

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

<hr/>		)
<b>GENE R. ROMERO, <i>ET AL.</i></b>		)
		)
<b>Plaintiffs,</b>		)
		)
<b>v.</b>		)
		)
<b>ALLSTATE INSURANCE COMPANY, <i>ET AL.</i></b>		)
		)
<b>Defendants.</b>		)
<hr/>		)
<b>GENE R. ROMERO, <i>ET AL.</i></b>		)
		)
<b>Plaintiffs,</b>		)
		)
<b>v.</b>		)
		)
<b>ALLSTATE CORPORATION, <i>ET AL.</i></b>		)
		)
<b>Defendants.</b>		)
<hr/>		)

**Civil Action No. 01-CV-3894 (RLB)**

**Civil Action No. 01-CV-6764 (RLB)**

**ALLSTATE’S OPPOSITION TO “PLAINTIFFS’ MOTION TO DETERMINE THE  
SUFFICIENCY OF ALLSTATE’S ANSWERS AND OBJECTIONS TO  
PLAINTIFFS’ SECOND SET OF REQUESTS FOR ADMISSIONS”**

**TABLE OF CONTENTS**

**I. INTRODUCTION.....1**

**II. FACTUAL BACKGROUND.....3**

A. Allstate’s Preparing For The Future Group Reorganization Program Offered A New Contractual Relationship And Significant Consideration To Plaintiffs In Exchange For A Release Of Claims.....3

B. Plaintiffs File Suit And The Parties Engage In Release-Related Discovery. ....5

C. The Third Circuit Directed Further Consideration Of The Validity Of The Release After Additional Release-Related Discovery. ....7

D. Plaintiffs’ Post-Remand Document Requests Sought Release-Related Documents, *Not* Documents Concerning The Program Generally. ....7

E. Allstate’s Extensive Efforts To Comply With This Court’s October 2010 Order And Plaintiffs’ Burdensome Discovery Demands.....9

F. Allstate’s Responses To Plaintiffs’ Questions Regarding Electronic Discovery And Preservation Of Documents, And Plaintiffs’ Refusal To Answer Allstate’s Questions.....10

G. Plaintiffs’ Second Set of Requests for Admission & Plaintiffs’ Refusal To Meet And Confer In Good Faith.....13

H. Allstate’s Preservation & Collection Practices Were Proper And Sufficient.....16

1. Allstate has produced documents, including ESI, for relevant custodians.....16

2. Allstate has not failed to preserve previously-collected documents.....19

3. Allstate had no legal duty to preserve “back up tapes” used only for disaster recovery.....20

4. Allstate had no duty to suspend its email auto-delete function because custodians preserved relevant email.....21

5. Allstate did not fail to instruct necessary custodians to preserve documents. ....22

6. Plaintiffs inaccurately portray the testimony of Karleen Zuzich.....22

- 7. Allstate has preserved ESI of relevant custodians that are no longer employed by Allstate. ....23

**III. ARGUMENT.....25**

- A. Allstate Properly Objected To Plaintiffs’ Overly Broad And Ambiguous “Program-Related” Definition. ....26

- 1. Allstate has not waived its objection to “Program-related.” .....26

- 2. Allstate properly objected to Plaintiffs’ definition of “Program-related” as vague and ambiguous.....28

- 3. Allstate properly objected to Plaintiffs’ “Program-related” definition as overbroad. ....30

- B. Allstate Properly Asserted That It Can Neither Admit Nor Deny Various Requests. ....32

**IV. CONCLUSION .....34**

## I. INTRODUCTION

In their Requests for Admission, Plaintiffs seek admissions as to Allstate's collection and preservation of documents relating broadly to Allstate's Preparing for the Future Program. All but conceding these Requests go beyond the limited Release-related discovery ordered by the Court, Plaintiffs argue that if the Requests are limited consistent with the Court's orders, then the admissions they seek will not be "meaningful." (Pls.' Mem. 27.) This is so, Plaintiffs explain, because "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)." (*Id.*) Thus, Plaintiffs argue, unless Allstate is required to respond with respect to "Program-related" documents, "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." (*Id.* (emphasis in original).)

Allstate agrees with Plaintiffs that Allstate was not on notice of many of Plaintiffs' Release-related arguments at the time it undertook to preserve and collect documents in anticipation of litigation. Allstate also agrees with Plaintiffs that Allstate had no duty to preserve documents about unknown legal theories that also have changed over time. But these are not reasons to expand discovery, as Plaintiffs argue. Rather, they merely reinforce the propriety of conforming Plaintiffs' Requests for Admission to the scope of discovery ordered by the Court. If conforming the Requests to the scope of permissible discovery will result in responses that are not "meaningful," then the appropriate remedy is to withdraw the Requests.

