendants had collected "ESI" from 26 custodians some time prior to March 16, 2009. *See* Doc. 48 (3/16/09 Def. Opp. to MTC) at 4. "ESI" is how Defendants described the files – a description which, to anyone knowledgeable about these matters (and as under the Federal Rules), would have meant **all kinds** of electronically stored information, not just *email*. It was only much later, under persistent questioning, that Defendants began to use the much more limited term, "*email* files." *See* SOF ¶ 8, below.

3. On October 14, Plaintiffs wrote to Defendants and proposed an "iterative search process" to decide on a final set of search terms. *See* Ex. 5 (10/14/09 Pl. email). They also asked Defendants to identify their 26 custodians and suggested that the parties discuss how Plaintiffs might obtain documents in the physical possession of third parties. *Id.*

4. In an October 20 email, Plaintiffs provided Defendants with 17 search terms for them to run against the emails they had collected from their 26 custodians (then still unidentified to Plaintiffs). *See* Doc. 77-7 (10/20/09 Pl. email). On their own initiative, Plaintiffs added filters to many of these search terms to minimize the number of irrelevant documents. *Id.*

5. The next day, Plaintiffs wrote to Defendants to express concern that Defendants' collection of ESI in late 2008 and early 2009 had apparently not included *non-email* ESI, at least not in any systematic way. Plaintiffs also asked again for information concerning the 26 custodians. *See* Doc. 77-9 (10/21/09 Pl. Ltr.).

6. In a letter dated October 21, Plaintiffs confirmed that their 17 search terms and

proposed an overarching framework that would help the parties to work cooperatively and transparently through the entire e-discovery process with as few missteps and misunderstandings as possible. *See* Doc. 77-9 (10/21/09 Pl. Ltr.) and Doc. 77-1 (the attached “Proposed ESI Discovery Agreement,” hereinafter, “ESI Proposal”). The proposal envisioned, among other things, Defendants providing information on their IT systems and ESI data sources – the kind of information contemplated by current best practices – that would allow Plaintiffs to make informed decisions about what classes of ESI should be (or should have been) preserved, collected and searched. *Id.* They also revisited the question of third party documents, urging Defendants to discuss how Plaintiffs might obtain documents in the custody or control of Defendants but in the physical possession of their outside counsel. *Id.*; *see also* Doc. 77-9 (10/21/09 Pl. Ltr.) at 3.

7. In a letter dated October 23, Defendants did not respond to Plaintiffs’ ESI Proposal but they did provide, after Plaintiffs’ had repeatedly asked for this information, the names, titles and hire dates for their 26 custodians. *See* Doc. 77-10 (10/23/2009 Def. Ltr.), Ex. A. Plaintiffs did not know at this time, and Defendants did not tell them, that in addition to the 26 custodians listed in Defendants’ October 23 letter, Defendants had identified 7 **other** custodians likely to possess relevant ESI and had in fact sent these individuals “Preservation Notices” in October or November 2008.<sup>9</sup> *See* Ex. 6 (12/23/09 Def. Resp. & Obj.) at 8-9.

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<sup>9</sup> Defendants claim to have sent “Preservation Notices” in October and November 2008 to a total of 33 employees and five third party service providers, *see* Ex. 6 (Def. Resp. & Obj.) at 8-9, well over a year after this suit was filed and, probably not coincidentally, only after Plaintiffs began pressing Defendants on the issue of their obligations to produce ESI. *See* Doc. 43-7 (10/16/08 Pl. Ltr.), Doc. 43-11 (11/5/08 Pl. Ltr.), Doc. 43-12 (12/12/08 Pl. Ltr.), and Doc. 43-13 (12/17/08 Pl. Ltr.). When these notices were sent, 16 went to people who had already left the company. *See* Doc. 77-10, Exhibit A and compare to Ex. 6 (Def. Resp. & Obj.) at 8-9. Defendants have not produced any preservation notices sent to employees (whether current or former), baselessly claiming attorney-client and work-product protection. *Id.* at 10. Defendants have not explained the point of belatedly sending preservation notice to a *former* employee.

Defendants did not even **tell** Plaintiffs about these additional 7 custodians until Plaintiffs served them with interrogatories last month. *Id.*; compare to Doc. 77-10 (10/23/2009 Def. Ltr., Ex. A).

