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I. INTRODUCTION

At the direction of the Third Circuit Court of Appeals, the threshold issue for this Court on remand is a determination of the validity of the Release. The parties agree that the only discovery that is proper at this time is discovery that is relevant to the Court's determination of that threshold issue. The parties disagree on what is and is not relevant to that determination.

Allstate's positions in this dispute are neither "frivolous" nor "troubling" as plaintiffs contend. (Pl. Mem. of Law in Supp. Mot. to Compel at 8, 21 ("Pl. Mem.")). Rather, they are meritorious. First, Allstate objects to producing documents relating to plaintiffs' "part and parcel" theory until the Court has decided whether that theory has any validity. This objection is supported by the Case Management Order, as well as by common sense. The Case Management Order approved by the Court provides that "Plaintiffs shall not be required to complete discovery as to their contention that the Releases are void as 'part and parcel' of an illegal scheme until after the Court has ruled on the applicability of the 'part and parcel' doctrine to these cases." (Apr. 7, 2010, Case Management Order, ¶ I.I.C, Docket No. 200.) This portion of the Order reflects the common sense notion that if the "part and parcel" theory is invalid, then the parties should not be required to engage in discovery as to that theory. As we show in this Opposition, the part and parcel theory cannot be applied to this case as a matter of law. As we also show, despite plaintiffs' attempt to cabin their "part and parcel" document requests by expressly labeling only three requests as such, it is apparent that this theory permeates numerous other requests as well.

Second, Allstate objects to plaintiffs' "Production Requests Directed to the Release" ("Requests") on the grounds that plaintiffs are improperly seeking a do-over of Allstate's document production. In 2002-2003, plaintiffs served document requests seeking many of the same documents plaintiffs seek in their Requests, and Allstate produced those documents in the

production format the parties expressly agreed to. Allstate is not required to engage in duplicative document discovery, nor are plaintiffs entitled to a re-do of electronic discovery with never-before requested metadata.

Third, Allstate objects to plaintiffs' Requests on the grounds that plaintiffs are improperly seeking discovery on allegations concerning "misrepresentations" that do not appear in their operative Complaint, or even in their proposed Second Amended Complaint. There is no factual predicate for the discovery plaintiffs seek in these Requests. Thus, as shown below, plaintiffs' Requests concerning unpled misrepresentation allegations are an improper fishing expedition.

Finally, plaintiffs' contention that they have served "narrow and focused document requests" (Pl. Mem. at 1) is incorrect. Plaintiffs have served 45 separate requests. Many have no date restrictions and thus represent an effort to sweep in documents pre-dating the Preparing for the Future Program by several decades, and post-dating plaintiffs' execution of the Release by a decade. In yet other requests, plaintiffs seek to discover Allstate's plans or decisions about "low performing agents" and termination of agency relationships over a twenty-year period. In short, plaintiffs are not seeking "narrow and focused" discovery, but instead are engaged in a broad fishing expedition for discovery that likely is not relevant to their case as a whole, and certainly is not relevant to a determination of the validity of the Release.

Notwithstanding the breadth of plaintiffs' Requests, Allstate has engaged in discussions with plaintiffs in a good faith effort to address Allstate's objections and narrow the scope of the issues in dispute. As a result of those discussions, Allstate evaluated its position on a number of Requests and stood by its objections to others. Although plaintiffs argue as if all of the Requests are in dispute and at issue, Allstate believes only the following Requests (reproduced on the attached Exhibit 1) remain in dispute:

- **Requests 4, 5, 7, 8, 9, 16, 17, 43-45:** Allstate objects to these requests because they seek, in whole or in part, documents related to plaintiffs’ “part and parcel” theory. *See* Section III(A), *infra*.
- **Requests 18, 21, 25-32:** Allstate objects to these requests because they seek documents that are not relevant to the validity of the Release and/or that relate to supposed “misrepresentations” by Allstate that are not pled in plaintiffs’ operative Complaint (or even their proposed amended one). *See* Section III(B), *infra*.
- **Relief sought in paragraph (d) of plaintiffs’ motion to compel:** Allstate objects to plaintiffs’ demand for production of documents with extensive metadata fields because (a) the parties agreed on a production protocol in 2002 that does not include those fields, (b) plaintiffs provide no justification for production of documents in this format, and (c) plaintiffs are not entitled under the law to a re-do of document production with metadata. *See* Section III(C), *infra*.
- **Relief in paragraphs (c) and (e) of plaintiffs’ motion to compel:** Plaintiffs provide no basis for seeking an order requiring Allstate to confer with them (Allstate has conferred and remains ready, willing and able to continue to confer on discovery related issues), or for requiring the written certification that plaintiffs seek. Plaintiffs are not entitled to discover privileged communications or attorney work product with respect to Allstate’s document collection efforts and strategy. *See* Section III(C), *infra*.

Allstate’s objections to the disputed Requests are explained below in Section III. First, in Section II, Allstate provides a brief overview of the case as well as Allstate’s previous document production concerning topics covered by plaintiffs’ Requests.

II. BACKGROUND

A. In The Preparing For The Future Group Reorganization Program, Allstate Offered A New Contractual Relationship And Other Valuable Benefits To Plaintiffs In Exchange For A Release Of Claims.

As of November 1999, Allstate marketed and sold its products primarily through an agency force consisting of approximately 15,000 agents in various programs. This included approximately 6,200 agents employed under an R830 or R1500 agreement (“R830 agents” and “R1500 agents”) and nearly 9,000 agents operating under an R3000 or R3001 “Exclusive Agency” (“EA”) agreement pursuant to the EA program started by Allstate in 1990. (*See*

Defendant's Written Response to Rule 30(b)(6) Topics at 4 (Ex. 2).) Each of the plaintiffs in this case was an R830 or R1500 agent. Under their agreements, plaintiffs had no transferable interest in the insurance business they sold or serviced. Plaintiffs were also not entitled to debt forgiveness, enhanced severance payments, or a conversion bonus upon the termination of their R830 or R1500 contract.

In November 1999, Allstate decided to eliminate employee agency programs in favor of the EA program, the agency program that was its most successful. Thus, in November 1999, Allstate announced that it was terminating the employment contracts of approximately 6,200 employee insurance agents as part of a company-wide reorganization of its agency force. The terminations took effect no later than June 2000. In connection with its "Preparing for the Future Group Reorganization Program" ("the Program"), Allstate offered four options to all 6,200 terminated agents. The first three options, described below, offered benefits in exchange for a Release:

- **Option 1 ("Independent Contractor Option"):** The terminated employee agent could become an Exclusive Agent independent contractor without meeting various requirements and restrictions, as well as receive various benefits from Allstate, including a transferable economic interest in the book of business, a payment of at least \$5,000, and higher commissions.
- **Option 2 ("Sale Option"):** The terminated employee agent could become an Exclusive Agent independent contractor without meeting various requirements and restrictions, and immediately acquire a transferable economic interest in the business written while an R830 or R1500 agent for the purpose of selling this interest to an Allstate-approved buyer after one month's service as an Exclusive Agent and prior to September 2000. The terminated employee agent also would receive various benefits from Allstate, including a payment of \$5,000.
- **Option 3 ("Enhanced Severance Option"):** The terminated employee agent could receive enhanced severance benefits equal to one year's salary.