Given the limited scope of current discovery, Allstate objected to Plaintiffs' Requests to the extent they incorporated broad "Program-related" terminology. At the same time, however, Allstate offered to respond with respect to the "Release-related" scope of discovery, defining

“Release-related” to include information related to the Release and all of the challenges Plaintiffs have raised. Plaintiffs, however, refused to discuss any middle-ground to appropriately narrow discovery consistent with the Court’s Case Management Order.

Plaintiffs’ brief also is replete with unfounded accusations and misstatements about Allstate’s document preservation and collection activities. Equally baseless are Plaintiffs’ assertions that Allstate has not been forthcoming in discovery. To the contrary, Allstate has been transparent in both formal and informal discovery concerning its past collection and preservation actions. Allstate has provided the details of its retrospective document collection efforts notwithstanding the Court’s October 2010 Order *denying* Plaintiffs’ request for that information as too burdensome and without any potential benefit. Allstate also has answered Plaintiffs’ informal questions about the actions it took to preserve documents even though Plaintiffs have refused to answer the same questions about their own preservation efforts.<sup>1</sup> Plaintiffs have no evidence to support their accusations that Allstate has fallen short in its preservation of documents, and their efforts to obtain discovery beyond what is relevant to the Court’s threshold determination of the validity of the Release should be denied.

Finally, Plaintiffs’ argument that Allstate has “failed to respond” to certain Requests for Admission is inaccurate. Rule 36 expressly permits a party to respond by neither admitting nor denying a request if after reasonable inquiry “the information it knows or can readily obtain is insufficient to enable it to admit or deny.” FED. R. CIV. P. 36(a)(4). Allstate properly invoked this provision of Rule 36. For all of these reasons, Plaintiffs’ Motion should be denied.

---

<sup>1</sup> Based on Plaintiffs’ recently-served responses to Allstate’s Requests for Admission, it is now apparent why Plaintiffs refused to answer Allstate’s earlier informal questions about the Plaintiffs’ efforts to preserve ESI: Plaintiffs’ responses reveal that Plaintiffs have failed to retain and preserve all of their Release-related ESI. (*See* Sections II(F) and II(H)(1), *infra*.)

## II. FACTUAL BACKGROUND

### A. Allstate's Preparing For The Future Group Reorganization Program Offered A New Contractual Relationship And Significant Consideration To Plaintiffs In Exchange For A Release Of Claims.

In November 1999, Allstate marketed and sold its products primarily through an agency force consisting of approximately 15,000 agents operating under various contracts. Of those, approximately 6,200 Allstate agents were at-will employees in various employee-agent programs and were employed under an R830 or R1500 agreement (“R830 agents” and “R1500 agents”). Nearly 9,000 agents were in Allstate’s Exclusive Agent program under either an R3000 or R3001 “Exclusive Agency” (“EA”) agreement. (Allstate’s Opp. to Pls.’ Mot. to Compel Documents Related to the Release (Dkt. No. 219) at 3-4 (collecting evidence).) Each of the Plaintiffs in this case was an R830 or R1500 Employee Agent. According to their R830 and R1500 contracts, Plaintiffs did not have, and could not acquire, a transferable economic interest in the insurance business they sold or serviced under those agreements. Plaintiffs were also not entitled to have debt or Office Expense Allowance (“OEA”) advances forgiven, enhanced severance payments, or a conversion bonus upon the termination of their R830 or R1500 contracts or conversion to the R3001 contract. (*Id.* at 4.)

Responding to the rapidly evolving markets for its insurance and financial products and services, Allstate announced the “Preparing for the Future Group Reorganization Program” (“the Program”) in November 1999 and that it was eliminating its employee-agent programs in favor of the EA Program. Allstate concluded that for at least three reasons, Allstate’s agent sales distribution force had to change in order to successfully meet the challenges of the twenty-first century marketplace. *First*, Allstate could not continue to administer the costly and inefficient multiple programs, numerous compensation structures, and various contracts that had evolved for its sales distribution force over the preceding thirty-three years. Administering this complex

system was too costly, and the system was too inflexible to respond to the competitive challenges facing Allstate's agents. (Allstate Opp. to Pls.' Mot. for Class Cert. (Dkt. No. 83) at 8 (collecting evidence).) **Second**, Allstate's most productive and successful agent program was its EA Program, which provided Exclusive Agents with the flexibility and discretion they needed to respond to local market conditions and to build their businesses accordingly. (*Id.*) **Third**, the strictures imposed on certain Allstate employee agents as a result of Allstate's 1998 settlement with the IRS severely hindered those agents' abilities to adapt their operations to meet local market conditions. (*Id.*)

