(Docket Entry No. 734, Transcript at p. 26). These facts are inconsistent with any effective implementation of the March 17, 2004 memorandum/ litigation hold, as described by its terms.

The proof establishes that even if the March 17, 2004 litigation hold memorandum were distributed, there was not any implementation of its provisions.[24] The proof is undisputed that the

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[24]After the June, 2006 evidentiary hearing, the Defendants submitted the affidavit of Linda Ross, a Deputy Attorney General and counsel for the Defendants. (Docket Entry No. 998). Defendants' counsel contended that for the "first time" in closing argument, Plaintiffs' counsel argued that private defense did not issue a litigation hold. (Docket Entry No. 997 at p. 5). In her affidavit, Ross asserts that she wanted to assure the Court that the Defendants' private counsel "fully supported" and "fully implemented" the March 17th litigation hold. Id. The Court disregards this affidavit for several reasons.

First, the Court made it clear that live testimony would be required for the issues at that hearing. The Court earlier struck affidavits submitted on this motion. (Docket Entry Nos. 1008 and 1009). The reasons for this requirement are that the Defendants' prior discovery affidavits have been conclusory, inadequate and at times, inaccurate. See Docket Entry No. 596, February 10, 2006 Transcript at pp. 35-36. Ross's affidavit exemplifies this problem with her conclusory references that private defense counsel "fully supported" and "fully implemented" the litigation hold. Ross's assertions are unsupported by any specifics facts as to what private defense counsel actually did so as to assess the credibility of her conclusory assertions. This affidavit is written, as other affidavits submitted by the Defendants' counsel, with conclusory assertions to support an argument.

Second, Plaintiffs' counsel raised the issue of the absence of a litigation hold at the November 6, 2006 conference (Docket Entry No.734 at pp. 14-19, 49-64) and the December 2006 conference (Docket Entry No. 764 at pp. 28-30, 42-50). Plaintiffs' counsel expressly raised this issue in their brief **before** the June 19th hearing.

B. The Defendants nonetheless failed to monitor and maintain an effective litigation hold within state government.

Although the litigation hold was issued, it was not implemented. Present defense counsel assert that their duty was only to issue the litigation hold, not to ensure that it was implemented. (Doc. 828, Ex. 9 and 10). **[FN4]** But the state failed to perform this duty as well - the litigation hold was never disseminated to the staff of the Governor's Office for Children's Care Coordination (GOCCC), the agency responsible for coordinating and overseeing implementation of the Consent Decree in this case. (*See* Doc. 938, Flener Deposition at 42:11 - 43:12; *cf* Doc. 569 at Paras. 2-4). Nor was there monitoring of state agencies to determine whether to document and ESI preservation procedures outlined in the litigation hold were being observed. (Doc. 938, Flener Deposition at 54:8-55:6).

The State's failure to implement the procedures outlined in the litigation hold was widespread, if not universal. Defense counsel reported to the Court at the November 6, 2006 hearing that yet custodians had not been forwarding potentially responsive information, and that privileged documents had not been reviewed or segregated. (Doc. 734 at 26).

> N.4 The March 17, 2004 litigation hold, which was developed by the Attorney General and the Governor's Counsel, acknowledged the duty and

March 17th memorandum was never disseminated to the staff of the Governor's Office for Children's Care Coordination (GOCCC), the agency that was created to coordinate and oversee implementation of the Consent Decree. (Docket Entry No. 938, Flener Deposition at pp. 42 - 43; cf. Docket Entry No. 569-4, Declaration of Thomas Catron at ¶¶ 2-4), nor to the TennCare official in charge of information technology. (Docket Entry No. 984 at p. 192). Pertinent State agencies were not monitored for compliance. (Docket Entry No. 984 at pp. 194-95 and Plaintiffs' Exhibit 23 at p. 54). GOCCC did not monitor the state agencies within its charge for document and ESI preservation procedures. Id. at pp. 54, 55. Rob Bushong, the State's paralegal in charge of document preparation had never seen the March 17th Memorandum. (Docket Entry No. 988 at p. 203). Neither counsel who prepared the March 17th Memorandum testified as to the distribution of that memorandum nor how the litigation hold was implemented.

If this litigation hold were implemented, as outlined in the March 17th memorandum, then these complex discovery issues about ESI discovery and related costs of privilege review issues would be moot as, for example, all privileged documents would have been aggregated, centrally

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> intention not merely to issue the memorandum but to take steps to ensure the actual preservation of relevant evidence. The role of lead counsel in this case passed to outside counsel shortly thereafter. (Doc. 383. 385).

(Docket Entry No. 941-1 p. 8).

Third, Nicole Moss, a defense counsel earlier acknowledged on this issue that: "I did suggest that the State does not have an obligation to preserve all documents simply because a consent decree is in place." (Docket Entry No. 828, Exhibit 9, Moss letter at p. 2). Moss added:"my comment was merely directed to the issue of whether the State had an obligation to do more than instruct state officials to preserve documents relevant to this litigation, which the State has done. The State believes that the document preservation policies and instructions it has issued fulfill its obligations to reasonably ensure that all documents relevant to this case are not destroyed and that there is no further legal requirement that all documents created by the State, even those not related to this litigation, be preserved for all time." Id. (emphasis supplied).

The Court concludes that the Defendants cannot utilize Plaintiffs' counsel's closing argument to justify proof that should have been presented at the June, 2007 hearing where Ross's conclusory assertions could be tested.

located, preserved, and segregated after a privilege review by the State Attorney General's office. As the circumstances now stand, the Defendants' counsel argue that none of this ESI should be produced because an expensive and costly privilege review of this information is necessary and that this review is so costly that members of the class or class counsel should be required to pay for the Defendants' privilege review and ESI production.

To be sure, at the December 6th hearing, Nicole Moss, one of the defense counsel did state that after Plaintiffs renewed their discovery, a litigation hold was issued in June, 2006, but those instructions, if written, were not introduced at the June 19th hearing. At the December 6th hearing, Moss told the Court that there was not any litigation hold until 2004 because this was a consent decree case. (Docket Entry No. 764 Transcript at p. 42). According to Moss, "[w]hen this case went into litigation, at that point, we put a litigation hold on responsive documents." Id. The Court finds this assertion flawed, given the clearly contested contempt proceedings in this action in 2000 and 2001 (Docket Entry Nos. 63, 65, 69, 79, 123 and 124) as well as the contested issues in 2002 (Docket Entry No. 281, Defendants' Motion to Modify the Consent Decree) that was set for a hearing in 2003 (Docket Entry No. 332). On May 20, 2004, Plaintiffs filed a motion for an evidentiary hearing. (Docket Entry No. 375).

In addition, the Defendants cite the testimony of GOCCC director Natasha Flener that there was a litigation hold and that she tried to save everything on her computer. Flener's actual testimony was :"You know, after I had been there a few months, I **think** I was told that we needed to be keeping all e-mail correspondence." (Defendants' Exhibit 17, Flener deposition at p. 44) (emphasis added). Flener also testified: "I mean, we had conversation, obviously, about it, because we were all doing it. I don't know that - I don't know if we talked about specifics on, you know,

what we needed to be producing." Id. at 68 (emphasis added).[25] On the critically important issue of preservation of records by the person in charge of oversight of this part of the TennCare programs, the Court would expect greater clarity in her testimony or a reference to the March 17th memorandum.

Defendants also cite Brent Antony, the TennCare official designated by the State to address the technical aspects of electronic discovery. Antony testified about a litigation hold in 2000, but there is not any documentary evidence of such. In his earlier affidavit, Antony described the collection of ESI in a single mailbox, as requested by the Plaintiffs, as an undue burden. (Docket Entry No. 720, Exhibit C thereto). Later, Antony characterized this method as "very convoluted and complicated process . . . which would require State officials to try to forward all of their emails and electronic documents to a separate e-mail account," for the ESI production. (Docket Entry No, 734, November 6, 2006 Transcript at p. 26). These assertions are contrary to the March 17th memorandum/litigation hold that actually requires a single mail box for all relevant ESI at two offices; Finance and Administration and the State Attorney General's offices. The Defendants did not actually have a single mail box for all emails until 2006 or 2007.

Plaintiffs argue that the lack of a litigation hold resulted in the destruction of responsive information from the Governor's Office for Children's Care Coordination, and e-mailboxes of a some key custodians in other agencies, citing Docket Entry No. 799 and Docket Entry No. 828, Exhibit

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[25] The only other uncertainty she expressed about the litigation hold concerned whether it extended to every single draft of a document, even hard copy drafts that merely reflected non-substantive grammatical and stylistic changes. Id. at 42 ("Like, if we had, you know, multiple drafts of something we were working on, I don't know that I really knew whether or not I needed to keep every draft hard copy of it.") Flener further testified that she received instructions regarding her preservation duties at the time Plaintiffs' Third Set of Interrogatories and Third Set of Document Requests were disseminated. See id. at 80 (testifying that she received instructions regarding "what things we might need to be keeping or maintaining or saving").

11 at TJC 85, TJC 173, TJC 188, TJC 209 and Exhibit 16 at TJC 196. Plaintiffs argue that the Defendants are well aware of the importance of e-mails as evidence because in 2001, the Defendants submitted numerous emails as evidence to support their assertions of compliance. See Docket Entry No. 223, admitting Plaintiffs' Exhibit D1, H09, H11, H14, H19, H39, H51. Defendants strongly dispute this destruction of evidence assertion.

