production does not provide the same information as does ESI. The ESI here contain metadata that are invaluable to Plaintiffs' understanding of the Defendants' data and reports. Some emails originally contained attachments, but those attachments generally are not included in reply messages in the paper version of reply messages.

Further, a paper document may not disclose hidden data that an ESI production may disclose. "Selected passages, which are not visible when the document is printed, can be marked as hidden text under options in various software programs." 7 Moore's § 37a.03[1] citing Robins, "Computers and the Discovery of Evidence - A New Dimension to Civil Procedure", 17 J. MARSHALL J. COMPUTER & INFO. L. 411, 414-415 (1999).

Another commentator noted the historical importance of electronic data. "[E]lectronic data, especially e-mail, often contains damaging evidence cause of its informal nature. Commentators state that e-mail has proven to contain the 'smoking gun' in many cases. One commentator asserts that e-mail is the source of such honest and important information because it is quick medium for dialogue that appears secure from eavesdroppers, due to the lack of personal interaction and minimal likelihood of being reduced to paper form." Shariati at 406. These collective authorities and the serious deficiencies found in the Defendants' 2004 production render meritless the Defendants' contention that ESI production for the same period is duplicative.

The Defendants' related argument is that the prior discovery in this action and related actions establishes that paper production was the agreed method of discovery production. The Defendants elicited proof on this issue at the June 2007 hearing. See also Docket Entry No. 997, Defendants' Supplemental Memorandum at p. 36, citing, United States v. Jenkins, No. 99-4451,2000 U.S. App. LEXIS 4472, at *2 (4th Cir. May 22, 2000) (noting that "prior dealings between the

parties" in discovery may control the parties' discovery obligations); Sty-Life Co. v. Eminent Sportswear Inc., No. 01.Civ.3320 (CBM), 2002 U.S. Dist. LEXIS 119, at *13 (S.D.N.Y. Jan. 4,2002) Harris Corp. v. Amperex Elec. Corp., No. 86 C 6338, 1987 U.S. Dist. LEXIS 14055, at *2-3 (D.Ill. Feb. 24, 1987). See also Docket Entry No. 734, Transcript at pp. 32-33.

The Court disagrees for several reasons. First, the Consent Decree expressly provides that the Defendants would create and provide Plaintiffs extensive data in an electronic format:

> 91. Upon request, **the evaluators shall be afforded access to such records (including electronic data files) or persons as necessary to fulfill the responsibilities imposed by this order. Each party shall have access to information and materials obtained by the evaluators**; however, except for information which originated with the parties' counsel, the evaluators may withhold the source of any information they have received. The evaluators may communicate ex parte with the parties, their agents or counsel; upon request, the evaluators shall disclose to the opposing party the general substance of such communications. The evaluators shall otherwise treat all records as confidential.
>
> * * *
>
> 97. **The state shall compile, in a standardized electronic format capable of supporting flexible, customized analysis and reporting, data on all pertinent provider encounters which involve children**, and which are covered by the TennCare program.
>
> 98. **The state shall conduct ongoing audits for the purpose of authenticating such encounter data**. In order to ensue the integrity of the audit reports, such audits shall be conducted by qualified personnel and shall meet generally accepted standards regarding sample size and selection.

(Docket Entry No. 12, Consent Decree at ¶¶ 91, 97 and 98) (emphasis added).

Second, in an earlier discovery dispute in this action, the Defendants filed a motion for a protective order on April 13, 2001, inter alia, on Plaintiffs' document request no. 34 for "encounter

data for class members in electronic media, in ASCII format, for the calendar years 1993-2000". (Docket Entry No. 92, Defendants' Memorandum at p. 9). With a modification of subject matter, the Magistrate Judge denied the Defendants' motion and ordered production on document request no. 34. (Docket Entry No. 103, Order at pp.7-8). Since at least the February 28, 2006 conference, the Court has entertained ESI issues. (Docket Entry No. 616, Transcript at pp. 82-100). The Plaintiffs' definitions for their 2006 discovery requests clearly reflect that Plaintiffs sought ESI. See the quotation supra at pp. 33-34.

Third, ESI issues did arise in Rosen where testimony was taken on the State's computer system's capabilities to provide notice and reverification data. Rosen v. Goetz, No.3:98cv0627, Docket Entry No.277, November 9, 2001 Transcript at pp. 72-84); Docket Entry No. 279, November 14, 2001 Transcript at pp. 8, 17-20); and (Docket Entry No.286, November 13, 2001 Transcript at pp. 12. 16-17).

Fourth, the Court is uncertain about the substantive issues in the Grier and Newberry actions, but Rosen was a procedural due process case. This action involves complex substantive issues of detailed medical treatment of children. Given the size of the class at the time of the Consent Decree (550,00) and with the extensive terms of the Consent Decree, the Court concludes that it is unreasonable to assume that only paper discovery would be provided. To do so would overwhelm counsel and the Court. By its nature, ESI enables parties to manage and evaluate efficiently massive and detailed information on the complex issues in this action. Such purposes are the essential value of ESI. In these circumstances, the legal authorities and limited testimony cited by the Defendants, do not justify limiting discovery to a paper production.

As Tigh explained, a party cannot search a paper production and to manage the massive

amounts of information in this action requires an ESI production. In this action, information must be in a computer format for any effective understanding and searching of discovery material. The Court is gravely concerned that the Defendants' insistence on paper discovery is to obscure the ascertainment of material information on their compliance with the Consent Decree.

As to Rule 26(b)(2)(C)(ii), the Plaintiffs made their ESI discovery requests because it was not until February 2006 that the Defendants' counsel insisted that the Defendants were in compliance with the Consent Decree. As discussed earlier, Plaintiffs sought and were awarded ESI, but only for earlier time period. (Docket Entry No. 103).

Amended Rule 26 (b)(2)(C)(iii), requires the Court to consider whether 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[40].

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[40] The comparable Zubulake I factors are:

1. the likelihood of discovering critical information;

2. the availability of such information from other sources;

3. the amount in controversy as compared to the total cost of production;

4. the parties' resources as compared to the total cost of production;

5. the relative ability of each party to control costs and its incentive to do so;

6. the importance of the issues at stake in the litigation; and

7. the relative benefits to the parties of obtaining the information.

217 F.R.D. at 322. Under Zubulake each factor is not considered equally and "cannot be mechanically applied". Id. at 323. Yet, "[t]he first two factors– comprising the marginal utility test– are the most important." Id.

As to the likely benefits of the ESI production, if Plaintiffs were individuals with unproven claims, then the expenditure of the Defendants' estimated millions of dollars for electronic discovery, after the balancing equities, might be unjustified. Yet, with repeated judicial findings of the Defendants' violations of children's rights to medical care under federal law, any cost of ESI discovery is far outweighed by the benefits of the improved health of the children in this state. On this weighing factor, the Congress appropriated in excess of $7 billion dollars to the Defendants to provide these medical services to the children in this action. The proper and effective use of this amount of federal funds is yet another indicator of the likely benefits in this action

The "needs of the case" factor weighs heavily in Plaintiffs' favor. The Defendants and the MCCs possess virtually all of the critical information on whether the Plaintiffs' class members are receiving medical services required by federal law and the Consent Decree. The magnitude of the issues here is reflected in the more than 550,000 members in the Plaintiffs' class. Without this discovery from the Defendants and MCCs, the Court cannot assess whether the Defendants are in compliance with Consent Decree and have taken all reasonable measures to address the Court's prior findings on the deficiencies in the Defendants' system for meeting the requirements of the Consent Decree and federal law.

As to the amount in controversy, since the entry of the Consent Decree, more than $7 billion of federal funds have been distributed to the Defendants and the MCCs to provide the medical services to the Plaintiffs' class. The Consent Decree provides injunctive relief until the Defendants meet the stated percentages of screenings. The fact that the Defendants have never been found to meet those standards in over nine years, leads the Court to conclude that in all likelihood, additional time for compliance is necessary so that the actual amount in controversy could be additional billions of dollars.

As to the parties' resources, the class consists of 550,000 children whose economic resources are non-existent. For the Defendants to argue that Plaintiffs should pay the costs of production is outrageous. Plaintiffs' lead counsel are in a not-for-profit organization that has limited financial resources and relies significantly on the pro bono services of large law firms and pro bono experts to protect the interests and rights of this large class of children. The Defendants are public officials who have received well in excess of a half of a billion dollars in federal funds for the administration of the EPSDT program alone, and additional undisclosed amount of federal funds for the administration of the TennCare program. Hopefully from state funds, the Defendants have retained two private law firms and computer experts. Defendants also have the services of the staffs of the State Attorney General's office, the TennCare program, the Department of Finance and Administration, the Department of Children's Services and the Department of Mental Health. The resources of the parties are grossly disproportionate in the Defendants' favor.