On November 10, 1999, Allstate announced the Preparing for the Future Program to its agents. Allstate informed agents that it was undergoing a company-wide reorganization of its agency force and was terminating the employment contracts of approximately 6,200 employee insurance agents. Allstate further announced that, with limited exceptions, all R830 and R1500 employment contracts would terminate no later than June 30, 2000. (Allstate's Opp. to Pls.' Mot. to Compel Documents Related to the Release (Dkt. No. 219) at 4 (collecting evidence); *see also Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 790-91 (7th Cir. 2005).) At the same time, Allstate offered each affected employee agent four different options. The first three options, described below, offered benefits in exchange for entry into 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, higher commissions, debt or OEA advance forgiveness, and the ability to participate in a stock bonus plan.
- **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. The terminated employee agent also would

receive various benefits from Allstate, including a payment of at least \$5,000 and debt or OEA advance forgiveness.

- **Option 3 (“Enhanced Severance Option”):** The terminated employee agent could receive enhanced severance benefits equal to one year’s salary and debt or OEA advance forgiveness.

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. (*Id.*)

Allstate gave its terminated agents more than six months to consider the options it offered and encouraged them to consult with attorneys and other professionals regarding their selections. *Isbell*, 418 F.3d at 791-92. During that six-month period, the named Plaintiffs consulted with attorneys, accountants, and personal advisers regarding their decisions, including whether to select one of the three options offered in exchange for the Release. (Allstate’s Opp. to Pls.’ Mot. to Compel Documents Related to the Release (Dkt. No. 219) at 5 n.2 (collecting evidence).) All but one of the currently-named Plaintiffs selected options offered in exchange for the Release, entered into the Release, and received valuable benefits in exchange. Plaintiff David Lawson, for instance, chose Option 1 and became an Exclusive Agent. In January 2002, Mr. Lawson sold the economic interest in the book of business he serviced for \$910,000. (Declaration of Erica B. Zolner (“Zolner Decl.”) ¶ 2, Ex. 1, No. 12, at 8.) Plaintiff Richard Wandner chose Option 2, and sold the economic interest in the book of business that he serviced for \$435,000. (*Id.* ¶ 3, Ex. 2, No. 12, at 9-10.) Plaintiff Roger Boyd chose Option 3, and received enhanced severance of \$42,462. (*Id.* ¶ 4, Ex. 3, No. 11, at 12.) Plaintiff Paula Reinerio also chose Option 3, and received enhanced severance of \$68,314. (*Id.* ¶ 5, Ex. 4, No. 11, at 13.)

**B. Plaintiffs File Suit And The Parties Engage In Release-Related Discovery.**

Plaintiffs filed suit on August 1, 2001, asserting that Allstate’s Preparing for the Future Program violated the ADEA and ERISA and constituted a breach of Plaintiffs’ employment

contracts and Allstate's fiduciary duties. The parties conducted significant document and deposition discovery, including discovery related to Plaintiffs' claim that they did not knowingly and voluntarily enter into the Release. Allstate produced documents in response to Plaintiffs' Release-related Requests for Production. (*See* Zolner Decl. ¶ 6, Ex. 5 (Pls.' First Set of Reqs. for Prod. of Docs., served 4/25/02) at No. 36 ("All documents relating to the Release, including but not limited to any communication with the EEOC about the validity of the Release and any documents concerning any allegation made by any Employee Agent that the Release is unlawful or invalid.")) Allstate answered more than 200 Requests for Admission served by Plaintiffs, many of which concerned the Release. (*See id.* ¶ 7, Ex. 6 (Pls.' First Set of Requests for Admission, served 12/20/02) at Nos. 118-19, 138-62, 165-71; *id.* ¶ 8, Ex. 7 (EEOC's First Requests for Admission, served 12/20/02) at Nos. 2, 9-23.) And Allstate produced 30(b)(6) witnesses to provide testimony on topics concerning the Release, including Allstate's decision to require a Release, the drafting of the Release, the meaning of the terms and provisions of the Release, and Allstate's communications with government agencies about the use of the Release. (*See id.* ¶ 9, Ex. 8 at 13-15.)

On June 25, 2007, the district court granted summary judgment in Allstate's favor, concluding that Plaintiffs' claims of ERISA and ADEA violations and retaliation failed for the same reasons held by the Seventh Circuit Court of Appeals in *Isbell v. Allstate Insurance Co.*, 418 F.3d 788 (N.D. Ill. 2005). Plaintiffs appealed to the Third Circuit Court of Appeals, arguing, among other things, that they were entitled to additional discovery relating to their claim that they did not knowingly or voluntarily enter into the Release. *Romero, et al. v. Allstate Ins. Co., et al.*, 344 F. App'x 785, 790 (3d. Cir. 2009).

