IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENE R. ROMERO, *et al.*, Plaintiffs, v. ALLSTATE INSURANCE COMPANY, *et al.*, Defendants.	:	Civil Action No.: 01-CV-3894 (RLB) CLASS ACTION
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. ALLSTATE INSURANCE COMPANY Defendant.	:	Civil Action No.: 01-CV-7042 (Consolidated with 01-CV-3894)
GENE R. ROMERO, *et al.*, Plaintiffs, v. THE ALLSTATE CORPORATION, *et al.*, Defendants.	:	Civil Action No.: 01-CV-6764 CLASS ACTION

AMENDED AND CORRECTED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO DETERMINE THE SUFFICIENCY OF ALLSTATE'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' SECOND SET OF REQUESTS FOR ADMISSIONS

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION 1

II. BACKGROUND 3

A. Defendants Forced Plaintiffs And Other Employee Agents To Sign The Release As Part Of The Mass Termination Program. 3

B. Allstate Has Repeatedly Sought To Avoid The Third Circuit's Mandate. 6

C. On October 21, 2010, The Court Compelled Defendants To Produce Responsive Documents And To Engage In "Meet And Confer" Sessions With Plaintiffs. 7

D. Allstate Evaded Plaintiffs' ESI-Related Questions 8

F. Allstate Has Failed To Produce Documents From Relevant Custodians And Has Made Concessions That Further Confirm The Need For Discovery Of Allstate's Preservation Practices. 9

G. Plaintiffs Served The Requests To Confirm And Understand The Extent Of Allstate's Preservation Failures. 11

H. Allstate Has Failed To Withdraw Its Objections And Properly Answer Plaintiffs' Requests. 14

III. ARGUMENT 15

A. Answers to Plaintiffs' Requests Are Crucial In Light Of Allstate's Apparent Failure To Preserve Relevant Documents 17

B. Allstate Has Failed To Respond To Nearly Half Of Plaintiffs' Requests Based Upon Its Frivolous Objection To The Definition Of "Program-Related" 20

1. Allstate Has Waived Any Objection To "Program-Related." 20

2. Plaintiffs' Definition Of "Program-Related" Is Not Ambiguous 22

3. Plaintiffs' Program-Related Requests Are Not Overbroad 24

C. Allstate Cannot Reshape Plaintiffs' Requests To Answer Separate Admissions 26

D. Allstate Has Improperly Refused To Admit Or Deny 18 Basic Requests Without Providing A Sufficient Explanation For Its Answers. 29

IV. CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

A. Farber & Partners, Inc. v. Garber
237 F.R.D. 250 (C.D. Cal. 2006) 16, 29

Asea, Inc. v. Southern Pacific Transp. Co.
669 F.2d 1242 (9th Cir. 1981) 16

Cada v. Costa Line, Inc.
95 F.R.D. 346 (N.D.Ill. 1982)...29

Chapman v. California Dep't of Educ.
No. C-01-1780, 2002 WL 32854376 (N.D. Cal. Feb. 6, 2002)..25

Creely v. Genesis Health Ventures, Inc.
No. 04-CV-0679, 2005 WL 44526 (E.D. Pa. Jan. 10, 2005)..22

Dickard v. Oklahoma Mgmt. Servs. for Physicians, LLC
No. 5:06-cv-05176-RTD, 2007 WL 2460618 (W.D. Ark. Aug. 24, 2007)...........................17

Doe v. District of Columbia
230 F.R.D. 47 (D.D.C. 2005)...18

Duchesneau v. Cornell Univ.
No. 08-CV-4856, 2010 WL 4117753 (E.D. Pa. Oct. 19, 2010) 22, 25

Guinan v. DuPont Hospital For Children
No. 08-228, 2008 WL 938874 (E.D. Pa. Apr. 7, 2008) 15, 16

Herrera v. Scully
143 F.R.D. 545 (S.D.N.Y. 1992) 16

House v. Giant of Md., LLC
232 F.R.D. 257 (E.D. Va. 2005) 16

In re eBay Seller Antitrust Litig.
No. C07-1882JF, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007)..17

Kutner Buick, Inc. v. Crum & Foster Corp.
No. 95-1268, 1995 WL 508175 (E.D.Pa. Aug. 24, 1995) 29

Loudermilk v. Best Pallet Co., LLC
No. 08-06869, 2009 WL 3272429 (N.D. Ill. Oct. 8, 2009)... 16, 29

Louis v. Martinez
No. 08-CV-151, 2011 WL 1832808 (N.D.W.Va. May 13, 2011) 29

Major Tours, Inc. v. Colorel
No. 05-3091, 2009 WL 2413631 (D.N.J. Aug. 4, 2009) 17

Philadelphia Gear Corp. v. Techniweld, Inc.
No. 90-5671, 1992 WL 99622 (E.D. Pa. May 1, 1992) 29

Porter v. Nationscredit Consumer Discount Co.
No. 03-3768, 2004 WL 1753255 (E.D. Pa. July 8, 2004) 22

Radio Corp. of Am. v. Raytheon Mfg. Co.
296 U.S. 459 (1935) 28

Romero v. Allstate Ins. Co.
344 Fed. App'x. 785 (3d Cir. 2009) 6

Uniden America Corp. v. Ericsson, Inc.
181 F.R.D. 302 (M.D.N.C. 1998) 16

Zen Investments, LLC v. Unbreakable Co.
No. 06-4424, 2008 WL 4489803 (E.D. Pa. Oct. 7, 2008) 15

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 26(b)(1) 17, 18, 26

Fed. R. Civ. P. 36 .... passim

Fed. R. Civ. P. 36(a)(4) 15, 16, 29

Fed. R. Civ. P. 36(a)(6) 16

Fed. R. Civ. P. 30(b)(6) 10, 18

I. INTRODUCTION

For nearly ten years, Allstate has failed to produce a meaningful volume of documents related to the Preparing for the Future Group Reorganization Program ("Mass Termination Program"), including documents from custodians who were responsible for the Release-signing requirement that Defendants imposed on Plaintiffs and 6,200 other employee agents.

(1) Allstate has failed to produce ***any*** electronically-stored information ("ESI"), including e-mail, with associated metadata, for 63 of the parties' 82 agreed-upon custodians.

(2) Allstate did not produce ***any*** ESI from the custodial files of 22 individuals whom Allstate itself has identified as persons most knowledgeable about the Release and Mass Termination Program, and from whom Plaintiffs requested that Allstate collect and produce responsive documents.[1]

(3) Allstate has failed to produce ***any*** documents, whether in hard-copy or electronic format, from any of the Allstate e-mail accounts and/or work-related computers—over which Allstate took possession—of any of the 33 named Plaintiffs (who are among the parties' 82 agreed-upon custodians).

(4) Allstate failed to instruct all of the parties' agreed-upon custodians to preserve documents and did not instruct other custodians to do so in a timely manner.

(5) Allstate failed to deactivate the auto-delete functions of its e-mail systems, failed to preserve back-up tapes of the ESI on its servers, and failed to take snapshots of the ESI on the work computers of key custodians when Allstate reasonably anticipated litigation.[2]

To confirm these deficiencies, Plaintiffs served Requests for Admission ("Requests") concerning Allstate's failure to take all necessary steps to preserve "Program-related" documents once litigation over the Mass Termination Program was reasonably anticipated, and to adequately search for and collect such documents. Pursuant to Rule 36 of the Federal Rules of

[1] In fact, while Allstate has refused to provide the custodial information for the hard-copy documents it produced prior to 2010 (despite having agreed in November 2002 to provide source information for its documents), the custodial information that Allstate has provided for its 2010-2011 productions suggests that Allstate has failed to produce any documents ***whatsoever*** from the custodial files of 18 of these 22 individuals.

[2] Similarly, Defendant Edward Liddy has not produced any documents, and contends that he has no relevant documents to produce. Defendants Allstate and Liddy are collectively referred to as "Defendants."

Civil Procedure, Allstate was required to "fairly respond to the substance" of each Request, after conducting a reasonable investigation. Rather than do so, however, Allstate appears to have conducted virtually no investigation, has raised frivolous objections, and has otherwise evaded answering Plaintiffs' Requests.

First, Allstate has refused to admit or deny 62 of the 145 Requests, and has objected to at least another 28 Requests, based upon its assertion that the phrase "Program-related" is somehow vague, ambiguous, and overly broad. This objection fails for multiple reasons:

- Allstate has waived any objection to the phrase "Program-related," because: (a) Allstate has in fact answered several Requests that use the phrase "Program-related;" and (b) Allstate has repeatedly served and responded to discovery that seeks Program-related information and documents.