As to the "importance of the issues at stake,"[41] the Consent Decree provides injunctive relief to enforce a Congressional mandate finding that the public interest requires children to have early

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[41] Zubulake suggested an exception to the proportionality test for institutional litigation on public policy issues.

> Last, "the importance of the issues at stake in the litigation" is a critical consideration, even if it is one that will rarely be invoked. For example, **if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery.** Cases of this ilk might include toxic tort class actions, environmental actions, so-called "impact" or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions.

Zubulake I, 217 F.R.D. at 321 (emphasis added).

screenings for their medical needs and to provide any medically necessary care, as revealed by those screenings. For these purposes, Congress appropriated and the Secretary distributed more than $7 billion in federal funds to the Defendants to benefit the Plaintiffs' class of children who are located throughout the State. The health of any child, particularly a child in economic and medical need, is immensely important. In addition, the Consent Decree awarded injunctive relief to enforce Congress' mandate, but on two prior occasions, this Court has found that the Defendants have not honored the Court's Orders. Judge Nixon also found that the Defendants have failed to comply with the Court's Order to submit an Initial Action Plan ("IAP") to cure the deficiencies cited by the Court. Judge Nixon stated:

> As recently as August 2004, the Special Master concluded in his status report to the Court that no feasible plan yet exists to achieve compliance for an indispensable section of the Consent Decree. **The Special Master reported that the State has failed to honor its renewed commitment to produce an IAP satisfactory to the Special Master, last made in September 2004, and still refuses to engage its key officials in planning efforts to achieve compliance, verification of the quality of its data, and evaluation of the successes or failures in attaining compliance.**
>
> The Special Master also reports that the State is incapable of reporting progress to the Court because it lacks a valid and reliable system of measuring progress in such key areas as provider network adequacy, case management, outreach, the effective use of information systems, and system level coordination, to name a few.

(Docket Entry No. 465, Memorandum at p. 5) (emphasis added).

The combination of the Defendants' violations of this Congressional mandate for children's medical care, the medical needs of the children, the Defendants' receipt of $7 billion dollars of federal funds to meet this mandate and the Defendants' violations of this Court's Orders to enforce that mandate, presents issues of utmost importance.

As to the importance of the ESI discovery in resolving these important issues, the Plaintiffs' discovery requests seek information to assess the Defendants' insistence that they are in

compliance with the Consent Decree. As the officials charged with operating and managing this program, the Defendants and the MCCs are the only sources for this information. To assert that they are in compliance and then refuse to permit full discovery to test that assertion is unfair. With the structural deficiencies in the Defendants' management and statistical systems found by Judge Nixon and the absence of a coherent remedial plan or even the Initial Action Plan that Judge Nixon ordered to be filed, the Plaintiffs present a compelling need for this ESI discovery. The importance of the issues at stake are the health and welfare of needy children who thus far, have not been receiving the medical services that federal law requires and that federal funds have been appropriated to provide. The expenditures of these federal funds without delivery of the requisite services to a significant percentage of class members presents a serious issue. Neither the members of the class, children nor Plaintiffs' counsel possess anywhere near the resources of the Defendants. At stake are billions of federal funds that are not being expended to comply with federal law.

Thus, the Court concludes that to provide the ESI required by the Court's directives and Orders is not an undue burden[42] and to the extent any burden exists, the Plaintiffs have amply

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[42]The Zubulake remaining factors also support this conclusion that is wholly in accord with the Court's earlier rulings. The third Zubulake factor, the "total cost of production, compared to the amount in controversy," disfavors cost-shifting. 216 F.R.D. 280, 287-88 (S.D.N.Y.2003). Under Zubulake "a responding party should not be required to pay for the restoration of inaccessible data if the cost of that restoration is significantly disproportionate to the value of the case." Id. at 288. Here, the amount in controversy is literally *billions* of federal funds that the Defendants agreed to administer for Tennessee's children's health care through the TennCare program. These funds dwarf the State's estimated $10 million cost of their ESI production. (Docket Entry No. 907 at p. 6).

The "total cost of production, compared to the resources available to each party," the fourth Zubulake factor, counsels against cost-shifting. 216 F.R.D. at 284. Here, the Defendant's resources are extensive and Plaintiffs' resources are minuscule. Therefore this factor, weighs against cost-shifting.

The fifth Zubulake factor concerns the "relative ability of each party to control costs and its incentive to do so." Id. In Zubulake, the court found that this factor was neutral because the requesting party "already made a targeted discovery request" and the producing party had already

demonstrated good cause to order this ESI production.

7. Privilege Issues

The Defendants and MCCs assert several privileges as barring Plaintiffs' ESI discovery. To assert privileges in response to a discovery request, Fed.R.Civ.P. 26(b)(5)(A) requires a privilege log:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The 1993 Advisory Committee Notes are informative on a party's failure to submit a privilege log with all privilege assertions:

> A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. **To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.**

(emphasis added).

Courts have held that a party's failure to assert a privilege on a privilege log constitutes a waiver of that privilege. Bowling v. Scott County, Tenn., 70 Fed. R. Evid. Serv. 959, 2006 WL

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selected the vendor to restore its backup tapes, so neither party could do anything more to reduce costs. Similarly, Plaintiffs here narrowed their search request to 50 terms that will produce relevant electronic responsive documents, so there is nothing else Plaintiffs can do to reduce the cost of production. The Defendants overly exaggerated their cost estimates with failure to utilize key word searches and filters to reduce the cost of reviewing for privilege. This factor has neutral effect in this case.

The sixth Zubulake factor, "importance of the issues at stake in the litigation." Id. at 289. The issue here involves mismanagement of billions of federal dollars intended for the health and welfare of over half a million of Tennessee's most vulnerable and needy children. This issue is of paramount importance.

2336333 at *3 (E.D. Tenn. Aug. 10, 2006); Carfagno v. Jackson National Life Ins. Co., 2001 WL 34059032 at *2 (W.D. Mich. Feb. 13, 2001); Butler Mfg. Co. v. Americold Comp., 148 F.R.D. 275, 277 (D.Kan. 1993); Hampton v. City of San Diego, 147 F.R.D. 227, 228-29 (S.D. Cal. 1993); Gottlieb v. Wiles, 143 F.R.D. 241, 246 n.9 (D. Colo.1992); Carey-Canada, Inc. v. California Union Ins. Co., 118 F.R.D. 242, 249 (D.D.C.1986).

In their privilege log, the Defendants asserted only the work product and attorney client privileges. (Docket Entry No. 707-2). Although not asserted, the deliberative privilege was recognized by Judge Nixon in an earlier ruling, (Docket Entry No. 401), but in the Defendants' response to Plaintiffs' first motion to compel, the Defendants unequivocally stated that they "waived" their deliberative process privilege in their objections to discovery in Rosen, a related action. (Docket Entry No. 720, Defendants' Memorandum at p. 3)

Under paragraph 105 of the Consent Decree, the Defendants waived any state law privilege because Plaintiffs were granted access to the Defendants' data "subject to any applicable federal law." (Docket Entry No. 12 at ¶ 105). In their response to the Plaintiffs' first motion to compel, the Defendants cited only Tenn. Code Ann. §§ 68-142-101, 68-142-105(3) and 68-142-108(a) involving child fatality review and did not argue for privilege based upon any state law. (Docket Entry No. 720, Defendants' Memorandum at pp. 6). In their response to Plaintiffs' renewed motion to compel, the Defendants now cite Tenn. Code Ann. §§ 63-6-219(b)(1), 37-5-107(b), (d) and 37-1-409(a)(2) as well as 42 U.S.C. § 5106 (b)(2)(A). (Docket Entry No. 920 at pp. 27-38).

The Court concludes first that all privileges, other than attorney client and work product privileges, have been waived for defense counsel's failure to assert them in the Defendants' privilege log. Yet, in the interests of judicial economy, the Court addresses the merits of the waived privileges in the event of an appeal.

Before addressing the substantive issues of privilege, the Court first addresses a procedural issue on privilege. The Defendants now argue that any clawback agreement on ESI discovery to avoid a waiver of privilege is available only upon a voluntary agreement of the parties. (Docket Entry No. 907, Defendants' Response at pp 11-13). "[A] mandatory clawback cannot be justified." Id. at p.13. Thus, Defendants argue that without their consent, a clawback provision is unavailable to the Court thereby reinforcing the need for the time consuming privilege review, as described by the Defendants. Id.

