

lc20sasc

Please visit [www.ITLawToday.com](http://www.ITLawToday.com)

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 MONIQUE DA SLIVA MOORE,

4 Plaintiff,

5 v.

11CV01279

6 PUBLICIS GROUPE, ET AL,

7 Defendant.

8 -----x  
9 New York, N.Y.  
December 2, 2011  
5:00 p.m.

10 Before:

11 HON. ANDREW J. PECK,

12 Magistrate Judge

13 APPEARANCES

14 SANFORD WITTELS & HEISLER  
15 Attorney for Plaintiff

16 BY: STEVEN WITTELS  
SIHAM NURHUSSEIN

17 JACKSON LEWIS  
18 Attorney for Defendant

19 BY: VICTORIA WOODLIN CHAVEY  
JEFFREY BRECHER

20  
21 MORGAN LEWIS & BOCKIUS, LLP  
22 BY: GEORGE STOHNER  
Attorneys for Defendant Publicis Groupe

lc20sasc

1 THE CLERK: All rise.

2 THE COURT: Be seated. Okay. What discovery issues  
3 are still in dispute based on the most recent letters that  
4 Judge Sullivan has not ruled on.

5 MR. WITTELS: Your Honor, good afternoon. Steven  
6 Wittels and Siham Nurhussein the plaintiffs. Ms. Nurhussein is  
7 going to address the main disputes, as far as we're concerned  
8 in response to the question.

9 THE COURT: All right. And what I will want to do,  
10 once you give me a little bit of background, if you think I  
11 need it -- and I have read the pleadings and Judge Sullivan's  
12 orders -- just take each discovery request one at a time, hear  
13 from one side, then the other as to where things stand, and  
14 then rule.

15 MS. NURHUSSEIN: So, your Honor, just a little bit of  
16 very quick general background. I represent the plaintiffs in  
17 the matter, gender discrimination class action filed on behalf  
18 of female public relations professionals against MSL Group and  
19 Publicis. And our clients are alleging pattern and practice  
20 discrimination based on pay, promotion, assignment, as well as  
21 pregnancy discrimination.

22 One of the common policies or practices at issue in  
23 this case is a companywide reorganization that began early  
24 2008, with the promotion of Jim Tsonakos to the position of  
25 president of the America of MSL Group. As part of this

lc20sasc

1 reorganization, women were disproportionately pushed out,  
2 demoted, and suffered a number of other adverse employment  
3 actions. And on the flip side, the majority of new hires and  
4 promotions, particularly into leadership positions, were  
5 disproportionately awarded to men. And these employment  
6 decisions and practices were made by an almost entirely male  
7 leadership team put in place by Jim Tsonakos' centralized  
8 leadership team that was put in place as part of the  
9 company wide reorganization. And I should add this is a  
10 company that is approximately 75 percent female.

11 By way of background, we had an initial scheduling  
12 conference before Judge Sullivan in May. And the Court set a  
13 June 3, 2012 fact discovery deadline in this case.

14 Since then, the parties have each served a number of  
15 discovery requests, deposition notices. Unfortunately, you  
16 know, discovery has been very one sided, in our view, which  
17 has, you know, really prejudiced the plaintiffs.

18 THE COURT: Which is to say the defendants have all of  
19 the documents and you have nothing.

20 MS. NURHUSSEIN: Exactly.

21 THE COURT: So let's cut to the chase. Let's get to  
22 where we're going.

23 THE COURT: Okay, so.

24 MS. NURHUSSEIN: Okay. So, really, I mean the two  
25 main issues that we -- we that are raised in our letter, first,

lc20sasc

1 NSR's failure to produce core discovery relating to a number of  
2 issues that are central to the case, number of basic documents  
3 such as group policies, but in particular the companywide  
4 reorganization, which is the focus of our letter.

5 THE COURT: The focus seems to be that you view  
6 everything that happened after Mr. Tsonakos was hired as  
7 quote/unquote a reorganization, and defendants don't. And that  
8 seems to be, at least from the letters, creating the confusion  
9 that this is not like the usual wrist case or something where  
10 there is, you know, a plan, we're going to reduce the workforce  
11 by 10 percent, and then the question is did they reduce that  
12 across the board, or did it a heavier hand against a protective  
13 class or whatever. So --

14 MS. NURHUSSEIN: One thing I should --

15 THE COURT: Is there a way, now, to get this so that  
16 you all understand what you mean by the reorg, so that they can  
17 respond appropriately.

18 MS. NURHUSSEIN: Right. And your Honor, we spent a  
19 fair amount of time explaining what we view as the reorg to  
20 defense counsel. We have spent three meet and confers. We've  
21 put it in writing in various e-mails and letters. And they  
22 continued to maintain they didn't understand what we were  
23 talking about, not even they considered it a request, they  
24 didn't understand. Which we find disingenuous.

25 THE COURT: Let me hear from the defendant, briefly,

lc20sasc

1 about why they still don't understand.

2 MS. NURHUSSEIN: And your Honor, one more thing I want  
3 to add, if I may. Just to one thing I neglected to mention at  
4 the outset, is this is a discovery dispute that went to Judge  
5 Sullivan. He compelled production of reorganization documents.  
6 I think the request as written is clearly worded, so.

7 THE COURT: Okay, thank you.

8 MS. CHAVEY: Yes. Good afternoon, your Honor,  
9 Victoria Chavey for defendant MSL Group. I think your Honor  
10 has hit the nail on the head in describing the essence of the  
11 dispute about the reorganization. And that is that the  
12 reorganization that plaintiff seeks to focus on is one that  
13 began on January 1, 2008 and is continuing today. And does  
14 appear to encompass, according to plaintiff's definition,  
15 everything that happened in the meantime, whether it is a  
16 practice-related change, a personnel-related change, an  
17 office-related change, geographic related change, a name change  
18 for example from Manning Selvage and Lee to MSL Group.