**C. The Third Circuit Directed Further Consideration Of The Validity Of The Release After Additional Release-Related Discovery.**

On July 29, 2009, the Third Circuit reversed and remanded the case, holding that “the District Court should reexamine the validity of the release, after allowing further discovery into the facts surrounding the signing of the releases.” 344 F. App’x at 793. Specifically, the Third Circuit explained that “plaintiffs are entitled to discovery that is responsive to their requests related to the specific release-related issues the plaintiffs raised with the District Court in their response to its March 21, 2007 Order: that the releases were part of an illegal scheme; that they were not signed knowingly or voluntarily; and that they were unconscionable.” *Id.* Following the Third Circuit’s direction, after remand, this Court entered a Case Management Order stating that “any party may serve discovery requests relating to the validity, enforceability, and applicability of the Release (hereinafter ‘Release-related discovery’)” and provided a schedule for motion practice for the Court’s determination of the validity of the Release. (4/8/10 Case Mgmt. Order (Dkt. No. 199) at 3.)

**D. Plaintiffs’ Post-Remand Document Requests Sought Release-Related Documents, *Not* Documents Concerning The Program Generally.**

In March 2010, after the remand, Plaintiffs served additional document requests purportedly relating to the validity of the Release.<sup>2</sup> (*See* Zolner Decl. ¶ 10, Ex. 9 (Pls.’ Release-related Doc. Reqs., served Mar. 5, 2010).) Allstate objected to requests relating to misrepresentation theories not pled in Plaintiffs’ then-operative complaint (which Plaintiffs subsequently obtained leave to amend) and requests relating to Plaintiffs’ “part and parcel” theory.

---

<sup>2</sup> Plaintiffs attack the validity of the Release based on the following allegations: Allstate did not provide 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 “to interfere with the attainment of rights to which employee agents were entitled or may become entitled under the Plans, to rid the company of older employees and to otherwise retaliate against the 6,300 or so employee agents who had refused to convert to the R3001 contract since October 1990.” (Pls.’ Second Am. Compl. (Dkt. No. 223) ¶¶ 153-59.)

Plaintiffs moved to compel production of documents relating to these theories, and also to compel Allstate to disclose information regarding its prior searches and collection of documents. (*See* Pls.' Mot. to Compel (Dkt. No. 214).) On October 21, 2010, the Court granted in part, and denied in part, Plaintiffs' Motion to Compel. Relevant to the instant motion, the Court denied Plaintiffs' request that Allstate be compelled to provide information regarding its prior searches for documents, explaining:

To the extent, however, that Plaintiffs seek a retrospective view of the searches Defendants have already conducted during the course of discovery over the past eight and half years, the Court is not inclined to compel such disclosures. To require Defendants to compile a list of all search terms, custodians, and other methods of searching used in the past would result in an undue burden on Defendants that is not justified by any potential benefit to Plaintiffs.

(10/21/10 Op. (Dkt. No. 236) at 23-24.) The Court also ordered the parties "to meet and confer to work in a cooperative, rather than an adversarial manner, to resolve discovery issues" (*id.* at 22), and compelled Allstate's production of certain documents requested by Plaintiffs. The day after the Court issued its opinion, Plaintiffs acknowledged "[i]n light of the Court's opinion" that Allstate need not produce a written disclosure of any of their past search methodologies. (Zolner Decl. ¶ 13, Ex. 11 at 1; *see also* Section II(F), *infra.*)

Plaintiffs characterize the document requests that were the subject of the Court's October 2010 Order as having sought documents concerning the Preparing for the Future Program generally (and not the Release specifically) and that the Court ordered Allstate to produce such documents. Thus, Plaintiffs state: "[c]onsistent with the Third Circuit's mandate, Plaintiffs served document requests" seeking "[a]ll documents concerning the creation, adoption, and implementation of the [Preparing for the Future] Program,' '[a]ll documents that Allstate disseminated . . . relating to the [Preparing for the Future] Program,' and '[a]ll documents relating to the Release.'" (Pls.' Mem. 6.) Not so. Plaintiffs did *not* serve these document requests after

the Third Circuit remand. Rather, Plaintiffs served these document requests *seven years earlier*, on April 25, 2002, when discovery was not limited to Release-related topics. (See Zolner Decl. ¶ 6, Ex. 5 (Pls.' First Set of Reqs. for Prod. of Docs., served April 25, 2002) at Nos. 32, 34, 36.) Thus, contrary to Plaintiffs' contention that this Court ordered production of "all documents concerning the creation, adoption, and implementation of the Program," the Court's October 2010 Order actually directed production of a more limited set of documents relating to five specific topics: the Release generally, unconscionability, knowing and voluntary standard with regard to the Release, retaliation, consideration for the Release, and three requests regarding Plaintiffs' "part and parcel" theory. (See *id.* ¶ 10, Ex. 9 (Pls.' Release-related Doc. Reqs., served Mar. 5, 2010).)