As to the clawback option for any privileged material in the Defendants' ESI production, the Court notes the following colloquy with Nicole Moss, defense counsel at the November 6, 2006 hearing:

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

(Docket Entry No. 734, Transcript at p. 80). The Court then entered an Order granting the ESI discovery with a clawback provision for any post-production assertion of privilege. (Docket Entry No. 734, Order at p.2)

The 2006 ESI amendments to the rules of civil procedure expressly contemplate a clawback protection for ESI discovery to address post-production privilege issues and to avoid any finding of waiver by the producing party in any other litigation:

> 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.

Fed.R. Civ. P. 26(b)(5)(B).

Defendants quote the Advisory Committee on this rule provision referring to clawback agreements as "voluntary arrangements." (Docket Entry No. 907, Defendants' Response at p. 11). The Advisory Committee Notes to the 2006 Amendments also reflect that Rule26(b)(5) was intended "to provide a procedure for a party to assert a claim of privilege or trial preparation material protection after information is produced in discovery" and that Rule 26 (b)(5)(B) in conjunction with other rules "allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection."

A commentator described the types of agreements in an ESI production that may cause a waiver of any privilege in other actions.

> [A] "claw back," under which counsel on both sides agree to surrender any documents they receive from the other if a privilege claim is asserted in a timely manner after production, and if there is a disagreement, to place the document on a privilege log for review by the judge at an appropriate time. While a claw back agreement may reduce tension in litigation, it might not actually reduce costs. If the issue of privilege waiver comes before the judge, one of the considerations will likely be the degree of care taken by the producing party to avoid such an error. Therefore producing parties will still exercise a high degree of care in the screening process, at a high cost. Perhaps more frightening is the prospect that while the "claw back" agreement may be useful and constructive between the parties, it does not bind non-parties, who may claim in parallel litigation in another court, perhaps operating under a stricter standard, that any privilege claimed over the documents "clawed back" had been waived by the fact of production.

> A second type of agreement is the "quick peek." Under this agreement, the parties can dramatically reduce the scope and cost of privilege review, and the scope and cost of discovery itself. The parties agree to an "open file" review of each other's data collections prior to formal discovery, reserving all rights to assert privilege when_responding to the actual document request. After the review, the parties designate the files or data sources that they believe are most relevant to their case, and submit a formal Rule 34 request listing those items. The producing party then has a much narrower task of privilege review, focusing on just those files or data sources before responding to the request.

Withers at p. 23.

Courts have adopted both types of agreements on privilege issues and have incorporated such provisions in Orders to avoid any finding of future waiver. Hopson v. The Mayor and City Council of Baltimore, 232 F.R.D. 228, 246 (D. Md. 2005) ("claw back" agreement was incorporated into court order to avoid any assertion of waiver of a privilege); Murphy Oil USA, Inc. v. Fluor Daniel, Inc, 2002WL246439 at *8 (E.D. La. Feb. 19, 2002) (reciting various options for a "quick peek" agreement)[43]

Here, the Court first concludes that Moss's statement at the November 6th hearing, establishes that the Defendants consented to the clawback provisions in the Court's Order. Second, as stated earlier, the defense counsel's computer should identify any clearly privileged ESI. Third, the Court adopts its earlier finding on the costs of a privilege review and recognizes that a select word search of Defendants' computers is a viable method to ensure that clearly privileged material is not disclosed in the initial ESI production; to avoid initially any waiver of clearly privileged material; and to protect against any inadvertent disclosure. With the clawback provision

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[43] For detailed procedures and protocols for a privilege production, see Fluor Daniel, 2002 WL 246439 at *8-9.

incorporated into a court order, such protection should insure against any future claim of the Defendants' waiver in any other litigation. The separate protective order prohibits the disclosure or use of material in this action for any other use.

Finally, as to the impact of In re Columbia/HCA Corporation Billings Practices Litigation, 293 F.3d 289 (6th Cir.2002) on any clawback arrangement, the Sixth Circuit made it clear that any waiver of any privilege requires a "voluntary disclosure". Id at 294. To the extent, any privileged material is produced under an Order of this Court in this action, no reasonable person would consider these Defendants to have made a "voluntary disclosure" of any privileged information.

a. Attorney Client Privilege

A party asserting the attorney-client or work product privilege to bar discovery bears the burden of establishing that either or both is applicable. United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999). In evaluating assertions of attorney-client and work product privileges, as procedural matter, the district court should require an in camera review of the disputed document(s). In re Antitrust Grand Jury, 805 F.2d 155, 169 (6th Cir. 1986). ("[W]e hold that the district court erred in not reviewing the documents in Exhibit C in camera in order to determine whether they reflect communications or work product made in furtherance of a contemplation or ongoing Sherman Act violation. . ."). The Court instructed defense counsel that for any documents subject to a claim of privilege, those documents should be filed under seal for an in camera inspection. (Docket Entry No. 734, November 6, 2006 Transcript at p.81). The Defendants' counsel did not do so.

The attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403 (1976) (holding inter alia, that the mere transfer of a document to counsel does not render

the document subject to the attorney-client privilege). The privilege can be asserted by a governmental entity. Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005) (quoting United States v. Collis, 128 F.3d 313, 320 (6th Cir.1997) "The attorney -client privilege is 'narrowly construed' because it reduces the amount of information discoverable during the course of a lawsuit." Id.

Communications, including memoranda or notes on such communications, by corporate employees to corporate counsel and outside counsel are covered by the attorney client and work-product privileges. Upjohn Company v. United States, 449 U.S. 383, 391 (1981). As the Supreme Court explained, "[t]he client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.. . . [T]he courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer." Upjohn, 449 U.S. at 396. (citations omitted.) The communications at issue in Upjohn were questionnaires that were marked clearly as from the corporate general counsel. Id. at 394-95. The legal implications of the questionnaires were also readily apparent to the corporate employees and officers. Id.

The Sixth Circuit Court described the purposes of the attorney client privilege.

> The purpose of the attorney-client privilege is to encourage clients to communicate freely and completely with their attorney. The privilege also serves the purpose of promoting "broader public interest in the observance of law and administration of justice." However, it is not an absolute privilege. It applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice. Under some circumstances the privilege is to be very narrowly construed.

In re Antitrust Grand Jury, 805 F.2d at 162. (citations omitted).

The privilege protects not only the confidentiality of communications by the client to an attorney, but the privilege also includes:

> Communications by the attorney to the client in the consultation process when they state or imply facts communicated to the attorney in confidence. . . It is true that a client's knowledge of facts may not be cloaked under the attorney-client privilege by incorporating a statement of those facts in a communication to the attorney. But privileged advice does not lose its protection when the client adopts it. To allow a litigant to probe beyond the assertion of privilege to the substance of the legal advice because the client takes that advice to heart and acts upon it would effectively circumvent the protection of the privilege. For this reason when a deponent answered a question about his reasons by saying that he was only relying on his attorney's legal advice, that answer is a sufficient response.

SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 516-17 (D. Conn. 1976).(citations omitted).

In ruling on issues of privilege, "[t]he mere fact that a person is an attorney does not render privileged everything he does for and with a client..." United States v. Bartone, 400 F.2d 459, 461 (6th Cir.1968). The Second Circuit stated, "it is important to bear in mind that the attorney client privilege protects communications rather than information; the privilege does not impede disclosure of information except to the extent that the disclosure would reveal confidential communications." In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2nd Cir. 1984).

Humphreys, Hutchenson & Mosley v. Donovan, 568 F.Supp. 161, 175 (M.D. Tenn. 1983), aff'd, 755 F.2d 1211 (6th Cir. 1985), is instructive on the determination of whether the attorney-client privilege applies. In Humphreys, Judge Nixon relied on the doctrine formulated in United States v. United Shoe Machinery Corporation, 89 F. Supp. 357, 358-59 (D. Mass. 1950) and held that the attorney client privilege applies only if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily

> either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Humphreys., 568 F.Supp. at 175. See also 4 Moore's § 26.60 [2]: "communications from a client to his attorney are privileged if legally related and having an expectation of confidentiality so long as the privilege has neither been waived nor lost."

On appeal in Humphreys, the Sixth Circuit explained that the attorney client privilege "does not envelope everything arising from the existence of an attorney-client relationship... [t]he attorney-client privilege is an exception carved from the rule requiring full disclosure, and as an exception, should not be extended to accomplish more than its purpose." 755 F.2d at 1219. (citations omitted). Accord United States v. Goldfarb, 328 F.2d 280, 281-82 (6th Cir.1964) (Attorney-client relationship does not create an automatic "cloak of protection...draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client.").