19 THE COURT: Somehow I suspect that they don't care  
20 about the name change, but I could be wrong.

21 MS. CHAVEY: According to our discussions, your Honor,  
22 I believe that they are interested in this name change. So the  
23 difficulty is at least twofold here. One is there is a lack of  
24 definition to the reorganization, and that the key part of this  
25 your Honor which goes back to many discussions that we have had

lc20sasc

1 with plaintiff's counsel is this alleged reorganization which  
2 they claim to be an event, it's a concrete event, is at the  
3 core of their class claim. This is the event --

4 THE COURT: Does it matter if the issue is all of the  
5 promotions and other activity that have taken place since  
6 January 1 of '08, up to either now or whenever we put a stop to  
7 the discovery may not be a reorganization in the traditional  
8 sense, it may not be what you would otherwise understand as a  
9 reorg, but you made the -- you objected to document request  
10 number 11. Previously Judge Sullivan said, no, you have to  
11 produce it. So now other than making sure everyone is on the  
12 same page, the ship has sailed to a large extent.

13 MS. CHAVEY: Right. And I guess that brings me to my  
14 second point, your Honor, which is we have produced significant  
15 materials relating --

16 THE COURT: Doesn't matter. What matter is whether  
17 you have completed production. Yes, I understand that as the  
18 defendant in an employment case, they're going to have  
19 virtually nothing, you have everything, and it is more  
20 expensive, et cetera, et cetera. That's what happens when you  
21 work for Jackson Lewis, you represent defendants. I am being  
22 facetious, but the question is not how much you have produced,  
23 but what haven't you produced.

24 MS. CHAVEY: So what we have produced is --

25 THE COURT: What haven't you produced?

lc20sasc

1 THE WITNESS: What we haven't produced, I guess, is  
2 every document relating to every decision made at MSL Group in  
3 the last 4 years.

4 THE COURT: Can I have someone give me a copy of  
5 document request number 11, which I have read previously. I  
6 don't have it at my fingertips.

7 Okay. Well, being as -- not that I disagree with  
8 Judge Sullivan, but being as he has ruled on this and overruled  
9 your objections, the question is now, how do you and the  
10 plaintiff get on the same page and get material produced.

11 MS. CHAVEY: We understand that. And we take our  
12 obligation to comply with the Court order serious. And we have  
13 tried to do that one way. In which we have tried to do that is  
14 through the electronic discovery protocol that we have been  
15 discussing with plaintiff's counsel. And we put forward a  
16 significant proposal, and are continuing to work through that.

17 THE COURT: Well, how much of the documentation is  
18 e-mail or other forms of ESI, and how much is paper, that no  
19 matter what do you with ESI protocol, is not going to pick up  
20 the paper.

21 MS. CHAVEY: This is a company that generally  
22 exchanges documents via e-mail. We think that e-mail is the  
23 most significant resource for all documents, both relating to a  
24 reorganization and otherwise.

25 THE COURT: All right, so where -- where are you all

lc20sasc

1 on that protocol.

2 MS. CHAVEY: If I may, I'll refer to Bret Anders, who  
3 has been working on --

4 THE COURT: If somebody has a copy of the --

5 MS. CHAVEY: Protocol.

6 THE COURT: -- ESI proposal that you are working on.

7 MS. CHAVEY: Okay.

8 MR. ANDREWS: Your Honor, if I can explain. It's not  
9 yet in a single document proposal form. We have had a series  
10 of discussions trying to flesh out the, you know, manner in  
11 which the parties are going to locate what's relevant. And I  
12 think right now there are two core disputes as relates to  
13 discovery.

14 The first is plaintiff's reluctance to utilize  
15 predictive coding to try to cull down the 2.6 million documents  
16 that are in our data base, and what will likely be close to  
17 3 million when we obtain the remaining 5 to 10 custodians.

18 The second is the list of custodians where there is,  
19 you know, apparent disagreement where I thought there was  
20 agreement.

21 On the predictive coding issue, the way defendants --

22 THE COURT: You must have thought you died and went to  
23 Heaven when this was referred to me.

24 MR. ANDREWS: Yes, your Honor. Well, I'm just  
25 thankful that, you know, we have a person familiar with the

lc20sasc

1 predictive coding concept.

2           What we have done, is partnered with Recombine, and  
3 we're using Accelerate software for review. And our proposal  
4 for how to go about culling down the 2.6 million documents that  
5 are currently there, was to use the predictive coding feature.  
6 Where we are right now, is we had developed a preliminary list  
7 of key words that we would test. And the second letter I gave  
8 you, I believe that is the November 18th letter we sent to  
9 plaintiff's counsel, that is our preliminary list of key words.  
10 But there is charts to show how we test it. We took the key  
11 words, we combined them with other key words. We reviewed a  
12 number of documents. And we showed plaintiff, of the documents  
13 we reviewed, of the 50 we reviewed in this category, these were  
14 how many were responsive. And we explained in the comments  
15 section what we were generally finding. And one of the reasons  
16 why we did this, your Honor is, again, plaintiffs have been  
17 resistant to the predictive coding, the way we view this  
18 happening, is once all of the custodians are loaded, is to take  
19 a seed set, we'll review them, we'll let the program pull back  
20 responses. We'll then review those. And through an interim  
21 process hopefully winnow it down. And our goal is to take the  
22 2.6 million, get it down to approximately 40,000 that would  
23 then be reviewed manually. We're looking at a -- per document  
24 review cost of \$5 a document. And MSL at this point has  
25 committed to spending \$200,000 in attorney review time to

1c20sasc

1 review that 40,000. That is in addition to the 169,000 that  
2 they have already spent in vendor costs, as well as the \$15,000  
3 a month that they are spending in hosting costs.