- Allstate cannot claim that the phrase "Program-related" is vague or ambiguous, because: (a) this boilerplate objection, which Allstate has yet to explain, was not properly raised; (b) Plaintiffs have clearly and unambiguously defined "Program-related" as all documents concerning the Mass Termination Program, which necessarily includes the Release; and (c) Plaintiffs' Requests track Allstate's contention that it instructed certain custodians to retain—and that Allstate collected—all documents "concerning the Preparing for the Future Group Reorganization Program and/or the Release"—that is, all "Program-related" documents.

- Plaintiffs' "Program-related" Requests are not overly burdensome, because: (a) rather than seeking merits-based discovery, they merely request admissions about Allstate's efforts to preserve documents concerning the Mass Termination Program; (b) this information is crucial for Plaintiffs to confirm the extent to which Allstate has failed to preserve Program-related documents, which will impact Plaintiffs ability to prove their challenges to the Release; and (c) the Third Circuit and this Court have ruled that Plaintiffs are entitled to discovery about the Mass Termination Program.

Second, Allstate has improperly re-written 6 Requests, which seek an admission that Allstate did not instruct certain custodians to search for and preserve "Program-related" documents prior to May 1, 2000, by improperly substituting "Program-related" with "Release-related," as defined by Allstate. Rule 36 does not permit an answering party to substitute one term for another that it would prefer to use. Moreover, Allstate's definition of "Release-

related"—as all information related to Plaintiffs' legal challenges to the Release—is unworkable and frustrates the purpose behind Plaintiffs' Requests, because this definition: (a) fails to convey a concrete, objective, and factual understanding of what documents fall within the definition of "Release-related"—and the universe of documents that Allstate has lost; and (b) renders any admission meaningless, since Allstate would not have known about all of Plaintiffs' legal theories prior to May 1, 2000 and therefore could not have instructed its custodians to preserve all "Release-related" documents (as defined by Allstate).

Finally, Allstate stated, without sufficient explanation, that it could neither admit nor deny 18 Requests. Each of these answers is defective because: (a) contrary to Rule 36, Allstate has failed to explain in detail why it cannot admit or deny these Requests; (b) it is simply inconceivable that Allstate can neither admit nor deny the basic matters in these Requests, including whether Allstate conducted electronic searches for Program-related ESI for certain custodians; and (c) Allstate appears not to have conducted a reasonable investigation.

Put simply, although Allstate may not want to admit that it failed to meet its obligations to preserve, search for, and collect relevant documents concerning the Mass Termination Program, Rule 36 obligates it to do so. Because Allstate's answers are insufficient, Plaintiffs' motion should be granted, and each of the Requests that Allstate has incorrectly refused to admit or deny should be deemed admitted.

II. BACKGROUND

A. Defendants Forced Plaintiffs And Other Employee Agents To Sign The Release As Part Of The Mass Termination Program.

In November 1999, Allstate had approximately 15,000 "captive" insurance agents in the United States who could sell and service only Allstate-authorized insurance and financial services products. (*See* Pls. Sec. Am. Compl., Doc. No. 223, at ¶¶ 55, 72, 99). More than 6,000

of these "captive" insurance agents were employee agents, as opposed to so-called "independent contractors," with standardized "R830" or "R1500" contracts which permitted termination only for "good cause." (*Id.* at ¶¶ 1, 3, 56, 60-62, 72, 183-198). These standardized "R830" and "R1500" contracts created an employment relationship that entitled Allstate's employee agents, including Plaintiffs, to a broad and comprehensive package of employee benefits, including a pension plan, a defined contribution plan, comprehensive medical insurance, dental insurance, long-term disability insurance, and life insurance. (*Id.* at ¶¶ 58, 65, 111-112).[3]

As part of an effort to eliminate the payment of benefits to employee agents and to weed out older employee agents, Defendants designed and implemented the Mass Termination Program, which they called the "Preparing for the Future" Group Reorganization Program. (*Id.* at ¶¶ 73-80, 111). Through the Mass Termination Program, Allstate terminated its employment relationship with virtually all remaining employee agents in the United States by December 31, 2000. (*Id.* at ¶¶ 75, 77). No part of the Program was subject to negotiation. (*Id.* at ¶¶ 88-91, 157).

Apparently recognizing that the Mass Termination Program was illegal and violated their agents' rights (*id.* at ¶¶ 73, 78-85, 153), Defendants coerced, pressured, and misled employee agents into signing the Release, which purported to "release, waive, and forever discharge Allstate . . . from any and all liability . . . or claims for relief or remuneration of any kind whatsoever . . . arising out of . . . the termination of my employment . . . or my transition to independent contractor status . . . . " (*Id.* at ¶ 87).

[3] Most employee agents had to invest large amounts of their own money in their agencies and books of business, to recruit family members to work for minimal or no pay, and to work long hours themselves. (*Id.* at ¶¶ 61, 65, 92-97). To recoup their investments, therefore, employees had to remain with Allstate so that they could continue to earn commissions upon the renewal of policies they sold and, eventually, the retirement benefits promised by the company. (*Id.*).

On August 1, 2001, Plaintiffs filed a putative class action lawsuit against Defendants ("*Romero I*"), seeking relief for claims arising out of the illegal Mass Termination Program and Release. Each Plaintiff has asserted claims for: age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA"); interference with pension and other employment-related benefits under Section 510 of the Employee Retirement Income Security Act ("ERISA"); unlawful retaliation under the ADEA and ERISA; breach of contract; and breach of fiduciary duty. (*See* Pls. Sec. Am. Compl., Doc. No. 223).

Anticipating that Defendants would raise the Release as a defense to certain of these claims (*see* Defs. Answer, Doc. No. 228, at Third Affirmative Def.), Plaintiffs also seek a declaratory judgment that the Release is invalid for multiple reasons, including that:

(1) it was executed under duress;

(2) it was not executed knowingly and voluntarily, in part because of a series of misrepresentations by Defendants;

(3) there was no valid consideration for the Release;

(4) Defendants violated public policy in conditioning continued service on execution of the Release;

(5) it was procedurally and substantively unconscionable;

(6) Defendants retaliated against non-Release-signers and threatened retaliation against other agents;

(7) Defendants violated the disclosure requirements of the OWBPA, 29 U.S.C. § 626(f)(1); and

(8) the Release was part and parcel, and in furtherance of, Defendants' unlawful scheme to interfere with the statutory and contractual rights of its employee agent—that is, the Mass Termination Program.

(*See* Pls. Sec. Am. Compl., Doc. No. 223, at ¶¶ 150-159).[4]

---

[4] Plaintiffs' Second Amended Complaint was filed on July 28, 2010.

About four months later, the *Romero I* Plaintiffs, joined by four other Plaintiffs, brought a separate action against Allstate and the Administrator of the Agents Pension Plan ("*Romero II*"), alleging that they violated the "anti-cutback" and fiduciary-duty provisions of ERISA. (*See* Pls. Am. Compl., No. 01-6764, Doc. No. 76). As in *Romero I*, the defendants in *Romero II* have asserted the validity of the Release as an affirmative defense to Plaintiffs' claims. (*See* Defs. Answer, Doc. No. 82, at Sec. Affirmative Def.).

Finally, on December 27, 2001, the United States Equal Employment Opportunity Commission ("EEOC") brought its own action against Allstate Insurance Company, alleging that it unlawfully retaliated against all employee agents, in violation of the ADEA and other federal employment statutes, by refusing to permit them to continue as Allstate employees unless they signed the Release. Like Plaintiffs, the EEOC seeks a declaratory judgment that the Release is invalid. (EEOC First Am. Compl., No. 01-7042, Doc. No. 2, at pages 5-7).[5]

B. Allstate Has Repeatedly Sought To Avoid The Third Circuit's Mandate.

The Third Circuit has ordered "further discovery into the ***facts*** surrounding the signing of the releases." *Romero v. Allstate Ins. Co.,* 344 Fed. App'x. 785, 793 (3d Cir. 2009) (emphasis added).

Consistent with the Third Circuit's mandate, Plaintiffs served document requests concerning the Mass Termination Program and Plaintiffs' challenges to the validity of the Release. Among other documents, Plaintiffs sought "[a]ll documents concerning the creation, adoption and implementation of the Mass Termination Program," "[a]ll documents that Allstate disseminated . . . relating to the Mass Termination Program," and "[a]ll documents relating to the Release." (Pl. Document Requests, Doc. No. 214-7, at Doc. Request Nos. 32, 34, 36). Because Defendants refused to produce documents responsive to those requests and refused to confirm

[5] *Romero I* and the action brought by the EEOC were consolidated in 2002.

that they had preserved all ESI, in native format and with all corresponding metadata, Plaintiffs filed a motion to compel on June 25, 2010. (*See* Pls. Mot. To Compel, Doc. No. 214).