Where the facts suggest combined business and legal advice in a document, courts can inquire about which purpose predominates. "It was also proper...to inquire into the nature of the 'legal services' rendered by [the Defendant]. Attorneys frequently give to their clients business or other advice that, at least insofar as it can be separated from their professional legal services, gives rise to no privilege whatever." Colton v. United States, 306 F.2d 633, 638 (2d. Cir.1962); See also United States v. International Bus. Mach. Corp., 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974). After such inquiries, if the lawyer acted as a business advisor or agent, then the information is not privileged. Asset Value Fund L.P. v. Care Group, No. 97Civ.1487, 1997 WL 706320 at *4 (S.D.N.Y. Nov. 12, 1997); Park Ave. Bank, N.A. v. Bankasi, No. 93 Civ. 1483, 1994 WL 722690 at *1 (S.D.N.Y. Dec.

30, 1994). In the context of business dealings, where a lawyer acts as a business advisor, several courts found that there is not any special relationship to give rise to a privilege to protect counsel's advice from disclosure. In re Grand Jury Subpoena, Duces Tecum Dated September 15. 1983, 731 F.2d 1032, 1037 (2nd Cir. 1984); Standard Chartered Bank PLCv. Ayala Intern. Holdings, Inc., 111 F.R.D. 76, 80 (S.D. N.Y. 1986); Coleman v. American Broadcasting Co., Inc., 106 F.R.D. 201, 205-06 (D. D.C. 1985). As one court explained,

> [T]he attorney-client privilege protects only communications pertaining to legal assistance and advice and does not extend to business advice given by an attorney to a client, or to inter-client communications designed to communicate only business or technical data. [Citations omitted.] Where an attorney gives advice of a general nature to a corporate client and also advises on the resolution of troubled loans made by the client, the line between business and legal advice may be fine indeed.

First Wisconsin Mortg. v. First Wisconsin Corp., 86 F.R.D. 160, 174 (E.D. Wis.. 1980) (emphasis in the original and citations omitted). Accord, SCM Corp., 70 F.R.D. **at** 517 ("To protect the business components in the decisional process would be a distortion of the privilege. The attorney-client privilege was not intended and is not needed to encourage businessmen to discuss business reasons for a particular course of action.")

Other courts have held that the attorney-client privilege does not extend to every memorandum or draft document exchanged between corporate employees and corporate counsel. Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987). In Searle, the Eighth Circuit held that "Risk management" documents with statistical analysis prepared by non-lawyer corporate officials on the costs of product-liability litigation, not to be privileged.

> Moreover, a number of courts have determined that the attorney-client privilege does not protect client communications that relate only business or technical data. Just as the minutes of business meetings attended by attorneys are not automatically privileged, business documents sent to corporate officers and employees, as well as

> the corporation's attorneys, do not become privileged automatically. Searle argues, however, that the special master formulated a per se rule barring privilege claims where a document is sent to corporate officials in addition to attorneys. We do not read the special master's report as establishing such an approach. Client communications intended to keep the attorney apprised of business matters may be privileged if they embody "an implied request for legal advice based thereon."

816 F.2d at 403-404. (citations omitted). See also Christman v. Brauvin Realty Advisors, Inc., 185 F.R.D. 251, 256; 1999 U.S. Dist. LEXIS 4860 at * 13 (N.D. Ill. 1999) (Drafts of proxy statements and comments thereto are not legal advice and are not privileged); United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) (copies of drafts edited by attorneys, including counsel's handwritten notes are not privilege because "[a] corporation cannot be permitted to insulate its files from discovery simply by sending a "cc" to in-house counsel."); Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 444 (S.D.N.Y. 1990) (lawyer's business advice was not protected from disclosure).

Another district court ruled that the privilege does not extend to communications about "business or technical data" or "technical matters."

> It should be emphasized, however, that no privilege will attach for documents designed merely to communicate non-privileged business or technical data. Nor will the privilege attach when the element of confidentiality is lacking. Furthermore, no privilege will attach to those documents directed to the attorney for the purpose of shielding the documents from disclosure.
>
> * * *
>
> In order to invoke the privilege, however, the party seeking protection must make a clear showing that documents containing technical matters are communicated in confidence and are primarily legal in nature. There must be a finding that each document is involved in the rendition of legal assistance.

Burlington Industries v. Exxon Corporation, 65 F.R.D. 26, 39 (D.Md. 1974). (citations omitted).

The Defendants rely upon Liberty Environmental Systems, Inc.v. County of Westchester,

1997 WL 471053 (S.D.N.Y. Aug. 18, 1997) that involved a consent decree where a magistrate judge concluded that "withheld documents...principally or exclusively to assist in two related litigations" were privileged. Id. at *7. The Court notes that in Liberty Environmental, the documents at issue were submitted for the magistrate judge's in camera inspection, id. at *1, and counsel submitted their affidavits to explain the specific circumstances of the privileged communications. Id. at *2.

Despite the Court's instructions to submit any privileged documents at issue for an in camera inspection and the Court's warnings about its prior reliance upon Searle, the Defendants' counsel ignored both. Moreover, unlike Liberty Environmental that the Defendants rely upon, the drafts of the documents at issue here were not filed with the Court nor were affidavits of counsel filed (under seal, if necessary) to provide the Court with the factual context for these documents. The Court's concern is that defense counsel are actually writing the policies and plans about the Defendants' EPSDT system and the facts for those policies. The semi-annual reports, particularly, are highly technical documents,. See e.g., Docket Entry No. 1012. With conclusory descriptions of the purportedly privileged documents and without in camera inspection or counsel's affidavits to provide specific factual context , the Court concludes that the Defendants have not carried their burden that the documents listed at pp.79-85, qualify for the protection of the attorney-client privilege.

b. The Work Product Privilege

This privilege protects the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party that is usually reflected in a document sought for production. Hickman v. Taylor, 329 U.S. 495 (1947). Under Hickman, this protection does not intend to bar discovery of facts, but rather "the work product of the lawyer" where disclosure of the

documents reveals counsel's "mental impressions, personal beliefs," and reflections of what counsel believes to be important, such as in witness statements and documents acquired by counsel and notes on witness interviews conducted by counsel. 329 U.S. at 510-11.

In Toledo Edison v. G.A. Technologies. Inc., 847 F.2d 335 (6th Cir.1988), the Sixth Circuit set forth the procedural framework for assessing the assertion of this privilege:

> 1. The party requesting discovery must first show that, as defined in Rule 26(b)(1), the materials requested are "relevant to the subject matter involved in the pending litigation" and not privileged. Because the application of subdivision (b)(3) is limited to "documents and tangible things otherwise discoverable under subdivision (b)(1)," the burden of making this showing rests on the party requesting the information.
>
> 2. If the party requesting discovery meets this burden and the court finds that the claimed material is relevant and not privileged, the burden shifts to the objecting party to show that the material was "prepared in anticipation of litigation or for trial" by or for that party or that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer or agent. This showing can be made in any of the traditional ways in which proof is produced in pretrial proceedings such as affidavits made on personal knowledge, depositions, or answers to interrogatories. This showing can be opposed or controverted in the same manner. The determination of this matter is the second sequential determination that must be made by the court.
>
> 3. If the objecting party meets its burden as indicated above and the court finds that the material was prepared in anticipation of litigation or for trial by one of the persons named in the rule, the burden shifts back to the requesting party to show that the requesting party (a) has substantial need of the materials in preparation of the party's case, and (b) that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In doing this, attention is directed at alternative means of acquiring the information that are less intrusive to the lawyer's work and whether or not the information might have been furnished in other ways.
>
> 4. After the application of the shifting burdens, even if the court determines that the requesting party has substantial need of the materials in the preparation of its case and that the requesting party is not able, without undue hardship, to obtain the substantial equivalent of the materials by other means, the rule flatly states that the court is not to permit discovery of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the

> litigation." On this issue, the burden of showing that the nature of the materials are mental impressions, conclusions, opinions or legal theories of an attorney or representative, rests on the objecting party. The term "representative of the party" embraces the same persons as did the term "party's representative" set out earlier in the rule including "... consultants ... agent...."
>
> 5. The court may not order discovery of materials if discovery of such materials would violate Rule 26(b)(4) involving trial preparation, i.e., experts. Different standards and procedures are set forth because of the nature of experts and the different purposes for which they are employed. Experts are used by parties for different purposes just as information is prepared or acquired by parties for different purposes.

Id. at 339-40.