4 While we understand this is a class action, that there  
5 obviously is a difference of opinion as to whether or not a  
6 class will ever be certified in this case, and the defendants'  
7 position is we think this is a reasonable, at least first  
8 approach to try to winnow down those documents. And we believe  
9 based on the custodians we have identified, which is very  
10 similar and very close to the Class A group that plaintiff has  
11 provided, this is where the lions share of the relevant  
12 documents should reside. Our custodians include Jim Tsonakis,  
13 his --

14 THE COURT: Lets slow down. Is there an agreement on  
15 custodians?

16 MS. NURHUSSEIN: If I may comment for a couple of  
17 minutes. I think the parties -- if I can take the podium for a  
18 minute.

19 I think the parties are coming close to reaching  
20 agreement on custodians. I would say it is not the biggest  
21 area of dispute with regard to ESI. There are a number of  
22 issues where the parties have, you know, some disagreement on  
23 ESI in terms of the methodology and the burden. However, ESI  
24 is a complete red herring when it comes to the topic of the  
25 sanctions letter. We have been working cooperatively with the

1c20sasc

1 other side on ESI protocol. We just sent them a very detailed  
2 letter on I believe it is November 29th and are still waiting  
3 for responses. So we're continuing to discuss that.

4 The issue is, even when we have identified specific  
5 documents related to ESI, documents that are not e-mails, other  
6 documents, we've identified them and brought them to MSL's  
7 attention multiple times, even though it isn't our burden to do  
8 it, even though we're operating at a very severely  
9 informational disadvantage, and MSL has not even addressed  
10 them.

11 If I may your Honor, I have a couple here, if I may  
12 approach the bench, just to give you a couple of examples. Or  
13 explain the sort of examples --

14 THE COURT: Hold on. Because if we do too many things  
15 at once, things get lost.

16 If you have got certain documents that you have that  
17 they have produced, or your clients have that refer to other  
18 core, what you think are core documents --

19 MS. NURHUSSEIN: Right.

20 THE COURT: -- there is absolutely no reason why they  
21 shouldn't search for them.

22 However, if you are saying that the reorganization is  
23 largely everything that happened at the company since 2008,  
24 they're telling me that most company material is computerized  
25 ESI, and therefore that the fight about request number 11 may

1c20sasc

1 be putting the cart before the horse because once you agree on  
2 an ESI protocol, you'll get responsive documents. So I don't  
3 really know, you know, whether it is because I'm coming to this  
4 case late, and whether it is because it's 4:30 on a Friday or  
5 whatever, but I can't quite figure out where you are in  
6 agreement and disagreement on anything.

7 MS. NURHUSSEIN: If I may, your Honor, I think the --  
8 the area -- I think what prompted us to bring this to the  
9 Court's attention is the fact that we served requests relating  
10 to reorganization back in May. We have been conferring with  
11 defense counsel for several months. We pointed them to  
12 specific documents that are not covered by ESI protocol and we  
13 have not received them.

14 THE COURT: Assuming I order them to give you the  
15 documents that are referenced in the documents you have given  
16 to them promptly, and that I give you all a deadline to agree  
17 on the ESI protocol so this doesn't eat up your entire  
18 discovery period, is there anything else you need?

19 MS. NURHUSSEIN: Beyond just the specific documents we  
20 have identified. Because as I mentioned, your Honor, because  
21 there is only so much information we have, I think what we  
22 would like is for MSL to represent that they have conducted a  
23 comprehensive thorough search of all, you know, not e-mail. I  
24 understand that that is going to take time, but --

25 THE COURT: A search of what?

lc20sasc

1 MS. NURHUSSEIN: Of other documents. Restructuring  
2 plans, paper --

3 THE COURT: Stop, stop, stop. Come on, this really is  
4 a problem that you and they are not speaking the same language.

5 As I understand it from what they are saying, there  
6 was no restructuring or reorganization. Am I correct, defense  
7 counsel, whichever firm it is on that side.

8 MS. CHAVEY: There was global reorganization of MSL in  
9 November of 2009. It was publicly announced, it's mentioned on  
10 the website. That was a major reorganization across the world.  
11 And the company went from MS&L to MSL Group. And there was  
12 that. But in terms of a reorganization that occurred when Jim  
13 Tsonakos was promoted in January of '08 and continues today,  
14 no.

15 THE COURT: Okay. Have you produced all of the  
16 material about that 2009 reorganization. Because that, there  
17 is no definitional problem on.

18 MS. CHAVEY: We have produced material relating to  
19 that announcement. I don't know that we have produced  
20 everything, because we have not gone all of the way into  
21 everything held in the electronic data base.

22 THE COURT: Other than electronic, have you produced  
23 all of the pieces of paper about the 2009 reorg.

24 MS. CHAVEY: Your Honor, we've produced the core  
25 documents. I -- you know, I -- I don't know that I can

1c20sasc

1 represent --

2 THE COURT: That is not a concept under the federal  
3 rules.

4 MS. CHAVEY: I know. And as we have told plaintiff's  
5 counsel, we are continuing to produce documents as we get them.  
6 We have certainly produced everything that we have. We have  
7 made diligent searches, interviewed multiple times key players.  
8 We have done what we think is everything we can do to date. If  
9 there is another piece of paper we have not found yet, then  
10 we'll supplement.

11 And I also want to address the one example that  
12 plaintiffs have mentioned to us, is there is an e-mail  
13 involving the Atlanta office of MSL that makes reference to a  
14 reorganization. Whether there was a reorganization in the  
15 Atlanta office, I didn't know. We have not -- we have actually  
16 looked for that e-mail. But it is not that that e-mail refers  
17 to a document. It just uses the word "reorganization." And we  
18 appreciate plaintiff's counsel's effort to inform us as to what  
19 the reorganization is that we're talking about. And we're  
20 trying to track all of these things down at this point, but --

21 THE COURT: Okay. Back to the plaintiff.

22 MS. NURHUSSEIN: Okay. Your Honor, may I approach the  
23 bench? I think it would help clarify what we are talking  
24 about.