8. In their October 23 letter, Defendants also reported that they had run Plaintiffs' 17 ESI terms against the ESI from these 26 custodians and offered a very general set of results.<sup>10</sup> *Id.* Defendants asked Plaintiffs to consider using a filter on the term "cash balance" to reduce the number of hits. Defendants also stated, in response to Plaintiffs' concerns about non-email files not having been properly collected, that they believed an "appropriate" search of non-email ESI was performed, but did not say when these searches occurred, who performed them or what criteria were used to find relevant ESI. *Id.*

9. Plaintiffs responded the next day (October 24) with two letters – one dealing with ESI issues, the other with hard copy documents and how a narrowed set of RFP Nos. 3-20 could provide Plaintiffs with the documents they sought while minimizing the burden on Defendants. *See* Doc. 77-11 (10/24/09 Pl. Ltr re ESI). In revising their RFPs, Plaintiffs dropped 4 RFPs entirely and reduced the scope of 9 others. *Id.* In their ESI-related letter, Plaintiffs noted their concerns about Defendants' possible failure to prevent the loss or corruption of potentially discoverable ESI, their possible failure to collect potentially discoverable non-email ESI, and their proposed course of action with respect to searching the 26 custodians' email files. *Id.* For early expressions of Plaintiffs' concerns about possible spoliation of evidence, *see also* Doc. 50 (4/7/09 Pl. Mtn. to Compel Reply Br.) at 21. In an attachment to this letter, Plaintiffs identified 8

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*Id.* The notices Defendants sent to Buck and Mercer, their actuaries and actuarial consultants, are lackadaisical and hopelessly vague. *See* Doc. 50 at 21.

<sup>10</sup> Defendants reported only (1) the total number of unique documents captured by the search of 17 terms and (2) the number of documents that contained the term "cash balance" but none of Plaintiffs' other terms. *See* Doc. 77-10 at 2.

additional custodians whose email and non-email ESI should have been collected at the same time as the 26 custodians whose data was collected by Defendants. *Id.* at Ex. A.<sup>11</sup>

10. In the October 24 letter dealing with hard copy documents and the scope of RFP Nos. 3-20, Plaintiffs proposed specific language that would narrow several of their RFPs and invited Defendants' written response. *See* Doc. 77-12 (10/24/09 Pl. Ltr re RFP Nos. 3-20).

11. On October 27, Defendants told Plaintiffs in an email that they would begin reviewing the documents that were hits in their first searches other than the "cash balance" hits. *See* Ex. 7 (10/27/09 Def. email). They told Plaintiffs in a telephone call on October 28 that they would produce ESI documents starting in 2 weeks and the rest 4 to 6 weeks thereafter. *See* 1/27/10 Declaration of Eli Gottesdiener ("1/27/10 Gottesdiener Decl.") ¶ 2.

12. On the parties' November 3 call, Plaintiffs asked Defendants for their written responses to Plaintiffs' 10/24 proposed revised RFP Nos. 3-20. *See* Sharpe Decl. ¶ 5. Defendants said that they were not yet prepared to discuss Plaintiffs' proposals. *Id.* Plaintiffs also asked if Defendants had any information on their 7 additional custodians (listed in Plaintiffs' October 24 letter). *Id.* Defendants reported that there were no longer any mailboxes for 4 of the 7 because these 4 were all former employees. *Id.* Defendants said that they had also searched for PST files for these custodians and had found none. *Id.* Defendants also said that they were still gathering information in response to Plaintiffs' ESI Proposal, but could not at that time either answer Plaintiffs' questions or tell Plaintiffs whether they would be willing or able to answer them. *Id.*

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<sup>11</sup> One of these 8 was already included in Defendants' 26 custodians under another name – resulting in 7 additional custodians identified by Plaintiffs. Some of these additional 7 custodians had received Preservation Notices in late 2008, but Plaintiffs did not know this at the time. Plaintiffs only learned about the Preservation Notices and who received them on December 23, 2009. *See* Ex. 6 (Def. Resp. & Obj.) at 8-9.

13. On November 5, Plaintiffs wrote to Defendants to repeat the questions first posed in their October 21 letter and in the attached ESI Proposal about how ESI had been collected in 2008 and 2009, whether *non-email* ESI had been collected, and, if so, how, from whom, by whom, and using what criteria. *See also* Ex. 8 (11/5/09 Pl. Ltr.).