The Defendants' standard retention policies on ESI are that items older than 180 days would roll off the system. In their discovery report to the Court, the Defendants described the loss of ESI in their system and the lack of organized retention of ESI:

> For email the State has policies and procedures regarding the removal of aged emails, and backups for disaster recover purposes. The State regards emails that have been in a mailbox for six calendar months as aged emails. **When emails reach the 6 month age they automatically become eligible for removal. Unless specific action is taken by a mailbox user, emails are removed from the system one month following their six month anniversary. The State preforms disaster recovery backups on its email servers on a daily basis. The backup media is retained for a period of five days from the day of the backup. If during that five day period an email server were to fail and lose the mailboxes it supports, the disaster recovery backup would be used to restore the mailboxes on a repaired or replaced server. Backup media is not maintained following the five day period. It is reused for backup, recycled into other uses, or destroyed.**
>
> While the State has issued instruction to archive emails so as preserve them from automatic deletion as described above, **the State does not have a specific policy or procedure on how to archive emails for future reference since there are so may myriad places and ways to archive. It is the responsibility of each email account owner to maintain archival copies of emails as instructed by their supervisors, or if not instructed, as they believe appropriate.**

(Docket Entry No. 740-2, TennCare E-Discovery Report at p. 10). (emphasis added).

Defendants elicited some proof that some custodians were instructed to retain relevant ESI in their archives. (Docket Entry No. 984, June 20, 2007 Transcript at pp. 162-63). Defendants' key custodians have individual work stations, where they maintain individuals "my documents" file/folders and "home folders." These work stations lack any backup restoration possible. In a

word, "there are no tapes for the designated custodians." (Docket Entry No. 786, December 20, 2006 Transcript at pp. 7-10). Only at the December 2006 conference did Antony describe the measures taken in 2006 to collect the key custodians' mail boxes into a single tape. Id. at p. 7.

Yet, in a December 7, 2006 response to the Plaintiffs' second request for admission, the Defendants acknowledged "a few isolated instances in which individuals had not archived their emails" and admitted that there was "one isolated instance" in which a former employee's entire email box had been deleted. (Docket Entry No. 771, Exhibit A thereto at pp. 5-6). The Defendants also admitted that "many electronic documents, in particular email, having been produced in hard copy form may no longer exist electronically." Id. at p. 5. In response to the Plaintiffs' Third Request for Admissions, the Defendant disclosed that when several key custodians left employment, they were never told to preserve relevant documents and their computers were reconfigured for other reasons. See Docket Entry No. 828, Exhibit 16 at pp. 4-7; id. at Exhibit 11 at pp. 1-3; id. at pp. 11-13; id. at pp. 4-7; id.. at pp. 8-10. Plaintiffs cite as other proof of lost emails[26]

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[26] See e.g., Rebecca Poling: Docket Entry No. 980 at 89 of 90 ("I don't typically have documents that relate to John B. What I would have would be emails concerning specific cases. So . . . I don't have anything stored anywhere on my computer that relates directly to John B. (Except where I've stated saving the emails")) with Docket Entry No. 799 at pages 44 - 45 of 64).

Jim Shulman; Docket Entry No. 980-2 at 15 ("I do not archive documents nor do I put them in folders. I am not very good with the computer.") with Docket Entry No. 799-10 at pp. 18-19.

Dick Chapman: Docket Entry No. 980-2 at 66 of 71 (GroupWise archive is empty).

Carol Kardos: Docket Entry No. 980 at 85 of 90 ("[N]o email archived.") with Docket Entry No. 799-13 at pp. 20 - 21.

(Docket Entry No. 996, Plaintiffs' Post-Hearing Memorandum of Facts and Law at pp.

As discussed earlier, some key custodians did not provide any email. Plaintiffs note that several of the 50 key custodians failed to produce any responsive e-mails, notably the Governor, Dave Cooley, the governor's deputy and David Goetz, the Commissioner of Finance and Administration who is in charge of TennCare and a named defendant in this action. These omissions are reflected in emails from other officials that were copied to these key custodians or mention their involvement. (Docket Entry No. 828, Exhibit 1, at p. 2 ¶ 9 and Plaintiffs' Exhibits 3, 4, 5, and 15). Plaintiffs' proof is that these state officers have been "actively involved" in the shaping of TennCare policy affecting EPSDT over the preceding two years. (Docket Entry No. 709 at 23-24; Docket Entry Nos. 712 and 713). As examples, Plaintiffs introduced Goetz's handwritten notes of weekly meetings with the Governor, who is identified in Goetz's notes by the initials, "PNB", and other state officials in 2004 and early 2005 that were produced in discovery in March 2005 in the Rosen action.[27] Plaintiffs' proof also includes an email addressed to Cooley about this action and a copy of another email to Cooley on issues in this action. (Plaintiffs' Exhibit Nos. 3 and 5). Two former directors of TennCare were not asked for their answers to the RFAs, and others purported to answer on behalf of the Governor and others. (Docket Entry No. 828, Exhibit 16 at pp. 1-3 and pp. 11-13; id. at pp. 8-10; id. at pp. 14-16). These facts are also inconsistent with the March17th memorandum. Moreover, the Defendants failed to instruct some key custodians regarding their responsibilities to archive ESI or how to do so, that leads the Court to find that in all likelihood, significant responsive ESI was destroyed after 180 days. (See Docket Entry No. 786

12, 13).

[27] Rosen v. Goetz, No. 3:98-627 (M.D. Tenn.).

at p. 43; Docket Entry No. 734 at p. 62; Docket Entry No. 740-2, TennCare E-Discovery Report at p. 5).

Significantly, the Defendants did not tell the MCCs (where most EPSDT services are processed or provided) to preserve and produce responsive information until weeks after the Court's bench ruling of November 6, 2006. (Docket Entry No. 734 at pp. 73-74). After the Court's Order of November 21, 2006, the Defendants informed its contractors of the existence of the outstanding discovery requests. (See Docket Entry No. 745 at pp. 1-2, and Docket Entry No. 751 at pp. 1-2). The Defendants did not require its contractors to institute a litigation hold and some MCCs did not issue preservation or litigation holds until December 2006 and in some cases January 2007. (Docket Entry No. 872, April 11, 2007 Transcript at p. at 165). As a result, the MCC's document retention policies systematically overwrote or otherwise destroyed e-mails and other responsive documents. (See, e.g., Docket Entry No. 751 at p. 2; Docket Entry No. 745 at p. 2; Docket Entry No. 828 at pp. 5-6). At the April 11, 2007 conference, some MCC representatives cited their continued destruction of potentially responsive ESI in December, 2006 or in January 2007. (Docket Entry No. 872 at p. 165).

In contrast to the Defendants' preservation practices, when the MCCs were advised to preserve responsive information, some MCCs issued directives to "lock down" any responsive ESI to avoid deletion by individual custodians or by routine document retention policy. (Docket Entry No. 986 at pp. 115-116 (AmeriChoice); Docket Entry No. 984 at pp. 96-97 (Doral); Docket Entry No. 988 at p. 84 (BlueCross); Docket Entry No. 986 at p. 91 and Docket Entry No. 872 at p. 154 (Unison)). Prior to that, MCCs' policies resulted in the automatic destruction of ESI on a daily basis, without protection of responsive materials. (See Docket Entry No. 816, Exhibit 10: 12/19/06, Roberts letter on behalf of Doral at p. 2 of 28; Docket Entry No. 816, Exhibit 10: 12/19/06, Paul

letter on behalf of United Healthcare at p. 7 of 28; Docket Entry No. 816, Exhibit 10: 12/19/06 Norwood letter on behalf of VHP at p. 10 of 28; Docket Entry No. 816, Exhibit 10: 12/19/06 Miller letter on behalf of PHP at pp. 14-15 of 28; Docket Entry No. 816, Exhibit 10: 12/18/06 letter on behalf of Memphis Managed Care at p. 21 of 28). Thus, except for Blue Cross's preservation of materials starting in January 2006, the other MCCs continued the destruction of responsive materials until at least November 2006.

The Defendants initially denied any duty to provide any MCC information contending that except for documents provided to the State, such information was not in the Defendants' "possession, custody, or control" (Docket Entry No. 711 p. at 4). Defendants' counsel repeated that argument in their post-hearing brief.

> [I]t is well settled that a party has no obligation to preserve evidence that is not in its possession, custody or control. See, e.g., MacSteel, Inc. v. Eramet N. Am., No. 05-74566, 2006 U.S. Dist. LEXIS 83338, at *4 (E.D. Mich. Nov. 16, 2006). ("[T]he duty to preserve evidence does not extend to evidence which is not in a litigant's possession or custody and over which the litigant has no control.") (quotation marks and alterations omitted)...

(Docket Entry No. 997 at p. 25).

At the November 6th conference, Defendants' counsel told the Court:

> MS. MOSS: And I want to be clear on the State's position. We're not saying that these documents are not in the State's custody or control or that we can't produce documents from our contractors. In fact, we've produced — — our response to details, entire categories of documents that we have produced from our contractors.

(Docket Entry No. 734, November 6, 2006 Transcript at p. 42).

3. Inadequacies in the Defendants' 2006 Paper Production

In their fourth request for production of documents, Plaintiffs focused on two major categories of ESI. First, Plaintiffs sought transactional or quantitative data that the Defendants

are required to maintain so as to monitor, track and report their compliance with the Consent Decree. As the Court understands, for the Defendants and most MCCs, with some exceptions, the transaction data controversy is now moot. The second and contested category includes e-mails and other such ESI among persons, including the Defendants' employees and the MCCs' employees with substantial responsibility to implement, monitor and measure compliance with the Consent Decree as well as other ESI about class members.