25 THE COURT: If you have documents, give them to Mike.

lc20sasc

1 MS. CHAVEY: May I see what you are showing him?

2 MS. NURHUSSEIN: I actually brought copies --

3 THE COURT: Okay.

4 MS. NURHUSSEIN: I'm getting a copy for defense  
5 counsel.

6 THE COURT: Why don't you all look on with one set, if  
7 that's what you need to do. Let's go.

8 MS. NURHUSSEIN: I apologize, your Honor. I don't  
9 have that one in front of me, since Ms. Chavey --

10 THE COURT: E-mail, first of all, which means things  
11 like it will be picked up by the ESI search.

12 MS. NURHUSSEIN: Right.

13 THE COURT: And, yes, it is referring to some sort of  
14 plan, which looks like it may have to do with the Atlanta issue  
15 that you have already raised, and that is what the defendants  
16 are saying they're looking for it.

17 MS. NURHUSSEIN: Right. But if I recall correctly, if  
18 I -- if I recall what Ms. Chavey said, is that she asked -- you  
19 know, she's looking into whether -- she didn't mention -- she  
20 neglected to mention is that e-mail specifically references a  
21 plan that Rob Baskin presented. I don't know understand why --

22 THE COURT: That could be an oral plan, that could be  
23 written, it could be electronic.

24 MS. NURHUSSEIN: Uh-huh.

25 THE COURT: You know, don't get hung up on one

1c20sasc

1 document when you haven't had the ESI search.

2 MS. NURHUSSEIN: And, your Honor, just to clarify  
3 though, we have requested clarification or asked them to  
4 respond to that e-mail and to produce the plan or documents  
5 relating to it. We have asked multiple times. They have  
6 neglected to even address our question. So I don't know if  
7 they even asked Rob Baskin about the plan.

8 Do you have an answer to that?

9 THE COURT: Ms. Chavey, have you looked for this  
10 so-called plan?

11 MS. CHAVEY: Yes, we have.

12 THE COURT: Have you found it? Have you talked to  
13 Rob, whoever Rob is.

14 MS. CHAVEY: He is no longer employed, so we have not.

15 THE COURT: Have you talked to any of the people on  
16 this e-mail that -- particularly, I guess, Ms. Ivana, is she  
17 still employed?

18 MS. CHAVEY: She is not.

19 THE COURT: Okay. Keep looking. And report back  
20 promptly to plaintiff's counsel.

21 MS. NURHUSSEIN: Your Honor, one additional point I  
22 wanted to make, regarding that e-mail, that's an he e-mail  
23 dating back to 2008. You know, defense counsel have  
24 consistently maintained that no reorganization --

25 THE COURT: Counsel, with all due respect, one of the

1c20sasc

1 search terms, in quickly looking at the letter I was just given  
2 is reorganization. And I'm sure when you do it, the right way,  
3 you'll get reorg and, you know, all of the various roots and  
4 extensions. You know, you can't say they haven't given you  
5 anything when you are taking a very amorphous position on what  
6 the reorganization is. And there may be certain plans. This  
7 looks like it has something to do with staffing of the Atlanta  
8 office.

9 Move on.

10 MS. NURHUSSEIN: Okay.

11 And one additional point, if I may very quickly, your  
12 Honor. I understand that it may appear, at first glance, to be  
13 an amorphous, you know, request. But MSL's own corporate  
14 documents, I mean that's in e-mail. Their own corporate  
15 documents refer over and over again to this reorganization.

16 THE COURT: What reorganization?

17 MS. NURHUSSEIN: I can show you.

18 THE COURT: And, again, if they've searched the paper  
19 documents, and they say that they have made a good faith  
20 search, and you're about to get anything quote/unquote reorg  
21 related in the ESI search, what is it you want me to order them  
22 to produce? If I don't understand the request at this point,  
23 how can I order it enforced any more than it already has been.

24 MS. NURHUSSEIN: Uh-huh. Well, I guess one thing I  
25 should add, your Honor. I mean in the documents, limited

1c20sasc

1 universe of documents we have seen, I mean we have already seen  
2 decisions regarding pay tied to reorganization, we have seen  
3 highering decisions tied to the reorganization. I can show you  
4 documents --

5 THE COURT: But all of those are discrete. Look, you  
6 can do one thing that would be helpful, is give them a list of  
7 every type of decision you are looking for.

8 I assume from looking at some of the things in the ESI  
9 protocol, that that is something you all have already  
10 discussed.

11 MS. NURHUSSEIN: We have discussed it at some length.  
12 And the response we have gotten, you know, are comments about,  
13 you know, whether this would encompass every employment  
14 decision --

15 THE COURT: You define what you want --

16 MS. NURHUSSEIN: Uh-huh.

17 THE COURT: -- in specific detail. Either via the ESI  
18 route or through the paper route, and then I can deal with it.  
19 At the moment, what you have given me is too vague for me to  
20 say that they're not in compliance. So I'm returning your  
21 document set to you.

22 MS. NURHUSSEIN: Your Honor, would it be possible to  
23 revisit the issue after, you know, in a few weeks if we have  
24 not been able to reach agreement on whether they actually have  
25 conducted --

1c20sasc

1 THE COURT: You keep, for better or for worse, you are  
2 in front of me for general pretrial supervision until the cows  
3 come home or the case is over. So we can have conferences  
4 daily, weekly, monthly; whatever makes sense. But if I don't  
5 understand what you are looking for, it's gonna be very hard  
6 for me to come out on your side. Particularly --

7 MS. NURHUSSEIN: Uh-huh.

8 THE COURT: -- when, if most of the documentation is  
9 in the form of electronic documents. And even the letters you  
10 handed me, I would bet, are on the company server's word or,  
11 the federal government's word perfect documents. So it's  
12 likely all to be electronically searched.