Notwithstanding the Court's October 2010 Order and Plaintiffs' acknowledgement that Allstate was not required to identify all steps taken to collect and search documents, all of Plaintiffs' Requests for Admission at issue concern Allstate's "methods of searching" in the early phases of this case. In other words, Plaintiffs now argue that the Court should find Allstate's answers are insufficient because they do not provide the information this Court expressly found Allstate was not required to produce and that Plaintiffs conceded Allstate was not required to produce.

**E. Allstate's Extensive Efforts To Comply With This Court's October 2010 Order And Plaintiffs' Burdensome Discovery Demands.**

Shortly after the Court's October 2010 Order, the parties engaged in a meet and confer process to discuss the custodians, date ranges, and search terms for Allstate's Release-related document collection. Plaintiffs took the position that Allstate was required to search the files of *113 custodians*, using *105 separate search terms*, to identify documents covering more than a *twelve-year period* from October 1, 1990 to December 31, 2002. (See Zolner Decl. ¶ 11, Ex. 10, at 2-4; *id.* ¶ 14, Ex. 12, at 3-4; *id.* ¶ 16, Ex. 14 at 5-11.) Allstate objected to three of Plaintiffs'

proposed search terms as overly broad and unduly burdensome. (*See id.* ¶ 15, Ex. 13, at 1-2.) Plaintiffs refused to compromise or modify any of their 105 search terms, instead insisting that Allstate run all of them. (*See id.* ¶ 16, Ex. 14 at 7.) To avoid burdening the Court with another discovery dispute, Allstate agreed to (1) run all 105 search terms; (2) use the twelve-year search period for the majority of Plaintiffs' requests; and (3) search the files of all but 7 of the 113 custodians demanded by Plaintiffs. Those seven custodians either had no involvement with issues relating to the validity of the Release, or their documents were not in the possession, custody, or control of Allstate. (*See id.* ¶ 15, Ex. 13 at 1-2; *id.* ¶ 17, Ex. 15 at 5; *id.* ¶ 18, Ex. 16 at 3; *id.* ¶ 19, Ex. 17 at 1.)

Between November 2010 and February 2011, Allstate interviewed more than 60 current and former employees, and collected more than 450 gigabytes of electronically-stored information ("ESI") and nearly half a million pages of hard copy documents. (*See id.* ¶ 21; *id.* ¶ 29, Ex. 21, at 20.) Allstate searched these documents — in addition to the nearly three hundred boxes of documents collected earlier by Allstate in 2000-2002 — using Plaintiffs' list of 105 search terms, and expended more than 5,000 hours of attorney time reviewing documents that hit on Plaintiffs' proposed search terms to evaluate whether the documents were responsive to Plaintiffs' Release-related document requests. As a result of Allstate's efforts, between the date of the Court's Order and March 1, 2011, Allstate produced nearly 8,000 responsive documents. Allstate produced native metadata associated with all responsive native documents, which totaled nearly 6,000 documents. (*Id.* ¶ 22.)

**F. Allstate's Responses To Plaintiffs' Questions Regarding Electronic Discovery And Preservation Of Documents, And Plaintiffs' Refusal To Answer Allstate's Questions.**

After the Court's October 21, 2010 Order, Plaintiffs withdrew a previously-served interrogatory (No. 15) that asked Allstate to "identify all steps taken to search for and collect

documents, including electronically-stored information, responsive to Plaintiffs' document requests since this litigation began." Plaintiffs withdrew this Interrogatory "[i]n light of the Court's opinion" that Allstate "need not produce a written disclosure of any of their past search methodologies." (Zolner Decl. ¶ 13, Ex. 11, at 1; 10/21/10 Order (Dkt. No. 237) at 2.) Additionally, Plaintiffs conceded that "consistent with the Court's October 21, 2010 Order, we do not expect Defendants to compile a complete list of all search terms, custodians, and other methods of searching used in 2002." (Zolner Decl. ¶ 14, Ex. 12, at 5.)