14. During a November 6 conference call, Defendants claimed to have no further information for Plaintiffs on a range of questions. *See* Sharpe Decl. ¶ 6. Defendants claimed that they did not have, or they were not yet willing to share with Plaintiffs, the “hit report” for their first searches, showing the number of documents that contained each term. *Id.* Defendants said they were still working on written responses to Plaintiffs’ proposed revised RFP Nos. 3-20. *Id.* Defendants also said that they were still working on a response to Plaintiffs’ ESI Proposal. *Id.*

15. As noted earlier, *see* SOF ¶ 11, above, Defendants had said on October 27 and 28 that they were going to begin reviewing documents and had promised Plaintiffs the first batch of documents two weeks later; and given that this 2-week period was coming to an end, Plaintiffs repeated on the November 6 conference call that they expected Defendants to be reviewing the documents that were hits against Plaintiffs’ 16 terms other than “cash balance.” *See* Sharpe Decl. ¶ 5. So that Defendants could begin reviewing the remaining documents, Plaintiffs agreed on the call to use filters on the term “cash balance.” *Id.*

16. Returning to the issue of third party documents, which Plaintiffs had raised as early as October 14, *see* SOF ¶ 3, above, and which they raised again in their letter of October 21, *see* SOF ¶ 6, above, Plaintiffs also asked during the November 6 conference call for Defendants’ thoughts as to how Plaintiffs might obtain documents in the physical possession of third parties. *See* Sharpe Decl. ¶ 5. Plaintiffs suggested on the call that, because relevant

documents that are in the physical possession of Defendants' law firms are, for purposes of Defendants' discovery obligations, in Defendants' custody or control, Defendants should collect law firm documents themselves. *Id.* In exchange for Defendants' agreement to do so, Plaintiffs would agree to obtain documents in the physical possession of non-law firm third parties by means of subpoena (even though it remains Plaintiffs' position that these documents are still in the legal custody and control of Defendants and that Plaintiffs are therefore under no *obligation* to issue subpoenas for these documents), as long as Defendants also agreed to help obtain these documents. *Id.* After stating their concerns about the special status of law firm documents, Defendants agreed to this approach and suggested that Plaintiffs put in writing the sort of arrangement that they have in mind. *Id.*

17. Defendants provided written responses to Plaintiffs' ESI Proposal in a letter dated November 6. While answering some questions, Defendants left most unanswered, promising only to consider Plaintiffs' questions. *See* Ex. 9 (11/6/09 Def. Ltr.) Even when Defendants provided answers, the information they provided was scant. Defendants said, for example, that Ms. Sibley, Turner's Director of Compensation & Benefits, and her department searched for and collected "any non email electronic files any non email electronic files, such as Microsoft Word documents and Microsoft Excel files, from the T-drive and personal H-drives within the Benefits Department." *Id.* at 3. However, Defendants did not say when these people performed these searches; where on the T: drive they searched; or which personal H: drives they searched. *Id.* In the same letter, Defendants confirmed that they would include in their ESI searches the email files of the Plaintiffs additional 7 custodians. *Id.* at 5.

18. On November 9, Plaintiffs again wrote to Defendants pointing out the many ways they had failed to provide meaningful information on a range of ESI-related topics and asking

that they promptly answer Plaintiffs' questions. *See* Ex. 10 (11/9/09 Pl. Ltr.) In the same letter, Plaintiffs provided proposed filter terms to be used against the hits for the term "cash balance" and asked again for a copy of the hit report underlying Defendants' October 23, 2009 report of search results. *Id.*

19. At this point, then, Defendants had received from Plaintiffs search terms that they agreed to run against all 111 GB of email files collected from their 26 custodians. Defendants had committed to run the same terms against Plaintiffs' additional 7 custodians. **There was therefore now no reason Defendants could not have immediately proceed with the review of all hits found in those 111 GB of files, and produced the results to Plaintiffs.** Even if the "cash balance" hits had been set aside pending receipt of Plaintiffs' filter terms (promptly forwarded, *see* SOF ¶ 18), Defendants had told Plaintiffs on October 27 that they were going to begin reviewing the bulk of the hits as of that date. *See* Sharpe Decl. ¶ 6.