13 MR. WITTEL: May I address one thing, all right. The  
14 documents that we had to give you, and which we got specific  
15 requests to the defendants say things like -- that we gave them  
16 and they're on their own Bates stamped documents --  
17 restructuring plan being discussed in each region. This is an  
18 October document from 2010. They have not given us any of the  
19 restructuring plans. It is fine for defendant to say, look, it  
20 is in my e-mail. But if they haven't searched their e-mail at  
21 all, we gave them specific --

22 THE COURT: Stop, stop, stop.

23 MR. WITTEL: Yes, your Honor.

24 THE COURT: You don't search e-mail multiple times  
25 willy nilly. Not cost effectively. So, yes, it may be an

lc20sasc

1 iterate process and something may come up later. But I'm not  
2 going to have them do an e-mail search because you have two or  
3 three documents that refer to various types of reorg when, in a  
4 week or two, if you all get your act together -- and if you  
5 don't, you know, you may wind up with a special master or me  
6 choosing your e-Discovery plan. Just get the e-Discovery plan  
7 done. Get all of the ESI. And then figure out what is  
8 missing. And that's the Court's ruling.

9 Now, if you want any more advice, for better or for  
10 worse on the ESI plan and whether predictive coding should be  
11 used, or anything else, if the case -- I will say right now,  
12 what should not be a surprise, I wrote an article in the  
13 October Law Technology News called Search Forward, which says  
14 predictive coding should be used in the appropriate case.

15 Is this the appropriate case for it? You all talk  
16 about it some more. And if you can't figure it out, you are  
17 going to get back in front of me. Key words, certainly unless  
18 they are well done and tested, are not overly useful. Key  
19 words along with predictive coding and other methodology, can  
20 be very instructive.

21 I'm also saying to the defendants who may, from the  
22 comment before, have read my article. If you do predictive  
23 coding, you are going to have to give your seed set, including  
24 the seed documents marked as nonresponsive to the plaintiff's  
25 counsel so they can say, well, of course you are not getting

lc20sasc

1 any reorganization related documents, you're not appropriately  
2 training the computer.

3 MS. CHAVEY: We understand.

4 THE COURT: Okay.

5 MS. NURHUSSEIN: And, your Honor, just one point of  
6 clarification.

7 I think defense counsel, what they said before about  
8 our second over simplified or our stance on predictive coding,  
9 we expressed multiple concerns to defense counsel on the way in  
10 which they plan to employ predictive coding. We asked for a  
11 lot of clarification. We can give you a copy of our last  
12 letter.

13 THE COURT: Well, unless you are all telling me that  
14 it is ripe for judicial resolution, I'm willing to give you  
15 certain advice. I don't think it is useful for me to give any  
16 rulings. And while I have been handed two very thick letters  
17 from the defendant, all I did was sort of take a look at some  
18 of the words that they were talking about using. Whether that  
19 is within predictive coding or just within a pure key word, I  
20 don't know.

21 MS. NURHUSSEIN: So you don't want our response.

22 THE COURT: No. And, in fact, if it will make you  
23 feel better, I'll give plaintiff and defendant back their two  
24 letters before we end the conference. We'll leave it here for  
25 now, just pick it up at the end of the conference, okay,

lc20sasc

1 even-steven.

2 MS. NURHUSSEIN: And, your Honor, one final point, we  
3 had also --

4 THE COURT: You know, there is -- well, look, if you  
5 all want to go to a special master on this limited point then,  
6 you know, who cannot just rule on anything, but who can help  
7 you all perhaps put your ESI plan together, but yes, somebody  
8 has to pay that person's freight. You know, I know enough  
9 people in the industry that I can recommend some, or you all  
10 can get your vendors to recommend somebody or whatever it is  
11 going to be. If you are perfectly happy, you know, arm  
12 wrestling over it and bringing back the issue, once you have  
13 finished your meet and confer, which will be some date we'll  
14 pick, which will be before Christmas so this is ready to run  
15 over the Christmas holiday or whatever, we'll get this moving.  
16 If you want a master, either side, tell me. If you don't,  
17 that's fine, too.

18 MS. NURHUSSEIN: Okay, your Honor. That sounds good  
19 to us, your Honor.

20 The additional point I wanted to make --

21 THE COURT: What sounds good, my general speaking or  
22 you want a master, or you don't.

23 MS. NURHUSSEIN: I think to have a follow-up  
24 conference to try to bring some closure to the dispute we have  
25 been having about ESI. But the related point I wanted to make

1c20sasc

1 is that we also raised the issue of deposition scheduling.

2 THE COURT: You really want to schedule depositions  
3 before you have documents?

4 If you do, I'll order a schedule now, picking specific  
5 dates. Or, tell you all to go back to your office and, within  
6 a week, have a deposition schedule. I'm not sure it makes  
7 sense to have the depositions schedule before you have the  
8 documents because you only get the witness once, but whatever  
9 you want, you --

10 MS. NURHUSSEIN: And I agree with that, your Honor.  
11 And that's the reason we have had to reschedule plaintiff's  
12 depositions on numerous occasions, because we haven't received  
13 any documents. But the only point I wanted to bring to your  
14 attention is the fact that defense counsel, they are taking the  
15 position that we can't receive any of our depositions until  
16 they have deposed all of the defendants.

17 THE COURT: It's not going to happen that way. While  
18 as Judge Sullivan's order said there is no priority, and while  
19 there is something usual about, you know, you serve notices  
20 that gives you a quasi priority, we're going to do it much more  
21 evenhandedly. Because as a practical matter, plaintiffs can't  
22 serve notices until they have the documents.

23 So that is the Court's ruling on that. You are going  
24 to sit down, anyone wants to take depositions now, can do so.  
25 Anyone who wants to wait for the documents, can wait. And as

1c20sasc

1 soon as we have a deadline for the production of the documents,  
2 you're going to sit down and come up with a relatively fair  
3 schedule -- take "relatively" out of that sentence. A fair  
4 schedule that, you know, might be two for one, might by one for  
5 one, might depend on witness availability. But you are going  
6 to start cooperating more, and you're going to get a schedule  
7 done.