Applying these standards, the Court concludes that the Plaintiffs have demonstrated relevance because these drafts involve documents required by the Consent Decree. Given that the filings were required by the Consent decree, the Court concludes that the Defendants have established the second factor. As to the third factor, because the Court has found that the Defendants have not met their burden of proof on the attorney client privilege for most of these documents, the Court concludes that alternate avenues exist to obtain the substantial equivalent of the information in these related documents. Yet again, the Defendants did not provide any documents for which the work product privilege is asserted, as directed by the Court and as done in Liberty Environmental that is relied upon by the Defendants. But for Toledo Edison, the Court would conclude that the Defendants have not met their burden to establish the work product privilege for these documents.

c. The Joint Defense Privilege

During the June 2007 hearings, the Defendants' counsel and some MCCs' counsel objected to questions about their communications on the ESI discovery matters, based upon the joint defense privilege. The joint defense privilege is an extension of the attorney-client privilege and protects as confidential communications among defendants and their counsel, where defendants are "part of

an on-going and joint effort to set up a common defense strategy." Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir.1992). Because the privilege may apply outside the context of actual litigation, the "joint defense" privilege is sometimes referred to, in such instances, as the "common interest" rule. In re Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir.2001). (citing United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir.1989)).

The burden to establish the privilege rests with the defendants. United States v. Moss, 9 F.3d 543, 550 (6th Cir.1993). The Defendants must prove an agreement among its members to share information arising out of a common legal interest in litigation. Id. An oral joint defense agreement may be valid, In re Grand Jury Subpoena, A. Nameless Lawyer, 274 F.3d 563, 569-70 (1st Cir.2001), and person need not be a named party to join the agreement. See Russell v. General Electric, 149 F.R.D. 578 (N.D.Ill.1993); U.S. v. LeCroy, 348 F.Supp.2d 375, 381 (E.D. Pa. 2004).

This privilege extends only to the exchanges of information within the shared interest, In re Santa Fe Intern. Corp., 272 F.3d 705, 712 (5th Cir.2001), In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir.1990); U.S. v. Duke Energy Corp., 214 F.R.D. 383, 388 (M.D.N.C.2003), but usually applies to protect documents. See Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.,152 F.R.D. 132, 140 (N.D.Ill.1993) citing U.S. v. McPartlin, 595 F.2d 1321,1336 (7th Cir.1979). Any participant in the agreement, however, remains free to disclose his own communications. See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir.1997). The joint-defense privilege shields some communications between co-defendants made outside of their counsel's presence, but only if the communications were pursuant to specific instructions of their counselU.S. v. Mikhel, 199 Fed. Appx. 627, 628 (9th Cir.2006).

For this privilege, parties must have a common legal interest in the subject matter of a communication, Allendale Mut. Ins., 152 F.R.D. at 140, and the communication must be to further the joint agreement. U.S. v. Evans, 113 F.3d 1457, 1467 (7th Cir.1997). The common interest must be identical and not solely commercial. Allendale Mut. Ins., 152 F.R.D. at 140. See also In re Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 416-17 (N.D.Ill.2006).

The Court will not add unnecessarily to this already lengthy memorandum and adopts and incorporates its rulings at the June 2007 hearing that the Defendants' and MCCs filings of their communications with the Court on substantive matters, operate to waive this privilege as to ESI discovery issues.

d. Deliberative Process Privilege

Defendants next assert the deliberative-process privilege to prevent disclosure of their planning documents. The Sixth Circuit has recognized this privilege to bar disclosure of executive communications to encourage frank deliberations on governmental policy and to protect federal officials from ridicule. Schnell v. United States Dept. of HHS, 843 F.2d 933, 939 (6th Cir. 1988). The Defendants do not cite any legal authorities applying this federal law privilege to a state official. In any event, despite their recent protestations in this action, the Defendants concede unequivocally that they waived this privilege in Rosen, a related action. (Docket Entry No. 720, Defendants' Response to Plaintiffs' Motion to Compel at p. 3) (citing the affidavit of counsel). That waiver applies in this related action. Thus, any extended analysis of this privilege is unnecessary.

e. State Statutory Privileges

The Defendants next assert a privilege for information sought from the Department of Mental Health and Developmental Disabilities (DMHDD), the Department of Children's Services

(DCS) and the TNKids program (Docket Entry No. 907, Defendants' Response at pp. 31-39). The Defendants contend that these state statutes (that were not asserted in the Defendants' initial response to this motion to compel nor in their privilege log) create substantial and important state interests against disclosure of this information and therefore, such information should qualify as a cognizable privilege under Rule 501 and Fed. R Civ P. 26(b) to bar discovery of this information.

The DMHDD has an Incident Reporting System that the Defendants contend falls under Tenn.Code Ann. § 63-6-219 (b) that prohibits the disclosure of information contained in the DMHDD Incident Reporting System. This statute was enacted to "encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peers' professional conduct, competence, and ability to practice." Id. at (b)(l). See Docket Entry No. 907, Defendants' Response at p. 32. The Defendants assert that this Incident Reporting System is available to quality performance improvement committees and related safety committees of the State's five RMHIs. These committees perform the peer-review functions of monitoring and evaluating the quality of patient care and improving safety by reducing the risk of system or process failures. These Committees report to the quality committee of the DMHDD and are designed to serve as "medical review committee[s]" or "peer review committee[s]," as defined in the Peer Review Law.[44] For such records, Tennessee law deems "confidentiality is essential." Tenn. Code Ann. § 63-6-219(b)(1). Defendants cite Tenn. Code Ann.§ 63-6-219(e) that bars disclosure of peer-review reports:

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[44] The statutory definition of "medical review committee" and "peer review committee" "means any committee of a state or local professional association or society, including...a committee of any licensed health care institution...the function of which, or one (1) of the functions of which is to evaluate and improve the quality of health care rendered by providers of health care services..." Tenn. Code Ann. § 63-6-219(c).

> All information, interviews, **incident or other reports**, statements, memoranda or other data furnished to any committee as defined in this section, and any findings, conclusions or recommendations resulting from the proceedings of such committee are declared to be privileged. **All such information, in any form whatsoever, so furnished to, or generated by, a medical peer review committee, shall be privileged.** The records and proceedings of any such committees are confidential and shall be used by such committee, and the members thereof only in the exercise of the proper functions of the committee, and shall not be public records **nor be available for court subpoena or for discovery proceedings.**

Tenn. Code Ann. 5 § 63-6-219(e) (emphasis added). The Tennessee Supreme Court deemed the broad language of the Peer Review Law to encompass "any and all matters related to the peer review process." Stratienko Chattanooga-Hamilton County Hosp. Auth., 226 S.W.3d 280, 285-86 (Tenn. 2007).

As to DCS's reports, the Defendants cite Tenn. Code Ann. §§ 37-1-409(a)(2) and 37-1-615(b) that bar disclosure of the identity of person(s) who reports child abuse and related disclosures. (Docket Entry No. 907 at p. 36). DCS issued administrative rules under Tenn. Code Ann. §§ 37-1-409(e)(l) and 37-1-612(f)(l). See Rules of the Tennessee Department of Children's Services, Child Protective Services, Chapter 0250-7-9, a violation of section 37-1-409 is a Class B misdemeanor. Tenn Code Ann. § 37-1-409(g). A violation of the confidentiality requirements of section 37-1-612 is a Class A misdemeanor. Tenn. Code Ann. 5 § 37-1-615(b). Defendants note that federal funds for child abuse prevention and treatment are contingent upon complying with the confidentiality requirements of the Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. § 5106a(b)(2)(A). (Docket Entry No. 907 at p. 36). Due to the confidential nature of Child Protective Services information, case recordings are inaccessible to DCS employees, except those employees granted security clearance.

From June 1, 2004, through April 30, 2007, there were 29,843 children in DCS custody;

1,110 of those could reasonably be excluded as non John B. class members because they were placed in detention or a Youth Development Center (YDC) throughout DCS custody. From May 1, 2006, through April 30, 2007, there were 16,026 children entering DCS custody with 668 placed in a YDC or detention and the latter are not John B. class members. Such placement renders them ineligible for TennCare.

Defendants contend that information about these non-class members can include medical, mental health, and substance abuse information that is protected from disclosure by state and federal privacy laws. (Docket Entry No. 907 at p. 38) (citing 45 C.F.R. Subtitle A, Subchapter C, Part 164, Subpart E; 42 C.F.R. Chapter I, Subchapter A, Part 2; Title 33 of Tennessee Code). Signed authorizations for release of information, including a HIPAA release, would be required from each individual non-class member. DCS is expressly required by statute to follow state and federal confidentiality laws. Tenn. Code Ann. § 37-5-107(b), (d).

The third database is the "TNKids" database within DCS. The TNKids database was originally developed for DCS as its State Automated Child Welfare Information System (SACWIS). This database includes case management information about children in DCS custody, including both child-welfare and juvenile justice cases, as well as children at risk in DCS custody and adopted through DCS. Case recordings can refer to court proceedings involving neglected, unruly, or delinquent children and termination of parental rights, that is confidential under Tenn. Code Ann. §§ 37-5-107, 37-1-409, 37-1-612, 37-2-408, 36-1-125, 36-1-126, 36-1-138 and the Adoption Assistance and Child Welfare Act (AACWA), codified at 42 U.S.C. § 671(a)(8). As stated earlier, the State's federal funding is contingent upon its compliance with the confidentiality requirements of AACWA.