Plaintiffs then reversed course and subsequently sought extensive information from Allstate about its custodians and methods of searching for documents that occurred more than a decade ago.<sup>3</sup> (Zolner Decl. ¶ 20, Ex. 18, at 7.) Even though the Court held that Allstate need not reconstruct and disclose its prior document searches, and even though Plaintiffs previously acknowledged that Allstate need not disclose prior search methodologies, in an effort to cooperate with Plaintiffs Allstate has provided detailed information — through interrogatory responses, meet and confer calls, and letters — concerning its document collection and preservation, including:

- The manner in which Allstate collected documents in the 2001-2003 timeframe;
- The categories of ESI concerning the Release or Preparing for the Future Program that were created and/or saved by Allstate between January 1999 and December 2002;
- Allstate's collection of electronic documents from relevant custodians prior to October 2010;
- Allstate's retention of email from January 1999 through December 2002 for relevant custodians, including information about the email system that Allstate used between January 1999 and December 2002, Allstate's utilization of Mailbox Manager, limits on the capacity of Allstate email accounts, information about employee's ability to archive or save their emails, and Allstate's preservation of relevant archived or saved emails between January 1999 and December 2002;

---

<sup>3</sup> Notably, this information would have been responsive to Plaintiffs' Interrogatory No. 15, but as previously explained, Plaintiffs withdrew this Interrogatory in light of the Court's opinion.

- The existence of databases, document management systems, or other sources of electronically-stored information, including departmental or other project-based drives/folders, intranet or extranet sites, or proprietary databases that were (a) in existence between January 1999 and December 2002; and (b) stored, housed, and/or contained electronic documents related to the Release and/or the Preparing for the Future Program;
- Upgrades to Allstate’s databases;
- Allstate’s document collection practices with regard to former, non-agent employees;
- Allstate’s use of back-up tapes for disaster recovery purposes;
- The total volume of ESI that Allstate has collected; and
- The names of all employees to whom Allstate directed a litigation hold notice related to the *Romero* litigation.

(*Id.* ¶ 23.) Plaintiffs’ statement that “Allstate refused to provide non-evasive, direct, and complete answers” to Plaintiffs’ preservation questions (Pls.’ Mem. 8-9) plainly misstates the record.

At the same time that Plaintiffs lodge unsupported accusations about Allstate’s purported unwillingness to answer Plaintiffs’ ESI-related questions, Plaintiffs have refused to answer Allstate’s questions concerning the existence and location of Plaintiffs’ ESI. On December 6, 2010, Allstate requested that Plaintiffs answer similar questions concerning Plaintiffs’ own ESI.<sup>4</sup> (Zolner Decl. ¶ 18, Ex. 16 at 4.) Plaintiffs promised they would answer Allstate’s questions: “Rest assured, however, we intend to respond to your December 6, 2010 letter in due course, and are certainly willing to discuss these issues with you at an appropriate time.” (*Id.* ¶ 24, Ex. 19 at 1-2.) But during the parties’ next meet and confer in early January and in subsequent

---

<sup>4</sup> Specifically, Allstate asked Plaintiffs the following questions: (a) what email systems and accounts Plaintiffs utilized; (b) whether Plaintiffs’ mailboxes were subject to limits in capacity, and if so, the details concerning such limits; (c) whether Plaintiffs’ mailboxes were subject to auto-delete functions, and if so, the details concerning such functionality; (c) what computers and other electronic storage devices Plaintiffs utilized; (d) whether Plaintiffs utilized personal email “listservs” to communicate regarding relevant issues, and if so, the names of such email lists, the recipients of the email list, and the dates the lists were in use; (e) whether Plaintiffs utilized “message boards” or other electronic posting services, and if so, the names of such services and the dates such services were in use; and (f) whether Plaintiffs utilized or maintained any websites that discussed relevant issues, and if so, the dates such websites were in use. (See Zolner Decl. ¶ 18, Ex. 16 at 4.)

correspondence and meet and confers, Plaintiffs retracted their promise and refused to answer a single question posed by Allstate. (*See id.* ¶ 24.)

Plaintiffs' recent responses to Allstate's Requests for Admission explain why Plaintiffs sought to avoid responding to Allstate's ESI questions for nearly a year. For example, every Plaintiff admits to having possessed Release-related ESI at one time, but not a single Plaintiff preserved or collected all Release-related ESI. (*See id.* ¶ 25, Ex. 20.) Most Plaintiffs did not know if their personal email accounts — where Release-related ESI existed — were subject to capacity limits or an auto-delete function, nor did a single Plaintiff with a personal email address make any effort to increase personal email account capacity or disable auto-deletion in an effort to preserve Release-related ESI. Finally, with the exception of Plaintiff Ronald Harper, no Plaintiff made a forensic copy of personal computers where Release-related ESI existed. (*Id.*) In short, Plaintiffs' admissions make clear that Plaintiffs attempt to impose a higher standard on Allstate than Plaintiffs can meet themselves.