C. On October 21, 2010, The Court Compelled Defendants To Produce Responsive Documents And To Engage In "Meet And Confer" Sessions With Plaintiffs.

On October 21, 2010, the Court granted, in large part, Plaintiffs' motion to compel, and entered an Order compelling Defendants to produce all responsive documents, including ESI concerning the Mass Termination Program, based upon mutually-agreed-upon search parameters. (*See* Oct. 21, 2010 Order, Doc. No. 237). The Court further ordered Defendants to produce all corresponding metadata for electronic documents that had not previously been produced, emphasizing that this case is a "nationwide class action involving potentially thousands of individuals that were employed by a large corporate defendant" and that metadata "will provide Plaintiffs with crucial information and permit them to engage in a more effective and meaningful search and use of Defendants' extensive documentation." (Oct. 21, 2010 Mem. Op., Doc. No. 236, at 20).

In addition, the Court directed Defendants to engage in "well-intentioned meet and confer sessions with Plaintiffs' counsel to discuss search strategies on a going-forward basis," including "the search terms that Defendants intend to use, the custodians they intend to search, the date ranges for their new searches, and any other essential details about the search methodology they intend to implement for the production of electronically-stored information concerning the Release." (Oct. 21, 2010 Mem. Op., Doc. No. 236, at 22, 23, 25; Oct. 21, 2010 Order, Doc. No. 237, at ¶ 6).

Finally, although the Court did not require Allstate to provide a certification that they have taken all necessary steps to preserve documents, including ESI, since they reasonably

anticipated litigation, the Court invited Plaintiffs to seek such information through discovery, and then to present any evidence of spoliation to the Court. (Oct. 21, 2010 Mem. Op., Doc. No. 236, at 25).

D. <u>Allstate Evaded Plaintiffs' ESI-Related Questions.</u>

Following the Court's Order, the parties engaged in a series of meet-and-confer sessions. Retreating from many of its prior discovery positions, Allstate committed to do, among other things, the following:

(a) provide answers to Plaintiffs' ESI-related questions concerning the existence of relevant electronic documents, including how certain documents were stored and the steps that Defendants took to preserve documents;

(b) run approximately seventy-five (75) search strings across the pre-2003 ESI of approximately eighty-two (82) custodians, and then to produce all responsive electronic documents with metadata; and

(c) withdraw its objections and provide responses to Plaintiffs' Interrogatories, including Interrogatory Nos. 13 and 14, which seek information about each step that Allstate took to preserve documents and what documents, both electronic and hard-copy, have been lost.

(Pls. Renewed Mot. To Compel Answers To Plaintiffs' First Set Of Interrogatories Directed To The Release ("Pls. Renewed Mot. To Compel"), Doc. No. 262-2, at 7).

Consistent with the Court's October 21, 2010 Order, Plaintiffs asked Allstate a number of ESI-related questions that were necessary for them to understand the universe of available ESI that Defendants would have to search, review, and produce in compliance with the Court's October 21, 2010 Order. (*See* Pls. Nov. 8, 2010 Letter, Doc. No. 262-7, at 2-4) (identifying list of ESI questions). Many of these questions focused directly on the nature and efficacy of Defendants' preservation efforts. (*Id.*).

Although Plaintiffs spent several hours attempting to obtain answers to their ESI questions during multiple meet-and-confer sessions, Allstate refused to provide non-evasive,

direct, and complete answers to those questions. (*See* Pls. Apr. 26, 2011 Letter, Doc. No. 262-10, at 13-15 (noting that "[r]ather than being forthright and cooperative, Allstate has steadfastly avoided giving us straightforward answers to even the most basic questions . . . .")).

F. Allstate Has Failed To Produce Documents From Relevant Custodians And Has Made Concessions That Further Confirm The Need For Discovery Of Allstate's Preservation Practices.

In addition to failing to answer fully Plaintiffs' ESI-related questions, Allstate also has failed to produce a meaningful volume of ESI for a class action of this size and magnitude. Prior to the Court's October 21, 2010 Order, Allstate had produced virtually no electronic documents, and, although it had produced a scant number of e-mails in "hard copy form," none relate to the Release. (*See* Pls. Br. In Support Of Mot. To Compel Documents Responsive To Pl. First Set Of Document Requests, Doc. No. 214-2, at 5, 22-24; Lieder Decl., Doc. No. 214-3, at ¶¶ 2, 9).

To date, Defendants have not produced ***any*** ESI, with corresponding metadata, for sixty-three (63) of the parties' eighty-two (82) agreed-upon custodians. (*See* Oct. 6, 2011 Amended and Corrected Declaration of Coleen M. Meehan ("Oct. 6, 2011 Meehan Decl."), attached hereto, at ¶ 3; July 13, 2011 Declaration of Coleen M. Meehan ("July 13, 2011 Meehan Decl."), Doc. No. 262-3, at ¶ 3; *see also* Pls. Apr. 26, 2011 Letter, Doc. No. 262-10, at 10-12; Pls. June 2, 2011 Letter, Doc. No. 262-11, at 13-14). Indeed, Defendants have failed to produce ***any*** documents, whether in hard-copy or electronic format, from ***any*** of the Allstate e-mail accounts or work-related computers—over which Allstate assumed possession—of any of the thirty-three (33) named Plaintiffs, who are also agreed-upon custodians. (*See* Oct 6, 2011 Meehan Decl., attached hereto, at ¶ 4; July 13, 2011 Meehan Decl., Doc. No. 262-3, at ¶ 4).

Worse yet, Defendants have not produced ***any*** ESI from the custodial files of twenty-two (22) of the individuals whom Defendants identified as "most knowledgeable" about the Release and Mass Termination Program.[6] (*See* Oct 6, 2011 Meehan Decl., attached hereto, at ¶ 5; Pls. Renewed Mot. To Compel, Doc. No. 262-2, at 9-10; July 13, 2011 Meehan Decl., Doc. No. 262-3, at ¶¶ 6-7). These key custodians include, among others, Defendant Edward Liddy, Chairman and CEO; Robert Gary, President of Allstate Property & Casualty; Richard Cohen, President of Allstate Protection; Jeff Kaufman, General Vice President of Leadership & Performance; Michael (Mick) McCabe, Senior Vice President and Chief Legal Officer; Barry Hutton, Vice President of Sales; Candice Beinlich, Human Resources Senior Manager; George Giles, Human Resources; Martha Avery, Associate General Counsel; Allstate's Board of Directors; James Dill, Home Office Counsel; and Allstate's Board of Directors. (*Id.*). Similarly, Allstate has produced just ***one*** electronic document from the custodial files of agreed-upon custodian Phil Lawson, Field Vice President, and that document does not even concern the Mass Termination Program. (Oct. 6, 2011 Meehan Decl., at ¶ 8; Pls. Renewed Mot. To Compel, Doc. No. 262-2, at 11; July 13, 2011 Meehan Decl., Doc. No. 262-3, at ¶ 8).

Moreover, Allstate has made concessions that acknowledge that it did not take all necessary steps to preserve documents and, therefore, may have lost relevant documents. One of Allstate's previous Rule 30(b)(6) deponents for class certification purposes acknowledged in deposition testimony that e-mails and other documents concerning the Program were "deleted." (Jan. 16, 2003 Dep. of Karlene Zuzich, Doc. No. 262-21, at 62:21-63:9).

---

[6] Allstate similarly failed to produce—in response to Plaintiffs' Document Requests Directed To The Release—any hard-copy documents from the custodial files of eighteen (18) of these individuals, including, most significantly, Barry Hutton, Richard Cohen, Robert Gary, Jeff Kaufman and Edward Liddy. (*See* Oct. 6, 2011 Meehan Decl., at ¶ 6). While Allstate did provide some hard-copy documents from the custodial files of four (4) of the twenty-two (22) most knowledgeable persons, the sole document family produced from the custodial files of George Giles was a 1997 letter (with attachments) directed to the IRS, which both predated and did not even concern the 1999 Mass Termination Program. (*Id.* at ¶ 7).

