responsive or not.

So I think there is a point of clarification for the parties to address at some point around what the ultimate requirement is on retention and, in fact, whether it requires retaining everything or implementing reasonable measures retain responsive information, through both systematic and procedural measures.

But I generally agree with Mr. Tigh that we have continued to make progress, although we have the discussion of search ahead of us, which could promise to be substantial.

THE COURT: Okay. Do any of the other private contractors want to add any additional comments to what has been said by plaintiff's expert and the State's expert? Feel free to. Yes, sir. Identify your name.

MR. HOLDREN: Mike Holdren with First Health Services. I agree with the comments on the transactional data. I think we have a good plan in place for that. And hopefully I speak for some of the other contractors, when we have the discussion, particularly around the e-mail, the harvesting of the e-mails.

As I walked through just the nine custodians that we've identified who receive an average of 90 e-mails a day, and in over an 1,100 day period, that's over 900,000 e-mails that we would have to go through. And these people work on other accounts.

So if we got hits on ten percent of those, using a tool, which I really am personally not confident in the accuracy of, but I haven't seen it fully executed, that's still 90,000 e-mails that we would have to go through [m]anually to cull out protected health information for some of our client and recipients and things like that.

So that's a difficult conversation. That's the only feedback I wanted to give you there, sir.

* * *

[Second Report]

THE COURT: Why don't you restate the agreement. Peggy, mark this one.

MR. TIGH: **Within two weeks from today, we will have from the MCCs their suggested revisions to the search terms, suggested revisions to the key custodian list, and suggested filters, as opposed to searches, that will reduce the number of messages or electronic documents that need to be reviewed.**

Within one week after the plaintiffs receive that information, they will respond with acceptance or additional revisions to the list of search terms, acceptance or additional modification of the key custodians, acceptance or additional modification to the filters that have been suggested by the MCCs.

At that point, the MCCs would be responsible for identifying a schedule under which they could, in fact, do the searches, only identifying a schedule under which they could do the searches and extract the information for delivery to the review team. That schedule is what we would get the two weeks after the last -- the last two weeks, the two weeks after the plaintiffs revised search terms.

THE COURT: Is that restatement of what the agreement is acceptable to all of the MCCs?

MR. KUBLY: **That's acceptable here, I believe, yes.**

THE COURT: Does anybody else have any objection to that?

MR. ELKINS: Matt Elkins, Memphis Managed Care. **The only other thing I think we'd like to ask is that that list become a final list.** We've had three or four iterations of a key word list search here. So if each organization is going to go through that, I think we would like to, at the point the plaintiff compiles that information from all of the organizations, let's finalize that key word search so we don't keep trying to hit a moving target.

THE COURT: **Any objection?**

MR. TIGH: **Not at all.**

THE COURT: **So it will be modified to reflect that.** Anything else?

MR. HOLDREN: Mike Holdren with First Health Services. One thing I think was not mentioned but we did agree on. Even though it hasn't been determined if the plaintiffs would accept 13 separate lists from the MCOs, **we did agree that, due to the disparate lines of business, that there would be at least one list accepted from the MCOs, one from the PBM, the dental, and Magellan for behavioral health. Is that not a correct interpretation?**

MR. TIGH: **That is correct.**

MR. HOLDREN: Thank you.

THE COURT: **So there will be a common list of similarly situated entities?**

MR. TIGH: **There will be four lists, Your Honor. The search terms will essentially be consistent across the floor, but there may be some modifications, depending upon the type of business. So there will be one for the seven health care organizations. There will be one for -- that will be essentially similar, but with some slight modifications for the dental, and so on.**

THE COURT: **Is that acceptable to the MCCs? Is there anything else any member of the MCC, any MCC, wants to address? We heard two. Are there any others?**

MR. MOSER: Your Honor, one thing we really --

THE COURT: Your name and company.

MR. MOSER: Excuse me, Dave Moser with Blue Cross Blue Shield. One thing we really haven't gotten to yet is formats with a different number of organizations. We all run different kind of systems, different kind of e-mails. Formats are going to be somewhat different. And we would like to produce the data and --

THE COURT: Would this work? If when you provide this two week period of reporting to the State on what you all have come up with, that you include in that your proposed format?

MR. MOSER: I think we should be able to.

THE COURT: Okay. Would that address that issue?

MR. MOSER: I think it would. I just hated for a format to be set when we didn't know whether or not we could produce that.

THE COURT: Okay. I would hope that in this exchange between search terms, that you all would finalize that before any run.

MR. TIGH: We'll certainly do that, Your Honor.

* * *

THE COURT: ...I would like to have plaintiffs and defendants and anyone from the MCCs summarize again the agreement on the transactional data.

DR. RAY: I guess I can do that. **The agreement on the transactional data is by Monday, I will provide to Brent Antony, who will pass it on to the others, a generic but specific list of the kind of variables and the values of those variables I'm hoping to get from the transactional data. Then one week after that, we will have a general conference call to ask questions. And in addition to that, any of the MCOs that want to contact me individually will be able to do that to ask questions.**

MR. MOSER: The HEDIS people were going to be involved with that call also.

DR. RAY: And the HEDIS people, that's correct. **There were three kinds of information that we put together: The information around the HEDIS measures, specifically, the kind of information that's not contained in the claims data that I'll already be getting; information relating to requests for services and denial of services; and the third is information related to individual case management.**

DR. RAY: Does anyone want to add to that, for the State?

MR. ANTONY: Your Honor, **Brent Antony again for the State. I think Dr. Ray provides -- has given an accurate summary of the discussion on transactions systems with respect to the MCCs. I would add that we did address a couple of other points with respect to the State systems, and specifically have a course of action to follow for discussion around the**

TennKids system from the Department of Children's Services, wherein DCS will provide additional information to Dr. Ray around the data that she has requested from that system. And she will provide some further guidance to them on the specifics of what she is seeking that will allow them to respond regarding their production.

Dr. Ray did also clarify, with respect to the Department of Health and the PTBMIS managed care module, and specifically the CFS cases that the plaintiffs were agreeable to the sampling methodology that the parties had previously discussed.

We also touched on the incidents database, which had been the subject of discussion and which Your Honor will recognize the State had asserted was protected by state law for peer review privilege. So that's still an open matter.

There are no technical matters there, with the exception of potentially being able to identify the members of the class, should the parties reach an agreement on that peer review issue. So that's the only items I would have.

* * *

MR. ANTONY: Yes, Your Honor. There is one issue with respect to that incidence database, which is still an open issue, beyond the peer review issue. There is minimal identifying information stored in that system. It is maintained for the purposes of peer review. So there are social security numbers and other things that might allow us to definitively identify class members. So there will be some complexity of that, should we get past the peer review issue.

DR. RAY: I didn't finish describing the schedule for the transaction data, I'm sorry. **One week after we have the conference call, then the MCOs were to provide their estimate of when they would be able to provide the transaction data and in what format.**

THE COURT: Do any of the MCCs want to add to the transactional data production? Well, there is a transcript of this, and I'm going to ask that the last session of this be made available as soon as we can practically get it done, to Mr. Tigh and to -- Mr.

Helton?

MR. ANTONY: Antony, Your Honor, for the State.

THE COURT: Antony, I'm sorry. **To reflect a summary of the memorandum of what were the deadlines and the agreements. And send that to you all of the technical people who were present during the discussion, for them to have comments and suggestions. And then, if you all would, after you've done that process, submit it to the Court**, and it will just be a preservation and perhaps a much more cohesive than this truncated process we've been going through.

(Docket Entry No. 872, Transcript at pp. 165-168, 216-219, 224-228) (emphasis added).

After a period of time, Antony had not filed the report and the Court entered an Order directing him to do so. The Defendants' counsel responded that there was no such directive. The Court then cited the pages of the transcript setting forth the Court's directive. Defendants' counsel then contended that their prior notice of the experts' activities after the April 11th conference satisfied the Court's directive. At the June, 2006 hearing, Antony testified , in essence, that he distributed the transcript of the April 11th conference to the MCCs and that the "Notice" filed by his counsel was all that the Court required of him.

Upon review of the Defendants' Notice, (Docket Entry No. 875) that is relied upon by Antony and defense counsel, the Court notes that this "Notice" does not contain any reference to the MCCs' institution of a litigation hold nor the MCCs' implementation of systems to ensure that the ESI of key custodians is not deleted. Of particular note is that the Defendants' "Notice" omits the request of Mr. Elkins's of Memphis Managed Care (that was adopted without objection) that the list of search terms and key custodians become finalized after the Plaintiffs make revisions and suggestions. Specifically, the record reflects the following: "MR. ELKINS: Matt Elkins, Memphis Managed Care. The only other thing I think we'd like to ask is that that list become a final list...

THE COURT: Any objection? MR. TIGH: Not at all. THE COURT: So it will be modified to reflect that." (Docket Entry No. 872 at pp.217-218). None of the MCCs objected to Elkins' request nor to the Court's modification to the stated agreement. The Defendants' counsel's Notice, however, states: "By May 16, 2007... The MCCs have commented, however, that this proposed schedule does not provide for a mechanism for resolving any dispute(s) that may remain after the MCCs propose (1) search terms, (2) custodians, and (3) filters to be applied in searching the MCCs' ESI, and because, at this point, the MCCs do not know the 'final' list that will be used...". (Docket Entry No. 875-1 at p.3). Another effect of the Defendants' Notice is to set aside what was an agreement on a final list of search terms.