**G. Plaintiffs' Second Set of Requests for Admission & Plaintiffs' Refusal To Meet And Confer In Good Faith.**

Despite Allstate's significant one-way disclosure of information concerning its pre-2010 document collection and preservation practices, Plaintiffs remained unsatisfied and served the 145 Requests for Admission at issue in the present Motion, which focus entirely on Allstate's collection and preservation of electronically-stored information. (*See Zolner Decl.* ¶ 30, Ex. 22.) After Allstate served its responses, the parties met and conferred, and Allstate expressed two main concerns with Plaintiffs' Second Set of Requests for Admission. *First*, Allstate expressed concern

that Plaintiffs' "Program-related" definition is overly broad and ambiguous.<sup>5</sup> Many of Plaintiffs' Requests ask for "Program-related" information, which Plaintiffs defined as:

[W]ithout limitation, information that constitutes, concerns, records, discusses, mentions, notes, reflects, memorializes, evidences, analyzes, describes, documents, comments upon, refers to, or has any relevance to or connection with the Program, including the Release and the Rehiring Moratorium.

(*Id.* ¶ 30, Ex. 22 at 6.) To make the definition even broader and more ambiguous, Plaintiffs defined "Program" 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 any other name by which it was known."

(*Id.*) Allstate explained that all Requests seeking "Program-related" information were both vague and overly broad because they exceeded the scope of "Release-related" discovery. (*See* Section III(A)(2)-(3), *infra.*)

In a good faith attempt to resolve the disagreement, Allstate proposed answering each such "Program-related" request using a carefully-tailored definition of "Release-related" information in place of "Program-related." (Zolner Decl. ¶ 31, Ex. 23 at 1.) Allstate defined "Release-related" using language directly from Plaintiffs' Second Amended Complaint and this Court's October 21, 2010 Order:

"Release-related" refers to 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 non-privileged information relating to Allstate's

<sup>5</sup> Allstate objected to the following Requests on grounds that the term "Program-related" was ambiguous and requested non-Release information: Nos. 3-6, 10-15, 19-23, 26-30 34-38, 42-47, 50-55, 58-63, 67-72, 76-81, 85-89, 93-98, 102-107, 111-115, 119-122, 126, 134, 136-142. (*See* Zolner Decl. ¶ 31, Ex. 24.)

knowledge of whether the Preparing for the Future Group Reorganization Program might be retaliatory, unlawful, or otherwise prohibited by law.

(*Id.* ¶ 31, Ex. 24, at 2.) Plaintiffs rejected Allstate’s attempt to compromise, rejected discussing additional potential definitions of “Release-related,” and demanded that Allstate respond to the Requests as written. (*Id.* ¶ 31, Ex. 25, at 4.) Allstate again sought to compromise with Plaintiffs, and asked Plaintiffs to explain what additional information was missing from Allstate’s Release-related definition. (*See id.* ¶ 31, Ex. 26 at 5.) Plaintiffs never responded.

**Second**, Allstate expressed concern over Plaintiffs’ definition of “You” and “Your.” As crafted, the definition made it impossible for Allstate to be able to admit or deny certain Requests because of Plaintiffs’ overly-expansive definition of “You.” Plaintiffs used these terms in connection with Requests asking if “You” searched for “Program-related ESI from the Relevant Time Period by conducting electronic searches...” for certain custodians, and defined “You” as “Allstate Insurance Company and The Allstate Corporation, along with all members of the Board of Directors, officers, employees, agents, consultants, attorneys, or other representatives acting or purporting to act on behalf of either company.” (*Id.* ¶ 33, Ex. 22 at 2.)<sup>6</sup> Given the expansive definition of “You,” Plaintiffs’ Requests required Allstate to literally ask thousands of people whether they had taken certain actions before it could admit or deny Plaintiffs’ Requests. In an attempt to compromise, Allstate asked Plaintiffs if they would be willing to limit the definition of “You” to actions taken by Allstate’s IT and legal departments. (*See Id.* ¶ 33, Ex. 26 at 4-5 n.3.) Plaintiffs once again ignored Allstate’s offer of compromise, refused to engage in any discussion concerning a middle ground on Allstate’s concerns, and filed the instant Motion on October 3, 2011.

---

<sup>6</sup> Allstate objected to the following Requests on grounds that the terms “You” and “Your” were overly broad and unduly burdensome, therefore making the Request unable to be admitted or denied: Nos. 10, 19, 26, 34, 42, 50, 58, 67, 76, 85, 93, 102, 111, 119.

**H. Allstate’s Preservation & Collection Practices Were Proper And Sufficient.**

Plaintiffs clutter their Motion with unfounded and inaccurate allegations about Allstate’s actions to preserve and produce documents. These allegations are immaterial to Plaintiffs’ motion. Nevertheless, Allstate responds to set the record straight.

**1. Allstate has produced documents, including ESI, for relevant custodians.**

Plaintiffs allege that Allstate has failed to produce ESI for 63 custodians, including 22 custodians who Allstate identified as persons most knowledgeable about the Preparing for the Future Program and/or the Release.<sup>7</sup> (Pls.’ Mem. 1, 9-10, 19.) Plaintiffs also allege that Allstate has not produced documents from custodian files of 18 individuals. (*Id.* at 1 n.1, 10 n.6.) Plaintiffs’ allegations are inaccurate and misleading.