In addition, Allstate has now conceded that it: (a) failed to save previously-collected documents concerning the Release in native format; (b) failed to disable the auto-delete function of its e-mail systems; (c) failed to instruct all of the parties' agreed-upon custodians to preserve relevant documents;[7] (d) failed to instruct key custodians, such as Edward Liddy, Phil Lawson, and Candice Beinlich, to preserve relevant documents when Allstate first anticipated litigation concerning the Mass Termination Program, but, instead, waited until some unidentified point after Plaintiffs filed their Complaint to do so; (e) failed to produce ESI, with metadata, from 63 of the parties' 82 agreed-upon custodians; and (d) failed to save back-up tapes of the ESI, including e-mails, that resided on its servers during the relevant time period. (*See* Oct. 6, 2011 Meehan Decl., attached hereto, at ¶ 9; Allstate's Fourth Amended And Supplemental Responses And Objections To Plaintiffs' First Set Of Interrogatories Directed To The Release ("Allstate's Fourth Am. Responses"), attached hereto as Ex. C to Oct. 6, 2011 Meehan Decl., at 3-4, 18-21; July 13, 2011 Meehan Decl., Doc. No. 262-3, at ¶ 9; Pls. Apr. 26, 2011 Letter, Doc. No. 262-10, at 8-9).

Finally, despite his role in approving the Mass Termination Program, Defendant Edward Liddy has produced no documents, and claims that he has no documents to produce. (*See* Def. Liddy Jan. 12, 2011 E-mail, Doc. No. 262-14).

G. Plaintiffs' Served The Requests To Confirm And Understand The Extent Of Allstate's Preservation Failures

On June 22, 2011, in light of Allstate's apparent preservation failures, Plaintiffs served Requests concerning Allstate's failure to preserve and collect "Program-related" ESI for many of

[7] Allstate's May 13, 2011 letter confirmed that hold instructions were never provided to, among others, the following: (1) any members of Allstate's Board of Directors other than Mr. Liddy; (2) George Giles; (3) Jeffrey Finley; (4) Kevin Novak; (5) Robert Gary; and (6) Anise Wilely Little—all of whom were identified as persons knowledgeable, if not most knowledgeable, about aspects of the Release and Mass Termination Program. (*See* Defs. May 13, 2011 Letter, Doc. No. 262-13).

the parties' agreed-upon custodians. (Pls. Second Set Of Requests For Admission ("Requests"), attached hereto as Ex. A to Oct. 6, 2011 Meehan Decl.). For each of the agreed-upon custodians for whom Allstate produced no ESI (or virtually no ESI), Plaintiffs requested that Allstate admit that:

- The custodian "created, obtained or otherwise had in her custody or possession Program-related ESI during the Relevant Time Period." (*See, e.g.,* RFA No. 3)

- Allstate did not instruct the custodian to "search for and preserve all Program-related Documents." (*See, e.g.,* RFA No. 4).

- Allstate did not collect "all Program-related ESI" that the custodian "created, obtained, or otherwise had in her custody or possession at any time during the Relevant Time Period." (*See, e.g.,* RFA No. 5).

- Allstate did not retain all "Program-Related ESI" that the custodian "created, obtained, or otherwise had in her custody or possession at any time during the Relevant Time Period in her capacity as an employee ore representative of Allstate." (*See, e.g.,* RFA No. 6).

- During and after the Relevant Time Period, Allstate "did not disable the 'janitorial' or 'auto-delete' function . . . for the Allstate e-mail accounts" of the custodian. (*See, e.g.*, RFA No. 7-8).

- Allstate "did not make a Forensic Copy (or otherwise make an electronic copy)" of the hard drive(s) of the work-related computer(s) the custodian used during the Relevant Time Period as an employee or representative of Allstate. (*See, e.g.,* RFA No. 9).

- Prior to January 1, 2010, Allstate "did not search for Program-related ESI from the Relevant Time Period by conducting electronic searches—such as key word searches—against the ESI" of the custodian. (*See, e.g.*, RFA No. 10).

- Allstate did not preserve all Program-related ESI from the Relevant Time Period that existed on the custodian's work-related computers when he or she left Allstate's employment. (*See, e.g.*, RFA No. 11).

In crafting their Requests, Plaintiffs defined "Program-related" as "information that . . . has any relevance to or connection with the [Mass Termination] Program, including the Release and Rehiring Moratorium." (Pls. Requests, Ex. A, Definitions, at ¶ 17).

Although Allstate's answers were due on or about July 22, 2011, Allstate requested an extension of time—until August 31, 2011—to answer Plaintiffs' Requests. (*See* Oct. 6, 2011 Meehan Decl., attached hereto, at ¶ 2). Plaintiffs granted that request. (*Id.*). During the nearly 70 days that Allstate had to respond to Plaintiffs' Requests, Allstate never suggested that it would be unable to answer them or that it had any objection to any language in the Requests. (*Id.*).

On August 31, 2011, Allstate served its Responses. (*See* Allstate's Responses To Plaintiffs' Requests, attached hereto as Ex. B to Oct. 6, 2011 Meehan Decl.). Attempting once again to prevent Plaintiffs from confirming the failures in Allstate's document preservation efforts, Allstate objected to, qualified, and/or gave an indeterminate answer to nearly every Request. Among other things, Allstate:

- refused to admit or deny nearly half of the Requests—that is, 62 of the 145—based upon its assertion that the phrase "Program-Related" was "overly broad, unduly burdensome, vague, ambiguous, indefinite, and subject to multiple interpretations,"[8] and objected to at least another 28 of the Requests on this basis;[9]

- unilaterally rewrote 6 Requests by replacing "Program-related" with Allstate's narrow and unworkable definition of "Release-related;"[10] and

- stated, without explanation, that it could neither admit nor deny 18 of the Requests that seek basic preservation admissions, including 14 Requests that seek an admission that Allstate did not electronically search for Program-related ESI for particular custodians.[11]

(*Id.*).

---

[8] *See* Allstate's Responses, Ex. B, at Nos. 3, 5, 6, 11, 12, 14, 15, 20, 22, 23, 27, 28, 30, 35, 37, 38, 43, 44, 46, 47, 51, 52, 54, 55, 59, 60, 62, 63, 68, 69, 71, 72, 77, 78, 79, 81, 86, 88, 89, 94, 95, 97, 98, 103, 104, 106, 107, 112, 113, 114, 115, 120, 121, 122, 126, 134, 136, 137, 138, 139, 140, 141.

[9] *See* Allstate's Responses, Ex. B, at Nos. 4, 10, 13, 19, 21, 26, 29, 34, 36, 42, 45, 50, 53, 58, 61, 67, 70, 76, 80, 85, 87, 93, 96, 102, 105, 111, 119, 142.

[10] *See* Allstate's Responses, Ex. B, at Nos. 4, 13, 21, 45, 80, 96.

[11] *See* Allstate's Responses, Ex. B, at Nos. 10, 19, 26, 34, 42, 50, 53, 58, 67, 76 , 85, 87, 93, 102, 111, 119, 123, 124.

H. Allstate Has Refused To Withdraw Its Objections And Properly Answer Plaintiffs'Requests.

By letter dated September 2, 2011, Plaintiffs detailed the reasons why the responses Allstate had served two days earlier were deficient, and asked Allstate to withdraw its objections to the Requests. (*See* Pls. September 2, 2011 Letter, attached hereto as Ex. D to Oct. 6, 2011 Meehan Decl.). After Allstate refused to do so, the parties met and conferred on September 15, 2011.

During the meet and confer, Plaintiffs confirmed that "Program-related" simply refers to all factual information about the Mass Termination Program and explained that Allstate's objections to the phrase are frivolous for a host of reasons, including that:

- Plaintiffs clearly defined "Program-related," and factual information concerning the Mass Termination Program is relevant to Plaintiffs' many challenges to the Release, including that Plaintiffs did not sign the Release "knowingly and voluntarily," that the Release was executed under duress, and the Release was part and parcel of an illegal or improper scheme;

- Allstate previously served and answered other discovery in this action that specifically requests information, such as the identity of all documents, concerning the Mass Termination Program;

- Notwithstanding its objections, Allstate actually answered several Requests that include the phrase "Program-related," thereby confirming that "Program-related" was neither ambiguous nor overbroad; and

- Allstate asserted repeatedly in its Fourth Amended and Supplemental Responses and Objections to Plaintiffs' First Set of Interrogatories ("Plaintiffs' Interrogatories"), served August 12, 2011, that it instructed certain custodians to retain—and that Allstate in fact collected—documents "concerning the Preparing for the Future Group Reorganization Program and/or the Release."

(*See* Pls. September 21, 2011 Letter, attached hereto as Ex. E to Oct. 6, 2011 Meehan Decl., at 2-4).

Immediately following the meet and confer, Allstate confirmed that it would not answer Plaintiffs' Requests, as drafted. (*See* Allstate's September 16, 2011 Letter, attached hereto as Ex. F to Oct. 6, 2011 Meehan Decl., at 1). Instead, Allstate stated that it would only respond fully to Plaintiffs' Requests if Plaintiffs agreed to: (a) permit Allstate to construe the Requests to seek "Release-related" information (rather than "Program-related" information), based upon Allstate's definition of that phrase; and (b) give Allstate at least another 30 days to complete the investigation required by Rule 36 and thereafter provide its ***first*** complete set of answers to all of the Requests. (*Id.* at 2).