Dr. Ray, Plaintiffs' statistical analyst, requested information from these databases, including case management records for health services for the children. The "case management" records are narrative recordings and written reports with notes of child welfare and juvenile justice case managers. These narratives are not indexed by content and are akin to a journal entry about a child in DCS custody or "biography" of the child in DCS's custody. Dr. Ray utilizes this data to cross-reference with statistical data and thereby validate the statistical studies.

For the Defendants' assertion of state law privileges, Rule 501 of the Federal Rules of Evidence provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed.R.Civ.P. 26(b)(1) also provides that "privileged" information is not discoverable absent order of the court.

Federal courts are not required to recognize state law privileges when deciding cases arising under federal law, but the presence of a state law privilege must be considered, particularly where a significant number of states recognize such a privilege.. Jaffee v. Redmond, 518 U.S. 1, 12-13 (1996) (state-created psychologist-patient privilege recognized in 50 states). In Freed v. Grand Court Lifestyles, Inc., 100 F. Supp.2d 610 (1998), the district court summarized the governing principles on any privilege based upon state law:

> [E]videntiary privileges are strongly disfavored in federal practice and must be narrowly drawn because they "contravene the fundamental principle that 'the public ... has a right to every man's evidence.' " University of Pennsylvania v. Equal

> Employment Opportunity Commission, 493 U.S. 182, 189, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990); see also Jaffee, 518 U.S. at 9. ("When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."); In re Zuniga, 714 F.2d 632, 638 (6th Cir.1983) (quoting United States v. Nixon, 418 U.S. 683, 711, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), and recognizing that " 'exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth' "). At the same time, comity favors recognizing a state law privilege, as a component of federal common law, to the extent that doing so will not impose a substantial cost on federal policies. Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058, 1061 (7th Cir.1981); Farley v. Farley, 952 F.Supp. 1232, 1237 (M.D.Tenn.1997) ("Principles of federalism and comity dictate that, should a federal Court depart from a state law privilege in concluding that discovery may proceed, some deference (and in certain cases a great deal of deference) must be given to the state interests underlying the privilege.").

Id. at 618.

The Defendants rely upon Farley v. Farley, 952 F.Supp.1232 (M.D. Tenn. 1997), wherein the Honorable Thomas A. Wiseman, Jr. deemed Tenn. Code Ann §§ 37-1-409 and 37-1-612 to be a cognizable privilege under Rule 501:

> By the enactment of these statutes, the Tennessee General Assembly has asserted in no uncertain terms that the reporting, systematic examination and prevention of child abuse is of fundamental public importance.
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> * * *
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> This Court has little difficulty in concluding that T.C.A. §§ 37-1-409 and 37-1-612 establish an evidentiary privilege that is entitled to deference under the principles of federalism and comity that are an implicit component of Rule 501 [of the Federal Rules of Evidence]. The confidentiality provisions at issue in this case have been construed by the Tennessee courts to block discovery in civil actions and are clearly designed to protect the anonymity of reporters, victims and perpetrators of child abuse. Taken together, these elements fulfill the functional definition of an evidentiary privilege set forth above.

952. F. Supp. at 1238-39. Notwithstanding this conclusion, Judge Wiseman ordered production of the reports with redactions: "The Court finds that redaction of identifying information is a proper and sufficient means of furthering the public policy of Tennessee by protecting the anonymity of

those who report child abuse." Id at 1240.

As pertinent here, Judge Wiseman explained that his finding of privilege was not intended to shield state regulators who are responsible for children's welfare and may be liable to them.

> [The statutes'] primary purpose is the protection of the privacy of those who are not likely to be parties to a federal civil rights suit. . . . the confidentiality of official records is generally guaranteed by statute to protect those who are regulated by a state agency rather than the agency itself. Lewis v. Radcliff Materials, Inc., 74 F.R.D. 102, 104 (E.D.La.1977). **Accordingly, the agency should not be permitted to use a privilege designed to ensure the welfare of those it governs when it is in possession of relevant evidence and is the target of a lawsuit.** Id.
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> * * *
>
> T.C.A. §§ 37-1-409 and 37-1-612. . . . . are clearly designed to protect the anonymity of reporters, victims and perpetrators of child abuse. Taken together, these elements fulfill the functional definition of an evidentiary privilege set forth above.
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> * * *
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> Without full and fair disclosure of relevant proof, the public is likely to lose confidence in the administration of justice by the federal courts. It is therefore of paramount importance that litigants be accorded the authority to seek out relevant evidence that they have been granted by the federal rules.
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> * * *
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> **The confidentiality granted child abuse records under Tennessee law may not be invoked as a shield with which to block scrutiny of governmental practices**. The federal courts have repeatedly held that the interest in ensuring governmental compliance with federally-guaranteed civil rights is paramount to the state interest in confidentiality. See e.g., ACLU of Mississippi, Inc. v. Finch, 638 F.2d at 1336, 1343-44 (5th Cir.1981) ("The purpose of enacting § 1983 was to ensure an independent federal forum for adjudication of alleged constitutional violations by state officials; ... there is a 'special danger' in permitting state governments to define the scope of their own privilege when the misconduct of their agents is alleged.").

Id. at 1238, 1239, 1240 (emphasis added). Accord Puricelli v. Houston, 2000 U.S. Dist. LEXIS

3517 (D. Pa.) (granting Plaintiffs' access to redacted versions of child abuse investigations contrary to similar Pennsylvania statute). Farley clearly does not support the Defendants' contention here, as the Defendants' liability to the class are plainly at issue here.

In Seales v. Macomb County, 226 F.R.D. 572 (E.D. Mich. 2005), the District Court rejected a similar Michigan law on juvenile records as a cognizable federal privilege.

> "Merely asserting that a state statute declares that the records in question are confidential does not make out a sufficient claim that the records are privileged within the meaning of Fed.R.Civ.P. 26(b)(1) and Fed R. Evid. 501." Martin v. Lamb, 122 F.R.D. 143, 146 (W.D.N.Y.1988). See also Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1205 (9th Cir.1975) ("The records are confidential but not privileged"). Given the absence of any express statutory language or judicial interpretation creating an evidentiary privilege, this Court declines to read one into the above confidentiality statutes.
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> * * *
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> Defendants, somewhat ironically, appear to invoke the state laws designed to protect juveniles, to protect themselves from possible liability as a result of their alleged mistreatment of wards. "'[T]here is a "special danger" in permitting state governments to define the scope of their own privilege when the misconduct of their agents is alleged.' " Pearson v. Miller, 211 F.3d 57,68 (3d Cir.2000), quoting ACLU v. Finch, 638 F.2d 1336, 1344 (5th Cir.1981). See also Longenbach v. McGonigle, 750 F.Supp. 178, 180-81 (E.D.Pa.1990) ("Nor does it make any sense to allow the state, under whose color of authority officers have allegedly violated rights, to limit unilaterally the availability of evidence.")

Id. at 576, 577.

For their assertions for an absolute privilege for the peer review information, the Defendants rely upon decisions where the parties who sought the information about the peer review process intended to use the identity of the person who provided the information to prove their claims. Doe v. UNUM Life Ins. Co. of Am., 891 F. Supp. 607 (N.D. Ga. 1995) (insurance company sought information about doctor's drug problem to deny his coverage claim for benefits) and Holland v. Muscatine Gen. Hosp., 971 F.Supp. 385 (S.D. Iowa 1997) (plaintiff sought peer

review records to prove her hostile work environment claim).

The Court adopts the rationale of Farley and the other similar decisions to conclude that in this action, particularly with the Court's prior findings of the Defendants' repeated violations of federal law, these Defendants cannot rely upon these state statutes as bars to discovery of this ESI data from DMHDD or the DCS's incident reporting data or the TNKids database. All of this data contains highly relevant information on the Defendants' violation of federal law and Plaintiffs' federal constitutional rights. An appropriate protective order for discovery and trial can avoid disclosures of the identities of the children, doctors and other protected persons.

As to the state criminal sanctions for disclosure of certain state data, the fact that another sovereign's laws have criminal sanctions to block disclosure of certain information does not preclude a federal court from ordering disclosure of that information under federal discovery rules. United States v. First National Bank of Chicago, 699 F.2d 341, 345 (7th Cir. 1983) ("The fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production."); In re Westinghouse Electric Corp. Uranium Contract Litigation, 563 F.2d 992, 997 (10th Cir. 1977) ("In our view Societe holds that, though a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign country...")(interpreting Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958)). These courts apply a balancing approach.