9. Other ESI Production Issues

The Plaintiffs next contend that the Defendants and the MCCs can complete their ESI productions within 90 to 100 days. (Docket Entry No. 882 at 10). Subject to the analysis of the Defendants' and MCCs' legal challenges, the Court finds that 60 days is sufficient time for these MCCs to produce the ESI sought by the Plaintiffs. This finding is based upon the Court's limitations for the ESI search for those MCCs who lack an agreement with the Plaintiffs on ESI production and the cost saving technological methods for such production and any privilege review. Based upon the estimates of BlueCross, the Defendants' largest MCC and the cost saving technology for ESI production and privilege review, the Court finds the 100 days limitation is a reasonable deadline for the Defendants to produce their ESI. Given the extraordinary delays with ESI discovery, the Court will not grant any extension of these deadlines.

B. Conclusions of Law

1. Discovery from The MCCs

A threshold legal issue is the Defendants' and MCCs' argument that the MCCs are not parties and are not subject to Plaintiffs' ESI discovery requests nor the Court's Orders to produce ESI. In Tennessee Assn. of Health Maintenance Orgs. Inc.v. Grier, 262 F.3d 559, 565 (6th Cir.2001), the Sixth Circuit held that where, as here, a Consent Decree grants injunctive relief, the common law and Fed. R. Civ. P. 65(d) bind not only the State, but its contractors that participate in the implementation of the Consent Decree. The MCCs "are agents of the State and are bound by the consent decree to which the state was a party." Id. Here, as in Grier, the Consent Decree here contains several paragraphs setting forth the responsibilities of the MCCs. (Docket Entry No. 12 Consent Decree at ¶¶ 18, 22, 60, 61, 74-83). To be sure, Grier limited the contractors' liabilities to the extent of their contract with the State. 262 F.3d at 565.

As to the scope of MCCs' obligations under the Consent Decree, for these discovery requests, the Court deems a brief reference to the rules of construction for such a decree to be necessary. As the Sixth Circuit stated that "[s]ettlement agreements are a type of contract subject to principles of state law." Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dept. of Natural Resources, 141 F.3d 635, 641 (6th Cir.1998) (quoting Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1017, 1018 (6th Cir.1994)). Tennessee's longstanding principle is that the clear language of a contract controls. Petty v. Sloan, 197 Tenn. 630, 277 S.W.2d 355, 358 (1955).

The Consent Decree here requires that the Defendants and MCCs maintain a reliable "tracking system" with "the capability of tracking each child in the plaintiff class, for purposes of monitoring that child's receipt of the required screening, diagnosis and treatment." (Docket Entry No. 12, Consent Decree at ¶¶ 94 and 95). The Consent Decree also require that the MCCs' tracking

system must "have the capacity to generate an immediate report on the child's EPSDT status, "reflecting all encounters reported to the contractor more than 60 days prior to the date of the report." Id. at ¶ 94. In addition, the Consent Decree expressly provides that "all such records shall be obtained, if necessary, and provided to plaintiffs' counsel through TennCare, rather than through individual MCOs." Id. at ¶ 105.

Given, the MCCs' contractual obligations to maintain a reliable monitoring and reporting system of each MCC's services to children, the Court concludes that Plaintiffs' ESI discovery requests for the Defendants' and MCCs' transactional data clearly fall within the scope of the Consent Decree. Moreover, given the express and expansive language of the MCCs' contracts with the State to perform duties under the Consent Decree and to provide any information "pertaining to" the TennCare program (Plaintiffs' Exhibit 28), the Court concludes that this express language in the Defendants' contract with the MCCs grants the Defendants unrestricted access to the MCCs' data systems for any information "pertaining to" a TennCare member. This language negates testimony about the Defendants' not requesting emails from MCCs. The Court concludes that Plaintiffs' other ESI discovery requests, including emails, also fall within the scope of the Consent Decree and the MCCs' contracts thereunder.

The MCCs insist that any ESI discovery from them must be obtained by a subpoena under FedR.Civ.P. 45. Yet, several discovery rules permit discovery from a party's "agent", or "managing agent," including "documents and tangible things otherwise discoverable," Fed. R. Civ. P. 26(b)(1) and Rule 26 (b)(3); depositions, Fed.R.Civ.P. 30(b)(6); and interrogatories. Fed.R.Civ. P. 33(a). The term "managing agent" is in several current and was utilized in prior rules of civil procedure. For the purposes of Rule 4(h)(1), the Sixth Circuit defined: "[A] managing agent [as] one authorized to transact all business of a particular kind at a particular place and must be vested

with powers of discretion rather than being under direct superior control." Bridgeport Music Inc. v. Rhyme Syndicate Music, 376 F.3d 615, 624 (6th Cir.2004). Under the former Fed.R.Civ.P. 43(b), the Eighth Circuit defined a "managing agent" is an individual: (1) [whose] interests in the litigation are identified with his principal, and (2) He acts with superior authority and general autonomy, being invested with broad powers to exercise his discretion with regard to the subject matter of the litigation." Lowry v. Black Hills Agency, Inc., 509 F.2d 1311, 1315 (8th Cir.1975) (quoting Skogen v. Dow Chemical Company, 375 F.2d 692, 701 (8th Cir.1967). The Sixth Circuit cited Skogen, approvingly in Jones v. Hancock Mut. Life Ins. Co., 416 F.2d 829, 833 (6th Cir.1969).

Here, the MCCs are independent and sophisticated companies with contracts with the Defendants to provide medical and related services in different areas of the state, as required by the Consent Decree and federal law. The Consent Decree expressly refers to their responsibilities to provide these services. (Docket Entry No. 12 Consent Decree at ¶¶ 18, 22, 60, 61, 74-83). By their nature, these services require a degree of autonomy and superior skills. As the actual providers of these services, the MCCs possess critical information on the named Defendants' compliance with the Consent Decree. The Court concludes that the MCCs are managing agents subject to discovery under Rule 26(b)(1) and (3), Rule 30(b)(1) and (b)(6) and Rule 33(a).

Moreover, Fed.R.Civ.P. 34(a) permits document requests for documents in a party's "possession, custody or control." "Control" has been broadly construed to mean "the legal right, to obtain the documents requested upon demand...even though [the party] presently may not have a copy of the document in its possession." 7 Moore's Federal Practice at § 34.14[2][b] (Matthew Bender 3d Ed.) (hereinafter cited as "Moore's"). In their post hearing Memorandum, the Defendants argue that the MCCs' ESI is not under their control. (Docket Entry No. 997,

Defendants' Supplemental Memorandum at pp. 24-28). " [I]t is well settled that a party has no obligation to preserve evidence that is not in its possession, custody or control." Id. at p. 25. Yet, 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, Transcript at p. 42). Moreover, the Consent Decree expressly provides that " All such records shall be obtained, if necessary, and provided to plaintiffs' counsel through TennCare, rather than through individual MCOs." (Docket Entry No 12 Consent Decree at ¶ 105). The Court concludes that this express language in the Defendants' contract with the MCCs grants the Defendants unrestricted access to the MCCs' data systems for any information "pertaining to" a TennCare member.

Another Court reached a similar conclusion. In In Re NTL, Inc. Securities Litigation, 2007 U.S. Dist. LEXIS 6198, at *59-60 (S.D.N.Y. Jan. 30, 2007), the district court sanctioned a defendant who argued, as the Defendants, that the ESI and other relevant documents were not in its "control," because a nonparty with whom the defendant contracted, had the ESI. The district court ruled that when a duty to preserve evidence arises, a defendant is required to issue a litigation hold to maintain responsive information and materials. Id. at *66. Second, if the defendant's agreement with the third party grants access to any documents necessary litigation then the defendant had control over document held by its contractors. Finally, the Court concluded that even without an agreement, the defendant still retained control over the relevant documents because a party cannot nullify its contract to evade the rules of procedure." Id. at *63 (citing Bank of New York v. Meridien Biao Bank Tanzania Ltd.., 171 F.R.D. 135, 148 (S.D.N.Y. 1997)).

The Court concludes that the MCCs' ESI is within the Defendants' possession or control within the meaning of Rule 34(a) and was so at the time of the Court's discovery orders to produce ESI.

As a practical matter, even if the Plaintiffs had issued subpoenas under Rule 45, the Court is at a loss to understand what procedural benefits would enure to the MCCs that have not been provided. Under Rule 45, the MCCs have an opportunity to identify and offer proof on why the ESI discovery sought by the Plaintiffs should not be had. The only real difference is that under Rule 45, the Plaintiffs would have to go to the districts where the information is located, if more than 100 miles from the site of this Court. For those courts in other districts and states to decide these issues would require a multiplication of these discovery proceedings throughout other districts. The Court would not wish that misfortune on any of its colleagues. In any event, the Sixth Circuit has consolidated issues in institutional litigation in this district affecting different districts of this state as a matter of judicial efficiency. See e.g., Carver v. Knox County, Tenn, 887 F.2d 1287, 1293 (6th Cir.1989).

Further, as a matter of law, the TennCare Bureau, is the "single state agency" designated by federal law to administer Tennessee's Medicaid program, TennCare. Linton v. Commissioner of Health and Environment, 779 F. Supp. 925, 936 (M.D. Tenn. 1990), affd. on other grounds 65 F3d 508 (6th Cir.1995). The Defendants cannot delegate the administration of this program nor vest the MCCs with ultimate control over information necessary to determine compliance with federal law. The Defendants must provide any records the Secretary requires. 42 C.F.R. 431.17(c). Federal regulations also require that the TennCare agency maintain or supervise the maintenance of the records necessary for the proper and efficient operation of the program, including individual records on each applicant and recipient as well as statistical and fiscal records necessary for

reporting and accountability as required by the Secretary of Health and Human Services. 42 C.F.R. 431.17(a)-(b). To receive federal funding, a State's contract with any provider must grant the State the right to audit and inspect any books and records for services provided by the MCO. 42 U.S.C. § 1369h(m)(2)(A)(iv). Under 42 C.F.R. 434.6, the MCC's contract must "provide that the contractor maintains an appropriate records system for services to enrolled recipients" that are accessible "through inspection or other means." 42 C.F.R. § 434.6(a)(5) and 7. A state must have a plan for maintenance of records to ensure the "proper and efficient" operation of the plan." 42 C.F.R. § 431.17(b)(ii).