Under the fourth option, which did not require execution of the Release, the terminated employee agent received severance payments of up to 13 weeks' pay.

Allstate provided its terminated agents with more than six months to consider the options it offered, and recommended that they consult with attorneys or other professionals regarding their selection.¹ During that six-month period, plaintiffs consulted with attorneys, accountants, and personal advisers regarding their decisions, including whether to select an option offered in exchange for the Release.² All but one of the currently-named plaintiffs in *Romero I* selected options offered in exchange for the Release, entered into the Release, and received valuable benefits in exchange.

Plaintiffs now attack the validity of the Release, arguing that Allstate did not provide the information required by the OWBPA; that the execution of the Release was not knowing or voluntary; that the Release is unconscionable; and that the Release is void as part and parcel of an illegal scheme. In its lawsuit, the EEOC claims that the Release constitutes unlawful “retaliation.”³

B. Plaintiffs In *Romero I* Obtained Documents Relating To Their Challenge To The Release And Engaged In Other Discovery With Respect To The Release.

In 2002, plaintiffs issued their First Set of Requests for Production of Documents. Among other things, the requests sought “[a]ll documents relating to the Release including but not limited to any communication with the EEOC about the validity of the Release and any

¹ See Allstate Preparing for the Future Release Form, at 3 (Ex. 3); see also, e.g., Dec. 3, 2002 Deposition of Paul Cobb (“Cobb Tr.”) at 47 (Ex. 4); Nov. 8, 2002 Deposition of Sylvia Crews-Kelly (“Crews-Kelly Tr.”) at 95 (Ex. 5); Nov. 21, 2002 Deposition of Larry Lankford (“Lankford Tr.”) at 134 (Ex. 6); Nov. 7, 2002 Deposition of Nathan Littlejohn (“Littlejohn Tr.”) at 91 (Ex. 7); Nov. 14, 2002 Deposition of Rebecca Maslowski (“Maslowski Tr.”) at 236-37 (Ex. 8); Jan. 24, 2003 Deposition of Gene Romero (“Romero Tr.”) at 133-34 (Ex. 9).

² See, e.g., Crews-Kelly Tr. (Ex. 5) at 96-99 (consulted with two attorneys and her accountant); Feb. 6, 2003 Deposition of Craig Millison (“Millison Tr.”) at 165-67 (Ex. 10) (consulted with attorney and with accountant “numerous times”); Nov. 26, 2002 Deposition of Christopher Perkins (“Perkins Tr.”) at 90-91, 97-98 (Ex. 11) (consulted with attorneys, friends, family members and other agents); Nov. 21, 2002 Deposition of Paul Shirley (“Shirley Tr.”) at 114-16, 120-22 (Ex. 12) (consulted with two attorneys and two CPAs); Dec. 4, 2002 Deposition of Richard Carrier (“Carrier Tr.”) (Ex. 13) at 205-11, 226-29 (consulted with several attorneys and approximately 100 former agents regarding Release).

³ In *Romero II*, plaintiffs allege improper reduction or elimination of early retirement benefits and a breach of fiduciary duty.

documents concerning any allegation made by any Employee Agent that the Release is unlawful or invalid.” (Pl.’s First Set of Requests for Production (Ex. 14), Request 36.) Plaintiffs did not request that Allstate produce files in native format or with any metadata, and in fact expressly requested that electronic documents be produced in “imaged form.” (*See id.* at 4.)⁴ Plaintiffs also entered into an agreement with Allstate regarding the format for electronic discovery (*see* section III(C)(ii), *infra*), which did not include the exchange of any metadata. Allstate then produced all non-privileged documents in the format that the parties had agreed upon. Allstate also produced a privilege log identifying privileged documents responsive to plaintiffs’ requests, including documents relating to the Release. Plaintiffs have neither challenged Allstate’s privilege designations nor the format in which Allstate previously has produced documents.

Plaintiffs’ previous discovery concerning the Release also included Requests for Admission and Rule 30(b)(6) testimony. Indeed, many of plaintiffs’ 179 Requests for Admission served in December 2002 sought admissions concerning plaintiffs’ allegations about the validity of the Release and Allstate’s compliance with the OWPBA. (*See* Pl.’s 1st Set of Requests for Admission Directed to Defs. Allstate Ins. Co., Allstate Corp. and Edward M. Liddy, Dec. 20, 2002, at Requests 14-15, 17, 119, 139-65 (Ex. 15).) Plaintiffs have also taken Rule 30(b)(6) deposition testimony concerning the Release, including testimony on the same topics that are the subject of plaintiffs’ recent requests. For instance, plaintiffs asked for and received testimony concerning non-compete and other restrictions contained in the R830 and R1500 contracts and the Agent Transition Severance Plan, as well as Allstate’s efforts to enforce those restrictions before and after the Preparing for the Future Program. (*See* Jan. 15, 2003 R. Lian

⁴ The only “computer-readable” data that plaintiffs requested was in Request 55, which asked for a spreadsheet listing various information about the Allstate agents whose employment had been terminated in the Preparing for the Future Program. Allstate agreed to, and did, produce an electronic spreadsheet responsive to Request 55.

Letter to M. Lieder at 2-3 (Ex. 16); Jan. 20-22, 2003 Deposition of B. Hutton (“Hutton Tr.”) at 76-81, 105-09, 266-78, 281-91, 354-55 (Ex. 17).) Inexplicably, plaintiffs’ Requests again seek information concerning these contractual terms and Allstate’s enforcement thereof. (See Pl. Production Requests Directed to the Release (attached to Pl.’s Mot. as Ex. C), Requests 18 & 19.) There are multiple other overlapping topics between plaintiffs’ Requests and the discovery requests served by them earlier in this case, including Allstate’s efforts to encourage employee agents to convert to the Exclusive Agent Program,⁵ and employee agents’ financial investments in their agencies.⁶

Given the extensive discovery and document productions that already have occurred, Allstate believes it has produced the vast majority of documents responsive to plaintiffs’ Requests. Nevertheless, Allstate is currently engaged in a thorough review to ascertain if there are any additional, non-duplicative documents responsive to plaintiffs’ Requests to the extent related to the validity of the Release. If there are such documents, Allstate has agreed to produce them on a rolling basis in the format the parties agreed in 2002 would govern document production in this case.