Plaintiffs challenge the adequacy of the Defendants' 2006 paper production and the Defendants' and MCCs' estimated costs of recovering the ESI sought by the Plaintiffs. At the June 19th evidentiary hearing, Plaintiffs' proof established several substantial and serious deficiencies in the Defendants' June 2006 paper production. As stated earlier, Plaintiffs note that several of the 50 key custodians failed to produce any responsive e-mails, notably the Governor, Dave Cooley, the governor's deputy and David Goetz, the Commissioner of Finance and Administration who is in charge of TennCare. These omissions are reflected in emails from other officials that were copied to these key custodians or mentions their involvement. (Docket Entry No. 828, Exhibit 1, at p. 2 ¶ 9 and Plaintiffs' Exhibits 3, 4, 5, and 15). Plaintiffs' proof is that these state officers have been "actively involved" in the shaping of TennCare policy affecting EPSDT over the preceding two years. (Docket Entry No. 709 at 23-24; Docket Entry Nos. 712 and 713). As examples, Plaintiffs introduced Goetz's handwritten notes of weekly meetings with the Governor, who is identified in Goetz's notes by the initials, "PNB", and other state officials in 2004 and early 2005 that were produced in discovery in March 2005 in the Rosen action.[28] Although incomplete, Goetz's notes reflect that the Governor, Commissioner, and other senior officials discussed not just TennCare in

[28] Rosen v. Goetz, No. 3:98-627 (M.D. Tenn.).

general, but specific TennCare matters relating to children. (Docket Entry No. 728-3). As another example, despite the Defendants' denial of the involvement of Dave Cooley, the deputy governor, in overseeing TennCare or making policy affecting EPSDT, Plaintiffs' proof included an email addressed to Cooley about this action and a copy of another email to Cooley on issues in this action. (Plaintiffs' Exhibit Nos. 3 and 5). On the cited inadequacy of this production, Defendants' counsel elicited from Thomas Tigh, Plaintiff's computer expert, testimony about the likely prospect for differences among custodians in their selection of documents for production. This fact, however, underscores the need for an independent entity to collect discoverable ESI, as Tigh testified is an industry standard for ESI production.

Second, Thomas Tigh, Plaintiff's computer expert who is well experienced in ESI production with twenty-seven years experience in complex litigation, scanned the Defendants' June 2006 paper production for search capabilities. In his electronic search of the Defendants' June 2006 paper production, Tigh found that J.D. Hickey, a key TennCare official, was named in about 500 emails in the Defendants' 2006 paper production. Tigh compared that number to the Defendants' ESI contractor's compilation of Hickey's emails from the Defendants' database. The Defendants' ESI contractor lists 30,000 emails in Hickey's files. In Tigh's opinion, this substantial disparity undermines the integrity of the Defendants' June 2006 paper production. The Court agrees.

Third, Tigh reviewed the Defendants' proof about the burdensomeness of the Plaintiffs' ESI. The Defendants identify millions of pages of responsive documents. According to the Defendants, using Plaintiffs' search words, the State's files from June 2004 forward resulted in 193 gigabytes of information from a total of 430 gigabytes. (Docket Entry No. 984 p. at 131). This 193 gigabytes comprises 118 gigabytes of data for the period prior to April 2006 and 75 GB for the

period after April 2006. Id. at pp. 157, 158. A gigabyte in the State's system is equal to 77,000 pages. Id. at p. 116. The Defendants contend that, using Plaintiffs' key term searches and upon review by their counsel, twenty percent of the documents located are responsive to Plaintiffs' requests. (Docket Entry No. 988 at p. 193). The calculation of 1.8 million responsive pages is: 118 gigabytes data for the period of June 2004 through April 2006 x 77,000 pages per GB = 9.1 million pages, and then 20% yield of responsive documents x 9.1 million pages = 1.8 million pages. (Docket Entry No. 984 at 213- 214).

Tigh testified that the Defendants' June 2006 paper production contains only approximately 71,0000 documents. (Docket Entry No. 982 at p. 88). Defendants' counsel contend that their 2006 paper production included their 2005 production in Rosen v. Goetz, a related action. Yet, Rob Bushong, the Defendants' paralegal in charge of documents testified that the Rosen documents were made available for Plaintiffs' inspection, but were not copied, unless Plaintiffs requested copies. (Docket Entry No. 988 at p. 187). On cross-examination, the Defendants' counsel suggested that Tigh cited a larger number of pages (183,000) in the State's paper production at the April 11th "experts only conference." Accepting the Defendants' assertions of the higher number, the actual number of responsive ESI in the Defendants' ESI contractor's database remains multiples of the total documents produced in Defendants' 2006 paper production.

Fourth, Tigh explained that the Defendants' method of collecting of ESI from its key custodians was flawed because the Defendants' custodians were left to determine for themselves whether to exclude unfavorable ESI on their computers. In addition, the Defendants provided little guidance or supervision for this production. Natasha Flener, GOCCC's director whose agency coordinates compliance under the Consent Decree, did not received any such directions or instructions. (Docket Entry No. 938, Flener Deposition at pp. 67, 68). The Defendants did not issue

instructions to the MCCs beyond the copies of the State's written objections and responses to the interrogatories and requests for production. According to Tigh, the Defendants' method of collection is known to leave gaps in production and violates industry standards for ESI collection. (Docket Entry No. 982 at pp. 38, 39). For example, under industry standards, an independent entity collects relevant ESI and industry protocol provides for an audit to ensure that the search is properly conducted. An independent entity's collection of all responsive ESI from individual custodians ensures against the non-production or destruction of e-mails that a particular custodian deems unfavorable. See also Docket Entry No. 764 at pp. 19, 20.

Fifth, Plaintiffs noted that the May 2006 log identified 3,201 pages of documents produced from the Department of Finance and Administration, but the log did not identify the specific individual(s) in the Department from whom the documents were collected.

Sixth, the Court ordered a survey of the custodians on removal of documents, but some of those surveys were oral, not written. (Docket Entry No. 734 at p. 26). Defense counsel assured the Court that, ". . . the survey, my understanding was most of those answers were oral, not written. So there is nothing to submit or provide to the plaintiffs..." (Docket Entry No. 984 at p. 150). When the Court ordered any completed written survey to be filed, the written survey responses were 161 pages. (Docket Entry No. 980). The survey questions do not reflect the Court's question about whether a custodian removed any data to another media. Id. Thirteen (13) custodians did not provide any information regarding the location of documents and files pursuant to the first question in the survey and thirty-nine (39) custodians did not provide information regarding the location of emails. Compare Plaintiffs' Exhibit 2 (list of custodians) with Docket Entry No. 980 (survey responses).

Out of thirty-one DCS custodians, four people responded and three gave a standard non-

responsive answer: "According to state policy and software program defaults, all created documents are stored on user directories and shared folder locations that reside on servers." (Docket Entry No. 980-2 at p. 13 (Miller); id. at p. 19 (Franklyn); id. at p. 21 (Jones)). Other custodians responded that they did not have any responsive documents. (Docket Entry No. 980-3 at p. 54 (Williams); id. at p. 56 (Whitlock); id. at p. 58 (Dwivedi); id. at p. 85 (Kardos); id. at p. 89 (Poling)). These answers are non-responsive because the survey was to elicit information on the custodians' storage or removal of responsive documents. (See Docket Entry No. 789 at p. 2-3).

Seventh, prior to Antony's production of the surveys for the January 14th Order, the Defendants asserted that the custodians' answers to the Plaintiffs' Third Request for Admissions and Fifth Interrogatories were also responsive to the January 14th Order. (Docket Entry No. 799; Defendants' Notice of Filing, January 30, 2007; Docket Entry No. 816-1 at pp. 14-15). Plaintiffs' counsel disagreed and requested the certifications required by the January 14th Order, defense counsel refused. (Docket Entry No. 828, Exhibit 15: Bonnyman letter of February 5, 2007).

Many of the emails sent from the custodians to Antony and then filed with the Court after the Court's June 20th Order have also been redacted without explanation about the information removed. (See, e.g., Docket Entry No. 980-3 at p. 49 (Outlaw); id. at p. 52 (Burley); id. at p. 54 (Williams); id. at p. 56 (Whitlock); id. at p. 58 (Dwivedi); id. at p. 61 (Edgar); id. at p. 68 (Carver); id. at p. 70 (Dean); id. p. 80 (Carter)). The Court finds that the Defendants never complied with the January 14th Order requirement that each custodian must certify that none of the responsive ESI had been removed.

Eighth, a paper production that is converted from ESI to hard copy, undergoes a process that strips "metadata" from the electronic version of the documents. "Metadata" is information created with an electronic document to capture imbedded edits and other non-screen information that are

integral elements of the ESI documents. (Docket Entry No. 720 at p. 3). Tigh explained that in his experience, metadata is important and reliable information that describes the path of a document among the Defendant's officials, when the document was created and edited. Metadata provides information that is not present in the State's paper production. As examples of metadata, Plaintiffs cite the following:

1. **BegAttach,** associated with the first page of a document
2. **EndAttach**, associated with the last page of an attachment
3. **Master_Date**, the actual date of the parent document
4. **Create_Date**, the date a document was created
5. **Create_Time**, the time a document was created
6. **LastMod_Date**, the date the document was last modified
7. **LastMod_Time**, the time the document was last modified
8. **ParentFolder**, which denotes the full path and folder information of a document
9. **BCC**, which displays the names of the blind copyee(s) of a document
10. **Custodian,** the custodian of a document
11. **Nativepath**, the full path to a native copy of a document
12. **Attachcount**, the number of attachments to a document

See Docket Entry No. 941, Plaintiffs' Reply Brief at p.16.