This Courts applies these authorities to the State's laws, as an independent sovereign. Here, the Defendants' repeated violations of federal law, as found by Judge Nixon, present compelling circumstances to justify disclosure. The Defendants have already produced the information covered by some of these laws to others, including filing of some of this information in another action in this

district without any threat of state prosecution. Any disclosure pursuant to a Court order should render unrealistic any state prosecution.

As to the HIPPA statutes and regulations, it is noteworthy that on April 24, 2001, Judge Knowles denied the Defendants' motion for a protective order, citing HIPPA and its regulations and expressly ruled that " to the extent that [the Defendants' motion] is based upon [42 U.S.C.] §290dd-2, is hereby DENIED" because "[t]he information sought on behalf of the class members cannot be considered 'confidential' with regard to the class members themselves (or their counsel)." (Docket Entry No. 103, Order at pp.5-6). The Court adopts that ruling as the law of the case and applies that ruling to 42 U.S.C. § 671(a)(8). Moreover, 42 U.S.C. § 5106a(b)(2)(A)(V) permits disclosures of children's records to a "court, upon a finding that information in the record is necessary for the determination of an issue before the court." Federal law des not bar the ESI production ordered by the Court. To the extent, some children are not class members, those individuals are not numerous and those children's and others' names shall be redacted by the Defendants, as in Farley.

8. Defendants' Failures to Answer Discovery Requests and to Comply with the January 14th Order

The next controversies involve: (1) the Defendants' failures to obtain all designated custodians' answers to the Plaintiffs' request for admissions ("RFA"), as authorized by the Court on the issue of destruction of evidence, including the Defendants' refusal to have the Governor personally sign his response to his RFA; (2) the Defendants' misleading answer to Plaintiffs' Interrogatory 22; and (3) the Defendants' failure to file their key custodians' certifications required by the January 14th Order to certify that ESI had not been removed from the key custodians' computers. Issues 1 and 3 are related and will be addressed together.

At the December 20, 2006 discovery hearing, Plaintiffs' counsel raised the issue about the loss or destruction of relevant evidence and the inadequacies in the Defendants' responses to the discovery requests on this issue. (Docket Entry No.786, Transcript at pp. 31-36). After reviewing the requests, the Court directed Plaintiffs' counsel to simplify the wording of the requests and send the revised requests to all of the Defendants' key custodians as designated by the Defendants. Id. at pp. 38-39. The Court denied the Plaintiffs' motion to compel on that point, but without prejudice to renew.

Plaintiffs' revised RFAs asked each custodian whether the search of his or her files had included all private email accounts and computers, including removable drives and storage, where the custodian had stored potentially responsive ESI. The RFAs sought assurances of the adequacy and completeness of the State's document preservation and production. In particular, RFA No. 1 reads as follows: "Other than e-mail that was deleted or destroyed pursuant to the State's routine document retention policy, are you aware of any paper documents or electronic records, stored in any location, that were requested by the plaintiffs, and that were destroyed, deleted, thrown away, or lost for any reason? (This includes e-mails that should have been archived but weren't, or that were archived and then deleted)". (Docket Entry No. 799-2 at p. 1). RFA No. 2 asked the custodians:

> When you searched for information and documents requested by the plaintiffs, did you search all paper or electronic records in your possession or control (including both state and private email accounts and computers, **including removable drives or storage**) that potentially contained requested information or documents, and did you provide to the State's lawyers all requested information or documents that you found?

Id. (emphasis added). If the respondent answered "yes" to these RFAs, Plaintiffs' Interrogatory Nos. 1and 2 were propounded for follow-up discovery.

Aside from Plaintiffs' RFAs, on January 14, 2007, this Court entered an Order based upon Plaintiffs' computer expert's declaration on the need to be assured that ESI had not been removed from the computers subject to the ESI search ordered by the Court. To do so, Plaintiffs' expert recommended certifications of nonremoval by each custodian. Given that removal of ESI could clearly compromise the ESI production ordered by the Court, the January 14th Order directed that "[t]he defendants shall file certifications of the key custodians as to whether any material has been removed." (Docket Entry No. 789, Order at p. 3) (emphasis added). The Court's Order cited the pertinent paragraph from the Plaintiffs' expert's declaration on this subject. Id.

The Defendants did not seek relief from the January 14th Order. Defendants insist that their custodians answers to Plaintiffs' RFAs are the same as any "certifications" required by the January 14th Order. See, e.g., (Docket Entry No. 828, Exhibit 5, February 27, 2007 Letter of Nicole Jo Moss at p.2) (noting that "these custodians have already been asked to sign and did in fact submit RFA responses which covered this issue") (emphasis added). The January 14th Order expressly referenced Thomas Tigh's declaration (Docket Entry No. 785-2), about the need for assurances that electronic documents had not been removed from the key custodians' computers. Tigh's specific suggestion was: "The question should ask the same key custodians if they have moved material from their local machine or the network to any nonattached media, such as CDs or USB devices ... The answer to this question, disclosed with the answers to those in the proposed Order, will provide the information required to determine if material was moved from the network . . .". Id.

Clearly, the January 14th Order's concern was whether ESI material was removed from Defendants' network's computers, such as a compact disks or DVDs, not to the destruction or loss of ESI. Plaintiffs' RFAs asked each custodian whether, he or she had "search[ed] all paper and

electronic records in your possession or control (including both state and private email accounts and computers, including removable drives or storage) that potentially contained requested information or documents." See Docket Entry No. 799-2 (Request for Admission No. 2) (emphasis added). A gap remains between the RFAs and the January 14th Order because a search by a custodian of a removable drive does not answer whether any ESI was actually removed. Accordingly, the Defendants shall be compelled to have their 160 designated custodians to file certifications that ESI has not been removed from their computers by them or anyone else.

Plaintiffs also note that Defense counsel could not attest to the accuracy or completeness of all answers to their RFAs. (Docket Entry No. 799). At a February 13th meeting of the parties' counsel, Defense counsel stated that the Defendants' custodians' answers had been filed without personally asking the custodians the questions. (Docket Entry No. 828, Exhibit 4 thereto, Bonnyman Letter Dated 02/23/07 at pp. 3-4 and Exhibit 5 thereto, Moss Letter Dated 02/27/07 at p. 2). The Defendants concede that they did not ask the key custodians who are former employees because defense counsel "has no authority or control over them to require them to submit a response". (Docket Entry No. 907 at 61-62). The Court agrees with the Plaintiffs that good faith required the Defendants at least to ask those former key individuals, as directed by the Court. The question of authority or control would only arise if the former employees refused to answer. Courts have held that former employees and agents of a party remain subject to discovery. See e.g., Alcan Intern. Ltd. v. S.A. Day Mfg. Co. Inc., 176 F.R.D. 75, 79 (W.D.N.Y. 1996) (retired employee); Boston Diagnostic Dev. Corp. Inc. v. Kollsman Mfg. Co. Div.of Sequa Corp., 123 F.R.D. 415, 416 (D. Mass. 1989)(former agent). Absent a showing that a former employee refused to answer these RFAs, the Defendants shall request their answers and undertake their best efforts to secure the former custodians personal records or notify Plaintiffs' counsel with the former employees'

addresses and telephone numbers. The latter information will be subject to the protective order.

Next, the Defendants identified the Governor as a "key custodian" and Plaintiffs assert that the Governor has had a crucial role in the formulation and implementation of policies on compliance with the Consent Decree. Citing the Governor's counsel's affidavit, the Defendants responded that Plaintiffs' insistence upon the Governor's personal signature to the RFAs "groundlessly impugns the integrity and credibility of the State's and the Governor's legal counsel". (Docket Entry No. 907 at p. 62). In an October 27, 2006 declaration, Nicole Jo Moss, a defense counsel asserted that she personally spoke with the Governor and other senior officials

> ... to ensure that they had searched their files and produced all responsive documents and to ensure that they had been archiving (i.e. preserving) responsive documents since the last production in 2004. My conversations reconfirmed what Plaintiffs had already been told, that these individuals saved and produced all responsive documents either as part of the production last May or the prior production in the Rosen matter. . . . **each confirmed that they have not been actively involved in matters directly related to EPSDT; nevertheless, they have been archiving their responsive TennCare documents, but they do not recall having received any documents related specifically to John B. or EPSDT.**

(Docket Entry No. 717 at ¶5) (emphasis added). Plaintiffs cite the bold portion of Moss's declaration to contend that upon closer examination, Moss's declaration never states that these officials actually searched all of their relevant files for documents responsive to discovery requests, only that they "do not recall" having "received" any responsive information. Plaintiffs deem the omission significant on whether these officials sent any documents related specifically to John B. or EPSDT. The ambiguity gives rise to Plaintiffs' concerns that are legitimate.