III. ARGUMENT

A. **Plaintiffs’ “Part And Parcel” Theory Provides No Basis, As A Matter of Law, For Invalidating The Release And, Accordingly, Plaintiffs’ Motion To Compel Production Of Documents Relating To This Theory Should Be Denied.**

In three requests explicitly labeled “Illegal Scheme” (Requests 43-45), and in several other requests not explicitly labeled as such but which are for the same purpose (Requests 4-5, 7-9, and 16-17), plaintiffs seek documents to support their theory that the Release was part and

⁵ Compare Jan. 15, 2003 R. Lian Letter to M. Lieder (Ex. 16) at 4, with Request 34; see Hutton Tr. (Ex. 17) at 142-44.

⁶ Compare Jan. 15, 2003 R. Lian Letter to M. Lieder (Ex. 16) at 5, with Request 15; see Hutton Tr. (Ex. 17) at 403-22.

parcel of an illegal scheme and hence invalid. Because plaintiffs' "part and parcel of an illegal scheme" theory is not a legally valid basis to attack the Release, Allstate has objected to requests seeking production of documents relating to such theory. (*See* Allstate's Responses & Objections to Requests Titled "Plaintiffs' Production Requests Directed to the Release" to Requests 4, 5, 7, 8, 9, 16, 17, 43, 44, and 45 ("Allstate's Resp. and Obj.") (attached to Pl. Mem. as Ex. D); June 17, 2010 S. Smylie Letter to Pl. Counsel ¶ 1(a) (attached to Pl. Mem. as Ex. E).)

In their motion, plaintiffs argue that the Third Circuit already has issued a "mandate" that plaintiffs are entitled to discovery as to their "part and parcel" theory. (Pl. Mem. at 21.) That is incorrect. The precise contours of discovery are to be determined by this Court. As explained below, the "part and parcel" theory is not a viable basis, as a matter of law, for negating the Release. *First*, this theory is a creature of antitrust law and has no applicability to the releases executed here. *Second*, even as applied in antitrust cases, the part and parcel doctrine would not, as a matter of law, be available to plaintiffs under the undisputed facts of this case.

(i) The Third Circuit Has Not Decided The Applicability Of The Part And Parcel Theory And Has Entrusted This Court With Decisions Concerning the Proper Scope of Discovery.

In their motion, plaintiffs acknowledge Allstate's argument that the "part and parcel" theory applies only in the antitrust context. (Pl. Mem. at 21). Tellingly, however, plaintiffs nowhere address Allstate's argument, nor do they provide any authorities that would support application of the part and parcel doctrine to the facts and circumstances of this case. Instead, they rely entirely on the Third Circuit's statement that plaintiffs are entitled to pursue discovery directed to the specific release-related issues in this case. (*Id.*) But the Third Circuit did not decide whether plaintiff's "part and parcel of an illegal scheme" theory was a legally viable basis for invalidating the Releases. Nor did the Third Circuit preclude Allstate from objecting to discovery on the grounds that the "part and parcel" doctrine has no legal applicability to this

case. To the contrary, the Third Circuit expressed confidence that the parties could “spell” out for the district court the issue of whether discovery should be permitted into matters such as whether the Releases were part of an illegal scheme. *Romero, et al. v. Allstate Ins. Co.*, 344 F. App’x 785, 794 (3d Cir. 2009) (“We are confident that on remand the parties can spell these out for the District Court . . . ***including the plaintiffs’ claim that discovery as to these issues and the release should be permitted.***”) (emphasis added).

Consistent with the Third Circuit’s directive, this Court’s Case Management Order makes clear that this issue is an open one, by providing that plaintiffs are not required to complete discovery as to the part and parcel of an illegal scheme theory until after the Court has ruled on the applicability of that theory to this litigation. (Apr. 7, 2010 Case Management Order, ¶ II-C, Docket No. 200.) By the same token, Allstate should not have to respond to such discovery until that time. For if, as a matter of law, the part and parcel theory provides no basis for invalidating the Releases, then permitting discovery as to this issue would undermine the “bifurcated” proceedings mandated by both the Third Circuit and this Court.

In short, the Third Circuit’s ruling cannot be construed as mandating discovery on the “part and parcel” theory without regard to whether that theory is legally viable. The Third Circuit did not require this court to wear blinders. Rather, it left it up to the court to manage discovery regarding the Release and expressed its confidence that the parties would provide guidance on how to proceed. Although they are the proponents of the “part and parcel” theory and discovery relating thereto, plaintiffs provide no support for the applicability of that theory to this case. Nor can they. As explained below, the part and parcel theory does not provide a basis for invalidating the Release, and thus is not the proper subject of discovery in this case.

(ii) The “Part And Parcel” Doctrine Does Not Apply To Challenges To Employment Decisions.

(1) The “part and parcel” doctrine is limited to antitrust cases.

“Rarely discussed and more rarely applied,” the part and parcel doctrine “holds that a release is invalid if ‘the release itself was an integral part of a scheme to violate *the antitrust laws.*’” *VKK Corp. v. Nat’l Football League*, 244 F.3d 114, 125 (2d Cir. 2001) (quoting *Dobbins v. Kawasaki Motors Corp.*, 362 F. Supp. 54, 58 (D. Ore. 1973)) (emphasis added); *see also Fresh Made, Inc. v. Lifeway Foods, Inc.*, No. 01-4254, 2002 WL 31246922, at *3 (E.D. Pa. Aug. 9, 2002) (Quoting *VKK*). As this statement shows, the doctrine is generally viewed as limited to antitrust cases.

Traffic Scan Network, Inc. v. Marc Winston, No. 92-2243, 1993 WL 390144, at *1 (E.D. La. Sept. 24, 1993), is equally clear that the part and parcel doctrine is a special creature of antitrust law. There, the court stated that under ordinary contract law a release “may be vitiated through fraudulent inducement or economic coercion,” but that “*in addition* to th[ose] two theories, a release of *antitrust claims* . . . will be invalid if it is ‘part and parcel’ of the alleged antitrust conspiracy that the plaintiff is attempting to prove.” *Id.* (second emphasis added).