The Court concludes that as a matter of federal law, the Defendants and the MCCs operate as a single entity, with the Defendants responsible for the plan's ultimate performance. These federal statutes and regulations grant the Defendants the legal right to these documents directly related to services to the class members. Thus, aside from Grier, the rules permitting discovery of a party's managing agent or agent the Consent Decree and the MCCs contracts, the Court concludes that these federal laws clearly require the submission of any relevant MCCs' information to the State. Thus, the Court concludes that MCCs are the Defendants' agents, not independent third parties, and also stand in the shoes of the Defendants so as to be subject to Plaintiffs' discovery requests as are the Defendants.

2. Discovery Standards

With the notice pleading standard under the Federal Rules of Civil Procedure for most actions, the relevancy standard for discovery has been "construed broadly". Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 351 (1978). A party may seek any information that is not privileged and is relevant to his claims or defenses. Fed.R.Civ.P. 26(b)(1). For discovery purposes relevant means information that is probative on a party's claim or defense and information that the Court

determines could "lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1).

In addition, "a presumption is that the responding party must bear the expense of complying with discovery requests." Oppenheimer, 437 U.S. at 358. Yet, district courts can limit discovery, if the information sought is overly broad or imposes an undue burden upon the party from whom discovery is sought. Fed.R.Civ.P. 26(b)(2) allows the Court to relieve any undue burden on the responding party. In Surles v. Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir. 2007), the Sixth Circuit observed that: "Th[e] desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant." (quoting Scales v. J.C. Bardford, 925 F.2d 901, 906 (6th Cir. 1991)).

As to the judge's role in discovery disputes, "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery." Surles, 474 F.3d at 305. The Advisory Committee notes reflect that the 1983 and 1993 amendments to Rule 26(b) "contemplate[] greater judicial involvement in the discovery process." Fed.R.Civ.P. 26(b), advisory committee's notes (1993). For example, one court appointed a special master to supervise electronic discovery. Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 558-59 (W.D. Tenn. 2003). Given the Defendant's history of creating collateral litigation in this action on the Court's appointment of a special master and the state of these proceedings, the Court deemed the appointment of a special master to resolve ESI discovery disputes counterproductive.

The Court also possesses inherent authority to manage litigation. As the First Circuit observed, "[a]s lawyers became more adept at utilizing the liberalized rules", "[t]he bench began to use its inherent powers to take a more active, hands-on approach to the management of pending litigation." In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1011 (1st Cir. 1988).

"The judiciary is 'free, within reason to exercise this inherent judicial power in flexible pragmatic ways'." Id. at 1101 n.2 (quoting HMG Property Investors, Inc. v. Parque Industrial Rio Canas, Ins., 847 F.2d 908, 916 (1st Cir. 1988).[30]

3. Discovery Rules on Electronic Discovery

As to relevant discovery rules, since 1970, Fed.R.Civ.P. 34 has expressly referred to "data compilations," and the Advisory Committee comments to the 1970 amendments to Rule 34 clearly reflect that the "data compilations" included electronic discovery.

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[30]As to legal authority for the "experts only conference," to resolve discovery disputes, the Court, on its own motion, can convene a discovery conference and "may order the parties or attorneys to attend the conference in person." Fed.R.Civ.P. 26(f). (emphasis added). The purpose of a discovery conference is "to address and discuss the propriety of asserted objections. [The parties] must deliberate, confer, converse, compare views, or consult with a view to resolve the dispute without judicial intervention." Cotracom Commodity Trading Co. v. Seabord Corp., 189 F.R.D. 456, 459 (D. Kan. 1999).

In addition, Fed.R.Civ.P. 16(c)(12) authorizes the district court to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems". For such procedures, Rule 16 grants the district court the authority to require attendance of any party to the case at any session of the court where the judge deems his presence to be necessary. In re LaMarre, 494 F.2d 753, 756 (6th Cir.1974) (citations omitted).

These authorities collectively support the "experts only" conference to allow an unrestricted dialogue among the most knowledgeable persons, the parties' computer experts. The "experts only" conference was conducted in the same format as the earlier successful discovery conference to which neither the parties, their agents nor counsel objected. Given the historical successes of this format in this district, the number of Defendants' contractors, the multiple and different computer systems of the Defendants' and their contractors, and the broad scope of the discovery disputes, the Court deemed the "experts only" conference an effective and efficient method to resolve these discovery disputes. There was not any prospect of the Plaintiffs' two experts pressuring the Defendants' and contractors' experts who numbered twenty or more. The participants are highly skilled persons so that there was not any prospect for abuse or overreaching by any participant and none was reported at the end of the conference. At the end of the conference, the experts were uniform in their comments that the conference was productive. One expert suggested that an earlier conference, such as this one, would have beneficial. The Defendants acknowledge that the right to counsel applies to formal proceedings. The Court sealed the record of that conference (Docket Entry No. 872), but without leave of Court, the Defendants' counsel violated that seal with public disclosures in their Memorandum that led to other disclosures of that conference. At least Plaintiffs' counsel sought leave of court and filed their submissions referring to statements at the conference under seal.

> Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form.

(emphasis added) See Williams v. Sprint/United Management Co., 230 F.R.D. 640, 648 (D. Kan.2005) (footnotes omitted). In addition, former Fed.R.Civ.P. 33(d) allowed a party to rely upon a "compilation to answer an interrogatory." The 2006 amendments to Rule 34 added the phrase "electronically stored information" to that Rule.

The current discovery motion was first filed in June, 2006, but the current controversy over ESI production arose on February 21, 2006 with the Defendants' motion for a protective order concerning the Special Master's request for utilization data (Docket Entry No. 604). The Defendants' motion was granted, in part and denied, in part, (Docket Entry No. 615), at the February 28, 2006 conference. (Docket Entry No. 616 pp. 42-102). At the April 17, 2006 conference, the Court "suggested" that the Defendants provide to the Plaintiffs any ESI that the Defendants provided to the monitors. (Docket Entry No. 646 at p. 33). On November 6 and 21, 2006, the Court ordered the production of the ESI subject to a protocol to be determined by the parties' computer experts. (Docket Entry No. 734 at p. 65-66, 74). These orders were prior to the December 1, 2006 effective date of the new amendments on ESI.

The Supreme Court's Order adopting the 2006 amendments on ESI states that these amendments "shall take effect on December 1, 2006, and shall govern . . . insofar as just and practicable, all proceedings then pending." Order of the Supreme Court of the United States, April 12, 2006. Defendants note that the Supreme Court announced the 2006 amendments in April 2006, and therefore, the parties were on notice that the amendments "would take effect long before the close of the discovery period in this litigation," (Docket Entry No. 907 at p. 4) (citing In Re

Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., No. MD 05-1720, 2007 U.S. Dist LEXIS 2650, *13 (E.D.N.Y. Jan. 12, 2007) (applying new ESI amendments to pending Rule 34 issue).

Yet, the law of the case doctrine provides that a prior order of the Court in an action controls unless a showing of a manifest injustice arises. Arizona v. California, 460 U.S. 605, 618 (1983). Here, in February 2006, the Court directed ESI to be made available to Plaintiffs. Prior to the November, 2006 rulings and Order on Plaintiffs' earlier motion to compel, the parties had extensively briefed the ESI issues. (Docket Entry Nos. 709, 720 and 727). The parties argued several of the same decisions on ESI, as they do on the Plaintiffs' renewed motion to compel. Id. This Court's published rules of local practice require any party asserting an undue burden of a discovery request[31] to present quantitative proof of that asserted burden. The Defendants offered only conclusory affidavits. (Docket Entry No. 720, Exhibits B and C thereto). Only after the November 2006 Orders were entered, did the Defendants provide necessary quantitative evidence of what they contend is an undue burden for any ESI production. The Defendants did not move to seek relief from the November 2006 Orders.

To be sure, the November 2006 rulings left some issues on the ESI protocol to be decided, namely the search terms and the protocol for the MCCs. From the Court's perspective, the Defendants stalled on any unresolved issues until the 2006 amendments to the discovery rules on ESI became effective, because after the 2006 amendments became effective, the Defendants

[31]Of course, absent a contrary order, the Sixth Circuit rule has been that for any party that contends discovery requests present an undue burden, the appropriate response is a motion for protective order. Tarleton v. Meharry Medical College, 717 F.2d 1523, 1534 n.4 (6th Cir. 1983). The wisdom of this rule is that the party asserting an undue burden is in the better position to explain what the undue burden is.

agreed to accept Plaintiffs' search terms. By this delay, the Defendants were able, in effect, to shift the burden of proof at the June 2007 hearing to the Plaintiffs on the absence of an undue burden under the revised rules[32] In some cases, such a strategic decision may be appropriate, but here there were outstanding Orders in November 2006 to produce this ESI. With the 2006 amendments, the Defendants can now argue that such production imposes an undue burden measured principally by monetary costs, whereas the earlier judicial standards, as discussed infra, were based primarily on technical availability.

The Court is reluctant to reward the Defendants for their intransigence, but in the event of an appeal of these rulings, the Court will consider the 2006 amendments because the Court lacks any interest in repeating this costly, time-consuming analysis, if the 2006 amendments were ruled to be controlling on appeal.

These 2006 amendments on electronic discovery amended several discovery rules that as pertinent here, are as follows:

Rule 26(b)(2)(B)

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. **On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).** The court may specify conditions for the discovery.