8 MS. NURHUSSEIN: Okay, thank you, your Honor, we'll  
9 discuss the deposition schedule with defense counsel.

10 Thank you.

11 THE COURT: Any issues from the defense, and any view  
12 from the defense on a special master or not?

13 MS. CHAVEY: Your Honor, it sounds like you don't want  
14 to go further into the deposition issue?

15 THE COURT: Not unless you really think that I am so  
16 wrong that you are going to say something that is going to  
17 change my mind.

18 MS. CHAVEY: We do think that, by virtue of serving  
19 the notices for the plaintiff's depositions --

20 THE COURT: Are you ready to take the plaintiff's  
21 depositions?

22 MS. CHAVEY: We are. We had -- we have been ready  
23 since September to take the plaintiff's depositions. We have  
24 three depositions scheduled for next week. A fourth is  
25 scheduled for the week after. Because of scheduling, those

1c20sasc

1 four happened to be two of the lower-level named plaintiffs and  
2 two opt-in plaintiffs. So the three named plaintiffs who were  
3 at higher levels have not been scheduled yet.

4 THE COURT: You have all the plaintiff's documents?

5 MS. CHAVEY: No.

6 THE COURT: And you realize that you don't get a  
7 second bite at the apple.

8 MS. CHAVEY: We do.

9 And one of the issues that we had presented to Judge  
10 Sullivan, which I would like to address with your Honor, is the  
11 issue of the plaintiffs' medical records or any documents  
12 supporting their claim for emotional distress damages.

13 THE COURT: All right. So let's first deal with the  
14 last issue on depositions. It's not a question of priority,  
15 but readiness. I see no reason why they can't start deposing  
16 your plaintiffs. Any reason not to?

17 MS. NURHUSSEIN: Your Honor, if I may retake the  
18 podium?

19 THE COURT: Yes.

20 MS. NURHUSSEIN: Your Honor, we have -- even though we  
21 don't have all of the documents relating to the case from  
22 defense counsel, we've agreed to go forward with the four that  
23 are scheduled within the next week and a half. All we are  
24 saying is they shouldn't be allowed to put a complete stop on  
25 our depositions --

1c20sasc

1 THE COURT: Then everybody is on the same page, good.  
2 Okay. Okay, so this is the emotional distress issue?

3 MS. CHAVEY: Right.

4 THE COURT: Do we have a -- this is coming back to me.  
5 Is this the garden variety versus --

6 MS. CHAVEY: Yes.

7 THE COURT: All right. The general rule on garden  
8 variety is, one, it's a damage amount of 25,000 or less.

9 Is that understood by the plaintiffs.

10 MR. WITTELS: Your Honor, I did a lot of research on  
11 this and, actually, was up in White Plains on this very issue.  
12 When you say 25,000, there are many cases that garden variety  
13 can encompass up to a hundred thousand. If you say that --

14 THE COURT: All right, then. I'm going to give them  
15 discovery on it. Look, not that 25,000 is peanuts. But as I  
16 understand the case law, the argument is, you know, I was  
17 annoyed, distressed, hurt by the way I was treated. That's  
18 garden variety and it's somewhere in the zero to 25 range.

19 If you're going for amounts higher than that and you  
20 are not prepared, for any or all plaintiffs to limit it to  
21 25,000 or less, then I think they're perfectly entitled to  
22 discovery on whether you are claiming, you know, a hundred  
23 thousand dollars because you didn't get a promotion here, or  
24 you were fired, isn't it also true that you broke up and your  
25 marriage dissolved during that same time period, or whatever

1c20sasc

1 else is a cause of emotional distress. And then the jury  
2 figures it all out. So that's your choice.

3 MR. WITTELS: Well, your Honor, is what you are  
4 suggesting that the plaintiff is to stipulate in advance of  
5 trial as to what --

6 THE COURT: Yes, or --

7 MR. WITTELS: -- limit would be?

8 THE COURT: -- yes, or --

9 Counsel?

10 MR. WITTEL: I'm sorry.

11 THE COURT: Yes. Or, keep your options open and --  
12 but then he they get the discovery. Because if you don't so  
13 stipulate, they're entitled to the discovery. You could change  
14 your mind later, but you can't change your mind the other way,  
15 because then they won't have the discovery.

16 MR. WITTELS: As I understand the ruling, your Honor,  
17 I'm certainly happy to be informed about it because we briefed  
18 it, was that if you are not claiming -- if you are claiming  
19 garden variety damages and not relying on medical damages,  
20 that's the issue, not so whether a jury awards you 75 or 25 or  
21 a hundred, that is -- the Court then says, well, is that a fair  
22 amount for garden variety. As I understood it the test, again,  
23 was are you claiming medical damages. We're not relying on  
24 medical damages --

25 THE COURT: That's not the way I understand the law,

lc20sasc

1 and that's not the way I am enforcing it. So, that is your  
2 choice.

3 MR. WITTELS: Well --

4 THE COURT: And obviously --

5 MR. WITTELS: Which -- I mean, we have not briefed  
6 that. May we have a two-page letter on that? Because as I --  
7 not to be disagreeable. But we have briefed that extensively  
8 and another magistrate judge and the judge affirmed that, came  
9 down very differently on that issue. So I just ask permission  
10 to address that, only because it is something I have never  
11 heard before and I have not seen it in a case.

12 I know the Second Circuit case didn't say -- didn't  
13 have a bright line 25,000 or you have to give medical damages.  
14 I didn't understand that to be the rule. That's -- I'm only  
15 asking permission on it.

16 MS. CHAVEY: We presented this issue to Judge  
17 Sullivan. And both parties briefed it before Judge Sullivan in  
18 the -- in the letters that we submitted to Judge Sullivan, and  
19 he ruled on September 14 that the plaintiffs were required to  
20 produce these documents. These were specifically ordered by  
21 Judge Sullivan. And so our motion, our --

22 THE COURT: And then, you know, then I can't even  
23 revisit that if I wanted to.

24 MS. NURHUSSEIN: Your Honor, I think what you  
25 neglected to mention, we did send a joint discovery letter,

1c20sasc

1 five-page discovery letter to Judge Sullivan.