The part and parcel doctrine’s status as a creature of antitrust law appears to stem from the centrality of the conspiracy in the antitrust context.⁷ Indeed, the language of conspiracy law, and its focus on which acts further the conspiracy, permeates the judicial discussion of the part and parcel doctrine. *Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448, 451 (3d Cir. 1961), is a good example. There, the plaintiffs tried to overcome a release by arguing that it was “obtained by defendants as part of and in furtherance of the continuing conspiracy among the defendants about

⁷ The Second Circuit has suggested that the doctrine “may have descended also from the ancient maxim that ‘if a contract is in restraint of trade it is void because in violation of the Sherman Anti-Trust Law.’” *VKK Corp.*, 244 F.3d at 125 n.7 (quoting *United States v. Del., Lackawanna & W.R.R. Co.*, 238 U.S. 516, 531 (1915)).

which plaintiffs complain.” *Id.* However, it was undisputed that the defendant who asserted the release had not been part of the alleged conspiracy by which the release had been obtained. The court thus held that, whatever may be true of the co-conspirators, plaintiffs’ attempt to preclude the defendant in question from relying on the release “fail[ed] to respect the limits within which the law confines the responsibility of a conspirator for the acts of a co-conspirator.” *Id.* The court added that “conspirators are chargeable with the acts of their fellows only if the acts are done in the furtherance of the joint venture as all understood it.” *Id.* (citing *Momand v. Universal Film Exchange*, 72 F. Supp. 469, 475 (D. Mass. 1947), *aff’d* 172 F.2d 37 (1st Cir. 1948)); *see also Ingram Corp. v. J Ray McDermott & Co.*, 698 F.2d 1295, 1315 (5th Cir. 1983) (insisting that for the doctrine to apply, plaintiff must prove that the release is part of “an antitrust conspiracy”); *Carter v. Twentieth Century-Fox Film, Corp.*, 127 F. Supp. 675, 678 (W.D. Mo. 1955) (“[T]he release was integrated into the lease contract, the end result of which, if plaintiff’s theory of the action is sustained, can only be said to have been *the culmination of the conspiracy* to effectively remove plaintiff from competition[.]”) (emphasis added).

There is no cause of action for conspiring to engage in employment discrimination, and the concept of “conspiracy” is not part of anti-discrimination law. Thus, when plaintiffs assert an “illegal scheme” on the part of Allstate (an allegation absent from their Complaint), they are not using a legal term of art; instead, they are indulging in rhetoric to make their claim sound like one to which the “part and parcel” doctrine might apply. That attempt should be rejected.

(2) The ADEA protects employees from the use of releases to further an illegal scheme.

Application of the part and parcel doctrine to cases involving releases of discrimination claims arising from a large-scale reorganization would be particularly inappropriate because the Older Workers Benefit Protection Act specifically addresses the validity of releases in this

context. The Fair Labor Standards Act (“FLSA”), which contains the Age Discrimination in Employment Act (“ADEA”), had always prohibited private, unsupervised agreements to waive claims. (Legislative History of the Older Workers Benefit Protection Act (S. 1511 and Related Bills), Committee on Labor and Human Resources, United States (June 1991) (“Legislative History”) (Ex. 18) at 225.) This rule was based on concern about the economic power possessed by employers in this setting. (*Id.*) However, after the EEOC obtained enforcement power with respect to the ADEA, it issued a rule permitting the private, unsupervised release of claims. (*Id.* at 226-27.) It did so based on the preference in employment discrimination disputes for settlement, rather than litigation. (*Id.* at 226). Congress, however, suspended the EEOC’s rule and held hearings on the subject. (*Id.* at 227-28.)

The issue was then taken up during congressional deliberations over the OWBPA. Both chambers of Congress passed legislation permitting the waiver of ADEA claims, provided that a series of safeguards is adhered to. The House bill, however, did not permit such waivers where employers implement a “group termination program.” (*Id.* at 259.) The House Committee Report explained that “[o]lder workers too often learn of these group termination programs in an atmosphere of surprise and uncertainty” and that “[i]n this setting, older workers are unlikely to be aware of possible patterns of discrimination in the program itself,” *i.e.*, what plaintiffs in this case call the illegal scheme. (*Id.* at 260.)

As ultimately enacted, though, the OWBPA did not prohibit the use of releases in the context of group terminations. Instead, the House’s concern was addressed by requiring employers, as a condition of obtaining a release in this context, to provide data that would enable affected workers to discern whether the terminations were disproportionately falling on older employees.

In short, Congress passed the OWBPA understanding fully that employers might offer releases to employees as part of, or as a follow-up to, a group termination, including an unlawful one. It rejected the notion that such releases should be prohibited, and declined to make their validity contingent on whether the Release can be characterized as part and parcel of a discriminatory scheme. Rather, it protected employees subject to a group termination from unknowingly waiving their rights in the face of a discriminatory scheme by, among other measures, making sure these employees obtain the information necessary to detect the possible existence of such a scheme. This Court should not overturn Congress's considered resolution of this issue in the name of a rarely invoked doctrine of antitrust law.

(iii) Even If Viable In Theory, The "Part and Parcel" Doctrine Does Not Apply Here.

The part and parcel doctrine applies only to cases in which the Release is the cause of the antitrust violation, not merely an outgrowth of it. *Ingram Corp.*, 698 F.2d at 1315 (upholding releases where they were "an out-growth – a result, not a cause of the acquisition" alleged to violate antitrust law); *Northern Oil Co., Inc. v. Standard Oil Co. of Cal.*, 761 F.2d 699, 706 (Temp. Emer. Ct. App. 1985); *Fresh Made*, 2002 WL 31246922, at *3. The doctrine does not apply where the goals of the underlying agreement in restraint of trade have already been achieved by the time the release is executed. In this scenario, the release cannot be part of the cause of the violation because the violation has already occurred.

Thus, in *Ingram Corp.*, the Fifth Circuit held that the releases at issue could not have been part and parcel of the alleged conspiracy to restrict competition because the plaintiff was already out of business when the releases were executed. 698 F.2d at 1315. Similarly, in *VKK v. NFL*, the Second Circuit held that, even if the part and parcel doctrine were theoretically viable, it would not apply to plaintiff's claim alleging a conspiracy to prevent franchise relocation. That

goal, the Court explained, had already been accomplished, pursuant to plaintiff's previous agreement not to move the team, by the time he signed the release. 244 F.3d at 126. The release "only stopped plaintiff from bringing suit to recover treble damages for [his] alleged victimization." *Id.*⁸ This was insufficient to satisfy the part and parcel doctrine.

Here, the underlying conduct about which plaintiffs complain is the termination of the employment status of Allstate's insurance sales agents for the alleged purpose of "robbing" them of benefits and clearing the way for Allstate (if it so chose) to replace them with younger employees. (Am. Compl. ¶¶ 5-6.) This was accomplished in November 1999, when Allstate terminated the contracts of these individuals effective June 2000. The subsequent execution of the Releases did not cause the sales agents to lose their benefits or their jobs; nor did it cause them to be replaced by younger individuals. To the contrary, it provided them with the opportunity to maintain their relationship with Allstate.

Plaintiffs may argue, as they have in the past, that the Release was key to the alleged plan to deprive older workers of benefits and employment because, without it, the risk of litigation was too great. (Pl. Opp. to Defendant's Mot. Summ. J. as to Released Claims, Sept. 5, 2003, at 39, Docket No. 121.) But this is merely an admission that the Release was intended, not to effectuate the underlying decision to terminate the employment status of agents, but rather to avoid lawsuits resulting from this decision. (*See also id.* at 39 (characterizing the Release as an effort by Allstate to "exempt itself from liability").)