Tigh testified that the absence of metadata in the Defendants' hard copy production creates a deficiency in information as to who received the document, who received copies of the document or email, who edited the documents, whether there were attachments to the documents and when the document was created. Plaintiffs deem metadata critical to their ability to understand any ESI provided and to challenge the Defendants' assertion of compliance with the Consent Decree,

especially given Judge Nixon's finding that the Defendants lack reliable statistical measures of their actual progress.

Finally, Tigh analyzed the MCCs' responses to interrogatories and noted several instances in which some MCCs did not respond at all. (Plaintiffs' Exhibit No. 9). Significantly Plaintiffs' cite a disturbing and misleading discussion with a state official about the Defendants' answer to Plaintiffs' interrogatory No. 22:

> **INTERROGATORY NO. 22** **Wendy this is a tricky one since the MCC's would have files, but we have answered that this is unanswerable.**
>
> During the twelve-month period prior to January 10, 2006, how many members of the plaintiff class received TennCare services that, since that date, have been excluded by TennCare Rule. 1200-13-13.10 as non-covered services?
>
> a. With respect to each such child, identify the pertinent documents relating to the now-excluded service. This request includes documents that identify the child, identify the service and address the child's purported need for the service.
>
> b. Identify any documents that discuss, analyze, evaluate, justify, criticize or implement the exclusion or speculate on their potential impact on members of the plaintiff class; this request includes any documents containing potential cost saving estimates or other budget effects associated with the exclusions as applied in plaintiff class members; this request also includes any documents containing analyses or estimates of the number of children or number of service requests that might be affected by the exclusions.

(Plaintiffs Exhibit 12-D at p. 16).

The Defendants introduced their actual response to this interrogatory.

> Defendants reiterate their General Objections as if each is specifically set forth immediately below in response to this interrogatory. In addition, Defendants object to this Interrogatory to the extent it implies that the items on the exclusions list in TennCare Rule 1200-13-13-.10 are newly non-covered services. Defendants further object to this Interrogatory to the extent it would require them to impose on their contractors to provide information not kept in the ordinary course and not tracked in a manner that would allow them to readily respond to this request without undue burden and expense. Because the information Plaintiffs appear to be seeking in this

> Interrogatory is not maintained in a readily accessible database, a response would require Defendants to review potentially hundreds of thousands of individual children's medial files, which is an unreasonable and objectionable request not contemplated by the Federal Rules or sanctioned by any court order in this case. Without waiving these objections, Defendants respond as follows.
>
> TennCare Exclusions Rules were promulgated through the ruling making process with a public hearing conducted on August 15, 2005. The rules became effective January 10, 2006. Further clarifications were promulgated as Public Necessity Rules on May 3, 2006 to reflect TennCare's compliance with EPSDT and the John B. Consent Decree. Coverage policy defined in the exclusions rules, including identification of certain services that are non-covered even for children under age 21, are not changes in TennCare's policy regarding these services, but rather, clarifications of coverage policy, and reflect services that the State believes are not covered even under EPSDT because they are services for which FFP is not available and/or are never medically necessary for children. These are not "now-excluded" services, but rather services which have always been excluded from coverage and for which clarification that such services are not covered has now been provided. **While the State acknowledges that it is possible that an MCC, absent these clarifications, may have, in fact, covered one of these services in the past, it is not because such services were covered under TennCare or mandated by EPSDT. Furthermore, because the kinds of services identified are services for which FFP is not available and/or are never medically necessary for children, obtaining claims information regarding possible inappropriate payments by an MCC for these services is impossible.** There are no ICD-9 or CPT codes for such items as Lovaas therapy, trampolines, or swimming pools.
>
> For documents generally responsive to this request, in addition to all documents previously produced in this and the Rosen matter and being generally produced herewith, see documents produced at TCJB0406-D-00233 to 00315; TCJB0406-D-00480 to 00516; TCJB0406-D-00537 to 00554; TCJB0405-D-0056-00612; TCJB0406-D-00631 to 00655.

(Defendants' Exhibit 12) (emphasis added). Both parties emphasized different portions of the underscored portions of this interrogatory answer.

Neither "Wendy" nor the person writing to Wendy testified about this statement: "Wendy this is a tricky one since the MCC's would have files, but we have answered that this is unanswerable." (Plaintiffs Exhibit 12-D at p. 16). It is unclear to the Court if this discussion occurred before or after the Defendants' response quoted above. The Defendants' failure to call

"Wendy," an employee of the Defendants' about this controversy adds to the Court's concern, as does the inclusion of the statement in the Defendants' actual answer to Interrogatory 22, i.e.: "Furthermore, because the kinds of services identified are services for which FFP is not available and/or are never medically necessary for children, **obtaining claims information regarding possible inappropriate payments by an MCC for these services is impossible.**" (Defendants' Exhibit 12), The latter statement, without explanation, is consistent with the statement "Wendy this is a tricky one since the MCC's would have files, but we have answered that this is unanswerable." (Defendants' Exhibit 12). This increases the Court's confusion about the Defendants' answer to the Interrogatory 22. The Court will order a complete a response and will further address this issue at a conference with counsel.

4. The Necessity of Plaintiffs' ESI Discovery Requests

As to the probative value of Plaintiffs' ESI discovery requests, Plaintiffs initiated this recent round of discovery based upon Defendants' counsel's assertion that the Defendants were in compliance with the Consent Decree. Given Judge Nixon's findings in 2001, 2004 and in his statements about the Defendants' non-compliance in his Order of recusal in 2006, the Court finds that Plaintiffs' ESI discovery requests are for legitimate purposes. In addition, in his 2004 opinion, Judge Nixon found that the Defendants had not cooperated with the Special Master and at one point, refused to " honor [the State's] renewed commitment to produce an IAP [Initial Action Plan] satisfactory to the Special Master, last made in September2004, and still refuses to engage its key officials in planning efforts to achieve compliance, verification of the quality of its data, and evaluation of the successes or failures in attaining compliance." (Docket Entry No. 465, Memorandum at pp. 5).

Significantly, Judge Nixon also noted that "[t]he Special Master also reports that the State

is incapable of reporting progress to the Court because it lacks a valid and reliable system of measuring progress in such key areas as provider network adequacy, case management, outreach, the effective use of information systems, and system level coordination, to name a few. [T]he ... Defendants have never created a list of precise "outcomes" towards which their efforts are focused, not only have failed to meet the terms of the Consent Degree, but they are not even in a position to be able to assess their own shortcomings for the purpose of making improvements." Id. at pp. 5-6.

Moreover, Judge Nixon found that the MCCs that actually provide the EPSDT services were also contributors to the Defendants' violations of the Plaintiffs' class's rights under the EPSTD statutes and the Consent Decree.

> [W]here there are overlapping medical and mental health issues, the MCOs and BHOs quibble over which entity is responsible for providing coverage. The State's TennCare contracts contribute to this ambiguity by sometimes failing to specify the responsible party, even though the BHOs do have coordination agreements with MCOs. In practice, individuals with overlapping issues sometimes "fall in the cracks" and fail to receive services from either a BHO or MCO, as with, for example, attention deficit disorder patients.

(Docket Entry No. 227, Findings of Fact and Conclusions of Law at pp. 16).

As to the need for transactional data, the Consent Decree sets agreed percentages for screenings of children. In 2004, six years after the decree, the medical screening for most class members was 53%(Consent Decree set no less 80% by 2001) and dental screening was 41.9% (Consent Decree requires no less than 80% required by September 2003). Id. at p. 4. In 2004, the Defendants had not met the 100% screening of children in DCS's custody that was to be achieved by September 11, 1999. See also Docket Entry No. 12, Consent Decree at ¶¶ 50 and 52). As Judge Nixon found, as of 2004, none of these percentages had been met.

Dr. Rose Ray, Plaintiffs' expert reviewed the transactional data from the Defendants for her analysis. Dr. Ray and other scientists at her research firm perform a failure analysis and design

quality improvement tests using statistics about various products, including medical products and medications. Dr. Ray who was awarded a Ph. D. in statistics from the University of California at Berkeley in 1972, specializes in statistical analyses of business practices and products with an emphasis in medical research analysis. Dr. Ray's analysis of the Defendants transactional data to date, reveals that for children who are members of the Plaintiffs' class and between ages 0 to 24 months, the number of paid screening visits at 12 months reveals that 20 % of these children had three (3) or fewer screenings and 72% have had 5 or more screenings . (Plaintiffs's Exhibit No. 18). For children in this group, at 23 months, 26% have had 5 or fewer screenings and 56% have had nine (9) or more screenings. Id. For children who have had a mental health diagnosis 34% are rehospitalized within 30 days of their mental health diagnoses. Id. This latter fact on readmission within 30 days is 2 to 30 times more likely than for children admitted within 30 days in 16 other States. Id. at p.2. In the Consent Decree, the Defendants committed to achieve an eighty percent (80%) screening rate. Dr. Ray's initial report raises serious issues on whether the Defendants are currently meeting the screening percentage standards in the Consent Decree.

The most significant remaining transactional database dispute is between Plaintiffs and some MCCs arising from Plaintiffs' demand for data underlying Health Employer Data and Information Set ("HEDIS") that are calculations to measure a provider's compliance with Medicaid regulations, rule and standards. HEDIS is cited in the Consent Decree as one standard to measure and set screening percentages. (Docket Entry No. 12, Consent Decree at ¶ 46).

