

*Moody et. al. v. The Turner Corp., et. al.* Case No. 1:07-cv-692 (S.D. Ohio)

Exhibit 10 to the Parties' Joint Filing, October 26, 2009

Defendants' Letter to Plaintiffs, October 23, 2009

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C O U N S E L O R S   A T   L A W

**Gregory P. Abrams**  
Associate  
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October 23, 2009

**VIA U.S. MAIL AND ELECTRONIC MAIL**

Eli Gottesdiener  
David Sharpe  
Gottesdiener Law Firm, PLLC  
498 7th Street  
Brooklyn, NY 11215  
eli@gottesdienerlaw.com  
david@gottesdienerlaw.com

Re: Moody et al. v. The Turner Corporation et al.

Dear Counsel:

We are in receipt of your October 21, 2009 letter concerning discovery in the above-referenced matter. As an initial matter, your letter mischaracterizes the very brief phone call from October 21, 2009 between David Sharpe and me. David has never appeared in this case and has not been admitted *pro hac vice* (as far as we know). Nonetheless, without any advance notice, David (along with a man Steve Cohen) called me seeking to immediately discuss a host of electronic discovery issues pertaining to this matter. As I explained at the outset, I was not able to have this call right at that moment. I also explained that in order for the call to be productive, it likely would need to involve to some extent other counsel on this matter, and that I cannot speak to someone else's potential availability. I said we hoped to get back to you as soon as possible. We believe it is unreasonable to expect that at the very second you call we would right then and there be available for a full-blown, substantive discussion on e-discovery matters with an attorney (and someone else) with whom we have never worked.<sup>1</sup>

Turning to the substantive items raised in your letter, we certainly agree that it would be best, as you state, to "put[] our disputes of form behind us so we can finally concentrate on substance."

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<sup>1</sup> Your characterization of my comments about LateralData serving as defendants' vendor is also misleading. As explained, LateralData was retained by Fulbright & Jaworski. However, we are not certain that LateralData will continue to serve as a vendor going forward.

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David Sharpe  
October 23, 2009  
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In light of this intention you express to move forward with the merits of this case, we would hope you agree that it is inappropriate for plaintiffs to leverage electronic discovery as a coercive tactic and to make e-discovery demands that are not reasonable or appropriate for a case like this one. Indeed, as you know, Magistrate Judge Hogan expressed in his Order “that to the extent [plaintiffs’] requests seek information about defendants’ motivation or intent, these issues re not relevant.” (Order, 5). As contemplated by Magistrate Judge Hogan’s Order, any e-discovery must be proportional to the nature of this case, which here centers on a very limited set of factual issues that are largely addressed in the Plan and related documents. With that in mind, we will try to address the specific items raised in your October 21 letter.

With respect to Eli’s recent request for the identity of the 26 custodians, along with their titles/roles and dates of service, this information is provided in the attached Exhibit A. For any sample e-mail search by the parties, it would include these 26 custodians. To that end, LateralData has run a search of the multiple terms proposed in Eli’s Tuesday, October 20, 2009 e-mail, a copy of which is attached as Exhibit B. The result is a staggering 38,816 unique files (that is, files with search term “hits” plus any related “family members” to the particular documents). Notably, the term “cash balance” results in 6,971 unique hits, meaning that there are close to 7,000 documents whose only connection to this case is that they mention “cash balance” without any of the other search terms you proposed. These documents could not be considered part of the “handful of the most highly relevant terms” discussed in Magistrate Judge Hogan’s Order. (Order, 4). By contrast, we are willing to review the documents identified through your other proposed search terms for relevance and privilege, and produce non-privileged relevant documents.

As for your comments about “ESI more generally,” keep in mind that the massive 111 GB of e-mail files that were collected include any attachments to these e-mails. Therefore, there should be only a very limited universe of general, non-e-mail ESI that has not already been captured. We also understand that an appropriate search of non-e-mail ESI was done and turned up a very small number of such documents, which were then produced. That said, we will look further into this issue. We would agree with your comments that the sample searches Magistrate Judge Hogan alludes to should be done against e-mail files and their attachments. The results described above reflect that effort.

We also agree that to the extent plaintiffs seek documents from third-parties, as discussed in your letter, it would be appropriate to use subpoenas with defendants conducting the review. We are willing to work with you to help facilitate this process. Of course, by doing so, defendants still preserve any objections to any particular requests on the grounds of relevance, undue burdensomeness, privilege, or any other basis.

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David Sharpe  
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To the extent you believe a phone call is necessary among the parties and their respective vendors in advance of the October 28 hearing, please let us know what times you are available.

Finally, we would be remiss not to point out that it is hardly defendants who are not pursuing the Federal Rules' "cooperative approach to discovery" mentioned by Magistrate Judge Hogan. For example, you refer to Eli's October 16 letter but neglect to mention that it was simply a cover letter attaching plaintiffs' (few) documents in response to defendants' requests for production, a production that was more than a month late. We also have for months asked for dates for depositions of the named plaintiffs, with either no response from your office or efforts at further delay. Certainly, we would expect that plaintiffs too cooperate in the collaborative discovery process discussed in your letter.

All that said, we remain hopeful that the parties will be able to work together through these issues in short order and with as few disagreements as possible.