As in *VKK*, a "scheme" to avoid being sued would be insufficient to trigger the part and parcel doctrine, even if that theory could apply to this case. Insulation from liability is the usual purpose of a Release. Thus, an allegation that the Release was an integral part of the program

⁸ By contrast, in *Carter v. Twentieth Century-Fox*, 127 F. Supp. at 678, the release "was integrated into the lease contract" that was alleged to be anti-competitive. *See also Traffic Scan Network*, 1993 WL 390144, at *2 ("[T]he release was executed simultaneously with the contract of sale, the object of the allegedly illegal scheme.").

under challenge by virtue of its tendency to minimize litigation risks can hardly suffice to invalidate the Release. Otherwise, public policy encouraging enforcement of releases fairly entered into would be undermined. *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 373 (5th Cir. 2002) (“Public policy favors voluntary settlement of claims and enforcement of releases.”).

Congress could have struck a different balance between its twin goals of encouraging private settlements and protecting the rights of older workers who lose their jobs due to group terminations. It could have prohibited waivers altogether in this context (as the original House version of the OWBPA did) or it could have made their enforceability contingent on the relationship between the use of releases and any underlying intent to discriminate. But Congress instead struck the balance in favor of enforcing releases provided that certain conditions designed to prevent procedural unfairness are satisfied.

This Court should respect that balance. It should hold the part and parcel doctrine inapplicable to this case as a matter of law and prohibit discovery that relates to that doctrine. Accordingly, the Court should uphold Allstate’s objections to plaintiffs’ document requests to the extent they seek documents relating to the part and parcel theory, including Requests 4-5, 7-9, 16-17, and 43-45.

(iv) Because The Part And Parcel Theory Is Not Legally Viable, Allstate Should Not Be Required To Respond To Requests 4-5, 7-9, 16-17, And 43-45, To The Extent Directed To That Theory.

Recognizing the frailty of their “part and parcel” theory as a basis to obtain discovery to challenge the validity of the Release, plaintiffs only explicitly label three requests as seeking documents related to that theory (Requests 43-45). Other requests, however, are similarly focused, as made clear by the language of the request itself or plaintiffs’ concessions – *i.e.*, Requests 4, 5, 7, 8, 9, 16, and 17. Allstate should not be required to respond to these requests.

In Requests 43, 44, and 45 (labeled “Illegal Scheme”), plaintiffs seek all reports and analyses, among other documents, provided to any “Key Person” with respect to the Preparing for the Future Program or any other proposed reorganization involving employee agents (Request 43); all documents analyzed or considered in an evaluation of whether the R830 and R1500 contracts were terminable only for cause (Request 44); and all documents relating to meetings and work product of the Allstate team who designed the Preparing for the Future Program (Request 45). In their memorandum, plaintiffs concede that these requests seek documents they believe will enable them to show that the Preparing for the Future Program “was illegal” and therefore Allstate “demanded that its employees execute the Release.” (Pl. Mem. at 22) In other words, Requests 43-45 are nothing more than requests designed to adduce support for plaintiffs’ underlying claims that Allstate’s Preparing for the Future Program allegedly violated the ADEA and ERISA, and breached plaintiffs’ employment contracts.

By the same token, Requests 7-9, and 16-17 also seek documents that plaintiffs believe will enable them to attack the legality of the Preparing for the Future Program and the termination of plaintiffs’ employment contracts, and hence relate to plaintiffs’ “part and parcel” theory:

- Request 4 requests documents “related to potential claims or liability arising from the implementation of the Mass Termination Program.” Documents concerning potential claims or liability arising from the Preparing for the Future Program relate to the merits of plaintiffs’ underlying claims that the Program was unlawful.⁹
- By including search terms such as “fairness issue,” “legally possible,” “breach” within two words of “contract*”, and “Preparing for the Future,” Request 5 also includes documents relating to the merits of plaintiffs’ challenges to the lawfulness of the Preparing for the Future Program. Indeed, plaintiffs admitted

⁹ Subject to resolving plaintiffs’ overbroad “Key Person” definition, Allstate has agreed in response to Request 4 to provide non-privileged documents concerning the Release prepared for or provided to any Key Person and documents concerning the review and approval by any of them of the Release, to the extent those documents have not previously been produced.

during the parties' meet and confer that the terms "fairness issue" and "legally possible" relate to their part and parcel theory.¹⁰

- Requests 7 and 8 seek documents concerning agents who decided not to sign the Release – who plaintiffs refer to as "Holdouts." Plaintiffs admit that Requests 7 and 8 seek information to enable plaintiffs "to demonstrate the success of Allstate's illegal plan to cause agent employees to sign the Release" (Pl. Mem. at 11) – a concession that these requests relate to plaintiffs' part and parcel theory.
- Request 9 includes a request for documents relating to Allstate's contention that it complied with the OWBPA in "designing, adopting and implementing the Mass Termination Program."¹¹ For the same reasons explained above, the only relevance of this topic is to the merits of plaintiffs' underlying claims, not to the validity of the Release.
- Request 16 seeks documents relating to "the significance of renewal commissions and/or employee benefits" "for the financial security of Employee Agents." This request has no relevance to whether plaintiffs did or did not knowingly or voluntarily enter into the Release, and instead is directed to plaintiffs' underlying claims that they were unlawfully deprived of compensation and benefits under their R830 and R1500 employment contracts. In the Preparing for the Future Program, plaintiffs were not given the option to continue working as employee agents under their R830 or R1500 contracts – those contracts were being terminated, regardless of whether plaintiffs signed a Release. Thus, whatever "significance" those benefits had to plaintiffs were not relevant to deciding whether or not to enter into the Release. If they have any relevance at all, it would only be to plaintiffs' claims that the Preparing for the Future Program was unlawful and that the Release was part and parcel of that "unlawful scheme."
- Request 17 similarly seeks documents unrelated to the validity of the Release. Any projections by Allstate concerning which employee agents would sign the Release, or the number who might choose not to, are irrelevant to the validity of the Release. Rather, the only conceivable relevance such projections would have

¹⁰ In Request 5, plaintiffs ask that Allstate search the files of twenty named individuals and countless unnamed persons (*e.g.*, "members of Allstate's Board of Directors . . . including any committee or subcommittee thereof") with search terms as vague as "charge." Plaintiffs nowhere explain why the individuals they label "Key Persons" are labeled as such, and Allstate has no idea why plaintiffs are designating certain individuals as "Key Persons." For example, one of plaintiffs' "Key Persons" is William Henderson, who left Allstate in 1992; another is Thomas Tewksbury, who left Allstate in 1994. Thus, in Allstate's objections to this Request, Allstate explained to plaintiffs that this request was overly broad and imposed an undue burden on Allstate, but that Allstate was willing to confer with plaintiffs to narrow the scope of the Request. (*See* Allstate's Resp. and Obj. at 8 (attached to Pl. Mem. as Ex. D).) Although the parties had a meet and confer on May 26, 2010, plaintiffs never raised Allstate's overbreadth objection to the persons listed nor explained their position why these individuals have been designated "Key Persons." Nor do plaintiffs explain in their moving papers why they have designated twenty-plus "Key Persons" or why they are entitled to an order requiring Allstate to search these individuals' files.