Rule 26(b)(2)(C)

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[32]As it were with prior law, see n.28, under amended Ruled 26(b)(2)(B), the Defendants could have filed a motion for a protective order on ESI before June 2007 hearing on the rulings, but did not do so.

The frequency or extent of use of the discovery methods otherwise permitted under the rules and by any local rule shall be limited by the court if it determines that:

* * *

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Rule 26(b)(5)(B)

Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Rule 34

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect [and], copy, test or sample any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, [phonorecords] sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained[,] — translated, if necessary, by the respondent [through detection devices] into reasonably usable form [)], or to inspect [and], copy, test, or sample and designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. **The request may specify the form or forms in which electronically stored information is to be produced. . .**

...The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, [in which event] **including an objection to the requested form or forms for producing electronically stored information, stating** the reason for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

> (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;
>
> (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and
>
> (iii) a party need not produce the same electronically stored information in more than one form.

(c) Persons Not Parties. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

Rule 37

Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

* * *

(f) Electronically stored information.

Absent exceptional circumstances, a court may not impose sanctions **under these rules** on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.[33]

(emphasis added).[34]

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[33] By the underscored language in Rule 37(f), the court retains its inherent authority to impose sanctions. See First Bank of Marietta v. Hartford Underwriters, Ins. Co., 307 F.3d 501, 513 (6th Cir.2002).

[34]These amendments are not without critics as to their need and potential for abuse. As to need for the amendments:

> Amendments to the Federal Rules are not warranted today because there is no clear demand for reform. In its case study of electronic discovery issues, the Federal Judicial Center found that seven out of the ten judges interviewed for the study believed no changes were necessary. While a majority of attorneys believed that the Federal Rules should be changed to address electronic discovery, almost half of the participants expressed that the "problems" that arise in electronic discovery are not unique to electronic discovery...Arguably, the need for reform of the discovery of electronic information is limited to the defense bar's need to further limit the scope and amount of discovery.

Henry S. Noyes, Is E-Discovery So Different that it Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure, 71 TENN. L. REV. 585, 615-16 (2004).

As to potential abuses:

> If adopted, the proposed Rules may enable litigants to engage in discovery abuse by hiding or destroying incriminating digital evidence. The proposed Rules also provide greater protection to data that is not reasonably accessible and restrict the judiciary's ability to impose sanctions on litigants. By providing greater protection for data that is not reasonably accessible, the proposed Rules encourage both software programmers and system architects to design and develop software storage solutions that render data "not reasonably accessible" by making access to the data fiscally or technically impractical. By re-characterizing accessible data as "not reasonably accessible," these parties obviate their production duties pursuant to the proposed Rules. These litigants would store data on inefficient storage systems, making it unduly burdensome or expensive to (1) search for data, (2) restore data, or (3) change the data's format, therefore, making discovery more difficult....
>
> The first loophole created by Rule 26(b)(2)(B) promotes the development of digital document storage systems that enable litigants to re-characterize their data by saving it in inaccessible forms to eliminate discovery production obligations while maintaining access to their data. Thus, the first loophole is likely to provide an advantage to

Under the 2006 amendments to Rule 26(b)(2), if the party from whom ESI is requested, considers the ESI request unduly burdensome, then that party can file a motion for a protective order[35] or the requesting party can file a motion to compel. Upon the filing of either motion, the

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> wealthy litigants and will likely create a software market that allows companies to re-characterize their data with the hopes of subverting the judicial process.
>
> The second potential loophole created by proposed Rule 26(b)(2)(B) is created by the requirement that the Rule requires requesting parties demonstrate "good cause" to permit a court to consider ordering discovery of "not reasonably accessible" information. This Rule not only restricts the actions of the bench, it also fails to define what constitutes "good cause," creating further ambiguity. .... Specifically, if a producing party fails to disclose the existence of certain documents, a discovering party will not know they exist, thereby making it difficult to show good cause to compel production based upon the value of discovering specific electronic documents.
>
> Proposed Rule 26(b)(2)(B)'s two loopholes in its provisions placing "not reasonably accessible" data presumptively beyond the scope of discovery and requiring a showing of "good cause" to compel production of "not reasonably accessible data" may be exploited if the proposed Rules are adopted in their current form. Instead of merely expediting and facilitating electronic discovery production requests, proposed Rule 26(b)(2)(B) threatens to strengthen the hand of wealthy litigants by giving them additional tools to evade electronic discovery requests and to wear down their opponents financial resources.

Daniel B. Garrie, et al., Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery, 25 Rev. Litig. 115,118-19, 125, 126 (2006). See also Rebecca Rockwood, Note, Shifting Burdens and Concealing Electronic Evidence: Discovery in the Digital Era, 12 RICH. J.L. & TECH. 16, 34 (2006) ("The combined effect of proposed Rules 26(b)(2)(B) and 37(f) is that companies can get the "benefits of a data deletion policy" without actually deleting anything. Although these new rules will help corporate defendants get through the litigation process without incurring a great deal of expense, it will also allow them more room to conceal important files and electronic documents. In the future, technically savvy defendants will have a distinct advantage in evading discovery of potentially damaging documents. In many cases, this could change the entire outcome of the litigation.") (internal citations omitted).

[35]Prior to the 2006 amendment, in Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228 (E.D.Md.2005), the court summarized the American Bar Association litigation section's protocol for counsel's approach to addressing the issue of ESI discovery. These measures were accomplished here primarily by the discovery conferences.

> Indeed, the newly revised Civil Discovery Standards for the American Bar Association Section on Litigation contain detailed information about the issues that the parties should discuss in their effort to agree upon an electronic records discovery plan. At a minimum, they should discuss: the type of information technology systems in use and the persons most knowledgeable in their operation; preservation of electronically stored information that may be relevant to the litigation; the scope of the electronic records sought (i.e. e-mail, voice mail, archived data, back-up or disaster recovery data, laptops, personal computers, PDA's, deleted data) the format in which production will occur (will records be produced in "native" or searchable format, or image only; is metadata sought); whether the requesting party seeks to conduct any testing or sampling of the producing party's IT system; the burdens and expenses that the producing party will face based on the Rule 26(b)(2) factors, and how they may be reduced (i.e. limiting the time period for which discovery is sought, limiting the amount

Court first assesses whether the ESI production is an undue burden. If so, then the Court considers whether the ESI discovery request is duplicative or available elsewhere or whether the requesting party could have sought the ESI earlier. If an undue burden is shown, the requesting party must show "good cause " to justify the ESI production. For the "good cause" determination, the Court is to consider whether the discovery request's "burden or expense ... outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed.R.Civ.P. 26(b)(2)(C)(i)(ii) and (iii)

In contrast, prior to the 2006 amendments, courts determined accessibility of ESI production based primarily on the technical availability of the data. If the data were not technically available, then the courts would consider whether to apportion costs to retrieve the ESI based on several factors, with some exceptions, discussed infra. Prior to the 2006 amendments, factors similar to Rule 26(b)(2)(B) were referred to as the "proportionality" test. Zubulake v. UBS Warburg, 217 F.R.D. 309, 316 (S.D.N.Y. 2003)[36] ("Zubulake I"). Under prior law, an undue burden did not arise

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> of hours the producing party must spend searching, compiling and reviewing electronic records, using sampling to search, rather than searching all records, shifting to the producing party some of the production costs); the amount of pre-production privilege review that is reasonable for the producing party to undertake, and measures to preserve post-production assertion of privilege within a reasonable time; and any protective orders or confidentiality orders that should be in place regarding who may have access to information that is produced.

Id. at 245.

[36] Another often cited decision is Rowe Entertainment, Inc. v. William Morris Agency, 205 F.R.D. 42 (S.D.N.Y. 2002), but the Court finds Zubulake I and its related decisions more persuasive on the factors to be considered on whether electronic discovery is inaccessible. For example, "Rowe makes no mention of either the amount in controversy or the importance of the issues at stake in the litigation .....Courts applying Rowe have uniformly favored cost-shifting largely because of assumptions made concerning the likelihood that relevant information will be found ....such proof will rarely exist in advance of obtaining the requested discovery. The suggestion that a plaintiff must not only demonstrate that probative evidence exists, but also prove that electronic discovery will yield a "gold mine," is contrary to the plain language of Rule 26(b)(1) which permits discovery of "any matter" that is "relevant to [a] claim or defense." Zubulake, 217 F.R.D. at 321, 323.

merely because the discovery request involved an ESI production. Id. at 318 n.48.

4. Duty to Preserve

In the Court's view, the critical and threshold issue that impacts the undue burden analysis is the Defendants' breach of their legal duty to preserve ESI relevant to this action. As set forth below, if such a hold were accomplished here, then this extensive commitment of the parties', the MCCs' and the Court's resources would have been mooted.

With the 2006 amendments on electronic discovery, the Advisory Committee Notes to Rule 26(b)(2) emphasize that: "A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence." Independent of the rules of procedure, a legal duty to preserve relevant information arises when a person "knew or should have known that the documents would become material at some point in the future then such documents should have been preserved." Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746 (8th Cir. 2003).

As to when this duty arises, the federal courts have held that the duty to preserve relevant information clearly arises when a complaint is filed with a court. Computer Associates, Intern., Inc. v. American Fundware, Inc., 133 F.R.D. 166, 169 (D. Colo. 1990); Telectron Inc. v. Overhead Door Corp., 116 F.R.D. 107, 127 (S.D. Fla. 1987). A duty to preserve may also arise before the filing of the complaint, if a party has notice that litigation of a matter is likely to be filed. Cappelupo v. FMC Corp., 126 F.R.D. 545, 551 (D. Minn. 1989); Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440 (N.D. Ill. 1976). The duty to preserve does not include evidence that the party "had no reasonable notice of the need to retain." Danna v. New York Tel. Co., 752 F. Supp. 594, 616 n.9 (S.D.N.Y. 1990) , but includes information that party " has control and reasonably knew or could reasonably foresee was material to a potential legal action." Krumwiede v. Brighton Associates,

LLC, No. 05 C 3003, 2006 WL1308629 at *8 (N.D. Ill. May 8, 2006) (citations omitted).