HEDIS is a nationally recognized set of standardized measures of MCO performance. The MCCs collect HEDIS data according to detailed specifications developed by the National Committee for Quality Assurance ("NCQA"), a private, non-profit. entity dedicated to improving health care quality. NCQA assesses and scores a MCC's performance and serves as an independent

accrediting organization for MCOs. Selected HEDIS measures are evaluated and scored by NCQA as a part of the accreditation process. NCQA requires that MCOs submit HEDIS data annually. For collection of HEDIS data, NCQA specifications requires each MCO to have an independent NCQA-certified HEDIS auditor to conduct the detailed analysis to validate the accuracy and reliability of MCC's reported HEDIS data. NCQA licenses auditors for these audits. See Docket Entry No. 907.

Dr. Ray seeks the MCCs' HEDIS data that are extracts and summaries of a class member's medical history as well as the HEDIS score reports. Some MCCs respond that HEDIS data is available from the State's production and in some instances is unavailable because that data is compiled **on** outside vendors' proprietary software. Several MCCs agreed to provide their HEDIS data to Dr. Ray, but other MCCs object because to do so imposes significant burdens upon them, and Dr. Ray lacks the qualifications to perform the only task for which she anticipates using the data. Unison and PHP asserted that to produce HEDIS-related data would require "extract[ing] and review[ing] for production medical record review data that already underlies audited HEDIS reports," a process these MCCs asserted is "unduly burdensome." (Docket Entry No. 907, Exhibit 10 thereto, PHP Letter). Except for HEDIS data on independent entities' proprietary software, the Court finds that this HEDIS should be provided by all MCCs in their native format.

5. The Costs of ESI Production

For their cost assertions, the Defendants explain that in January, 2007, the Defendants retained Document Solutions, Inc. ("DSI"), an ESI contractor to assist with the ESI production sought by Plaintiffs. Under the experts' protocol, DSI's search result was actually 350 gigabytes, but that data was uncompressed and thereby increased to 430 gigabytes. (Docket Entry No. 907 at p. 11; Docket Entry No. 984 at pp. 116, 120-22 and 131). Defendants do not justify the need to

uncompress their extract that yielded a 25% increase in the ESI production. Plaintiffs note that the Defendants' brief cited 600 gigabytes. (Docket Entry No. 907 pp. at 9-10). With Plaintiffs' revised search terms, the Defendants' proof is that the search from June 2004 to present for 50 search terms and the 50 key custodians, would capture 493 gigabytes of data. A gigabyte can range from 75,000 to 77,000 pages and Defendants determined that their gigabyte is 77,000 pages. Tigh explained that a software program can be used to "deduplicate" or eliminate duplicate documents from the 493 gigabytes, resulting in approximately 193 gigabytes that represents about 15 million pages of documents for review. The Defendants have reviewed approximately 75 gigabytes of non-duplicative e-mails and other ESI and found only 20 percent of that data is non-privileged and actually responsive to Plaintiffs discovery requests.

Once the initial search is performed, DSI then provides a post-search process or "delivery" to render the data collected reviewable to the human eye. To perform these post-search processes, DSI charges the State $1200 per gigabyte for the first 50 gigabytes "delivered" over the total life of the contract, $1000 per gigabyte for the next fifty "delivered," and $800 per gigabyte for delivery of any additional gigabytes. The Defendants assert that $458,000 that has been spent in gathering and preparing their data for review. Any search itself would cost over $70,000 (430 gigabytes x $165 per gigabyte) and to "deliver" or translate the selected documents into a format reviewable to the human eye would cost approximately $184,000. The latter figure is calculated with 193 gigabytes at $1200 per gigabyte for the first 50 gigabytes, $1000 per gigabyte for the next fifty, and $800 per gigabyte for the final ninety-three.

With the earlier results of 20 percent of the 193 gigabytes as responsive and non-privileged documents, Defendants project that from 193 gigabytes, only 39 gigabytes or about 3 million pages of documents will have to be produced. At six cents a page, the Defendants estimated an additional

$180,000 to Bates-stamped these documents in a producible format. In addition to the $458,000 in consolidation and "extraction" costs to run the Plaintiffs' final search terms, the search of the TennCare file server and the 50 key custodians would cost the State approximately $434,000.

Another component of their costs projections, Defendants cited TennCare and other child-serving agencies' employees who examined the individual computers of the over 150 custodians to capture the ESI from their email archives, "My Documents," equivalent folders servers and home directories. The Defendants consolidated the active e-mail boxes of those custodians onto a single e-mail server to facilitate harvesting their active e-mail as well. The costs of this process is approximately $200,000. The State also captured the ESI on the TennCare file server and the Defendants cite the substantial costs of time to State's agencies' personnel .

A significant element of the Defendants' estimated costs is for privilege review by Defendants' and the contractors' counsel, including the costs of Defendants' attorneys and paralegals to conduct a privilege and responsiveness review of the millions of pages generated in response to Plaintiffs' searches. The Defendants' estimates are based on a manual review by their counsel of the electronic documents for privilege. (See Docket Entry No. 907 at p. 11).

The Court finds the Defendants' costs estimates are highly exaggerated for several reasons. First, the Defendants' representative who is charge with overseeing this production explained that the State has two servers containing ESI, a report or document server and an email server. Michael Kirk, defense counsel conceded that the Defendants' real concern is with the email server, as the document server has data compilations, such as public reports, spreadsheets and statistics. Thus, the volume of documents requiring attorney review is greatly reduced.

Second, as Tigh, Plaintiffs' computer expert testified, the amount of time to search for potentially attorney client and work product privileges can be efficiently accomplished by use of

selective search terms, such as names of counsel to identify and words such as "confidential" and "privilege" to identify potentially privileged information. The Court finds that independent of the Defendants' data systems, the defense counsel's firms computers should be readily able to identify all clearly privileged correspondence with their clients from their computers.

Third, as Tigh explained and as the Defendants' private counsel have actually done, contract attorneys can be hired to perform any privilege reviews at significantly lower costs than the hourly rate of the Defendants' current counsel. Plaintiffs noted that Defendants' lead counsel's description of his firm's significant experiences on ESI discovery and his firm's use of contract attorneys to control costs in ESI discovery. "Our use of well-trained, closely supervised contract lawyers to assist with document discovery is designed to hold down the ratcheting litigation costs of our clients. In document-intensive litigation, deploying expensive litigation associates to perform the initial review, indexing, and electronic coding of documents would dramatically increase the client's litigation expense." Plaintiffs Exhibit No. 35 at p. 2 (emphasis added). For any oversights by contract attorneys, the Court's November 21st Order made ESI production "[s]ubject to Defendant's right to 'claw-back' privileged documents." (Docket Entry No. 743 Order at p. 2).

As to the Defendants' estimated costs and time for review for privilege issues, the Court's adopts Tigh's testimony that the use of attorney names and other privilege filters as well as the use of contract attorneys should substantially reduce the Defendants' and MCCs' costs for any privilege review. (Docket Entry No. 988 at pp. 279 and 282; Docket Entry No. 984 at p. 133).

Another significant factor to reduce production costs is a clawback right for any inadvertent production of privileged material. At an earlier conference, the defense counsel complained that the Court had not afforded it clawback protection for privileged documents that were inadvertently disclosed. (Docket Entry No. 720 at pp. 19-20). In their pre-hearing brief, the Defendants stated that

"Plaintiffs at various points have urged the Court to compel the State a avoid the costs and delays involved in the State's review for privilege and responsiveness by compelling the State to produce the documents without reviewing them under a 'claw-back' agreement." (Docket Entry No. 907, Defendants' Response to Plaintiffs' Renewed Motion to Compel at p. 11). Citing a Committee Report on the 2006 Rule amendments, the Defendants argue that only a voluntary claw-back agreement is permitted by these rules.

The Court discussed this clawback provision with Nicole Moss, a defense counsel and as the Court understood her, Moss agreed to a clawback agreement for any ESI production to Plaintiffs.

> THE COURT: And if we've got a claw back provision, as I understood the plaintiffs agreed to, then, if something sort of slips through, then you have the right to come back and claim it as privileged. I mean, that's what I understood you wanted, isn't it?
>
> MS. MOSS: We do, Your Honor. Certainly that would be part of the provision.

(Docket Entry No. 734 at p. 80). Thus, it was at the Defendants' counsel's request and with the Plaintiffs' counsel's agreement, the Court entered an order with a clawback provision for the Defendants. Id. at p. 74. and Docket Entry No. 743, Order at p. 2. In a word, the Court did not impose any "compulsory" or "mandatory" clawback upon the Defendants nor did the Plaintiffs.

The Defendants' also expressed concerns about disclosures of ESI to their unnamed "political enemies" and "political opponents." (Docket Entry No. 907, Defendants' Response at pp. 11, 13). A protective order limits the disclosure of sensitive information for use solely in this action. (Docket Entry No. 878).

Assuming the correctness of the Defendants' gigabytes, the Court also credits Tigh's testimony that in his experiences in complex litigation, such estimates are reasonable for this

complex action. This action involves a class of more than 550,000 children and their rights to various medical services, including dental and behavioral services provided throughout the State. The EPSDT statutes and the Consent Decree clearly contemplate multiple screenings and any necessary followup medical care for each member of the class through TennCare or more MCCs. In these circumstances, vast amounts of data is inherent in the operation of this system that the Defendants elected to establish. Even with the 2006 paper production, ESI is necessary to restore relevant metadata that was removed when the Defendants converted electronic documents to hard copy before producing them to the Plaintiffs in 2006. (Docket Entry No. 982 at pp. 49, 58).