¹¹ Allstate has confirmed, however, that in response to Request 9, it will produce any non-duplicative, non-privileged documents relating to its position that it strictly complied with the OWBPA in drafting the Release.

– again, to the extent relevant at all – is to plaintiffs’ theory that the release was part and parcel of an invalid scheme, *i.e.*, that Allstate was attempting to project whether or not the Release would have its “intended effect” of “insulating” Allstate from liability for actions taken in the Preparing for the Future Program. Indeed, plaintiffs conceded in the parties’ meet and confer that they are seeking the documents in Request 17 to support their “part and parcel” theory.

For the reasons explained above, the Court should deny plaintiffs’ motion to compel documents in response to Requests 4-5, 7-9, and 16-17, except to the extent Allstate has agreed to produce responsive non-privileged, non-duplicative documents.

B. Plaintiffs’ Motion To Compel Documents Responsive To Requests 18, 21, And 25-32 Should Be Denied.

(i) Requests 18 And 21 Are Overbroad And Seek Documents That Are Not Relevant To The Validity Of The Release.

Request 18 seeks all documents relating “to the interpretation or enforcement of the non-compete, confidentiality, or exclusive work provisions of the R830 Contract and R1500 contract.” Allstate has objected to Request 18 because plaintiffs have refused to limit the timeframe for the request, meaning plaintiffs are seeking all documents Allstate has in its possession relating to its interpretation or enforcement of the non-compete, confidentiality, or exclusive work provisions of the R830 and R1500 contracts. Nowhere do plaintiffs offer any theory or explanation why they believe documents relating to the enforcement of contracts that were in use with thousands upon thousands of Allstate employee agents over multiple decades are relevant to their challenge to the Release.

Similarly, in Request 21, plaintiffs seek all documents relating to an alleged representation “that Allstate will treat any attempt by former Agents to contact Allstate policyholders or customers (or any person whose identity was discovered as a result of the status as an Allstate agent) in whatever form, as solicitation.” Again, plaintiffs seek documents, unlimited by time, with respect to Allstate’s enforcement of provisions in its contracts with many

thousands of agents. And again, plaintiffs fail to offer any explanation or justification for why documents relating to Allstate's enforcement of contractual provisions spanning several decades are relevant to the validity of the Release.

(ii) Requests 25-32 Seek Documents Concerning Misrepresentations That Are Not Pled In Plaintiffs' Complaint.

In a section of their document requests labeled "Knowledge and Misrepresentation," plaintiffs seek documents related to supposed "misrepresentations" by Allstate with respect to (a) planned or actual reductions or changes in commission rates after June 2000 (Requests 24-26); and (b) performance standards that would apply to agents entering the Exclusive Agent program (Requests 27-32). Plaintiffs do not point to any paragraph of their Complaint that alleges Allstate made *any* representations on these topics in connection with the Release, let alone misrepresentations – nor can they, for the simple reason that no such allegations appear in their Complaint. Plaintiffs do not allege a promise of specific "commission rates" or certain "performance standards" in connection with the R3001 contract, let alone assert a claim or theory that Allstate made misrepresentations to plaintiffs on these topics in connection with the signing of the Release. Indeed, it is noteworthy that not even in their proposed Second Amended Complaint do plaintiffs allege that Allstate made representations or misrepresentations concerning planned or actual reductions or changes in commission rates or performance standards.¹² Plaintiffs are not entitled to discovery with respect to claims or theories that are not pled in their Complaint. *See Texas Capital Corp. v. Fleet Capital Corp.*, No. Civ. A. 03-1605, 2004 WL 1472778, at *1 (E.D. Pa. June 14, 2004) (denying plaintiffs' motion to compel where document requests sought discovery for a theory not pled in the complaint); *DM Research, Inc.*

¹² Plaintiffs' proposed Second Amended Complaint merely contains vague allegations that Allstate made "misrepresentations about the Release and the consequences of signing or not signing it." (*See* Allstate's Mem. in Opp. Mot. to File and Serve Am. Compl. at 12, Docket No. 204.)

v. Coll. of Am. Pathologists, 170 F. 3d 53, 55 (1st Cir. 1999) (affirming grant of motion to dismiss despite plaintiffs’ allegation that a “conspiracy” existed because “the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.”); *Ranke v. Sanofi-Synthelabo, Inc.*, 436 F.3d 197, 204 (3d Cir. 2006) (affirming dismissal of complaint and noting that to allow discovery concerning fraud or concealment claims not pled in a complaint would be permitting plaintiffs “to conduct a fishing expedition in order to find a cause of action”); *Smith v. Lyons, Doughty & Veldhuius*, No. 07-5139, 2008 WL 2885887, at *5 (D.N.J. July 23, 2008) (“The purpose of discovery is to uncover evidence of the facts pleaded in the Complaint, . . . not ‘to find a cause of action.’”) (quoting *Ranke*, 436 F.3d at 204).

There is no factual predicate in the Complaint to support plaintiffs’ Requests 25-32. They are an improper fishing expedition, and plaintiffs’ motion to compel as to these requests should be denied.¹³

C. There Is No Basis To Compel Allstate To Produce Documents In Accordance With Plaintiffs’ Unilaterally-Imposed Format Requirements.

(i) Contrary To Plaintiffs’ Assertions, Allstate Has Produced Electronic Documents.

Plaintiffs state that Allstate “has not produced any electronic documents in response to Plaintiffs’ document requests.” (Pl. Mem. at 22) Not so. In its prior production, Allstate

¹³ Allstate also has objected to Requests 26 and 29 on the grounds that plaintiffs seek documents from June 2000 to the present and have declined to agree to any time limitation. Documents concerning reductions or changes in commission rates, and Allstate’s policies concerning termination of agents for not meeting production standards, at any time during the ten-year period since the Preparing for the Future Program was implemented and plaintiffs entered into their Releases cannot possibly relate to the validity of the Release. Plaintiffs offer no argument or explanation for why documents on these topics covering a 10-year time span after plaintiffs entered into their Releases are relevant to the validity of the Release. If the Court concludes that the topics covered by Requests 26 and 29 are relevant, it should impose a reasonable restriction on the time period covered by these requests.

produced hundreds of pages of electronic documents.¹⁴ Plaintiffs also contend that Allstate refuses “to confirm that it will search for and produce electronic documents for the instant Requests.” (*Id.* at 24.) Again, not so. Allstate has responded that it will search for electronic documents in response to plaintiffs’ Requests and, to the extent not privileged and not previously produced, to produce such documents in the agreed-upon format governing the parties’ document productions throughout this case.