Clearly with the filing of Plaintiffs' complaint in February 1998, the duty of preservation arose for all parties to take reasonable measures to preserve all relevant evidence. Here, the Defendants' duty to preserve evidence probably arose at least several months before the filing of the Consent Decree in 1998, given the extensive and negotiated details in the Consent Decree. The Consent Decree provides ample guidance and clarity on what information is relevant and material and therefore should be retained. The MCCs' information "pertaining to" a TennCare enrollee was under the Defendants' control under federal law and their contracts with the MCCs. Yet, the proof establishes the Defendants did not create any meaningful litigation hold until the March 17, 2004, Memorandum when this action was more than six years old.

Defense counsel's assertions that prior to 2004, a litigation hold was not required because this is a consent decree action, not litigation, the decisions cited above, are to the contrary. Moreover, on December 18, 2000, the Defendants moved to modify the Consent Decree (Docket Entry No. 69) and on January 29, 2001, the Plaintiffs moved for contempt (Docket Entry No. 79). The contempt hearing started in June, 2001 and Judge Nixon entered his findings and conclusions on December 19, 2001. (Docket Entry No. 227). The parties were involved in other contested issues in 2002 and 2003. (Docket Entry Nos. 238, 251, 258, 266, 275, 291, 301 and 319). These docket entries clearly undermine the Defendants' contention on the appropriate timing of a litigation hold. Even after a written and detailed March 17, 2004 memorandum/litigation hold, the proof establishes that the Defendants did not implement this litigation hold, as outlined in the March 17th memorandum.

"Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent

documents that may be relevant to the litigation." Telecom International Am. Ltd. v. AT & T Corp., 189 F.R.D. 76, 81 (S.D.N.Y.1999) (citing Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 18 (D.Neb.1983)). Neither a preservation demand letter nor a court order is required. Wiginton v. Ellis, 2003 WL 22439865 at ** 4, 5 (N.D. Ill. Oct. 27, 2003). A preservation order only clarifies the parties' particular obligation. Treppel v. Biovail Corp., 233 F.R.D. 363, 369 (S.D.N.Y. 2006).

This preservation duty extends to potential evidence relevant to the issues in the action, including electronic information. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V"); Renda Marine, Inc. v. United States, 58 Fed. Cl. 57, 60-61 (2003). As the Zubulake V Court explained in an ESI controversy and the lack of preservation thereof:

> Once a party reasonably anticipates litigation, [the defendant] must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. **As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery)**, which may continue to be recycled on the schedule set forth in the company's policy. **On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.**

Id. at 431 (emphasis added) (quoting Zubulake v. USB Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y.2003) ("Zubulake IV")).

In Zubulake V, the Court excluded from the back-up tapes exception, the back-up tapes of "key players" that exist:

> "[I]t does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to **all** backup tapes.

229 F.R.D. at 431 (quoting Zubulake IV, 220 F.R.D. at 218 (emphasis in original).

This preservation duty extends to the parties' outside counsel and beyond the mere issuance of a litigation hold. In Zubulake V, contrary to outside and in-house counsel's instructions, key employees of the defendant deleted e-mails that the plaintiff alleged would support her claims. In Zubulake V, the court summarized its 2003 decision in Zubulake IV[37] and delineated the types of measures stated therein, as necessary for outside counsel to monitor his client's behavior and the timely production of information. 229 F.R.D. at 435. The Court regrets the following lengthy quotation, but its purpose is to illustrate the level of guidance available to counsel on the preservation of ESI, including that occasionally telling clients that they need to preserve relevant ESI is legally insufficient.

> A party's discovery obligations do not end with the implementation of a "litigation hold"--to the contrary, that's only the beginning. **Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.**
>
> 1. Counsel's Duty to Locate Relevant Information
>
> **Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required in Zubulake IV.** To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. **This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information.** In this case, for example, some

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[37] There are a series of Zubulake decisions on ESI discovery issues that are summarized in Zubulake v. Warburg, LLC, 229 F.R.D. 422, 425 n. 5 (S.D.N.Y. 2004). District courts, in the Sixth Circuit, have recognized that although "Zubulake IV is not technically binding on this court, it has received wide recognition at the federal bar as authoritative." Kemper Mortgage, Inc. v. Russell, 2006 WL 2319858 (S.D. Ohio 2006).

UBS employees created separate computer files pertaining to Zubulake, while others printed out relevant e-mails and retained them in hard copy only. **Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected.** A brief conversation with counsel, for example, might have revealed that Tong maintained "archive" copies of e-mails concerning Zubulake, and that "archive" meant a separate on-line computer file, not a backup tape. Had that conversation taken place, Zubulake might have had relevant e-mails from that file two years ago.

To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. **It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents.** [FN75] When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

> n.75 It might be advisable to solicit a list of search terms from the opposing party for this purpose, so that it could not later complain about which terms were used.

In short, it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.

2. Counsel's Continuing Duty to Ensure Preservation

Once a party and her counsel have identified all of the sources of potentially relevant information, they are under a duty to retain that information (as per Zubulake IV) and to produce information responsive to the opposing party's requests. Rule 26 creates a "duty to supplement" those responses. Although the Rule 26 duty to supplement is nominally the party's, it really falls on counsel. As the Advisory Committee explains,

Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. **In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information.**

To ameliorate this burden, **the Rules impose a continuing duty to supplement responses to discovery requests *only* when "a party[,] or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney."**

The *continuing* duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost. Indeed, the notion of a "duty to preserve" connotes an ongoing obligation. Obviously, if information is lost or destroyed, it has not been preserved.

> See OXFORD ENGLISH DICTIONARY (2d ed.1989) (defining "preserve" as "[t]o keep safe from harm or injury; to keep in safety, save, take care of, guard"); see also id. (defining "retain" as "[t]o keep hold or possession of; to continue having or keeping, in various senses").

The tricky question is what that continuing duty entails. What must a lawyer do to make certain that relevant information--especially electronic information--is being retained? Is it sufficient if she periodically re-sends her initial "litigation hold" instructions? What if she communicates with the party's information technology personnel? Must she make occasional on-site inspections?

Above all, the requirement must be reasonable. A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, **counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without the active supervision of counsel.**

There are thus a number of steps that counsel should take to ensure compliance with the preservation obligation. While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.

***First*, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is**

fresh in the minds of all employees.

***Second*, counsel should communicate directly with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.**

***Finally*, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.** In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. **By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.**

229 F.R.D. at 432-34 (emphasis added) (some footnotes omitted). See also Rebecca Rockwood, Note, Shifting Burdens and Concealing Electronic Evidence: Discovery in the Digital Era, 12 RICH. J.L. & TECH. 16, 22 (2006) ("It is counsel's responsibility not just to tell the client that they have to retain and produce all information relevant to the case, but also to follow up with the client and continuously remind them of what they are required to do...Clients must be aware of all duties to preserve information, 'whether imposed by litigation or state or federal regulation.' Until the client begins to realize the impact of technology in litigation, the lawyer must educate them to provide the best service and avoid sanctions litigation that could be damaging.") (emphasis added and footnotes omitted.)

In Zubulake V, that Court noted cases where counsel and the clients failed to understand each other on ESI issues.

Keir v. UnumProvident Corp. provides a disturbing example of what can happen

when counsel and client do not effectively communicate. In that ERISA class action, the court entered an order on December 27, 2002, requiring UnumProvident to preserve electronic data, specifically including e-mails sent or received on six particular days. What ensu[]ed was a comedy of errors. First, before the court order was entered (but when it was subject to the common law duty to preserve) UnumProvident's technical staff unilaterally decided to take a "snapshot" of its servers instead of restoring backup tapes, which would have recovered the e-mails in question. (In fact, the snapshot was useless for the purpose of preserving these e-mails because most of them had already been deleted by the time the snapshot was generated.) Once the court issued the preservation order, UnumProvident failed to take any further steps to locate the e-mails, believing that the same person who ordered the snapshot would oversee compliance with the court order. But no one told him that.

Indeed, it was not until January 13, when senior UnumProvident legal personnel inquired whether there was any way to locate the e-mails referenced in the December 27 Order, that anyone sent a copy of the Order to IBM, who provided "email, file server, and electronic data related disaster recovery services to UnumProvident." By that time, UnumProvident had written over 881 of the 1,498 tapes that contained backup data for the relevant time period. All of this led to a stern rebuke from the court. Had counsel in Keir promptly taken the precautions set out above, the e-mails would not have been lost. [FN87]

> FN87. See also Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union, 212 F.R.D. 178, 222 (S.D.N.Y.2003) (ordering default judgment against defendant as a discovery sanction because **"counsel (1) never gave adequate instructions to their clients about the clients' overall discovery obligations, [including] what constitutes a 'document' ...; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who ... was not instructed by counsel[ ]** that a document included a draft or other nonidentical copy, a computer file and an e-mail; ... and (5) ... failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.")

Zubulake V , 229 F.R.D. at 434 (emphasis added and some footnotes omitted).

The Court concludes that the proof establishes that the Defendants did not issue any

litigation hold in this action until March 17th, 2004 and then did not implement that March17th litigation hold memorandum. Significantly, the March 17th Memorandum required collection of relevant documents by the assigned custodian for each working group and the ongoing segregation and review of relevant documents for privileges by the State Attorney General's Office. The Defendants now assert that to respond to Plaintiffs' ESI request, as ordered by the Court, will cost them millions of dollars and a number of years due to their need to segregate documents and to conduct a privilege review of massive amounts of information. This evidence establishes that the March 17th Memorandum was never implemented.