Sincerely,



Gregory P. Abrams

- c: William H. Blessing (via U.S. mail)
- Charles C. Jackson (via e-mail)
- Jeremy P. Blumenfeld (via e-mail)
- Michael D. Eagen (via e-mail)
- Reagan M. Brown (via e-mail)

# **EXHIBIT A**

Name	Job Title	Hire Date	Termination Date
Aulson, Patrick	Senior Vice President; Pension Admin. Committee Member	7/30/2001	5/12/1999
Aviles, Maria	Administrative Asst. (Karl Mayer)	12/15/2000	6/18/2002
Churchman, Barbara	Administrative Asst.	2/27/2006	10/9/2009
Coates, Martina	Benefits Specialist	7/7/2008	
Eckert, Wilfried	Exec. VP, CFO; Pension Admin. Committee Member	5/1/2001	
Gage, Gail	Executive Assistant	10/1/1999	
Henderson, Julie	Manager, Human Resources	4/4/2001	
Herman, Debi	VP Treasurer; Secretary of Pension Admin Committee	11/29/2009	
Hudson, Melissa	Benefits Specialist	4/10/2006	
LaScala, Saro	Senior VP, Human Resources; Resigned - Pension Admin. Committee Member	1/3/1968	
Leppert, Thomas	Chairman of the Board; Pension Admin. Committee Member	6/9/1999	2/28/2007
Mayer, Karl	Director Employee Benefits; Pension Admin. Committee Member	11/16/1999	6/15/2001
McCurrach, G. Peter	Director Employee Benefits; Pension Admin. Committee Member	6/18/58; Rehire 2/18/63	1/1/2002
Murphy, Michael	Controller - TCCO	12/15/1986	
Murray, Jacyna	Assistant Director - Employee Benefits/Flexible Benefits	5/23/83; Rehire 3/27/89	5/1/2000
Onnembo, John	Vice President	1/8/2007	
Ramriez, Elma	Benefits Analyst	12/16/2002	
Robinson, Stuart	Exec. VP; Pension Admin. Committee Member	7/1/1968	
Sexton, Renee	Executive Assistant (Tom Leppert)	10/2/2000	12/31/2006
Sibley, Penny	Director Compensation & Benefits	1/10/2000	
Sleeman, Donald	Exec. VP, CFO; Chariman - Pension Admin. Committee	8/31/1987	1/7/2006
Soo Hoo, Judy	Human Resources Assistant	6/23/1986	10/3/2000
Turner, Thomas	VP National Marketing	6/27/1972	2/1/2008
Walls, Jane	Director Inv, R/E, Assistant Treasurer; Retired - Pension Admin. Committee Member	10/25/1965	10/1/1987
Williams, Freda	Executive Assistant	7/22/2002	3/5/2009
Willox, Lori	VP Finance & Accounting; Secretary - Pension Admin. Committee	11/1/2000	1/7/2006

# **EXHIBIT B**

**Abrams, Gregory P.**

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**From:** Eli Gottesdiener [eli@gottesdienerlaw.com]  
**Sent:** Tuesday, October 20, 2009 4:08 PM  
**To:** Abrams, Gregory P.  
**Cc:** Blumenfeld, Jeremy P.; Jackson, Charles C.; David N. Sharpe; Steven D. Cohen  
**Subject:** RE: Moody v. Turner - E-Mail Searches

Hi Greg: Thanks for your email. We agree to proceed with a preliminary round of ESI searches as you suggest – namely, including a filter where the term alone is likely to capture documents not related to the Plan. We propose the following terms for this purpose.

417e		
417(e)		
4.5%	AND	cash balance OR pension OR retire* OR cb
4.50%	AND	cash balance OR pension OR retire* OR cb
96-8		
actuar* W/3 equiv*	AND	cash balance OR pension OR retire* OR cb
algorithm	AND	cash balance OR pension OR retire* OR cb
cash balance		
cb	AND	cash balance OR pension OR retire*
earning* W/3 cred*		
interest cred*		
lumpsum	AND	cash balance OR pension OR retire* OR cb
lump*sum	AND	cash balance OR pension OR retire* OR cb
Predictor	AND	cash balance OR pension OR retire* OR cb
supplem* W/3 rate		
whipsaw		
whip*saw		

We also propose that such a sample search form part of a comprehensive approach to the discovery of responsive ESI. We will send you a letter outlining such an approach and addressing other discovery-related matters tomorrow.

Best regards, Eli G.

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**From:** Abrams, Gregory P. [mailto:gabrams@morganlewis.com]  
**Sent:** Tuesday, October 20, 2009 4:41 PM  
**To:** Eli Gottesdiener  
**Cc:** Blumenfeld, Jeremy P.; Jackson, Charles C.  
**Subject:** Moody v. Turner - E-Mail Searches

Eli:

In preparation for our hearing with Magistrate Judge Hogan, we are planning on asking our vendor to run some sample searches for various e-mail search terms. Let us know if you want to propose any search terms for these searches. As the Magistrate Judge pointed out in his October 1 Order, any terms should be linked with "the universe of documents specifically related to The Plan." (Order, p. 3). Thus, we would suggest that any such terms should be appropriately tied to the Plan (such as by using the connector "plan" and \_\_\_ or "cash balance" and \_\_\_), or the terms should be those that could only be connected to the Plan (such as "notice 96-8"). Thanks.

Regards,

Greg

**Gregory P. Abrams**

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