(ii) Allstate Is Not Required To Produce Documents In Response To Plaintiffs’ March 2010 Requests In Plaintiffs’ Demanded Format.

In a “General Instruction” in plaintiffs’ Requests, plaintiffs demand that “[i]f any Document is maintained in an electronic, digital or imaged format, the Document shall be produced in ‘native’ format, together with all associated meta-data.” (*See* Pl. Production Requests Directed to the Release at 4 (attached to Pl.’s Mot. as Ex. C).) Allstate objects to the production of native documents and metadata as unduly burdensome. (*See* Allstate’s Resp. and Obj. at 4 (attached to Pl. Mem. as Ex. D).)

Plaintiffs did not seek to confer on this request during the parties’ meet and confer on May 26, 2010, and it was not until Allstate received an email from plaintiffs’ counsel on June 5, 2010 that Allstate learned of plaintiffs’ “electronic production specifications.” (*See* June 5, 2010 M. Lieder email to S. Smylie (attached to Pl. Mem. as Ex. F, at 5).) Counsel for Allstate inquired as to these “specifications,” and on June 9, 2010, learned that plaintiffs were unilaterally attempting to change the parties’ agreed-upon format for production and demanding that Allstate produce all electronic documents as “single-page, black and white Group IV TIFF images with

¹⁴ *See, e.g.*, ARI 000140; ARI 000468; ARI 001150; ARI 001958; ARI 002152 - ARI 002153; ARI 004009; ARI 006356; ARI 006896 - ARI 006898; ARI 007414; ARI 008723 - ARI 008724; ARI 009528 - ARI 009530; ARI 010107; ARI 018551; ARI 022298; ARI 022707 - ARI 022708; ARI 033863 - ARI 033865; ARI 035314; ARI 036202; ARI 036285; ARI 038147; ARI 039042; ARI 040639; ARI 049801; ARI 050167 - ARI 050168; ARI 051001.

coded data contained in a separate file.” (See June 5, 2010 M. Lieder email to S. Smylie (attached to Pl. Mem. as Ex. F, at 1).) Plaintiffs then demanded that Allstate produce the following metadata fields:

Field Name	Description
BegBates	Beginning bates number
EndBates	Ending bates number
BegAttach	Beginning attachment number
EndAttach	Ending attachment number
Custodian	
DocType	Type of document (e.g., email, attachment, efile)
NativeFile	For Excel or other Files that cannot be rendered to TIFF
Author	Email author; Efile creator
Recipient	
CC	
BCC	
Subject/Title	Email subject; Efile filename
Sent Date	
Received Date	
Create Date	
Modified Date	
Parent Date	
Application/Mime Type	Application used to create the native file (e.g., Excel, Word, Powerpoint)
Document Extension	E.g., XLS, DOC, PDF
Original File Path	File path from original media including file name
DUPSOURCE	To the extent documents are being deduplicated globally, this field will list all custodians that had possession of this document
MD5 Hash Value	
Extracted Text	The searchable text as extracted from the native file

Plaintiffs’ electronic format demands are contrary to the parties’ agreement and are not supported by case law.

First, in October 2002, prior to producing any documents in this matter, the parties reached agreement regarding the format of electronic discovery. (See Oct. 1, 2002 Letter from S. Coler D. Peale [sic] (Ex. 19).) Specifically, the parties agreed to the following terms:

1. Each side will produce its documents in the form of single-page TIF[F] images suitable for use in Concordance;
2. The documents will have Bates numbers on each page; and
3. Each side will produce a log file in electronic form that will indicate the beginning and ending Bates numbers (BegBates & EndBates) of each document.

Since 2002, Allstate has produced electronic documents in accordance with this agreement and provided plaintiffs with TIFF images and a log file indicating the beginning and ending Bates numbers for each document.¹⁵ Until now, plaintiffs have not disputed or sought to amend this electronic discovery agreement. Indeed, in connection with plaintiffs' own prior productions, plaintiffs themselves have never produced the metadata that plaintiffs now demand from Allstate. The metadata fields presently requested by plaintiffs go considerably beyond the fields in the parties' prior agreement, and plaintiffs give no justification or rationale for deviating from the agreed-upon protocol.

Second, Allstate's collection of Release-related documents occurred nearly 10 years ago when plaintiffs first requested such documents. Allstate collected and produced those documents in accordance with the parties' electronic document production agreement. Plaintiffs are not entitled to the same documents they previously requested, this time seeking metadata that plaintiffs neither previously sought nor Allstate agreed to produce. See *Ford Motor Co. v. Edgewood Props., Inc.*, No. 06-1278, 2009 WL 1416223, at *8 (D.N.J. May 19, 2009) (refusing

¹⁵ See, e.g., Oct. 7, 2002 Letter from D. Peel to S. Coler; Oct. 29, 2002 Letter from D. Peel to S. Coler; Nov. 13, 2002 Letter from D. Peel to S. Coler; Nov. 22, 2002 Letter from D. Peel to S. Coler; Nov. 25, 2002 Letter from D. Peel to S. Coler; Sept. 3, 2003 Letter from D. Peel to M. Wilson; Oct. 18, 2005 Letter from D. Welch to M. Amadeo (attached collectively as Ex. 20).

to compel party to produce metadata because “it is without question unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection” to the prior production format); *Autotech Techs. Ltd. P’ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 559 (N.D. Ill. 2008) (“It seems a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format.”); *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350, 360 (S.D.N.Y. 2008) (declining to compel the reproduction of emails with intact metadata because the requesting party did not formally ask for metadata until the collection process was nearly complete).

Third, even if the parties had not previously agreed on an electronic discovery format and Allstate had not already completed its collection of Release-related documents, neither Rule 34 nor prior court decisions require Allstate to produce the extensive amount of metadata plaintiffs now demand. Plaintiffs have not shown a “particularized need” for the extensive metadata requested. *See Covad Commc’ns Co. v. Revonet, Inc.*, 267 F.R.D. 14, 20 (D.D.C. 2010) (denying plaintiffs’ request for metadata because “[t]here is no question presented by them that only the metadata can answer”); *Reeves v. Case Western Reserve Univ.*, No. 1:07-CV-1860, 2009 WL 3242049, at *16 n.37 (N.D. Ohio Sept. 30, 2009) (explaining that metadata “ordinarily need not be produced absent the showing of some particularized need for that data”); *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) (explaining that the court adheres to the “[e]merging standards of electronic discovery [which] appear to articulate a general presumption against the production of metadata.”) (citing *Williams, et al., v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 651 (D. Kan. 2005)); *Kentucky Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing*, No. 05-138, 2006 WL 5097354, at *8 (E.D. Ky. Dec. 18, 2006) (denying motion to

compel production of metadata because movant failed to show “a particularized need for the metadata”); *see also The Sedona Conference, Best Practices, Recommendations, & Principles for Addressing Electronic Document Production # 12* (2004) (“Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.”).