Plaintiffs rejected Allstate's so-called "proposal," explaining that Allstate was not entitled to rewrite the Requests by substituting "Release-related" for "Program-related." (*See* Pls. September 21, 2011 Letter, Ex. E, at 1). Plaintiffs further explained that Allstate's definition of "Release-related" was inadequate for at least two reasons: (a) it sought to define "Release-related" according to Plaintiffs' legal theories, thereby failing to convey a ***concrete***, ***objective***, and ***factual*** understanding of the universe of documents that fall within that definition; and (b) it was too narrow (in some respects), because, for instance, it failed to account for the universe of documents implicated by Plaintiffs' "part and parcel" challenge to the Release. (*Id.* at 3).

Plaintiffs gave Allstate one more opportunity to withdraw its objections. On September 26, 2011, Allstate declined to do so, continuing its pattern of preventing Plaintiffs from understanding the extent to which Allstate has failed to preserve documents, including ESI. (*See* Allstate's September 26, 2011 Letter, attached hereto as Ex. G to Oct. 6, 2011 Meehan Decl.).

III. ARGUMENT

Rule 36 does not permit Allstate's gamesmanship. It is well-settled that "[a] party must admit a fact it knows to be true, even if that admission will gut its case and subject it to summary

judgment." *Zen Investments, LLC v. Unbreakable Co.,* No. 06-4424, 2008 WL 4489803, at *1 (E.D. Pa. Oct. 7, 2008). It is equally well-settled that "hair-splitting distinctions" are improper, and that "[a]nswers that appear to be non-specific, evasive, ambiguous, or that appear to go to the accuracy of the requested admissions rather than the 'essential truth' contained therein are impermissible . . . ." *Guinan v. A.I. DuPont Hosp. For Children,* No. 08-228, 2008 WL 938874, at *1 (E.D. Pa. Apr. 7, 2008) (internal citations omitted).

Consistent with these principles, the responding party bears the burden of admitting as much of a request as possible. Fed. R. Civ. P. 36(a)(4). If a party admits "only a part of a matter, the answer must specify the part admitted and qualify or deny the rest." *Id.* If a party does not admit or deny a request, the party must "state ***<u>in detail</u>*** why the answering party cannot truthfully admit or deny it." *Id.* (emphasis added).

Before answering a request, "the answering party [must] make reasonable inquiry and secure such knowledge and information as are readily obtainable by him." Advisory Committee Note, 1970 Amendment to Fed. R. Civ. P. 36; *Asea, Inc. v. Southern Pacific Transp. Co.,* 669 F.2d 1242, 1246 (9th Cir. 1981); *Guinan*, 2008 WL 938874, at *2. To satisfy this burden, the answering party must conduct an "investigation and inquiry of any of defendant's officers, administrators, agents, employees, servants, enlisted or other personnel, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response." *Herrera v. Scully,* 143 F.R.D. 545, 548 (S.D.N.Y. 1992) (internal quotations and citations omitted); *see also Loudermilk v. Best Pallet Co.*, LLC, No. 08-06869, 2009 WL 3272429, at *2 (N.D. Ill. Oct. 8, 2009). This may include former employees. *See, e.g.*, *A. Farber & Partners, Inc. v. Garber*, 237 F.R.D. 250, 254, 256 (C.D. Cal. 2006); *Uniden America Corp. v. Ericsson, Inc.*, 181 F.R.D. 302, 304 (M.D.N.C. 1998).

Rule 36 permits the party who served the requests to move "to determine the sufficiency of an answer or objection." Fed. R. Civ. P. 36(a)(6). It also authorizes a reviewing court to impose stringent penalties for non-compliance. If an objection is not justified or if the answer is insufficient, the reviewing court "may order either that the matter is admitted or that an amended answer be served." Fed. R. Civ. P. 36(a)(6); *see also House v. Giant of Md., LLC*, 232 F.R.D. 257, 262 (E.D. Va. 2005) ("The party to whom requests for admission are propounded acts at his own peril when answering or objecting. Gamesmanship in the form of non-responsive answers, vague promises of a future response, or quibbling objections can result in the request being deemed admitted or in a post-trial award of monetary sanctions *without* prior opportunity to correct the deficiency.").

Here, as described below, Allstate's responses fail to comply with Rule 36 for the following independent reasons:

(1) Allstate has refused to admit or deny 62 of Plaintiffs' Requests based upon an improper and frivolous objection to Plaintiffs' use of "Program-related;

(2) Allstate has improperly rewritten 6 of the Requests to seek "Release-related," rather than "Program-related," information; and

(3) Despite now having had more than 90 days to respond to the Requests, Allstate has stated, without sufficient explanation, that it can neither admit nor deny 18 of the Requests that seek basic information about preservation efforts.

Because Allstate's answers are insufficient, each of these Requests should be deemed admitted in accordance with Rule 36.

A. Answers To Plaintiffs' Requests Are Crucial In Light Of Allstate's Apparent Failure To Preserve Relevant Documents.

It is well-settled that a party may obtain discovery about the "existence," "custody," and "location" of "any documents" relevant to a party's claim or defense. Fed. R. Civ. P. 26(b)(1). Applying Rule 26(b)(1), courts routinely permit discovery of information about an opposing

party's efforts to collect and preserve electronic and hard-copy documents. *See, e.g., Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 2413631, at *2 (D.N.J. Aug. 4, 2009) ("plaintiffs are entitled to know which categories of electronic storage information employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end"); *In re eBay Seller Antitrust Litig.*, No. C07-1882JF, 2007 WL 2852364, at *1-2 (N.D. Cal. Oct. 2, 2007) (permitting discovery of "retention and collection efforts" of electronically-stored information); *Dickard v. Oklahoma Mgmt. Servs. for Physicians, LLC*, No. 5:06-cv-05176-RTD, 2007 WL 2460618, at *5 (W.D. Ark. Aug. 24, 2007) (requiring defendant "to describe in detail the effort it has made to 'preserve, search for, identify, collect, review, and produce relevant document[s]'"); *Doe v. District of Columbia*, 230 F.R.D. 47, 55-56 (D.D.C. 2005) (compelling deposition testimony on "process used to collect the documents that have been produced or will be produced . . . in response to plaintiff's requests for production of documents") (internal quotations omitted).

Consistent with Rule 26(b)(1) and the well-settled case law applying this Rule, Plaintiffs seek admissions about the nature and efficacy of Allstate's preservation efforts for particular custodians. Notably, Allstate has not objected to this form of discovery, has not suggested that Plaintiffs are not entitled to seek admissions about preservation efforts, and, in fact, has served similar Requests on Plaintiffs.

It is also clear that Plaintiffs need binding admissions regarding the full extent of Allstate's failure to preserve documents related to the Release and Mass Termination Program. The limited record indicates that Allstate has not retained all relevant documents that existed in its possession, custody or control between April 1999 and December 2002:[12]

[12] Plaintiffs contend that Allstate's preservation obligations were triggered no later than April 1999 because, among other reasons, the earliest Program-related document for which Allstate's November 25, 2002

- ***First***, Karlene Zuzich, an Allstate officer and one of its Rule 30(b)(6) designees in this action, testified that she did not have certain documents, including a 2000 draft rehire policy, in part because she maintained her records in her Outlook email folder and, in the third quarter of 2002, Allstate implemented a "new policy where things are being dumped out of our emails." (Zuzich Dep., Doc. No. 262-21, at 62:21-63:4). As a result, relevant emails were deleted. (*Id.* at 63:5-9).

- ***Second***, Allstate has conceded that: (a) it did not save previously-collected electronic documents in native format, which would necessarily include documents concerning the Release; (b) it has not saved back-up tapes during the relevant time period; (c) it never deactivated Allstate's auto-delete e-mail function; and (d) some of the parties' agreed-upon custodians were not the subject of Allstate's original instructions to preserve documents. (*See* Pls. Apr. 26, 2011 Letter, Doc. No. 262-10, at 8-9).

- ***Third***, for twenty-two (22) of the individuals whom Allstate has identified as the persons most knowledgeable about the Mass Termination Program and/or the Release and whom Plaintiffs requested be included as custodians for document collection and production purposes, Allstate did not produce any ESI. (*Id.* at 10-12; Pls. June 2, 2011 Letter, Doc. No. 262-11, at 14). Moreover, in response to Plaintiffs' Document Requests Directed To The Release, Allstate has also failed to produce any hard-copy documents for eighteen (18) of these individuals, including key agreed-upon custodians such as Barry Hutton, Jeff Kaufman , Richard Cohen and Edward Liddy. (*See* Oct. 6, 2011 Meehan Decl., attached hereto, at ¶¶ 6-7).