For the MCCs, Plaintiffs accepted all of the contractors' proposed lists of key custodians and developed a protocol and search terms. Plaintiffs' ESI requests have been resolved with the largest MCO Bluecross Blueshield of Tennessee, Doral and the smallest MCO (Memphis Managed Care). (Docket Entry No. 893; Collective Exhibit A). The Court notes that BlueCross estimated a review of the 42GB of information would take 30 days to review with 10 reviewers. (See Docket Entry No. 988 at pp. 72, 76). BlueCross BlueShield and Doral also agreed to impose filters to eliminate its non-TennCare business. Plaintiffs Exhibit 26 at p. 4. BlueCross BlueShield also agreed on production of HEDIS data and case management data. BlueCross BlueShield, Doral and Memphis Managed Care seek an equitable allocation of costs for the ESI, primarily for attorney review for confidential and privileged information.

As to the other MCCs, AmeriChoice, First Health, Magellan, Memphis Management, and Unison agreed to produce transactional data and HEDIS data as well as care plan data. PHP agreed only to produce transaction data from January 1, 2006 to April 11, 2007. UAHC agreed only as to the number of custodians (11) for the ESI search as well as transaction data and case management information. As to the other ESI searches, AmeriChoice estimates that reviewing the search results

from its estimated 17 -19 gigabytes of information would take 8 months to 1.5 years with 10 reviewers. (See Docket Entry No. 986 at pp. 122, 129). First Health, has estimated its cost for Plaintiffs' e-mail production demands would run as high as $1.6 to $1.7 million. Prior to the April 11th Status Conference, First Health had "estimate[d] that undertaking the key word search proposed by plaintiffs would require close to 18,000 hours of work and cost almost $3.0 million dollars." (Docket Entry No. 907, Exhibit 2 thereto). See also Docket Entry No. 907, Exhibit 3 thereto, Moss Letter dated May 24, 2007 (reporting First Health's estimate that it will take "two and one half years to harvest and produce ESI for the six First Health custodians"). Unison asserts, "[i]t is clear that, for the seven relevant Unison custodians within the relevant time frame, the costs to conduct the . . . search and review [methodology on which Plaintiffs currently insist] will be excessive and, depending on the costs of outsourcing, may well approach seven figures." Id. at Exhibit 5.

At the June 2007 evidentiary hearing, the Court inquired of Tigh whether an ESI word search limited to the terms "John B." "ESPTD" and "TennCare," coupled with the names of MCC personnel who responded to or wrote to the Defendants about any compliance or complaint(s) as well as the names of those responding TennCare officials, would alleviate any undue burden for the ESI production for the MCCs. A similar question was put to Unison's chief of information who teaches college courses on computer science. Both witnesses agreed. Thus, the Court finds that for the remaining ESI searches for those MCCs that have not reached agreements with the Plaintiffs, will be so limited. Plaintiffs, however, may renew an ESI request if the initial search is shown to be inadequate or seriously deficient.

Some MCC contractors have taken the position that cost allocation issues must be resolved prior to commencement of any electronic production. See e.g., (Docket Entry No. 907 at Exhibit 8 thereto) ("Sixty days from a final determination of who bears the costs of production, BCBS will have

collected and processed all of the data from its twenty-two key custodians."). The MCCs' contracts with the State provide that the costs of production are to be borne by the contractor. Yet, in this discovery dispute, the Court will assess costs of production at issue on Plaintiffs' renewed motion to compel under federal law.

Since the entry of the Consent Decree the State has received $7,434,375,701 in federal funds for class members of which $6,691,980,359 constitute the total federal funds for the direct provision of heath care services to class members. (Docket Entry No. 948, at p. 2). The difference in these two amounts, $ 742,395,342, was expended on "outreach, case management, disease management, claims processing, provider network maintenance and other administrative services related to providing care." Id. at pp. 2-3. In addition, the State receives separate and undisclosed amount of federal funds "for administrative costs incurred by state personnel to operate the TennCare program". Id. at p. 3.

The gross amounts of the federal funds that the State has distributed among the MCCs for services for the class members, since the entry of the Consent Decree, are reported as follows:

Americhoice $115, 853, 341.67;

Blue Cross/Blue Shield of Tennessee $1, 413, 851, 994.20

Doral Dental of Tennessee $74, 757, 246

First Health Services $28, 795, 619

Magellan (TennCare Partners) $1, 428, 295, 294.26

Preferred Health Partnership of Tennessee $520, 116, 405.14

Unison Health Plan of Tennessee $152, 638, 134

Windsor Health Plan, Inc. $77, 777, 037

Volunteer State Health Plan $1, 413, 851, 994.20

(Docket Entry Nos. 947, 950, 951, 953, 954, 957 and 958).[29]

6. Privileged Information in the ESI Production

Defendants assert various privileges to bar production of some ESI. Defendants first assert the attorney-client and work product privileges for documents that are principally, drafts of documents that defense counsel or in-house counsel commented upon, revised or reviewed. These drafts are mostly of semi-annual reports ("SARs") required to be filed under the Consent Decree as well as initial assessment protocol ("IAP") and initial work plan ("IWP") that were ordered by the Court. (Docket Entry No. 303; see also Docket Entry No. 485).

At the November 6, 2006 hearing on discovery motions, the Court discussed with both counsel potential privilege issues in the ESI production.

THE COURT:	So the drafts would be moot. If we work out the electronic protocol, the drafts would be moot
MR. BONNYMAN:	Correct. And the advantage of that is, we would then be able to compare and - -
THE COURT:	All I want to know is whether it's moot or not.
MS. MOSS:	Does that then moot our obligation to log as privileged those drafts which were exchanged with counsel?
THE COURT:	Yes. What I said on the electronic protocol is that there is a claw back provision so that you - - so you

[29]The Defendants and MCCs provided this data in response to an Order (Docket Entry No. 885) to state the amounts of federal funds provided to each entity. The Order also required data on the amounts expended on class members, but the MCCs' responses on the latter varied. Without more information on the different methodologies for their various statements on expenditures, the Court elected to present the gross amount of federal funds received by each MCC. Under Fed R. Evid. 614, the Court can question witnesses at an evidentiary hearing. Given the Defendants' and MCCs's submissions about the costs of Plaintiffs' ESI production, the Court intended to ask questions on the amounts of federal funds given to the Defendants and the MCCs for the benefit of the class. See Fed.R.Civ.P. 26(b)(2)(C). Because the responses may require some time to compile, the Order was entered prior to the June 19th evidentiary hearing.

have the right to come back and assert the privilege if there is some disclosure of privileged - - inadvertent disclosure of privilege information.

MS. MOSS: But Your Honor, an additional large part of the burden is knowing that a substantial amount of these drafts, maybe hundreds and hundreds of them, are privileged. And if we are going to produce some, do we then have to take each one of those drafts individually, log them on a privilege log as a draft of the SAR, - -

THE COURT: I take it that these policy writers are a relatively small group. So I would think that, of that relatively small group, you would be able to identify what's on the electronic database that they wrote that they think is privileged.

MS. MOSS: But, Your Honor, there are - -

THE COURT: And I'm saying this on the basis of what I saw en camera in Rosen.

MS. MOSS: Sure. In terms of reports that discuss - - the State puts together - - I mean, it probably is not an exaggeration to say 20, 30 reports. Every MCO has an outreach report; there's annual external quality review reports.

THE COURT: Now let me say this. I know there are cases out of the Seventh Circuit that say, just because a lawyer wrote it doesn't mean it's work product. If it's a document that is written in the course of the business of the client, then it's not work product, because just because a lawyer wrote it. It's Searles, out of the Seventh Circuit. (actually the Eighth Circuit).

So what I'm saying to you is, you ought to think about that in terms of - - you know when you make these assertions of work product. Just because you put a lawyer's name on it doesn't necessarily means that it's a work product.

MS. MOSS: But Your Honor, I think if they are reviewing documents to offer advice on compliance with the consent decree and compliance with this Court's orders, it's the same work product that they have

asserted over their own materials.

THE COURT: Yes, but that's the point. You can't - - I'm uncertain as to whether you can take a lawyer - - take lawyers, put them as part of the deliberative process, and blanket from discovery everything you have to do under a consent decree. I don't know that you can do that.

You look at this Searles case. It may be a little dated, but you look at it, because that's what I'm going to be looking at. That's why I'm telling you about it.

MS. MOSS: I guess, Your Honor, I would direct your attention - - I don't have the name off the top of my head, but in our memorandum, we also cited some case law that suggests that reports that are created as part of the consent decree, even if it's a consent decree in another case, that are reviewed and created and overseen by counsel, are entitled to work product protection. So I would suggest there is, at a minimum, competing authority out there on this issue.

THE COURT: Well, I've cited and approved of Searles on prior occasions. So just keep that in mind. What I'm saying is, if you apply Searles, then I think that should reduce that number of truly work product assertions. And if we've got a claw back provision, as I understood the plaintiffs agreed to, then, if something sort of slips through, then you have the right to come back and claim it as privileged.

I mean, that's what I understood you wanted, isn't it?

MS. MOSS: We do, Your Honor. Certainly that would be part of the provision. It was offered, I suggest, less in terms of these drafts and more in terms of the State reviewing all of the metadata associated with these documents that would be produced electronically, which would be extraordinarily burdensome. And their suggestion, well, just produce it, and you can claw it back. And to provide them with privileged information that they are not otherwise entitled to,--

THE COURT: Well, every part of preparing anything in compliance with the report is going to be mental impression. I mean, how can you go through the exercise without forming a mental impression? And that way you insulate everything.