20. On a November 11 conference call with Defendants, Plaintiffs again made little headway. Defendants said that they were still working on written responses to Plaintiffs' proposed revised RFP Nos. 3-20. *See* Sharpe Decl. ¶ 7. Plaintiffs again asked that Defendants put in writing their answers to – or the basis for refusing to provide answers to – all of Plaintiffs' ESI-related questions. *Id.* Plaintiffs again pressed Defendants to provide information, preferably in writing, about how non-email ESI was collected and searched in late 2008 and early 2009. *Id.* Plaintiffs expressed particular concern that ESI appeared to have been located according to criteria still not disclosed and then printed, with the resulting loss of crucial metadata. *Id.* Plaintiffs asked whether the metadata for these files might be retrieved and how Defendants would accomplish this. *Id.* Defendants replied that the person who performed the "manual" search for documents might repeat the process in order to gather the metadata, but still would not

commit to putting in writing a description of the search process that led to the selection of those ESI files that were produced. *Id.*

21. On the conference calls of November 3, 6, and 11, Defendants repeatedly told Plaintiffs that they would be receiving ESI within two weeks. *See Sharpe Decl.* ¶ 8; *Gottesdiener Decl.* ¶ 3. On November 18, Plaintiffs twice called Defendants to get an update on Defendants' progress with searches and review of the email ESI dealt with in Defendants' October 23 letter. *See Sharpe Decl.* ¶ 9. Defendants wrote an email the same day, acknowledging Plaintiffs' phone calls and saying that they were "continuing to try to gather additional ESI/IT information per our ongoing discussions." To this email Defendants attached the initial hit report underlying their report of results on October 23, 2009. *See Ex. 11* (11/18/09 Def. email).

22. On November 19, more than three weeks after receiving Plaintiffs' proposed revised RFP Nos. 3-20, Defendants sent Plaintiffs their written responses. *See Ex. 12* (11/19/09 Def. Ltr.)

23. Plaintiffs called Defendants again on November 19 requesting a call back to discuss the many outstanding ESI issues that remained to be resolved, and sent a follow-up email. *See Sharpe Decl.* ¶¶ 9-10; *Ex. 13* (11/19/09 Pl. email inviting a call-back). Plaintiffs also sent Defendants an email asking questions about Defendants' vendor's hit report and their search technology. *See Ex. 14* (11/19/20 Pl. email re hit report). The following day, Defendants emailed their vendor's responses about the hit report. *See Ex. 15* (11/20/09 Def. email re hit report). Plaintiffs immediately provided 5 replacement terms that would deal with an issue relating to wildcard that Defendant's email had revealed. *See Ex. 16* (11/20/09 Pl. email). Defendants replied that afternoon by email, saying they would have their vendor "add these terms to the terms from the last report and run a new search." *See Ex. 17* (11/20/09 Def. email re

running 5 terms). None of Defendants' emails on November 20 addressed any of the ESI questions left unanswered from Plaintiffs' ESI Proposal and subsequent letters.

24. On December 1, 2009, Plaintiffs replied to Defendants' written responses to Plaintiffs' proposed revised RFP Nos. 3-20, suggesting a reasonable accommodation of the parties' differences. *See* Ex. 18 (12/1/09 Pl. Ltr. re RFP Nos. 3-20). **As of the filing of the instant motion, Defendants have still not responded to this December 1, 2009 letter.** *See* Sharpe Decl. ¶ 12. Also on December 1, Plaintiffs wrote to Defendants with suggestions as to how they might reach agreement on the scope of RFP Nos. 1-2 (dealing with ESI). *See* Ex. 19 (12/1/09 Pl. Ltr. re RFP Nos. 1 & 2). **Again, as of the filing of the instant motion, Defendants have not responded to Plaintiffs' letter.** *See* Sharpe Decl. ¶ 13.

25. On December 1, 2009, the parties participated in a status call with the Court during which the Court, having heard Plaintiffs describe their efforts to obtain cooperation, information and discovery from Defendants, twice suggested that Plaintiffs consider moving for sanctions in tandem with further requests or interrogatories and, if those were met with inadequate responses, filing a motion to compel. *See* Sharpe Decl. ¶ 11.

26. The next day, Plaintiffs issued their Second Set of Discovery Requests, which consisted of interrogatories dealing with ESI and requests for the production of associated documents. *See* Ex. 20 (12/2/09 Pl. 2d Set of Disc. Req.).