- ***Fourth***, Allstate has failed to produce any ESI, with corresponding metadata, from sixty-three (63) of the parties' eighty-two (82) agreed-upon custodians. (Pls. April 26, 2011 Letter, Doc. No. 262-10, at 10-12).

- ***Fifth***, Allstate has repeatedly refused to confirm that it preserved the ESI of custodians who are no longer employed by Allstate, including the Plaintiffs, and has not produced any ESI or other documents from any of the Plaintiffs' custodial files.

(*See* Oct. 6, 2011 Meehan Decl., attached hereto, at ¶¶ 2-9; Allstate's Fourth Am. Responses, Ex. C, at 3-4, 18-21; Pl. Mot. To Compel, Doc. No. 262-2, at 11-12; July 13, 2011 Meehan Decl., Doc. No. 262-3, at ¶¶ 2-9).

---

amended privilege log asserted attorney work product protection was dated April 19, 1999. According to the log, that April 19, 1999 document consisted of a letter from outside counsel that discussed "Preparing for the Future and termination of pension benefits." ("Pls. Renewed Mot. To Compel"), Doc. No. 262-2, at 21; Excerpt From Nov, 25, 2002 Am. Privilege Log, Ex. S, Doc. No. 226-22, at #ARIP00045). Notably, in 2010, Plaintiffs directed Allstate's attention to this entry to explain the basis for the April 19, 1999 date that Plaintiffs used in certain preservation-related discovery. On May 20, 2011, more than eight (8) years after originally serving its amended privilege log, Allstate purportedly changed its mind and produced an amended privilege log in which Allstate conveniently removed its work product claim for that April 1999 document, as well as for approximately 100 other documents that predated February 2000, the date when Allstate now asserts it first anticipated litigation concerning the Mass Termination Program.

To fully understand the extent to which relevant documents have been lost and, thus, the extent to which Plaintiffs may be prejudiced in their effort to show that the Release is invalid and/or unenforceable, Plaintiffs need full and complete answers to their Requests. Because Allstate has failed to provide such answers, Plaintiffs' motion to determine the sufficiency of Allstate's Responses should be granted.

B. Allstate Has Failed To Respond To Nearly Half Of Plaintiffs' Requests Based Upon Its Frivolous Objection To The Definition Of "Program-related."

Allstate has stated that it can neither admit nor deny 62 of Plaintiffs' Requests because Plaintiffs' provided definition of "Program-related in this context is overly broad, unduly burdensome, vague, ambiguous, indefinite, and subject to multiple interpretations." (*See*, *e.g.*, Allstate Response, Ex. B, at Response To Request No. 3). As described below, these answers are woefully insufficient.

1. Allstate Has Waived Any Objection To "Program-Related."

Allstate has waived its right to object to Plaintiffs' "Program-related" Requests for multiple reasons. As an initial mater, Allstate has already answered numerous Requests that include the phrase "Program-related" despite its contention that the phrase, as defined, is vague, ambiguous, and overbroad. By way of example, Allstate ***denied*** Request No. 29, which stated that "[a]t no time prior to May 1, 2000 did you instruct Rodney Daniels [Allstate's HR Senior Manager and Plan Administrator] to search for and preserve all Program-related Documents." (Allstate Response, Ex. B, at Request No. 29; *see also id.* at 36, 61, 76, 105) (emphasis added).[13] By doing so, Allstate has waived its objection to "Program-related."

At a minimum, Allstate's ***selective*** and ***inconsistent*** decision to respond definitively to some Requests that seek "Program-related" admissions, but not others, shows that Allstate is not

[13] These Requests seek an admission that Allstate did not instruct certain custodians to "search for and preserve all Program-related Documents."

asserting its objection in good faith. If Allstate truly did not understand what Plaintiffs meant by the phrase "Program-related" or believed that such a phrase was otherwise objectionable, Allstate would not have been able to answer—and therefore could not have denied—Request Nos. 29, 36, 61, 70, and 105. For this reason alone, Allstate's answers are insufficient. *See, e.g.*, *State Farm Mut. Automobile Ins. Co.,* No. 07-518, 2010 WL 1223588, at *4 (E.D. Pa. March 29, 2010) (granting motion to compel because "Defendants' attempt to construe the RFAs as compound, vague, and conveying improper inferences is [a] disingenuous attempt to shift the focus away from the essential truth of the information sought to the accuracy of the RFAs").

To make matters worse, Allstate has repeatedly sought to obtain discovery from Plaintiffs about all facets of the Mass Termination Program. By way of example only, Allstate's Third Set of Interrogatories asks each Plaintiff to identify, among other things, "***all Documents concerning the Preparing for the Future Group Reorganization Program*** and/or the Release . . . ." (Def. Third Set Of Interrogatories, attached hereto as Ex. H to Oct. 6, 2011 Meehan Decl., at No. 10) (emphasis added). Similarly, Interrogatory No. 11 requests that Plaintiffs identify each document that "***concern[s] the implementation of the Preparing for the Future Group Reorganization Program*** and/or the Release." (*Id.* at No. 11) (emphasis added). This discovery—which Allstate served on December 23, 2010—involves the very same language that Allstate now contends is vague, ambiguous, and overly broad.

Finally, Allstate has responded to prior discovery that specifically requests information about the Mass Termination Program. For instance, several of Plaintiffs' Interrogatories seek the equivalent of what Plaintiffs have defined as "Program-related" information, including:

- the identity of the persons most knowledgeable about the "creation, design, and structure of the Mass Termination Program" (Pls. First Set Of Interrogatories, Doc. No. 262-4, at No. 1(a));

- the identity of each individual who was responsible for "creating, designing, and structuring the Mass Termination Program" (*Id.* at No. 2(a));
- all databases, files, and documents that concern the "creation, design, and structure of the Mass Termination Program" (*Id.* at No. 3(a)); and
- when Allstate reasonably anticipated litigation concerning the Mass Termination Program and all steps taken to preserve documents since that date (*Id.* at No. 13).

Allstate has answered ***each*** of these Interrogatories. (*See* Allstate Answers To Pl. Interrogatories, Doc. No. 262-5).

Put simply, Allstate cannot identify certain individuals who are most knowledgeable about the Mass Termination Program, yet refuse to answer specific Requests about whether, for instance, Allstate searched for or collected Program-related documents for those individuals. Nor can Allstate ask Plaintiffs to identify all documents concerning the Mass Termination Program, yet refuse to properly answer Requests about Allstate's failure to preserve Program-related documents. Because Allstate's objection to the phrase "Program-Related" is frivolous, it should be overruled, and Request Nos. 3, 5, 6, 11, 12, 14, 15, 20, 22, 23, 27, 28, 30, 35, 37, 38, 43, 44, 46, 47, 51, 52, 54, 55, 59, 60, 62, 63, 68, 69, 71, 72, 77, 78, 79, 81, 86, 88, 89, 94, 95, 97, 98, 103, 104, 106, 107, 112, 113, 114, 115, 120, 121, 122, 126, 134, 136, 137, 138, 139, 140, and 141 should be deemed admitted.

2. Plaintiffs' Definition Of "Program-Related" Is Not Ambiguous.

Even if Allstate did not waive its objection to "Program-related" (and, for the foregoing reasons, Plaintiffs respectfully contend that it did), Allstate's cursory contention that the phrase "Program-related" is vague and ambiguous lacks merit for several reasons.

As an initial matter, this objection has not been sufficiently stated. It is well-settled that cursory or boilerplate objections, such as a party's statement that the request is "overly broad, burdensome, oppressive, vague or irrelevant," are insufficient to state a proper objection.

Duchesneau v. Cornell Univ., No. 08-CV-4856, 2010 WL 4117753, at *2 (E.D. Pa. Oct. 19, 2010) ("objecting party must state specific reasons supporting such grounds [for objecting]"); *see also Creely v. Genesis Health Ventures, Inc.*, No. 04-CV-0679, 2005 WL 44526, at *2 (E.D. Pa. Jan. 10, 2005) (applying rule); *Porter v. Nationscredit Con. Discount Co.*, No. 03-CV-3768, 2004 WL 1753255, at *1 (E.D. Pa. July 8, 2004) (holding that "[a]s case law and common sense dictate, Plaintiff must provide reasoning and specificity with each objection").