I think that's overly broad. I'm not sure it's work product.

MS. MOSS: Well, the objection was, **the substantive reviews and edits primarily come from attorneys**, whereas the typographical or formatting edits - - and it was simply a - -

THE COURT: I think that's what Searles addresses, is where the lawyer is placed in the posture of actually doing the business of the client.

MS. MOSS: Well, when it's a consent decree that governs the Medicaid program, where we're under a court order - -

THE COURT: Yes, but it's also policies for the State. I mean, thus far, Judge Nixon hasn't found anything that complies with the consent decree.

MS. MOSS: It isn't the policies. It would be substantive edits about the -- it would be substantive edits about the compliance with the decree. This is a lawyer's advice to the client on how to follow the consent decree.

THE COURT: **Well, you can submit them under seal like we did in Rosen, if we get to that. I mean, if we're going to get to the finer points, you will just have to submit it under seal.**

MS. MOSS: **Again, we would welcome that...**

(Docket Entry No. 734 at pp. 77-81) (emphasis added). Despite the Court's instructions, the Defendants did not submit any purportedly privileged documents for an in camera inspection. Once again, Defendants' counsel ignored the Court's instructions.

As to drafts of documents, the privileges asserted and the specific document purportedly covered by privileges are as follows:

Bates Number (Range)	Document Type (Letter, Date of memo, Email, etc.	Date of Document	Document Author (Title/Agency)	Document Recipient(s) (Title/Agency)	Basis of Privilege (subject Matter - detailed) Attorney-client communication re Andrea Thaler's proposed final draft	Privilege Type (A/C, W/P)
JB-A-001 57-001 65	Email	7/31/2002	Susie Baird	Mary Griffin		A/C, W/P
JB-A-001 09-001 12	Draft Remedial Plan		Laura Stewart	Mary Jane Davis	Draft remedial plan prepared for counsel's review	A/C
JB-A-00268-00270	Email with Attachment	4/28/2004	Susie Baird	Linda Ross	Attorney-client communication re request from counsel for client's review of draft EPSDT	A/C
JB-A-00282-00287	Email with Attachment	4/6/2004	Linda Ross	Susie Baird, Betty Boner	Attorney-client communication requesting comments re draft letter to Special Master	A/C, W/P
JB-A-01 581-01 584	Draft Policy	6/4/2003	Mary Griffin		Counsel's working copy of draft EPSDT transportation assistance policy	A/C, W/P
JB-A-01 775-01 778	Email	5/21/2004-5/24/2004	Mary Griffin	Michael Drescher, Tam Gordon, Theresa Lindsey	Attorney-client communication re counsel's edits to the content of EPSDT brochure	A/C, W/P
JB-A-01 574	Email	3/19/2002	Mary Griffin	Stephanie Anderson	Counsel's edits to EPSDT section of contract and attaching documents	A/C, W/P

JB-A-01099-01210	Draft Contract		Patricia Newton		Draft amended and restated CRA with counsel's edits and notes	A/C, W/P
JB-A-01 820-01 825	Email with Attachment	2/24/2004-3/15/2004	Annette Goodrum	Mary Jane Davis	Attorney-client communication discussing draft of EPSDT guidelines	A/C
JB-B-00020-00022	Email with Attachment	7/11/2002	Mary Griffin	Stephanie Anderson	Counsel's edits to MCO Contract	A/C, W/P
JB-B-01917-01929	Draft Agreement	11/21/2002	Christy Ballard		Counsel's edits to Interagency Agreement	W/P
JB-00598	Email	5/25/2004	Tam Gordon	Mary Griffin	Attorney-client communication re providing instructions for the IWP/IAP to the clients; the IWP was drafted and/or reviewed by counsel during each stage of process	A/C, W/P
JB-C-00541 -00553	Email	3/18/2004	Theresa Lindsey	Mary Griffin	Attorney-client communication re DOH's proposed outreach plan for the IAP, the IAP was drafted and/or reviewed by counsel during each stage of process	A/C, W/P

JB-C-00557-005564	Email	4/8/2004	Theresa Lindsey	Linda Ross	Attorney-client communication forwards counsel copy of the DOH outreach plan for the IAP, previously sent to Mary Griffin; the IAP was drafted and/or reviewed by counsel during each stage of process	A/C, W/P
JB-C-00573	Email	3/26/2004	Theresa Lindsey	Robert Cooper, Tam Gordon	Attorney-client communication re previous draft of format for EPSDT activities and the responses received to the initial draft.	A/C, W/P
JB-C-00607	Memo	6/17/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00608	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00609	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006010	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006011	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C

JB-C-006012	Memo	6/30/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006013	Memo	7/1/2002	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006014	Memo	7/1/2002	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006015	Memo	6/17/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006016	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006017	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006018	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006019	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006020	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006021	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006022	Memo	7/1/2002	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C

JB-C-006023	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006024	Memo	7/17/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006025	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006026	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006027	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006032	Memo	7/1/2002	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006033	Memo	6/17/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006034	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006035	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006036	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-006037	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C

JB-C-00643	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00644	Memo	7/1/2002	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00645	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00646	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00647	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00648	Memo	6/17/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00649	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00650	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00651	Memo	6/17/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00652	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00653	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C

JB-C-00654	Memo	7/1/2002	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00655	Memo	6/30/2003	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C
JB-C-00656	Memo	6/21/2004	Betty Boner	Robert Barlow	Comments from counsel on contract draft.	A/C

The Defendants' privilege log (Docket Entry No. 941-3) is not the model of clarity as the first sixteen pages list the documents and the next sixteen pages list the privileges. The Court does not know the capacities of several of these persons, except for counsel of record and Mary Griffin who was named as in-house counsel and Tam Gordon. (Docket Entry No. 720, Moss Declaration). At the June 2007 conference, Defendants did not offer any proof on these privileges. In her prior declaration, Moss cited counsel's necessity to review documents prior to submission to the Court and referred "substantive edits to the [SAR] report come from counsel". Id. at p. 19. The SAR is a technical document. See e.g., Docket Entry No. 728.

In their response to the Plaintiffs' renewed motion to compel, the Defendants assert a privilege based upon various state statutes. Plaintiffs ' ESI requests include various health information from different state agencies and the MCCs about children in the certified class. The purpose of Plaintiffs' requests for this data is to allow Dr. Ray, one of Plaintiffs' expert to cross reference or validate any failures revealed by her statistical analyses. This data is from principally three state agencies. The Tennessee Department of Mental Health and Developmental Disabilities ("DMHDD) has a "Incident Reporting System" database that is utilized by the State's five Regional

Mental Health Institutes (RMHIs) to record information on incidents affecting mental health patients in these institutes. This database contains narrative descriptions of various incidents (such as elopements, falls, injuries, assaults, or property destruction) relating to mental health patients, including demographic information about the patient, the nature and circumstances of the incident and any injury resulting therefrom, the names of witnesses to the incident, and medical and management review of the incident.

Plaintiffs also seek the DCS Incident Reporting data to study the consequences of the lack of available and appropriate health care to members of the Plaintiffs' class. This DCS information discloses the treatment needs of children in DCS custody and what medical and mental health treatment the children are actually receiving. Dr. Ray will analyzed this data for children in DCS's custody to determine if all of a child's medical and mental health needs are being met while the children are in state custody.

Plaintiffs also request the TNKids database that includes a child's case manager's narrative case recordings about the child or any information the case manager deems appropriate. For example, a narrative case recording might include a case manager's summary of medical services received by the child, visits of DCS Health Advocacy nurses describing health services the child is receiving , and number and frequency of case management contacts with the child. A database count of the records on April 10, 2007 showed that since January 1, 2004 there have been 5,377,286 case recordings. Since April 1, 2006 there have been 1,431,048. The TNKids system data can range from a few paragraphs to several pages for each recording. A child in custody will typically have multiple recorded entries. The sort of health services information that would be responsive to Plaintiffs' requests are in any one of four narrative fields. These fields are labeled to record the purpose, the content, the observation/assessment, and the plan. However, each field is a free form

text field without any required format.

The Defendants contend that there is not any automated method to determine if these records contain the health services information responsive to Plaintiffs' requests. Some MCCs contend that this information is already available to Dr. Ray and the Plaintiffs through other sources, such as the State's Interchange database, DCS's monthly EPSDT reports, and the Face-To-Face Contact reports. As to the readmission statistics on mental health issues for children, the Defendants contend that Dr. Ray earlier stated that this information would not be useful because this data cannot be converted to Excel as she had originally anticipated. (Docket Entry No. 907 at 35). The Defendants also cite Dr. Ray's April 6, 2007 email to Brent Antony in which she states: "Large numbers of .pdf files do not suit Plaintiffs purposes very well." Id. at Exhibit 1. The Court finds that if Plaintiffs assert that they can access this data for their experts, the Defendants must provide the data in its current or native format.

The Defendants also object to disclosure of incident reporting data because of privacy protections under state and federal laws and related policy considerations. For example, Defendants presented proof that if persons who report abuse of children, knew that their statements and identity could be disclosed to others, then such persons would not report abuse. For these privilege concerns, Plaintiffs agree to an appropriate protective order to protect the identities of any person reporting a serious incident and assure the Court that they do not seek the information to identify particular clinicians or physicians. The state and federal statutes cited by the Defendants will be addressed infra.