In *Covad Communications*, the plaintiff argued, as plaintiffs do here, that “only native production, with metadata, of electronically stored information, is reasonably usable under Rule 34.” 267 F.R.D. at 20. The district court first explained that Rule 34 “explicitly indicates that, when no form for producing electronically stored information has been specified, it must be produced in a reasonably usable form.” *Id.* The court then *rejected* plaintiff’s argument that “native, electronic format is absolutely obligatory,” and held that “the rule itself permits production either in the format in which e-mail is ordinarily maintained, i.e. ‘native format,’ or another usable format” and that defendant’s production without metadata was “another useable format” permissible under the Rules. *Id.*

Plaintiffs’ cases do not support their argument that Allstate is required to produce metadata. In *Aguilar v. Immigration and Customs Enforcement Division of the U.S. Department of Homeland Security*, the court *denied* the plaintiffs’ request for email metadata because plaintiff provided no indication that the metadata would provide any significant information. 255 F.R.D. 350, 360 (S.D.N.Y. 2008). The court required defendants to produce metadata from Word and Excel files at the plaintiff’s expense, only because the plaintiff demonstrated that the metadata could have some relevance to the action. Here, plaintiffs have failed to show that the metadata provides any additional information critical to plaintiffs’ claims that cannot be obtained from the face of the documents. The court in *In re Payment Card Interchange Fee & Merchant*

Discount Antitrust Litigation held that the producing parties need *not* produce metadata for documents “that they have already produced . . . or that they have already substantially processed for such production” because it “would impose an undue burden on them.” No. MD 05-1720, 2007 WL 121426, at *4 (E.D.N.Y. Jan. 12, 2007). Similarly, here, Allstate collected responsive material nearly a decade ago and already have produced the vast majority of Release-related documents.¹⁶

Plaintiffs have not shown any need, as is their burden, for the extensive amount of metadata requested. Plaintiffs merely state that metadata includes “essential information about the author, the date of creation, the date of modification, and the recipient of the document.” (Pl. Mem. at 26.) But most of this “essential information” is available on the face of the document, and plaintiffs fail to explain why they have a particularized need for the remaining metadata fields. Accordingly, plaintiffs’ motion to compel Allstate to produce metadata beyond the limited metadata originally agreed to should be denied.

(iii) Plaintiffs’ Request For An Order Requiring Allstate To Disclose Its Document Collection Strategy And To Provide Written Certification Concerning Document Preservation Should Be Denied.

Plaintiffs ask this Court to order Allstate to (1) confer with plaintiffs concerning additional relevant custodians and search terms, and what searches Allstate conducted in the

¹⁶ Plaintiffs’ other cited cases are inapposite. The electronic documents at issue in *In re Priceline.com Inc. Securities Litigation* were all native files that had not already been collected or processed for production. 233 F.R.D. 88, 89-90 (D. Conn. 2005). And while the court required defendants to provide “searchable metadata databases,” it provided no further detail in the types of metadata required to be produced. *Id.* at 91. There is no indication that the court in *Priceline* ordered the extensive amount of metadata plaintiffs presently request from Allstate. In *In re Verisign, Inc. Securities Litigation*, the court made no mention of metadata whatsoever, and instead required the defendant to produce native files. No. 02-02270, 2004 WL 2445243 (N.D. Cal. Mar. 10, 2004). With the exception of Excel files, the plaintiffs here are not seeking Allstate’s native files. Finally, plaintiffs’ reliance on *Williams v. Sprint/United Management Co.* is most puzzling. The *Williams* court held that with regard to “electronic documents . . . the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.” 230 F.R.D. 640, at 652 (D. Kan. 2005). In the present case, Allstate and plaintiffs agreed on a production format years ago and have been following that protocol ever since.

past, “so that Plaintiffs receive all relevant documents concerning the Release,” and (2) confirm that Allstate has “preserved all relevant electronic documents, including email, since the time when it reasonably anticipated litigation.” (Pl. Mem. at 24-25.) Plaintiffs have no basis to seek such an order.

First, plaintiffs’ request that Allstate “confer with plaintiffs” to discuss additional search terms and custodians, and to discuss “the searches Allstate conducted in the past, and the scope and manner of any prior searches,” is beyond that required of Allstate by the discovery rules. Allstate is under no obligation to provide plaintiffs with a list of the search terms Allstate has employed in the past or the method by which Allstate searched for responsive material. Such information is attorney work product and need not be disclosed. *See Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (holding that “the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product”).

Second, plaintiffs’ request that Allstate confirm it has preserved all relevant electronic documents since the time Allstate reasonably anticipated litigation is untethered to any factual or legal basis. Plaintiffs provide no evidence (or even any argument) that Allstate has failed to preserve relevant documents, and plaintiffs cite no legal support for this requested relief.

IV. CONCLUSION

For the reasons explained above, Allstate requests that this Court:

- 1) Rule that, as a matter of law, plaintiffs’ “part and parcel” theory provides no basis for invalidating the Release and therefore deny plaintiffs’ Motion to Compel documents responsive to Requests 4, 5, 7, 8, 9, 16, 17, 43, 44, and 45 to the extent those requests seek documents relating to or intending to support plaintiffs’ “part and parcel” theory;
- 2) Deny plaintiffs’ Motion to Compel documents responsive to Requests 18, 21, 25, 26, 27, 28, 29, 30, 31, and 32 on the grounds that such requests seek documents

that are not related to the validity of the Release and/or relate to supposed “misrepresentations” that are not pled in plaintiffs’ operative Complaint;

- 3) Rule that Allstate is not required to produce electronic documents in native files or with the metadata plaintiffs now seek but instead, to the extent there are additional documents to produce that have not been produced before, Allstate may produce those documents in the format consistent with the parties’ 2002 agreement regarding electronic discovery; and
- 4) Deny the relief sought in paragraphs (c), (d), and (e) of plaintiffs’ Motion to Compel.

Dated: July 23, 2010

/s/ Katherine M. Katchen

Katherine Menapace Katchen (I.D. No.
80395)

AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2001 Market St., Ste. 4100
Philadelphia, PA 19103
(215) 965-1200
(215) 965-1210 (fax)

Richard C. Godfrey, P.C.
Sallie G. Smylie, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654
(312) 862-2000
(312) 862-2200 (fax)

Peter A. Bellacosa
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
(212) 446-4900 (fax)

Donald R. Livingston
Nathan J. Oleson
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
(202) 887-4288 (fax)

Attorneys for Allstate Defendants

John B. Langel
BALLARD, SPAHR, ANDREWS & INGERSOLL
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500
(215) 864-8999 (fax)

Attorney for Defendant Edward M. Liddy

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on July 23, 2010, by the Court's Electronic Case Filing system and by electronic mail on all counsel of record.

/s/ Katherine M. Katchen