2 THE COURT: Did Judge Sullivan rule against you?

3 MS. NURHUSSEIN: He didn't specifically address the  
4 issue of garden variety damages.

5 THE COURT: Okay, I have got --

6 MS. NURHUSSEIN: And -- and --

7 THE COURT: Stop.

8 I have got his order. I think, at least from my crib  
9 sheet notes, all he just said is you have to respond to these  
10 various interrogatories. Let me get the order out again but,  
11 you know, you can't keep briefing issues repetitively. If the  
12 issue came up, and you didn't raise whatever argument you are  
13 making now, but the issue was should those discovery requests  
14 be enforced or not, I don't see any reason to revisit the  
15 issue.

16 MS. CHAVEY: If I may direct the Court's attention to  
17 the parties joint letter to Judge Sullivan dated August 26 of  
18 2011. It contains the plaintiff's statement: Discovery into  
19 plaintiff's medical psychological treatment is not only  
20 premature but irrelevant as applies to those plaintiffs seeking  
21 only garden variety damages. And then they cite the case.

22 And this relates specifically to requests that are  
23 within the enumerated requests that Judge Sullivan ordered  
24 plaintiffs to comply with. And then when we filed a letter  
25 with Judge Sullivan seeking permission to have a conference

lc20sasc

1 with regard to motion for sanctions for plaintiff's failure to  
2 comply with this, we submitted our letter, the plaintiffs  
3 responded by letter, and that was the request that Judge  
4 Sullivan denied without prejudice, and then referred all  
5 matters to this Court.

6 But as far as we're concerned, Judge Sullivan has  
7 ruled on that. And, incidentally, Judge, we had asked the  
8 plaintiffs if they would propose a stipulation to us, because  
9 we would certainly entertain a stipulation if they would be  
10 able to do so. They declined to do that, indicating that by  
11 stating in their supplemented initial disclosures that they  
12 were only seeking garden variety damages, that's really all we  
13 needed. But this is discovery, this is the only chance we  
14 have.

15 THE COURT: All right. Give me a copy of your Request  
16 for Production. And which request is it?

17 MS. CHAVEY: Interrogatories 2 and 3, and Request for  
18 Production 7 and 8. There may be some other numbers, but those  
19 are the central ones. And it's listed as Exhibit B to the  
20 document that we just handed up.

21 THE COURT: Judge Sullivan ordered you to produce it,  
22 produce it.

23 MS. NURHUSSEIN: Your Honor.

24 THE COURT: The only way I will reverse that order is  
25 if you stipulate, as I have already indicated. And even that

lc20sasc

1 may be technically more than I'm allowed to do, but Judge  
2 Sullivan and I are friends.

3 MS. NURHUSSEIN: Yes, your Honor.

4 And we did we, we did say that we would be willing to  
5 put it in writing, we did put it in supplemental disclosures,  
6 we asked if there was any reason why that wasn't sufficient --

7 THE COURT: Now, you have received my response. You  
8 have the choice of 25,000 or less, or producing the documents.

9 How soon can you talk to your client and make that  
10 decision?

11 MS. NURHUSSEIN: We'll try to reach out to them as  
12 soon as possible. I mean -- yeah, I mean we have several  
13 clients and we'll need to -- I mean they'll need some time to  
14 make the decision.

15 THE COURT: Just give me a date. Give me a date.

16 MR. WITTELS: Two weeks from today, your Honor?

17 THE COURT: My only concern is four people being  
18 deposed next week. Because, in a way, they have to make that  
19 decision before their deposition or they're going to be asked  
20 questions about their mental health treatment.

21 MR. WITTELS: Your Honor, I -- with all due respect on  
22 this issue --

23 THE COURT: We all know what "with all due respect"  
24 means, if the lawyer says it.

25 MR. WITTELS: I have never seen a case that limited

1c20sasc

1 emotional or garden variety damages to \$25,000.

2 THE COURT: This is not the first case I have tried or  
3 had discovery on in this area. But, fine, you're right, I take  
4 it back.

5 You can't stipulate out of it. Judge Sullivan ordered  
6 you to produce it. I'm ordering you to produce it. Period,  
7 end of discussion. Makes life simple for me and takes away the  
8 "all due respect" argument.

9 You want to get me to change my mind, you can think  
10 about stipulating in a way that I have said would be something  
11 I would take my chances on, in essence reversing Judge Sullivan  
12 on. Otherwise, he ruled, not my problem. That's the Court's  
13 ruling. End of discussion on this.

14 What else do we need to do besides set a date for our  
15 next conference?

16 MS. CHAVEY: We don't have any other issues, your  
17 Honor.

18 THE COURT: Anything else from the plaintiff?

19 MS. NURHUSSEIN: Well, again, with all due respect --

20 THE COURT: You would think you would learn.

21 MS. NURHUSSEIN: No. We --

22 MR. WITTELS: We are going to have depositions next  
23 week. The issue was never brought up. We're in a very bad  
24 situation.

25 THE COURT: Life is tough.

1c20sasc

1 MR. WITTELS: But they -- we came down here because  
2 defendants had not produced documents that they were ordered to  
3 do.

4 THE COURT: What relief are you asking for? A minute  
5 ago, your associate or colleague said it's fine for depositions  
6 to go next week, so I know longer know what you want.

7 MR. WITTELS: Well, I would like an opportunity to be  
8 able to -- I think the depositions shouldn't go until we have  
9 had an opportunity to discuss this issue with them, we're in a  
10 very -- we have not even --

11 THE COURT: You have known this issue since  
12 September 14th, or whatever date it was that the judge ruled.

13 MR. WITTELS: We understood -- as I understood it from  
14 co-counsel, they had withdrawn their request. It wasn't an  
15 issue coming down here, in terms of the garden variety.

16 MS. NURHUSSEIN: Not that they had withdrawn the  
17 request, per say, they had agreed -- they said if we had agreed  
18 that our clients were only seeking garden variety, they were  
19 not seeking the documents, as far as I was aware.