The proof at best is that on "several occasions," Defense counsel told state employees to save emails and responsive documents. In their earlier papers, Defendants' counsel insisted that "[k]ey state officials have **periodically** been reminded of their duty to preserve documents and the instructions have even been expanded as the potential issues in dispute have expanded." (Docket Entry No. 720 at p. 27)(citing Docket Entry No. 720, Moss Declaration at ¶¶ 7-8) (emphasis added). Moss's 2006 declaration actually states that "state officials had been reminded on **several occasions** about their continuing obligation to preserve responsive documents." "Periodically" connotes "communications at regular intervals of time," Webster's Third New International Dictionary at p. 1680 (1981), "several occasions" does not.

In any event, the proof is that Defendants left their employees to decide on their own what to retain without evidence of any written instruction or guidance from counsel on what is significant on material information in this complex action. Under the State's computer system, after six to seven months emails were destroyed. Some key custodians did not have backup tapes for their work station computer. Given the complexity of this action, isolated statements about the litigation hold over a period of several years are equivalent to the lack of any meaningful litigation hold. The

inadequacy of these isolated occasions is evidenced by the detail in the March 17th memorandum that describes reasonable methods to accomplish effective preservation of relevant information in this action.

Significantly, the Defendants did not provide the MCCs with any instruction to preserve relevant information until November 2006. The significance arises because, as Judge Nixon found, all of the substantive activities under the Consent Decree occur, at least initially at the MCC level. The MCCs are the sites for services and where all of the substantive decisions are initially made. Without a litigation hold, the MCCs' ESI data has been regularly destroyed from 1998 to 2006, when the MCCs issued their litigation holds in 2006 to halt the loss of their ESI. The Defendants did not undertake any efforts to ensure the systemic preservation of the MCCs' data that is particularly disturbing in light of Judge Nixon's findings in 2001 and 2004.

In their post hearing submission, the Defendants argue that they did not have any obligation to preserve the MCCs' data because the MCCs' ESI is not within their possession, custody, or control. (Docket Entry No. 997 at pp. 24-28). " [I]t is well settled that a party has no obligation to preserve evidence that is not in its possession, custody or control." Id. 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 at p. 42).

For these reasons stated earlier, since the entry of the Consent Decree, the Defendants had control over the MCCs because paragraph 105 of the decree expressly states that " All such records shall be obtained, if necessary, and provided to plaintiffs' counsel through TennCare, rather than

through individual MCOs." (Docket Entry No 12, Consent Decree at ¶ 105). Under their contracts with their MCCs, the Defendants and "any other duly authorized state or federal agency shall have immediate and complete access to all records pertaining to the medical care and services provided to TennCare enrollees". (Plaintiffs' Exhibit 28) (emphasis added). To repeat the governing legal principle: "Control" has been broadly construed to mean "the legal right, to obtain the documents requested upon demand...even through it presently may not have a copy of the document in its possession." 7 Moore's § 34.14[2][b]. Under the evidence and applicable law, the Court concludes that the Defendants possessed the clear legal right and control over the MCCs' ESI and thereby owed a duty to take reasonable measures to preserve the MCCs' relevant information, but the Defendants breached that duty.

Courts have imposed sanctions for a party's failures to preserve electronic information. As to sanctions for failure to preserve ESI, as stated earlier in Zubulake V, the defendant deleted e-mails the plaintiff alleged would support her claim. 229 F.R.D. at 425 This destruction occurred contrary to outside and in-house counsel's instructions to key employees not to deleted relevant e-mail. Id. at 426-28. For sanctions, the court ruled that it would give an adverse inference instruction at trial, and required the defendant to restore backup tapes and to pay for depositions that had to be retaken as well as granting an award of attorney fees and costs. Id. at 437.

In other courts, in United States v. Philip Morris USA, Inc., 327 F.Supp 2d 21, 23 (D.D.C.2004), the Court entered a broad preservation order, but for at least two years under company practices, the defendant's employees continued to delete e-mail messages more than sixty days old. Defense counsel later learned of this destruction, but waited four months to inform the Court. Id. Upon a motion for sanctions, the court found that eleven of the company's highest officers and supervisors violated not only the court order, and the company's stated policy for

electronic records retention. Id. at 25. The court fined each defendant $250,000 per employee, and precluded the defendant from calling any of the eleven employees as witness at trial. Id. at 26, n.1. In In re Cheyenne Software, Inc., Securities Litigation, 1997WL714891 at * 2 (E.D.N.Y. Aug. 18, 1997), a securities action, the court ordered the defendant to pay $15,000 in fees and fines for the routine recycling of computer storage media. In Renda Marine, 58 Fed. Cl. 57 (2003), the court granted the plaintiff's motion to compel to order the U.S. Army Corps of Engineers to produce the backup tapes at its own expense and to provide access to the contracting officer's computer hard drive. There, the Defendant's policy was that after an email was read, the e-mail had to be deleted or moved to a personal folder immediately. Despite the notice of litigation, this practice continued resulting in the court's sanctions.

Where a defendant contends that business necessity required or caused the destruction of relevant electronic discovery, a court rejected this defense because the party did not make a prior request for judicial relief on this issue. As stated in Cheyenne Software:

> [t]he defendants, not entirely unreasonably, argue that they cannot "freeze" their business by maintaining all hard drives inviolate, but rather must erase and reformat their computer hard drives as people leave and as business needs dictate. The documents could have been preserved, however, without keeping the hard drives inviolate; the information on those drives could simply have been copied to other relatively inexpensive storage media. If the defendants found that to be so burdensome, an application to the court was the appropriate procedure, not ignoring the court's orders.

1997 WL714891 at *1. Defendants sought no such relief here.

The Court reserves any discussion of sanctions for the Defendants' failure to implement an effective litigation hold until completion of the ESI discovery ordered by the Court.

5. The Undue Burden Analysis

The undue burden analysis will discuss the types of ESI subject to production, the

Defendants' databases subject to the ESI searches, the costs of that production and an application of the Rule 26(b)(2)(C) factors to the circumstances of this controversy.

(i) Types of ESI Data

As to what ESI must be produced, at the time of the November 2006 Order, the issues of the accessibly of the ESI was determined primarily based on the technical availability of the ESI This analysis was formulated in Zubulake I, and its progeny, often cited decisions. Under Zubulake I, the issue of undue burden due to costs of production was reserved for data that was technically inaccessible.

> **Whether electronic data is accessible or inaccessible turns largely on the media on which it is stored**. Five categories of data, listed in order from most accessible to least accessible, are described in the literature on electronic data storage:
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> 1. **Active, online data**: "On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records [sic] life--when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, i.e., milliseconds." Examples of online data include hard drives.
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> 2. **Near-line data**: "This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10-30 seconds for optical disk technology, and between 20-120 seconds for sequentially searched media, such as magnetic tape." Examples include optional disk.
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> 3. **Offline storage/archives**: "This is removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered 'archival' in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the

> storage facility." The principled difference between nearline data and offline data is that offline data lacks "the coordinated control of an intelligent disk subsystem," and is, in the lingo, JBOD ("Just a Bunch Of Disks").
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> 4. **Backup tapes**: "A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred kilobytes to several gigabytes. Their transfer speeds also vary considerably ... The disadvantage of tape drives is that they are sequential- access devices, which means that to read any particular block of data, you need to read all the preceding blocks." As a result, "[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] ... the organization of the data mirrors the computer's structure, not the human records management structure." Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack of uniform standard governing data compression.
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> 5. **Erased, fragmented or damaged data**: "When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters ... As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk." Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.

Id. at 318-19 (emphasis added).

Applying this technical viewpoint on the accessibility of ESI, the Zubulake Court deemed **the first** three types of ESI, presumptively accessible.

> **Of these, the first three categories are typically identified as accessible, and the latter two as inaccessible. The difference between the two classes is easy to appreciate. Information deemed "accessible" is stored in a readily usable format**. Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. **"Inaccessible" data, on the other hand, is not readily usable. Backup tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible.**

Id. at 319-20.

One commentator cited the number of custodians to be searched as posing the risk of increasing production costs. Kenneth J. Withers, Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure, 7 Sedona Conf. J. 1 (2006) (hereinafter "Withers")

> **To the extent that the appropriate technology is readily available to render the electronically stored information intelligible, it is considered "accessible."** However, much of the electronically stored information that may be subject to discovery is not easily rendered intelligible with the computers, operating systems, and application software available in every-day business and personal environments. This electronically stored information may be considered "not reasonably accessible" due to the cost and burden associated with rendering it intelligible.
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> * * *
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> **Electronically stored information, if kept in electronic form and not reduced to paper printouts, can be very inexpensive to search through and sort using simple, readily available technologies such as word or "string" searching. The cost of copying and transporting electronically stored information is virtually nil. The costs for the producing side, however, have increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion.** Organizations without state-of-the art electronic information management program in place, which classify information and routinely cull outdated or duplicative data, face enormous (often self-inflicted) costs and burdens.
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> * * *
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> While we may informally refer to "accessible data," **the emphasis is really on the data source-the media and formats in which the data is kept. This subtle distinction becomes more important when we consider the second tier of discovery of electronically stored information-data from sources that are "not reasonably accessible." We concentrate on the characteristics of the data source, as opposed to the data, because the difficulties presented by a data source that it "not reasonably accessible" prevent us from knowing anything about the data itself. Most importantly, the medium or the format prevents us from knowing whether the data itself is relevant to the litigation. Costs must be incurred and burdens borne before that threshold determination of relevance can reasonably be made.**

Id. at pp. 5, 9 and 21 (emphasis added).