27. On December 4, 2009, Plaintiffs wrote to Defendants, putting in writing the agreement already reached orally on the November 6 conference call concerning how Plaintiffs might obtain discovery of documents in the physical possession of third parties. *See* Ex. 21 (12/4/09 Pl. Ltr.). **As of the filing of the instant motion, Defendants have not yet responded to this letter.** *See* Sharpe Decl. ¶ 15. The same day, and in keeping with the parties' oral

agreement on the November 6 conference call, see SOF ¶ 16, above, Plaintiffs issued subpoenas to 6 non-law firm third parties that had provided services to Defendants and, on the same day, served notice on Defendants of these subpoenas. *See Sharpe Decl.* ¶14.

28. Despite Defendants' agreement during the November 6 conference call to assist Plaintiffs in securing relevant, responsive documents from third parties, *see* SOF ¶15, above, Plaintiffs have not yet received a single document from any of the entities subpoenaed, despite the January 6 deadlines for compliance. *See Sharpe Decl.* ¶ 21. One of those entities ignored the subpoena entirely until after the deadline for responding had expired, and despite being in default of its obligations, and although it is now represented by Defendants' lead litigation counsel, it still refuses to respond to requests for more information and at the very least provide a written assurance for the latest date by which Plaintiffs will receive its responses and production. *Id.* This non-responsiveness is emblematic of Defendants' own behavior throughout the discovery process.

29. Almost three weeks later, having heard nothing in response to their two letters of December 1 and their letter of December 4 (not to mention earlier emails and phone calls urging a response to Plaintiffs' many questions), Plaintiffs sent an email on December 23 asking Defendants again for a response to their letters and an update on their ESI searches and document review. *See Ex. 22* (12/23/09 Pl. email). **As of the filing of the instant motion, Defendants have not responded to this email.** *See Sharpe Decl.* ¶ 16.

30. Later that same day (December 23), Plaintiffs received Defendants' Responses and Objections to Plaintiffs' Second Set of Discovery Requests. *See Ex. 6* (12/23/09 Def. Resp. & Obj.).

31. At no time, despite repeated requests, have Defendants told Plaintiffs whether

Defendants have started reviewing any documents, whether Defendants have run Plaintiffs' additional search terms provided on November 9 and 20 (*see* SOF ¶¶ 18 & 22, above), or when Plaintiffs can expect to receive additional documents. *See* Sharpe Decl. ¶ 17.

32. Other than some mostly-irrelevant excerpts of Summary Plan Documents produced on August 31 and October 30, *see* Sharpe Decl. ¶ 18, Defendants have produced no new hard copy documents responsive to Plaintiffs' First Set of Discovery Requests since March 2009, and none at all since October 30. *Id.* Moreover, despite Plaintiffs' unrebutted showing that Defendants improperly withheld directly on-point correspondence between Turner and the IRS regarding Defendants' failures to correctly credit and project interest credits (copies of which Plaintiffs received directly from the IRS; *see* Doc. 69 at 3-5), to this day Defendants have failed to produce a complete set of that correspondence, which likely includes materials not contained within the documents disclosed to Plaintiffs under the Freedom of Information Act. *Id.*

33. As of the filing of the instant motion, Plaintiffs have not received any ESI documents from Defendants out of the email files they collected in February 2009 or any of the additional custodians' files they promised, on November 6, they would search. *See* Sharpe Decl. ¶ 19.

**C. Defendants' Responses and Objections to Plaintiffs' Second Set of Discovery Requests**

34. In response to Plaintiffs' Second Set of Discovery Requests, Defendants revealed several disturbing facts concerning their collection efforts in February 2009 and at times muddied the waters by providing conflicting information about how their data is maintained and what ESI they had collected. Most importantly, they revealed how little ESI they searched.

**(1) Conflicting information about where Defendants searched for email files.**

35. In February 2009, approximately three months after Defendants had sent out Preservation Notices to 33 custodians, *see* SOF ¶ 7 and fn.9, above, Defendants' information technology personnel collected email files (but not non-email files) from 26 custodians. *See* Ex. 3 (12/23/09 Def. Resp. & Obj.) at 17. For *then-active employees* among these 26 custodians, emails (and attachments) were collected "from *the archive system* within the Storage Area Network of Microsoft Exchange." *Id.* at 17 (emphasis added). Defendants therefore represent in their responses and objections that their searches for the emails of both active and inactive custodians were performed only against archive email systems – and not against active email systems. *Id.* However, Defendants had earlier told Plaintiffs that, for all 26 custodians, emails and attachments were collected "from the *active and archive* system within the Storage Area Network of the Microsoft Exchange System." *Id.* at 3 (emphasis added). Plaintiffs therefore can have no confidence at all that Defendants collected all of the email files they should have collected.