Here, Allstate has failed to substantiate its assertion that Plaintiffs' use of "Program-related" is vague or ambiguous—particularly when Allstate has served discovery using essentially the same terminology. (*See, e.g.*, Allstate Responses, Ex. B, at No. 4) (stating only that Allstate "objects to this Request on the grounds that the phrase 'Program-related' in this context is vague and ambiguous"). For this reason alone, this objection must be overruled.

Moreover, contrary to Allstate's assertion, Plaintiffs' definition of "Program-related" is neither vague nor ambiguous. Plaintiffs have clearly defined "Program-related" as all information that has any "connection with the [Mass Termination] Program"—which, in turn, Plaintiffs have defined as "Allstate's Preparing for the Future Group Reorganization Program announced on or about November 10, 1999, including all earlier iterations of the Program such as the Channel Integration Project or Early Bird Project, or another name by which it was known."[14] (Pl. Requests, Ex. A, at ¶¶ 16-17).

In addition, during the parties' September 15, 2011 meet and confer, as well as in subsequent correspondence, Plaintiffs further confirmed that "Program-related" should be interpreted in its plain sense—as "information concerning the Mass Termination Program." (Pls. September 21, 2011 Letter, Ex. E, at 2). Thus, Plaintiffs' definition of "Program-related" comprises a limited universe of

[14] This, of course, includes information about the Release-signing requirement of the Mass Termination Program.

documents: all documents that, on their face, relate to the Mass Termination Program. Nothing could be plainer. Because there is no ambiguity, Allstate's objection is clearly inappropriate. *See, e.g., Guinan*, 2008 WL 938874, at *2 (granting motion to strike, in part, because "[t]hese Requests for Admission are straightforward, and are deserving of a straightforward answer").

3. <u>Plaintiffs' Program-Related Requests Are Not Overbroad.</u>

Allstate has also refused to admit or deny 62 of the Requests because Plaintiffs' use of the phrase "Program-related" is purportedly "overly broad and unduly burdensome to the extent it requests information unrelated to Release-related ESI." (*See, e.g.*, Allstate Responses, Ex. B, at No. 3). Once again, Allstate's objection is frivolous.

Plaintiffs' Requests seek basic information regarding Allstate's efforts to preserve all documents factually related to the Mass Termination Program that were in Allstate's possession, custody, or control between April 1999 and December 2002. The basic factual information about the Mass Termination Program is at the heart of Plaintiffs' challenges to the Release. Indeed, Plaintiffs need to understand all of the facts concerning the Mass Termination Program in order to prove, *inter alia*, that: (a) the representations that Allstate made about the Mass Termination Program—prior to the deadline for signing the Release—were false; (b) the Mass Termination Program was an illegal, improper, and/or unlawful scheme and the Release was "part and parcel" of that scheme; (c) Plaintiffs did not execute the Release "knowingly and voluntarily," in part because the nature of the Mass Termination Program made it impossible for Plaintiffs to do so; and (d) the Release is unconscionable, in light of the Mass Termination Program and the context in which Allstate forced Plaintiffs to sign the Release. (Pl. Am. Compl., Doc. No. 223, at ¶¶ 148-159). Because Plaintiffs' ability to prove that the Release is invalid will be prejudiced if Allstate did not preserve all Program-related documents when

litigation became foreseeable, Plaintiffs' "Program-related" Requests are neither "overly broad" nor "unduly burdensome."

Moreover, Plaintiffs' Requests track Allstate's very language. Allstate has contended that it instructed certain custodians to retain—and that Allstate in fact retained and collected—documents "concerning the Preparing for the Future Group Reorganization Program and/or the Release." (Allstate's Fourth Amended Responses, Ex. C, at 3-4). To get meaningful responses about whether Allstate took certain steps to preserve documents when litigation was first reasonably anticipated, Plaintiffs' Requests ***had*** to use the phrase "Program-related"—which represents the scope of what Allstate itself sought to preserve at that time. Accordingly, it is simply unacceptable for Allstate to object to the Requests as overly broad, when Plaintiffs are simply using virtually the same "Program-related" phraseology that Allstate supposedly used in instructing certain custodians to preserve documents.

Finally, this Court has already declared that Program-related documents—beyond those that merely reference the Release—are relevant at this stage of discovery. (*See* October 21, 2010 Order, Doc. No. 236). By way of example, in its October 21, 2010 opinion, the Court expressly held that Plaintiffs are "fully entitled" to take discovery "on their theory that the release are void because they are 'part and parcel' of an illegal scheme." (*Id.* at 8; *see also id.* at 9 ("The Court holds that Plaintiffs are entitled to discovery relevant to proving that the Releases are void under a 'part and parcel' theory"). Plaintiffs are therefore entitled to know the extent to which Allstate failed to preserve all documents about the Mass Termination Program, which may have been relevant to show that the Program was an "illegal scheme." Thus, Allstate's objection lacks merit.

C. Allstate Cannot Reshape Plaintiffs' Requests To Answer Separate Admissions.

Rule 36 does not "tolerate objections or denials based upon 'hair-splitting distinctions that frustrate the purpose of the Request.'" *Duchesneau*, 2010 WL 4117753, at *2 (internal citations and quotations omitted). Yet, this is precisely what Allstate did when it responded to 6 Requests by: (a) objecting to the term "Program-related"; (b) replacing the term "Program-related" with Allstate's definition of "Release-related"; and (c) admitting in part the newly-formulated Request. (Allstate's Responses, Ex. B, at Nos. 4, 13, 21, 45, 80, 96). Allstate's answers are insufficient for multiple reasons.

First, because Plaintiffs' definition of "Program-related" was proper, Allstate was required to answer these Requests as drafted. *See, e.g., Chapman v. California Dep't of Educ.,* No. C-01-1780, 2002 WL 32854376, at *3 (N.D. Cal. Feb. 6, 2002) ("The proponent of discovery is the master of its terms. So long as the information sought is within the broad bounds of relevancy as set forth in Rule 26 and is otherwise properly discoverable, the respondent may not unilaterally reshape or rephrase the discovery request.").

Second, even if Allstate were permitted to unilaterally reshape Plaintiffs' Requests (and it is not), Allstate's definition of "Release-related" frustrates the purpose behind those Requests—which seek admissions that Allstate failed to instruct custodians "to search for and preserve all Program-related Documents." (Allstate's Responses, Ex. B, at Nos. 4, 13, 21, 45, 80, 96). To avoid giving meaningful, concrete responses, Allstate has attempted to define "Release-related" according to its own self-serving construction of the ***legal theories*** that underlie Plaintiffs' challenges to the Release:

> For purposes of these Responses and Objections, Allstate defines "Release-related" as information relating to the drafting and interpretation of the Release, communications with Employee Agents concerning the Release, information relating to Allstate's

> compliance with the Older Workers Benefit Protection Act ("OWBPA") in drafting the Release, information relating to Plaintiffs' allegation that Plaintiffs "received no consideration in addition to anything of value to which they already were entitled in exchange for executing the Release" (2d Am. Compl. ¶ 155), information relating to Plaintiffs' allegation that Plaintiffs signed the Release under "extreme economic duress" (*id.* ¶ 106), Plaintiffs' allegation that Plaintiffs signing of the Release was neither "knowing nor voluntary" (*id.* ¶ 154), and nonprivileged information relating to Allstate's knowledge of whether the Preparing for the Future Group Reorganization Program might be retaliatory, unlawful, or otherwise prohibited by law.

(Allstate's Response, Ex. B, at General Objections, ¶ 1). By doing so, Allstate's definition fails to convey a ***concrete***, ***objective***, and ***factual*** understanding of the universe of documents that fall within that definition. Thus, Plaintiffs have no idea what Allstate is admitting or denying.

Moreover, Allstate's use of "Release-related" would frustrate the intent behind Plaintiffs' Requests for yet another reason. Plaintiffs' entire set of Requests was carefully crafted to seek admissions as to the procedural steps that Allstate failed to take to ensure the preservation of documents at or soon after the time when it first reasonably anticipated litigation concerning the Mass Termination Program. To get meaningful admissions, the Requests ***must*** employ terminology—such as "Program-related"—that represents the scope of what Allstate itself sought to preserve ***at that time***. Otherwise, Plaintiffs merely would receive admissions about whether Allstate preserved an undefined universe of documents relating to various legal theories that were first articulated ***after*** the duty to preserve originally attached and that have ***changed*** over time. And even if Allstate had known Plaintiffs' legal theories at the time the duty to preserve attached, there likely would have been significant disagreement between Plaintiffs and Allstate about the universe of documents relevant to these legal theories. There is much less room for disagreement about the universe of documents factually related to the Program.