Special mention, however, is necessary for two types of discoverable ESI sought by the Plaintiffs, namely "deleted" data and "metadata". To the extent that any information of 50 key custodians work station has been deleted, the reference to "deleted" information from a computer system is a misnomer.

> The term "deleted" is sticky in the context of electronic data. " 'Deleting' a file does not actually erase that data from the computer's storage devices. Rather, it simply finds the data's entry in the disk directory and changes it to a 'not used' status--thus permitting the computer to write over the 'deleted' data. Until the computer writes over the 'deleted' data, however, it may be recovered by searching the disk itself rather than the disk's directory. Accordingly, many files are recoverable long after they have been deleted--even if neither the computer user nor the computer itself is aware of their existence. Such data is referred to as 'residual data.' " Deleted data may also exist because it was backed up before it was deleted. Thus, it may reside on backup tapes or similar media. Unless otherwise noted, I will use the term "deleted" data to mean residual data, and will refer to backed-up data as "backup tapes."

Zubulake, 217 F.R.D. at 313 n.19 (quoting Shira A. Scheindlin & Jeffrey Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?, 41 B.C. L. Rev. 327, 337 (2000) (footnotes omitted).

Deleted information in a party's computer's backup tapes is as discoverable as electronic documents in current use. "[I]t is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable. ...[C]omputer records, including records that have been 'deleted,' are documents discoverable under Fed.R.Civ.P. 34.". Zubulake, 217 F.R.D. at 317 n.38 (quoting Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn.2002) and Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S. D .Ind.2000). See also Renda Marine, Inc. v. United States, 58 Fed. Cl. 57 (2003) (U.S. Army Corps of Engineers ordered to produce backup tapes at its own expense and to provide access to the contracting officer's computer

hard drive) and Williams v. Armstrong, 2007 WL 1424552 *2 (W.D. Mich. May 14, 2007) ("Typically speaking, [email], even when deleted is maintained in a computer system as replicant data, archival data or residual data, which is subject to production and discovery") (citations omitted).

Thus, the Court concludes that any deleted data recoverable from the work stations of the 50 key custodians is technically accessible. The Court cannot find the same for the statewide email server for lack of proof.

Another type of electronic data at issue in these discovery disputes that impacts the costs issue is "Metadata" that is a different type of ESI.

> Metadata, commonly described as "data about data," is defined as "information describing the history, tracking, or management of an electronic document." Appendix F to **The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age defines metadata as "information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information.)"** Technical Appendix E to the Sedona Guidelines provides an extended description of metadata. It further defines metadata to include "all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records." **Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.**

Sprint/United Management Co., 230 F.R.D. at 646 (emphasis added and footnotes omitted).

Sprint/United Management Co. directed that if the metadata is viewable in the ordinary usage in the defendant's business, and probative then the metadata should be produced absent an agreement of the parties or order of the court.

> Certain metadata is critical in information management and for ensuring effective retrieval and accountability in record-keeping. **Metadata can assist in proving the authenticity of the content of electronic documents, as well as establish the context of the content. Metadata can also identify and exploit the structural relationships that exist between and within electronic documents, such as versions and drafts. Metadata allows organizations to track the many layers of rights and reproduction information that exist for records and their multiple versions.** Metadata may also document other legal or security requirements that have been imposed on records; for example, privacy concerns, privileged communications or work product, or proprietary interests.
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> * * *
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> It is important to note that metadata varies with different applications. As a general rule of thumb, the more interactive the application, the more important the metadata is to understanding the application's output. At one end of the spectrum is a word processing application where the metadata is usually not critical to understanding the substance of the document. The information can be conveyed without the need for the metadata. At the other end of the spectrum is a database application where the database is a completely undifferentiated mass of tables of data. **The metadata is the key to showing the relationships between the data; without such metadata, the tables of data would have little meaning.**

Id. at 647 (emphasis added and footnotes omitted). See also Bahar Shariati, Zubulake v. UBS Warburg: Evidence that the Federal Rules of Civil Procedure Provide the Means for Determining Cost Allocation in Electronic Discovery Disputes," 49 VILL. L. REV. 393, 404 n.49 (2004) (hereinafter "Shariati") ("[F]ormatting codes and other information are means to manipulate electronic data . . . and metadata tells 'when the document was created, the identity of the user who have accessed the document, [and] whether the document was edited'.")

To be sure, the 2006 amendment to Rule 34(a) no longer requires production of ESI in its native format that would include metadata. The Defendants note an emerging judicial trend that metadata should not be produced, absent some showing of necessity. "[E]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata" and "[i]t is likely to remain the exceptional situation in which metadata must be produced."

Sprint/United Management Co. , 230 F.R.D. at 652. Accord Wyeth v. Impax Labs., Inc., No. 06-222-JFF, 2006 U.S. Dist. LEXIS 79761, at *4 (D. Del. Oct. 26, 2006), ("Emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata. The Default Standard for Discovery of Electronic Documents utilized in this District follows this general presumption."); Kentucky Speedway, LLC v. NASCAR, Inc., No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at * 22-23 (E.D. Ky. Dec. 18, 2006) ("Emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata. . . [T]his court is convinced - at least on the facts of this case - that the production of metadata is not warranted. The issue of whether metadata is relevant or should be produced . . . . ordinarily should be addressed by the parties in a Rule 26(f) conference.")[38] By Administrative Order, this Court joined the Default Standard under which the need for metadata must be shown.

A noted treatise on federal practice explained the value of "metadata" in the context of litigation:

> A printout or hard copy version of a computer-generated document does not contain all the embedded metadata. Similarly, the metadata, other than a file name, is not shown on the document when viewed on the monitor screen, but it can be easily retrieved. Different software applications may generate different types of metadata. In some cases, metadata can include significant information essential to a full understanding of the document. For example, metadata or system data in computer-generated information can reveal the evolution of a document. A record of earlier drafts, dates of subsequent revisions or deletion, and the identity of persons revising a document are routinely captured in software applications. System data may also identify anyone downloading, printing, or copying a specific document. Metadata may also assist in evaluating the authenticity of a document. For example, the relationship and arrangement of a particular file with other electronic files in a directory listing may offer helpful information regarding its

[38]The Defendants' counsel too often attempt to ignore the history of this case and seek to recast this action and its discovery dispute as if this were a recently filed action. First with the filing of a Consent Order contemporaneous with the filing of a complaint, a Rule 26(f) conference was not required.

> authenticity. This data can be particularly useful when earlier drafts differ or the authenticity of an original document is disputed.
>
> A document produced electronically may be more useful than a hard copy of the data or document in certain cases because it may contain metadata that is not revealed in a printout but that can be essential to a full understanding of the document. For example, a printout of an email message may include only a generic reference to a distribution list that fails to refer to the individuals who received the message.
>
> Metadata that identifies the author, creation date, and dates when the document was modified remain on a computer's hard drive and can be retrieved when the information is stored on a CD-ROM, floppy diskette, or other media.

7 Moore's § 37a.03[1] (footnotes omitted).

Although the Defendants contend that metadata cannot be "Bates stamped" and is subject to alteration as a live document, Tigh described the "Hash" coding that can be attached to metadata to ensure its integrity. The Honorable Shira Scheindlin, the author of the Zubulake opinions likewise observed that:

> "Native format, on the other hand, may create authenticity problems, as careless handling (or intentional alteration) can affect the integrity of the data. Unless protective measures are taken, the data may change each time the information is viewed or sorted. Thus, it is difficult to be sure that the information is maintained as it is produced and it is difficult to identify, or "Bates stamp" the original production, although technologies now exist to solve this problem."

Shira A. Scheindlin, U.S. District Judge Southern District of New York , "E-Discovery: The Newly Amended Federal Rules of Civil Procedure," Moore's Federal Practice (2006) (emphasis added).

The significance of metadata in litigation is evidenced in Williams, an employment class action suit involving layoffs, where the defendant produced spreadsheets showing reduction-in-force calculations in a static image format that had been "scrubbed" to eliminate metadata that included the mathematical formulae behind the spreadsheets. Referring to the "Sedona Principles"

as well as then proposed Rule 34(b), the district court determined that the defendant should have produced the spreadsheets "as they are maintained in the regular course of business", that is, in native format. 230 F.R.D. at 654. The court also stated that other measures should have been taken to preserve the metadata within the electronic files because such information, such as calculations and text would be relevant and material to the claims in the action. Id. at 652-53. Accord, In re Verisign, Inc. Securities Litigation, No. C 02-02270, 2004 WL 2445243 (N.D. Cal. March 10, 2004).

Metadata in this action will assist in understanding the tracking data required by the Consent Decree and what Judge Nixon found to be unreliable statistics. Metadata may disclose any attachments to email and assist in tying related documents with their respective custodians. Metadata would be necessary to understand the multiple policies and reports prepared and published by the Defendants. ESI is also necessary in light of the inconsistencies and gaps in Defendants' 2006 paper production and the Defendants' failure to preserve relevant data, as discussed above. The Metadata will facilitate understanding changes and alterations of documents, particularly reports filed with the Court. Here, the Court credits Tigh's testimony that metadata is important to understand the path of a document. Metadata is especially important to understand what remedial measures the Defendants took after this Court's repeated findings of the Defendants' non-compliance with the Consent Decree.

The amended version of Fed.R.Civ.P. 34(b)(iii) reflects that a party can produce ESI in one format, "unless the Court orders otherwise." The Court concludes that the metadata here is technically accessible and that Plaintiffs have satisfactorily shown that metadata is relevant and necessary for meaningful ESI production. Thus, pursuant to Rule 34(b)(iii), the Court concludes that the Defendants' and the MCCs's ESI production must include metadata.