The discovery standard is not whether a person has been actively involved, but rather whether the person has knowledge of discoverable matters or at this point, whether the person's knowledge could lead to the discovery of relevant information. The Defendants do not cite any legal authority to exclude the Governor from discovery and such exclusion runs counter to the

Supreme Court's principle that "there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." Jaffee, 518 U.S. at 9. The Defendants' counsel listed the Governor as a key custodian and have disclosed his statements albeit through his counsel. In any event, as a matter of comity, the Court will give the Defendants the option of the Governor's personal signature or an inspection of the Governor's computer by the Plaintiffs' computer expert or his designated expert, to assess if any removal of ESI has occurred.

The next controversy is Plaintiffs' contention that the Defendants deliberately provided a misleading response to Interrogatory No. 22. "INTERROGATORY NO. 22 Wendy this is a tricky one since the MCC's would have files, but we have answered that this is unanswerable". (Plaintiffs' Exhibit 12d at p. 16). The disputed portion of Defendants' actual response to Interrogatory No. 22 is as follows: "because the kinds of services identified are services for which FFP is not available and/or are never medically necessary for children, obtaining claims information regarding possible inappropriate payments by an MCC for these services is impossible." Id. at 108-09.

Neither "Wendy" nor the person communicating with her, testified about this statement to provide some context to understand its meaning. The Sixth Circuit has stated: "'[E]vasive or incomplete answers to proper interrogatories impede discovery.' Badalamenti v. Dunham's Inc., 118 F.R.D.437 , 439 (E.D. Mich. 1987)(citing Bell v. Automobile Club of Michigan, 80 F.R.D. 228, 232 (E.D. Mich. 1978) (misleading interrogatory answers tantamount to failure to answer interrogatories)." See also Jackson v. Nissan Motor Corp. in USA, 888 F.2d 1391, 1989 WL 128639, No. 88-6132 at *2 (6th Cir.Oct. 30, 1989). The Defendants did call Tina Brill, an MCC representative who testified that it might have been possible to run the searches referenced by Plaintiffs' interrogatory by stating that "it depends if they came in as a claim and how they were

coded and so forth. We certainly have all of our claims data. So to the extent they are specific enough to be able to responsively show that, then, yes." (Docket Entry No. 988, June 25, 2007 Transcript at p. 31). In response to Plaintiffs' counsel's question, Brill also testified"[i]f we had anything responsive, we were told to provide it." Id. at 33. The Court found Brill difficult to understand and the Defendants' failure to call "Wendy" leads the Court to consider this response incomplete.

At the end of the expert's discussions at the April 11, 2007 conference, the Court requested the Defendants' expert and the Plaintiffs' expert to summarize any agreements that had been reached (Docket Entry No. 872, Transcript at pp. 211-228). After those summaries, the Court instructed that Antony, the Defendants' computer expert, to prepare a written summary of the experts' agreement and to distribute that summary to all participants for comment and then file the summary agreement with the Court. This filing was to reflect a "summary" of the agreements at the April 11th conference. Antony, however, distributed the transcript of the conference to experts who attended the conference.

The Defendants' April 26, 2007 Notice of Filing, (Docket Entry No. 875) announced meeting dates, but was not the written agreement that the Court requested at the end of the April 11th conference. When the Court entered an Order requiring the agreement to be filed, the Defendants disputed the existence of any such Court directive. After another Order, citing the pages of the transcript of the April 11th conference, Docket Entry No. 982, April 11, 2007 Transcript at p. 228, lines 10-17, the Defendants then responded that their prior Notice was that agreement. The notice, however, reports on the follow-up meeting of the parties' experts and the MCCs' technical and computer experts. (Docket Entry No. 875, at pp. 2 and 3-4). Antony testified that he thought the information provided in the April 26, 2007 Notice of Filing satisfied the Court's

instructions.

The Court concludes that the April 26th Notice does not comply with the Court's directive at the conclusion of the April 11th conference. The significant omission are the MCCs' implementation of a litigation hold and the MCCs' agreement on the request of Mr. Elkins of Memphis Managed Care that the list of search terms and key custodians become finalized after the Plaintiffs made revisions and suggestions. The Defendants' Notice left the MCCs without knowing the 'final' list to be used. The effect of the Notice is to ignore or set aside significant parts of the experts' agreements at the April 11th conference and those omissions were by defense counsel, who prepared the Notice, not Antony.

III. REMEDIES

Plaintiffs' renewed motion to compel was filed under Rule 37(a). (Docket Entry No. 826, Renewed Motion to Compel at p.1). Fed. R. Civ.P. 37(a)(4) provides, in pertinent part:

> (4) Expenses and Sanctions.
>
> (A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.
>
> * * *
>
> (C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26 (c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

The Court has granted the Plaintiffs' motion with some modifications for some MCCs, but without prejudice to renew their original ESI requests as to some MCCs.

Thus, the Court concludes that Plaintiffs have prevailed on their renewed motion to compel and consideration of an award to Plaintiffs for their attorney fees and costs on this motion as well as the production costs and attorney fees of the MCCs, is appropriate. The Defendants are given eleven (11) days from the date of entry of the Order to file their position on whether the Court should award Plaintiffs their attorney fees and costs for their work on this motion as well as the production costs and attorney fees of the MCCs. These costs would be imposed for the Defendants' breaches of their duty to preserve responsive information of its agencies, officers, employees and its contractors with responsibilities under the Consent Decree in this action.

The Defendants insist that any remedies should not include sanctions because Plaintiffs' renewed motion to compel was filed under Rule 37(a). Defendants assert that without notice and for the "first time" during closing argument at the June, 2007 hearing, Plaintiffs' counsel engaged in a "classic bait and switch" by asking for sanctions for the Defendants' spoliation of responsive information. (Docket Entry No. 997, Defendants' Supplemental Memorandum at pp. 1-2). Actually, in their response to Plaintiffs' renewed motion to compel **prior** to the June 2007 hearings, Defendants contended that: "In short, Plaintiffs urge that the Defendants be punished **now** for the alleged spoliation, by adverse rulings on five discovery issues, while postponing Plaintiffs' proof of the alleged spoliation until later." (Docket Entry No. 907-1 at pp. 3-4) (emphasis in the original). By their own brief, the Defendants were well aware of this contention prior to the June 2007 hearing and now complain when Plaintiffs met their evidentiary challenge.

The Court notes that the Defendants again ask the Court to sanction Plaintiffs' counsel,

upon its own motion, under Rule 11 for the Plaintiffs' counsel's assertions about the Defendants' response to Interrogatory 22 and Plaintiffs' counsel's assertions about spoliation of evidence. From the Court's perspective, Plaintiffs' counsel's assertions and argument are well within the proof and the realm of advocacy. With the Defendants' raising this issue, if the Court were to sanction upon its own motion, the Court would consider sanctions upon defense counsel who are responsible for some questionable assertions and argument. As noted earlier, the Court's authority to sanction is not limited to Rule 37(b)(2), supra at p.114, n. 31. Aside from the Defendants' failure to preserve evidence, the Court will discuss certain matters at a conference with lead counsel for the parties and defense firms and the Attorney General of Tennessee.

The Court has shared Judge Nixon's goal of attempting to focus this controversy to ensure that the class gets the benefits owed to them under the Consent Decree that the Defendants agreed to provide and that federal law requires. With these most recent discovery disputes , the Court has come to share Judge Nixon's view of the lead defense counsel, Cooper and Kirk, and their litigation practices on an earlier discovery motion:

> [T]he Court has attempted to steer this case away from the needless and acrimonious litigation and focused on fashioning a solution that would increase compliance with the Consent Decree and federal EPSDT requirements. This constructive approach has been fueled by one goal: to provide the underserved children of Tennessee the entire spectrum of medical benefits to which they are entitled under federal law.
>
> The State's pending Discovery Motion attempts to push this goal to the wayside and refocus the case on wholly unnecessary, time-consuming, costly, and highly divisive litigation. I refuse to condone a path that will waste resources and time in the face of the urgent need to improve healthcare for the children of Tennessee.

(Docket Entry No. 584, Memorandum and Order at p. 4). The Defendants' responses to Plaintiffs'

motions to compel raise the same concerns with this member of the Court.

In any event, the Court reserves the exercise of its authority to sanction until after the actual ESI production and complete responses to the January 14th Order as well as a conference with counsel for the parties.

For the above stated reasons, the Plaintiffs' renewed motion to compel should be granted. An appropriate Order is entered herewith.

ENTERED this the 9th day of October, 2007

WILLIAM J. HAYNES, JR.
Unites States District Judge