The proof establishes that the Defendants already provide this information to a private group, Tennessee Assistance Committee that monitors the Defendants' TennCare program. Two magistrate judges earlier ordered the defendants in this and a related action to produce these same

materials. Moreover, the Defendants actually file this data regularly in another action in this Court. Brian v Sundquist, No. 3-00-0445 (M.D. Tenn). Docket Entry No. 219 at p. 14; Docket Entry No. 244 at p. 18; Docket Entry No. 245; Docket Entry No. 253 at p. 3 and Docket Entry No. 262). As quoted supra at p.43, under the MCCs' contracts that includes behavioral or mental health providers, the MCCs and the State agreed to provide any information "pertaining to" a class member's care to a number of state and federal agencies.

Although there was testimony from some MCC witnesses that email has not been required to be provided to the Defendants under their TennCare contracts, the Court deems controlling the unequivocal language in the MCCs' contracts to create a legal duty to provide any information "pertaining to" a TennCare member to the state or other federal agencies upon their request. (Plaintiffs' Exhibit 28). In these circumstances, the Court finds that the disclosure of email about TennCare is appropriate information to disclose to class members' counsel under a protective order in recognition of the privacy interests of the affected individuals.

The MCCs also have privacy concerns arising under federal law, HIPPA, and their contractual obligations with customers and providers under separate contracts, non-Medicaid contracts and business as well as business in other states. Plaintiffs agreed to a filter in the ESI search to exclude protected information involving other businesses and programs in other states. As to HIPPA disclosures, Judge Knowles ruled earlier in this action that disclosure of class members' protected information to class counsel, does not violate federal law. (Docket Entry No. 103, Order). The MCCs have not shown that a properly tailored protective order would not adequately address their concerns. If any such report or data is presented at an evidentiary hearing, the names of the persons involved can be redacted.

Subject to the legal analysis of the privileges asserted, the Court finds that these collective

facts establish the Plaintiffs' need for transactional data and ESI, including policy statements, drafts thereof and emails for several purposes to discover how the Defendants and the MCCs deliver services to class members; to evaluate the Defendants' purported compliance with the Consent Decree; and to understand the measures the Defendants considered in remedying their past violations found by the Court.

7. Defendants' Failures to Answer Plaintiffs Requests for Admissions and to Comply with the January 14th Order

Plaintiffs next contend the Defendants' custodians' responses to Plaintiffs' requests for admissions ("RFAs") on destruction of ESI were inadequate because "for nine former employees...as well as the Governor, the State did not provide responses from the custodians themselves." (Docket Entry No. 828-1 Plaintiffs' Renewed Motion To Compel at p. 16). Plaintiffs also contend that the Defendants also did not comply with the January 14th Order requiring the Defendants to file certifications with the Court that ESI had not been "removed" from the Defendants' designated custodians' work station computers.

The first of Plaintiffs' revised two RFAs asked key custodians if they were aware of any documents, including ESI, that had been "destroyed, deleted, thrown away or lost for any reason". See e.g., Docket Entry No. 828-12 at p. 1. The second RFA asked custodians if they had searched "all paper and electronic records in their possession or control (including both state and private email accounts and computers, including removable drives or storage)." See Id. at p. 2 (emphasis added). Two companion interrogatories sought information that had been destroyed or lost. If the person answered "NO" to RFA No. 2, then Interrogatory No. 2, requested the identity of "any record, e-mail account (including removable drives or storage) in your possession or control that you believe potentially contained information or documents requested by the plaintiffs and that you did not

search." See Id. at p. 2 (emphasis added)

As for the "nine former employees" to whom Plaintiffs refer, Defendants explain that these former employees no longer work for the State and that Defendants lack the authority or control over their responses. The State officials who actually performed searches of former employees' files, and participated in preparing the State's discovery responses on their behalf signed a Request for Admission for each former employee. These signed assurances **were** offered to satisfy any concerns Plaintiffs might have "to obtain assurances on completeness of discovery responses." (Docket Entry No. 743 at p. 3). Yet, three former employees who performed their own searches, left employment before the Requests for Admission were served on the Defendants. In Plaintiffs' view, the RFAs and interrogatories were also intended to resolve gaps in the State's paper production in May, 2006.

Plaintiffs argue that in the 318 pages of documents submitted on behalf of 166 custodians, none provided the information required by the January 14th order. Plaintiffs cite correspondence with Defendants' counsel and a February 13th meeting with defense counsel, at which Plaintiffs' counsel stated that neither the RFAs nor companion interrogatories had asked each custodian for the information required in the Court January 14th Order. (Docket Entry No. 828, Exhibit 5 Bonnyman letter of February 5, 2007; Exhibit 4, Bonnyman letter of February 23, 2007). The Defendants' counsel responded that the custodians' responses to Plaintiffs' RFAs also answered the question in the January 14th Order and refused to provide any further responses. (Docket Entry No. 828, Exhibit 5: Moss letter of February 27, 2007). In a letter, defense counsel responded that it would be too burdensome to comply with the January 14th Order:

> ...[W]ith respect to the issue of burdensomeness in sending yet another survey/request to custodians asking them "whether any material has been removed," to be clear the State's burdensomeness objection is based both on the fact that these custodians have already been asked to sign and did in fact submit RFA responses which covered this issue, but in addition, **because the Court's Order requiring a**

> **certification came after the custodians had already been surveyed about the location of their My Documents or equivalent folders. It is our strong belief that yet another survey will be confusing and will prompt numerous questions and concerns and will further task the resources of the State's IT personnel who have already expended hundreds of hours already in attempting to respond to the Plaintiffs' overly broad discovery requests.**

Id. (emphasis added)

The Court finds that the Defendants' custodians' RFA answers do not comply with the January 14th Order that required certifications on whether any ESI had been **"removed"** from any storage media. Plaintiffs' RFAs asked only if "**removable**" files had been "**searched**". The January 14th Order addressed actual removal of ESI by anyone. The Defendants' custodians' RFA replies are not responsive to that issue. The Defendants did not seek relief in the January 14th Order nor ask the Court to treat the Defendants' custodians' RFA responses as satisfying the Order. Defense counsel elected to nullify the Court's Order. The Court finds the Defense counsel's position reflects yet another instance of the Defendants' disrespect and disregard for Court's Orders in this action.

The sole remaining factual dispute involves the Governor's failure to sign a copy of his responses to Interrogatories and Requests for Admission, that were signed by Steve Elkins, his legal counsel. See Docket Entry No. 799. Defendants argue that Plaintiffs' insistence on a personal assurance from the Governor is groundless, impugns the integrity and intolerably intrudes upon the prerogatives of the State's Chief Executive, as well as impugning the credibility of the Governor's legal counsel. The Defendants designated the Governor as a key custodian and emails were set to the Governor who also attended a meeting on this action. The Defendants' counsel has disclosed the Governor's response. Whether to compel the Governor's personal signature is discussed infra.

At the April 11, 2007 "experts only" conference , there were two occasions on which the

Court inquired of the experts' progress and at such times, the Court received reports on their agreements in the presence of their counsel. At the conclusion of the hearing, the Court then directed Brent Antony, the Defendants' expert, to prepare a written "summary" of those agreements and circulate that document to all experts at the conference for comment and thereafter, to file the summary agreement with the Court. Counsel for the parties were present when the experts gave their reports and when the Court gave its directive to Antony. From the Court's review of the transcript of that conference, the experts gave two reports of their agreements, as follows:

[First Report]

MR. TIGH: Your Honor, this is Tom Tigh. We have spent -- shall we review the morning as well?

THE COURT: Well, it's really more of a report on how much longer you think you might need to complete your discussions.

MR. TIGH: We finished the discussions on the transactional data. **We have a plan to move forward that provides a two week delivery schedule for the analysis of plaintiff's -- of the MCCs data, and a schedule for when they can provide that data to the State for distribution to the plaintiffs.**

THE COURT: That's the transaction data?

MR. TIGH: That's the transactional data. That was finished before lunch. Since one o'clock, we've been reviewing the ESI, which is proving to be a little bit more difficult to get our hands around.

We have identified the fact that all of the MCCs currently have a litigation hold in place. In many cases, that litigation hold was put into place in December or January of 2007. December of 2006 or January of 2007. And that data back to 2004 is not available. All of the MCCs have in place or will have in place a preservation system so that no data from the point when they put their litigation hold into place forward will be eliminated from their systems.

The point that we were just about to cover was how we can

reduce the search terms to something that would be suitable for each of the systems.

The largest or the most feedback comes from the fact that there may very well be a significant number of documents that have to be reviewed, even after the search terms are applied, in order to determine what has to be produced.

THE COURT: For the State? The State experts?

MR. ANTONY: Yes, Your Honor. **As reported, following the morning session, with respect to both the transaction systems and the searching of electronic data, the parties were largely in agreement as relates to the State, and so the bulk of the focus has been on the contractors.**

The process after lunch has been somewhat more tedious. We've made it through a discussion of really preservation and collection of material, and not so much into the search protocol.

I would like to sort of clarify or at least at add my perspective on two points. We did address the issue of the litigation hold and the preservation techniques that the plans are implementing. Mr. Tigh noted that that data was not available back to 2004.

I would say actually **what I understood from the plans is that, on the identification on key custodians, they have implemented systematic merits to ensure that data is not deleted for the key custodians. And that prior to that, data may not be available back to 2004**, but on the other hand may, depending on the procedures that they have implemented on the staff level.

I will note that there was -- the point of discussion around the retention of data and sort of following on a comment by Mr. Tigh, around the practicality of implementing measures that would require attention of all information coming into or out of an e-mail system, or whether the litigation hold and preservation requirements speak to reasonable system measures to retain data and procedures to retain responsive information without requiring some of these plans that are large and national in nature, require any and every e-mail that comes in and out of their system to be retained, whether it's