(ii) The Defendants' and MCCs Databases

The proof here establishes that the Defendants have two servers: a document server and an email server. In addition, the Defendants agreed to establish a storage facility for the ESI on the computers of the Defendants' 50 key custodians. These work stations have separate folders for which there is no backup, but whatever relevant ESI remains, has been collected. Thus, from a technical viewpoint, the information under the November, 2006 Orders remains accessible. All information on these media storage devices that are not found to be privileged is discoverable and all transactional data is discoverable.

Subject to privileged information, all other ESI data bases are discoverable, but several of the MCCs' systems do not possess the same capabilities as the Defendants' systems. With the Court's modifications of the ESI production for those MCCs that have not resolved the ESI search conditions, the cited differences in those MCCs' systems will not affect those MCCs' ESI searches.

(iii) The Costs of Production

The issue remains of whether the ESI production sought of the Defendants and MCCs imposes an undue burden upon them. In their Opposition Brief, Defendants describe this "undue burden" in terms of "multiple millions of pages" and hundreds of gigabytes of information as well as exorbitant amounts of attorney time for privilege reviews. (Docket Entry No. 907, Defendants' Response at pp. 22, 24).

The Defendants' costs of production can be substantial depending upon the scope of the search and the number of custodians included in the search:

> [e]lectronically stored information, if kept in electronic form and not reduced to paper printouts, can be very inexpensive to search through and sort using simple, readily available technologies such as word or "string" searching. **The cost of copying and transporting electronically stored information is virtually nil. The costs for the producing side, however, have**

> **increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion.**

Withers at p. 9 (emphasis added).

For the custodian factor in the undue burden analysis, the Court concludes that the 50 agreed custodians for the Defendants and the Plaintiffs' acceptance of the MCCs' designated custodians are reasonable and will not create an undue burden for the Defendants or the MCCs.

As to the search terms, the Defendants agreed to accept the Plaintiffs' 50 search terms. The ESI that Plaintiffs request is targeted by these 50 select key words that should eliminate a substantial amount of documents. Here, the Defendants' and MCCs' proof establishes that the ESI sought by the Plaintiffs is on active and stored data, except for the ESI that was destroyed as part of the Defendants' and MCCs' routine business practices. To the extent this data is on an active system, Zubulake[39] supports the Court's earlier Order requiring the production at the Defendants' expense, but given the 2006 amendments, the Court must consider whether the Defendants can show an undue

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[39] Prior to the 2006 amendments, the district court in Zubulake set forth a tri-part test to resolve these discovery issues. The first two factors are as follows:

> First, it is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data. For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. **A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.**
>
> Second, because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media. **Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases.**

Id. at 324. (emphasis added). Zubulake I factors are similar to Rule 26(b)(2)(C)(iii)'s provisions on whether ESI discovery imposes an "undue burden or expense on the responding party." 217 F.R.D. at 318 .

burden. For the reasons stated below, the Court deems the Defendants' proof does not establish an undue burden their proof submitted prior to the earlier Order was conclusory and insufficient. See Docket Entry No. 720, Exhibits A and B thereto.

As to the Defendants' proof of an undue burden, the Defendants' computer search based upon Plaintiffs' 50 word search with 50 key custodians reflects a total of 493 gigabytes of information which equals approximately 15 million pages with a maximum cost of $10 million. (Docket Entry No. 907 at pp. 2, 9). Assuming the estimates are reliable, for a class size of more than 550,000 children, the unit cost for this ESI discovery is approximately 25 pages per class member at a cost of $16.66 per Plaintiff class member. If Plaintiffs were individuals with unproven claims, then the expenditure of millions of dollars for electronic discovery, after balancing equities, might be unjustified. Yet, with repeated judicial findings of the Defendants' violations of children's rights, this cost of ESI discovery is not an undue burden for the Defendants. Moreover, as to whether this expense for ESI discovery outweighs its benefits, Congress has authorized in excess of $7 billion dollars to the Defendants to provide the medical services at issues in this action. Of the Defendant's two systems, the Defendants and most of the MCCs reached an agreement on the ESI production of transaction data, the Defendant concerns about privilege is for ESI on the State's email server and the individual computers of key custodians. The significant costs identified by the Defendants is for privilege review.

As to the costs of privilege review, "[T]he most significant contributor to the cost of privilege screening, however, is fear." Withers at p. 11. As Tigh noted, a word search can be employed using the names of counsel and other search terms, such as "privileged" and "confidential" to identify clearly of course, privileged information before any production defense counsel's computer can identify clearly privileged information. Courts recognize that scanning of

vast amounts of ESI utilizing key words to identify privileged information can significantly reduce the costs of a privilege review. Zubulake I, 217 F.R.D. at 318 ("key words can be run for privilege checks"). "'By comparison [to the time it would take to search through 100,000 pages of paper], the average office computer could search all of the documents for specific words or combination[s] of words in minute[s], perhaps less'". Id. at n.50 (quoting Scheindlin & Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task? 41 B.C. L.REV. 327, 364 (2000) and citing Public Citizen v. Carlin, 184 F.3d 900, 908- 10 (D.C.Cir.1999)).

The Court finds that the Defendants have unduly exaggerated the costs for their ESI collection and any privilege reviews of this ESI. As stated earlier, courts have recognized computers' capabilities to perform select word searches from massive ESI material on privilege in a matter of seconds. The Court agrees with Tigh that selective word searches of ESI are viable options to reduce privilege review costs significantly for the Defendants and the MCCs. The Court also deems the defense counsel's internal data system and the availability of selective word searches to eliminate any excessive costs or undue burden arising from any privilege search of the ESI that the Court ordered to be produced.

For those MCCs that did not reach an agreement with the Plaintiffs, as stated in Rule 34(a), a threshold measure, before consideration of any undue burden **is** a sampling of the databases, particularly backup tapes to determine the likely yield of the information sought, as to avoid the costs of an extended search. Prior to the 2006 amendments, courts engaged in this analysis. As Zubulake I observed, "by requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork." 217 F.R.D. at 324, accord Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah 1985) ("[S]ome courts have required the responding parties to develop programs to extract the requested information and to assist the requesting party

in reading and interpreting information stored on computer tape.") and McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D. D.C. 2001) ("The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense the less likely it is, the more unjust it would be to make the [responding party] search at its own expense. The difference is 'at the margin'"...). See also Zubulake I, 217 F.R.D. at 323 (the "test run" established in McPeek is the best solution for preventing courts from basing cost-shifting analysis on assumptions).

With the lack of a preservation or litigation hold, the Court questions the viability of sampling for the Defendants' and the MCCs' data bases. The Defendants' actual ESI search based upon Plaintiffs' 50 word search with 50 key custodians reflects a total of 493 gigabytes of information which equals approximately 15 million pages (Docket Entry No. 907 at p. 9) with an estimated maximum cost of $10 million. Id. at 2. With Defendants' estimates, the unit cost for this ESI discovery is approximately 25 pages per class member at a cost of $16.66 per class member for this class. This cost is not an undue burden. As to the MCCs', with the Court's modification of the MCCs' ESI search, Plaintiffs' expert and Unison's expert agreed that this modified ESI search would not be unduly burdensome nor costly.

6. Good Cause and The Rule 26(b)(2)(C) Factors

Even if the Court agreed with the Defendants that this ESI discovery presents an undue burden, Rule 26(b)(2) also states that if the party seeking discovery can show "good cause," then the ESI production can be ordered. Fed.R.Civ.P. 26(b)(2)(C)(i)(ii) and (iii). Amended Rule 26(b)(2)(C)(i) requires consideration first of whether the ESI is duplicative or available elsewhere as less burdensome and less expensive.

The Defendants contend that their 2004 paper production provides the identical or the same data as the ESI production for that period and therefore, Plaintiffs' ESI discovery is duplicative. The Court disagrees. Since 1972, courts have held that a paper production does not preclude an ESI production of the same material. Adams v. Dan River Mills, Inc., 54 F.R.D. 220 (W.D. Va. 1972). See also; National Union Electric Corp. v. Matsushita Electric Industrial Co., Ltd., 494 F.Supp. 1257 (E.D. Pa. 1980). In In re Honeywell International Inc. Securities Litigation , 230 F.R.D. 293, 297 (S.D.N.Y. 2003), despite the defendant's prior paper production, the district court ordered ESI production that would cost $30,000. The court reasoned the prior paper production was "insufficient because they were not produced as kept in the usual course of business." Id. In In re Verisign the court ordered the defendant to convert existing TIFF images that had to be searchable in electronic format and ordered the production of metadata. 2004 WL 2445243 at * 3.

The reasons for this difference between paper production and ESI production may be as explained in Sprint/United Management Co., 230 F.R.D. at 646. To be sure, some courts differ on this issue. Compare Williams v. Owens-Illinois, 665 F.2d 918 (9th Cir. 1982) (denying such a request) and Anti-Monopoly, Inc.v. Hasbro, Inc., 1995 WL 649934 at *2 (S.D.N.Y. Nov. 3, 1995) (ordering production of hard-copy and computerized data.). Commentators recognize that, "paper copies of e-mail differ from electronic copies of e-mail." Shariati, at 405, n.49.

Given the technical and substantial differences in ESI and paper production, the Court adopts the Hasbro ruling: "the rule is clear: production of information in "hard copy" documentary form does not preclude a party from receiving that same information in computerized/electronic form." Id. at *2. The inconsistency and gaps in the Defendants' 2006 paper production for this time period, discussed supra, further demonstrate that the ESI sought and ordered by the Court is neither duplicative nor otherwise obtainable by other means. As discussed earlier on metadata, paper