**(2) Failure to search for non-email ESI in all available business unit folders.**

36. Defendants' non-email electronic documents are housed on either a T: drive or an H: drive. The T: drive is organized by business unit, while the H: drives are essentially folders assigned to individual users. *See* Ex. 6 (12/23/09 Def. Resp. & Obj.) at 7. Defendants have no document deletion policy. *Id.* at 13. Consequently, non-email files on the T: drive or in personal H: drives will remain on Defendant's active network shares unless an administrator or user deletes them.

37. At some time in February 2009 but not later than February 16, 2009, Ms. Sibley “was tasked with assisting in searching and collecting documents belonging to Turner in response to requests for production served by Plaintiffs.” *See* Ex. 23 (12/3/09 Sibley Decl.) ¶ 3, 7. Ms. Sibley reports that, to find relevant documents, she accessed the “HR” folder; within that, the “Benefits” folder; and, within that, three folders: “Cash Balance,” “Master Documents,” and “Fulbright.” In these folders she “looked for any materials within these subfolders that pertained in any way to the cash balance plan at issue in this litigation.” *Id.* ¶¶ 2-3 & 5.

**(3) Failure to search all custodians’ personal drives.**

38. Ms. Sibley also searched some of the H: drives within the Benefits Department, based on her knowledge that “[m]aterials concerning the cash balance plan may also be stored on individual user[s]’ H-drives within the Dallas Corporate Office’s network.” *Id.* ¶ 6. She “asked the Benefits Department team if they had any information stored on [these drives]” and said: “I am certain that the team members [in the Benefits Department] responded to my request and to the extent they responded I forwarded any such responses and documents to Fulbright & Jaworski LLP.” *Id.*

39. Thus, although Defendants themselves had identified a total of 33 former and current employees as possibly being in possession of relevant ESI, only three personal H: drives were searched – those of Martina Coates, Melissa Hudson, and Elma Ramirez. *See* Ex. 6 (12/23/09 Def. Resp. & Obj.) at 21. Ms. Coates, Ms. Hudson, and Ms. Ramirez are all Benefits Specialists and were hired, respectively, in July 2008, April 2006, and December 2002. *See* Doc. 77-10 (10/23/09 Def. letter, Ex. A).

**(4) Key custodians were completely ignored.**

40. According to Defendants’ own disclosures, then, there were 30 custodians who

had been issued Preservation Notices in late 2008 but whose H: drives were not searched. *See* Ex. 6 (12/23/09 D. Resp. & Obj.) at 8-9; *compare with id.* at 21. According to “Termination Date” information provided by Defendants, of these 30 custodians, 12 were still active employees as of February 2009. *See* Doc. 77-10 (10/23/09 Def. Ltr., Exhibit A); and Ex. 6 (12/23/09 Def. Resp. & Obj.) at 8-9. In other words, Defendants had identified 12 individuals in late 2008 as likely to possess relevant ESI and issued them Preservation Notices; these 12 were still active employees when Ms. Sibley and her colleagues conducted their searches for non-email ESI; yet these 12 individuals’ H: drives were not searched. These 12 people include: Senior Vice President and member of the Pension Administration Committee, Ralph Beck; Executive Vice President, CFO and Pension Administration Committee Member, Wilfried Eckert; Secretary of the Pension Administration Committee, Debi Herman; and Vice President and Controller, Michael Murphy. Included in the 12 is also Penny Sibley, Director of Compensation & Benefits and *the very person tasked by Defendants with collecting relevant ESI*. *See* Doc. 77-10 (10/23/09 Def. Ltr., Ex. A).

**(5) Failure to explain search methods and describe criteria for assessing relevance.**

41. Plaintiffs asked Defendants to describe in detail how they searched for relevant documents and then assessed their relevance, *see* Ex. 20 (12/2/09 Pl. 2d Set of Disc. Req.) at 3, ¶ F, but Ms. Sibley does not explain how she decided whether a document “pertained in any way to the cash balance plan at issue in this litigation.” *See* Ex. 23 (12/3/09 Sibley Decl.) ¶ 5. She does not say whether she used keyword searches (and, if so, which keywords she used), whether she relied on filepaths or filenames, or whether she examined the contents of files. Furthermore, Defendants do not say which folders within the Benefits Department’s business unit folder they did not search, nor why Ms. Sibley did not search anywhere on the T: drive outside of the

Benefits Department's folder structure. *See* Ex. 6 (12/23/09 Def. Resp. & Obj.); Ex. 23 (12/3/09 Sibley Decl.).