This deficiency in Allstate's definition of "Release-related" is clear from Allstate's Responses to its re-formulated versions of Requests Nos. 4, 13, 21, 45, 80, and 96. While

Allstate has admitted that it did not instruct six key custodians to search for and preserve all "Release-related" documents prior to May 1, 2000, this admission is arguably meaningless, in part because Plaintiffs had not yet filed their complaint in *Romero I.* Thus, prior to May 1, 2000, Allstate presumably was not aware of all the specific legal challenges Plaintiffs would raise, including that the Release was not knowingly and voluntarily executed, in part, because Allstate had disseminated myriad material misrepresentations to Plaintiffs and other employee agents subject to the Mass Termination Program—a fact that Plaintiffs themselves did not discover until after Allstate produced documents in this litigation that contained these misrepresentations.[15] Confirming this point, Allstate "denies that it was under any obligation to instruct [the custodian] to search for and preserve Release-related documents prior to May 1, 2000." (Allstate's Response, Ex. B, at Nos. 4, 13, 21, 45, 80, and 96). Accordingly, Allstate's definition of "Release-related" undermines the very purpose behind Plaintiffs' Requests.

Finally, in addition to being too amorphous, Allstate's definition is also too narrow in at least one respect: it fails to account for critical documents implicated by Plaintiffs' "part and parcel" theory. Instead, it is limited to information pertaining to "***Allstate's knowledge*** of whether [the Mass Termination Program] might be retaliatory, unlawful, or otherwise prohibited by law." (Allstate's Response, Ex. B, at General Objections, ¶ 1) (emphasis added). Plaintiffs' part and parcel theory, however, is not limited to Allstate's subjective belief of whether any aspect of the Mass Termination Program—including the Release itself—was unlawful. *See, e.g., Radio Corp. of Am. v. Raytheon Mfg. Co.*, 296 U.S. 459, 462 (1935) (release is "void in its inception" when it is "part of an illegal transaction"). Instead, Plaintiffs are entitled to answers concerning Allstate's failure to preserve all factual information about the Mass Termination

[15] In fact, Allstate's definition of "Release-related" refers specifically to Plaintiffs' Second Amended Complaint, which was not filed until July 28, 2010.

Program—as captured by Plaintiffs' definition of "Program-related"—because the loss of Program-related information likely will prejudice Plaintiffs' ability to prove that the Release was invalid and/or unenforceable on the basis that the Program was, in application, retaliatory, unlawful, or illegal. The same is true with respect to Plaintiff's challenge to the Release on the grounds that it is unconscionable and otherwise not knowing and voluntary. Accordingly, Plaintiffs' motion should be granted.

D. Allstate Has Improperly Refused To Admit Or Deny 18 Basic Requests Without Providing A Sufficient Explanation For Its Answers.

In addition to refusing to answer nearly half of Plaintiffs' Requests, Allstate has improperly stated—without explanation—that it can neither admit nor deny 18 Requests. (Allstate's Responses, Ex. B, at Nos. 10, 19, 26, 34, 42, 50, 53, 58, 67, 76, 85, 87, 93, 102, 111, 119, 123, 124). These answers are defective.

As an initial matter, Allstate has not given any explanation as to why it cannot admit or deny these Requests. Certainly, none of Allstate's answers to these Requests state "***in detail*** why the answering party cannot truthfully admit or deny it." Fed. R. Civ. P. 36(a)(4) (emphasis added); *see also Loudermilk,* 2009 WL 3272429, at *6 (finding responses defective when plaintiff failed to state "the specific reasons why Plaintiff still could not admit or deny the assertion in the request after the inquiry"); *Philadelphia Gear Corp. v. Techniweld, Inc.*, No. 90-CV-5671, 1992 WL 99622, at *2 (E.D. Pa. May 1, 1992) (holding that "defendant must elaborate on the specific unknown facts which prevent it from admitting or denying the statement at this time" and that "mere recitation of Rule 36 language regarding a party's inability to answer is not adequate"); *Cada v. Costa Line, Inc.* 95 F.R.D. 346, 347 (N.D.Ill. 1982) (requiring "specific reasons" for failure to admit or deny). Because Allstate failed to provide any explanation for

why it cannot answer or deny these Requests, Allstate's answers are insufficient.[16]

Furthermore, Allstate's answers to these Requests appear to be inaccurate. At a minimum, they suggest that Allstate failed to make a reasonable investigation before responding.[17] Indeed, it is simply inconceivable that Allstate does not know the answer to the general information contained within these Requests, such as:

- whether Allstate, the company, electronically searched for Program-related ESI from certain custodians prior to January 1, 2010 (Nos. 10, 19, 26, 34, 42, 50, 58, 67, 76 , 85, 93, 102, 111, 119);

- whether Allstate, the company, disabled the auto-delete function of its email systems for Plaintiffs (No. 123-124);

- whether Allstate, the company, instructed Defendant Liddy to search for Program-related documents (No. 87); and

- whether George Giles, a HR representative who served on the team responsible for developing and implementing the Mass Termination Program, ever searched for and preserved Program-related documents (No. 53).

Although Allstate may not want to admit that it failed to take certain preservation efforts, Rule 36 obligates it do so. Accordingly, each of these Requests should be deemed admitted.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court: (a) grant Plaintiffs' motion to determine the sufficiency of Allstate's Responses; (b) find that Allstate's

---

[16] In fact, for Request No. 53, Allstate has not even stated that it conducted a reasonable inquiry before providing its indeterminate answer. (Allstate's Responses, Ex. B, at Request No. 53) ("Allstate states that documents were collected from George Giles' files, but Allstate is unable to admit or deny Request for Admission No. 53 at this time."). As a result, this Request should be deemed admitted for this reason alone. *See, e.g.*, *Louis v. Martinez,* No. 08-CV-151, 2011 WL 1832808, at *3 (N.D.W.Va. May 13, 2011) (deeming requests admitted when answering party failed to state that it made reasonable inquiry); *Garber,* 237 F.R.D. at 256 (same); *Kutner Buick, Inc. v. Crum & Foster Corp.,* No. 95-1268, 1995 WL 508175, at *2 (E.D.Pa. Aug. 24, 1995) (holding that "[u]nder Rule 36, when an answering party gives lack of information or knowledge as a reason for failure to admit or deny but does not allege sufficient reasonable inquiry as required by Rule 36(a), the court may deem the matter as admitted . . . .").

[17] During the September 15, 2011 meet and confer, Allstate even confirmed that it had not contacted many, if any, of the custodians identified in Plaintiffs' Requests during the three months since June 22, 2011, when Plaintiffs served their Requests. (Pls. September 21, 2011 Letter, Ex. E, at 4).

Responses to Requests Nos. 3, 4, 5, 6, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 26, 27, 28, 30, 34, 35, 37, 38, 42, 43, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55, 59, 60, 62, 63, 67, 68, 69, 71, 72, 76, 77, 78, 79, 80, 81, 85, 86, 87, 88, 89, 93, 94, 95, 96, 97, 98, 102, 103, 104, 106, 107, 111, 112, 113, 114, 115, 119, 120, 121, 122, 123, 124, 126, 134, 136, 137, 138, 139, 140, and 141 are insufficient; and (c) deem admitted each of those Requests, or, in the alternative, give Allstate 10 days to submit Amended Responses.

Dated: October 6, 2011

Respectfully submitted,

/s/ Coleen M. Meehan_______________

Coleen M. Meehan (ID No. 39765)
John v. Gorman (ID No. 80631)
Brian M. Meehan (ID No. 91591)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: (215) 963-5000
Facsimile: (215) 963-5001

Michael D. Lieder (*admitted pro hac*)
Michal J. Wilson (*admitted pro hac*)
SPRENGER & LANG, PLLC
1400 Eye Street, N.W.
Washington D.C. 20005
Telephone: (202) 265-8010
Facsimile: (202) 332-6652

Paul Anton Zevnik (ID No. 140986)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 739-3000
Facsimile: (202) 739-3001

Thomas W. Osborne (admitted *pro hac vice*)
Mary Ellen Signorille (admitted *pro hac vice*)
AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049
Telephone: (202) 434-2060
Facsimile: (202) 824-0955

Counsel for Plaintiffs and the Class

C. Felix Miller, Senior Trial Attorney
U.S. Equal Employment Opportunity Commission
St. Louis District Office
Robert A. Young Federal Building
1122 Spruce, Room 8-100
St. Louis, Missouri 63101
Telephone: (314) 539-7949
Counsel for the EEOC

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2011, a true and correct copy of Plaintiffs' Amended and Corrected Memorandum Of Law In Support Of Plaintiffs' Motion and the Amended and Corrected Declaration of Coleen M. Meehan attached thereto, was served via ECF on all counsel of record.

Date: October 6, 2011

/s/ Coleen M. Meehan
Coleen M. Meehan