20 MR. WITTELS: Right, in other words --

21 MS. NURHUSSEIN: So perhaps this is something we need  
22 to discuss more with defense counsel.

23 THE COURT: You want a week extension on depositions  
24 to discuss it?

25 MS. NURHUSSEIN: Your Honor, we're going to have to

lc20sasc

1 check with our clients to see. I think some of them have  
2 already made travel arrangements, so --

3 THE COURT: You know, then the depositions -- look,  
4 here is the deal. For any of them that can't switch it, are  
5 you all available the week of the 12th instead of the week of  
6 the 5th, whoever is taking these depositions?

7 MS. CHAVEY: We can make those arrangements, yes.

8 THE COURT: Good. So you will find out quickly. And  
9 any of your clients who could be deposed the week of the --

10 How about listening to me, instead of talking to each  
11 other?

12 MR. WITTELS: Sorry.

13 THE COURT: Any one of them that can be deposed the  
14 week of the 12th, instead of the week of the 5th, that's great.  
15 Anyone already off to Florida or wherever it may be, then the  
16 date sticks for the next week, unless you work out some  
17 accommodation in writing with the defendants.

18 Because I don't want to hear misunderstandings or  
19 whatever. If there is a written letter signed, you know, one  
20 now e-mail, you e-mail them and say, you know, how about we do  
21 it on the 19th instead of the 12th. If they say yes in  
22 writing, then you're fine. If there is no response or  
23 whatever, the deposition goes forward next week as previously  
24 scheduled.

25 Clear? Clear. Date to come back? By which point you

1c20sasc

1 must have your ESI plan in place, or very specific and very  
2 targeted, you know, we agree to these 50 custodians, or agree  
3 to X custodians, we're fighting over Y custodians, we agree on  
4 these key words, we're fighting over these. If you give me  
5 amorphous stuff, it's very hard for me to rule.

6 When do you want to come back?

7 MS. CHAVEY: Something like December 23, would work  
8 for us.

9 MR. WITTELS: How about Tuesday, the 20th or 21 --

10 THE COURT: Tuesday is the 20th. Does that work for  
11 the defendants?

12 MR. ANDREWS: I'm sure I can make it work, I don't  
13 have a calendar with me. It's locked up downstairs.

14 THE COURT: The sooner -- you are all local,  
15 Morristown, I don't know, whatever. But if you are  
16 quote/unquote New York lawyers, get the New York State Bar  
17 card, get a federal bar card, whatever we call it. That let's  
18 you bring your cell phone in. In any event --

19 MR. WITTELS: How about the Wednesday, your Honor,  
20 give us some time to work out the --

21 THE COURT: Fine, December 21 at 2:00. Does that  
22 work?

23 MR. ANDREWS: We can make it work. That is the date  
24 of deposition scheduled in Atlanta, but I guess you know,  
25 they're enough lawyers on both sides, we can make that work.

1c20sasc

1 THE COURT: If there is another day early that week  
2 that you want that works better for everyone, you know, I'm  
3 trying to accommodate you all here.

4 MR. STOHNER: Your Honor, while they are trying to  
5 talk about dates, my name is George Stohner, I represent  
6 Publicis Groupe. I have never been to a discovery conference  
7 where I have not uttered a word. But just a point of  
8 clarification. I came today because I was uncertain as to the  
9 scope of this hearing. There is no dispute at this time.  
10 Hopefully, never, vis-a-vis Publicis Groupe. And I do have a  
11 New York Bar card, but I am not local. And if it's possible  
12 for Publicis Groupe to be excused, I would ask that, unless  
13 there is some reason for them to be here.

14 THE COURT: Are you talking about the next conference?

15 MR. STOHNER: The next conference.

16 THE COURT: All right. Does anyone need them at the  
17 next conference? You, certainly from California, can appear  
18 telephonically if it's useful, to let you off the hook  
19 completely.

20 MS. CHAVEY: It's fine with us.

21 MR. WITTELS: We also have a counsel, my co-counsel in  
22 and partner Janette Wipper, if she could be on the phone as  
23 well, that would be helpful, your Honor.

24 THE COURT: That's fine. But the question is do you  
25 want Publicis on the phone for the next conference, or are we

1c20sasc

1 only dealing with disputes with MSL?

2 MR. WITTELS: Well beyond the correspondence, if they  
3 feel they need to be here then, or on the phone, that would be  
4 appropriate. If not, I don't see any need to.

5 THE COURT: All right. And I don't know what the --  
6 how close the relationship is between the two defendants. If  
7 you're not here and something comes up, you run the slight risk  
8 that you are relying on your co-defendant to protect your  
9 interest.

10 MR. STOHNER: I'll read the correspondence, your  
11 Honor.

12 THE COURT: Okay. And if you are going to be on the  
13 phone and the plaintiffs in San Francisco, counsel, you two  
14 need to coordinate on one call calling in, and we put you on  
15 the magic speakerphone in the sky, et cetera. But you have to  
16 be on one phone for that purpose.

17 MR. STOHNER: Okay.

18 THE COURT: Have you all figured out what date you  
19 really want? Wednesday, the 21st?

20 MS. NURHUSSEIN: Yes, your Honor.

21 MS. CHAVEY: Yes, your Honor.

22 THE COURT: Okay, the 21st at 2:00, which also is  
23 beneficial to the Californians.

24 MR. STOHNER: Thank you, your Honor.

25 THE COURT: All right, it is my practice to have the

1c20sasc

Please visit [www.ITLawToday.com](http://www.ITLawToday.com)

1 parties, since the only orders you get out of these conferences  
2 are what you have heard and what the court reporter  
3 transcribes, and unless there is an economic or other  
4 objection, I require that the parties to split the cost 50/50,  
5 based on each side of the table. Any problem with that?

6 MS. CHAVEY: No.

7 MR. WITTELS: No, your Honor.

8 THE COURT: Okay. Make your arrangements with the  
9 reporter.

10 (Adjourned)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25