42. Ms. Sibley also said that, with respect to the Benefits Departments' H: drives, she "asked the Benefits Department team if they had any information stored on this drive." *See* Ex. 23 (12/3/09 Sibley Decl.) ¶ 6. If this is indeed the question she asked, it is clear that Defendants failed to take their discovery responsibilities at all seriously.

43. Nowhere do Defendants clearly state that they searched for the email files of *current employees* in both active email systems and archive email systems and that they searched for the email files of *former employees* in both active email systems and archive email systems.

44. In summary, then, the non-email ESI "searches" performed by Ms. Sibley, as detailed in SOF ¶¶ 37-43, above, are nothing more than a mere fig-leaf for Defendants' naked defiance of the Court's 9/30/09 order. Ms. Sibley performed a purely perfunctory manual or visual search of three Benefits Department subfolders for materials that "pertained" to the Plan, according to undisclosed criteria, without Plaintiffs' requests in hand, and at a time when Defendants maintained they had no obligation to search for and produce any ESI (email or non-email) in response to Plaintiffs' requests at all. *See* SOF ¶ 37. When she thought about non-email ESI stored on individuals' personal drives, all she did was ask other, unnamed individuals in the Benefits Department if they had any "information" on these drives. *See* SOF ¶ 38. Only three H: drives were searched – and **Ms. Sibley's own drive was not among them.** *See* SOF ¶ 39. All other custodians' H: drives, including those of important senior managers, were completely ignored. *See* SOF ¶ 40. Furthermore, when Ms. Sibley did these searches for non-email ESI, she never actually collected the files *to make them available for searching*. She merely sent the selected files as email attachments to outside counsel. *See* SOF ¶ 40.) Plaintiffs

are left with no information at all as to why these ESI files were selected and why others were not. Cursory and arbitrary, Ms. Sibley's search doesn't cut the mustard. Defendants have the duty to collect, search for and produce all relevant, non-privileged, non-email ESI from *all* available data sources in both active and archived systems, whether those data sources are organized by business unit (such as folders on the "T: drive") or assigned to individual users (such as personal "H: drives"), SOF ¶ 36, from *all* business units that might possess relevant ESI and from *all* custodians of interest identified to date by Defendants or Plaintiffs. Regrettably, they must be ordered to do so.

**(6) What little non-email ESI was produced was produced without metadata.**

45. When Ms. Sibley had selected the files on the three H: drives that she deemed to be "pertinent," she sent them to Turner's outside counsel at the time, Fulbright & Jaworski, by attaching them to one or more emails. *See* Ex. 23 (12/3/09 Sibley Decl.) ¶ 7. These files were then processed and produced as TIF images with loadfiles, without searchable text or metadata. *See* Ex. 6 (12/23/09 Def. Resp. & Obj.) at 22; Sharpe Decl. ¶ 2.

**ARGUMENT**

From the foregoing, it is apparent that the Court should order Defendants to immediately produce all relevant and responsive ESI (email and non-email) in Defendants' possession, custody or control using the keyword search terms already agreed to by the parties and located in all relevant and appropriate ESI datasets, and produce all hard copy documents in Defendants' possession, custody or control responsive to Plaintiffs' narrowed RFP Nos. 3-20. Additionally, the Court should also order Defendants to produce, within one week of the production of ESI and hard-copy documents, a Rule 26(b)(5)-compliant privilege log so as to allow Plaintiffs to make an independent assessment of the stated basis for the claim of privilege as to each document.

The Court should also require Defendants to provide Plaintiffs and file with the Court, within one week of the production of the privilege log, a certification from a person with knowledge of the steps taken to comply with this Order that all elements of this Order have been complied with.

### **CONCLUSION**

Wherefore, for the reasons set forth here and such as may appear to the Court, Plaintiffs respectfully request that the Court grant the instant motion.

Dated: January 27, 2010

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on January 27, 2010 I caused Defendants to be served with a copy of this document by serving their counsel designated below by hand and by electronically filing this document with the Clerk of Court using the CM/ECF system, which will send notification of the filing to:

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