*First*, Plaintiffs ignore that Allstate has produced ESI for many of these custodians in hard copy form, including, for example, from the custodial files of Candice Beinlich, James Dill, George Giles, and Barry Hutton. (*See* Zolner Decl. ¶ 34.) Because Plaintiffs issued document requests in 2002 that sought “[a]ll documents relating to the Release” (*id.* ¶ 6, Ex. 5 at 14), Allstate collected and produced documents related to the validity of the Release — including ESI — nearly a decade ago. Allstate’s practice in 2000-2002 was to maintain and preserve ESI in the manner in which it was collected, and Allstate often collected ESI at the time by printing and scanning electronic documents as images and storing them in a database. (*See id.* ¶ 29, Ex. 21 at 3, 4, 13, 18-20.) Allstate has maintained this ESI in that format since then, and all relevant Release-related ESI has been produced. Indeed, what Plaintiffs are complaining about is not the

---

<sup>7</sup> Plaintiffs argue that Allstate’s production to-date is not a “meaningful volume of ESI for a class action of this size and magnitude.” (Pls.’ Mem. 9.) Plaintiffs cite no basis (and have no basis) for this assertion, nor to Allstate’s knowledge is there any generally-recognized standard to measure a “meaningful volume” of ESI. More to the point, notwithstanding the prevalence of email communications in today’s world, email communications were not standard in 1999, when Allstate made the decision that Plaintiffs seek to challenge in this lawsuit. In any event, to date, Allstate has produced more than 200,000 pages of documents — including approximately 8,000 responsive documents produced since October 2010, 6,000 of which were produced with associated native metadata. (Zolner Decl. ¶ 22.)

failure to produce the documents, but instead simply the production format, and the parties reached an express agreement on the form of production in 2002: Plaintiffs agreed to accept images *instead* of native format.<sup>8</sup> (*See id.* ¶ 36, Ex. 28.) Plaintiffs’ intimation that Allstate has not *produced* ESI just because it is not in native *form* is misleading. Rather, as demonstrated by Plaintiffs’ recent responses to Allstate’s Requests for Admission (*id.* ¶ 25, Ex. 20), Allstate and Plaintiffs shared an understanding that, during the 1999-2002 timeframe, printing electronic documents and storing them as images was an appropriate method of preservation.

**Second**, Plaintiffs unfairly try to paint a picture of Allstate’s *general* preservation and collection practices based only on Allstate’s limited *Release-related* document production. All documents collected by Allstate are not responsive to Plaintiffs’ current Release-related document requests. Many custodians may have ESI relevant to non-Release issues, but no Release-related documents.<sup>9</sup> (*Id.* ¶ 44.) Ronald McNeil and Scott Smith, for example, had no role in the Preparing for the Future Group Reorganization Program and have no documents related to the validity of the Release.<sup>10</sup> (*Id.*) Plaintiffs’ argument that Allstate lost or destroyed documents

---

<sup>8</sup> Plaintiffs’ argument misleadingly confuses two distinct concepts: “ESI” and “form of production.” “ESI” is electronically-stored information, which means documents stored in the ordinary course of business in an electronic form. “Form of production” simply refers to the form of the document when it is produced during litigation. ESI can be produced on paper as scanned images, in native form, or in a variety of other file formats. Regardless what the form of production, electronic documents produced in these forms are still ESI, so Plaintiffs cannot argue, as they do here, that ESI from 63 custodians has not been produced.

<sup>9</sup> Plaintiffs misleadingly argue that Allstate has “failed to produce any hard-copy documents for eighteen [custodians], including key agreed-upon custodians such as Barry Hutton, Jeff Kaufman, Richard Cohen and Edward Liddy.” (Pls.’ Mem. 19.) However, as Allstate has repeatedly explained to Plaintiffs, Allstate collected all responsive documents from these custodians in 2000-2002 and produced these documents to Plaintiffs as scanned images without custodian information. Allstate has not endeavored to produce this custodian information because Plaintiffs previously told Allstate that “consistent with the Court’s October 21, 2010 Order, we do not expect Defendants to compile a complete list of all search terms, custodians, and other methods of searching used in 2002.” (Zolner Decl. ¶ 14, Ex. 12 at 5.) Accordingly, Mr. Hutton, for example, has produced many hard copy documents, but none have been produced to Plaintiffs with a load file linking the document to Mr. Hutton’s name.

<sup>10</sup> Allstate agreed to add Messrs. McNeil and Smith to the list of agreed-upon custodians because Plaintiffs demanded they be added, not because Allstate believed those custodians were in possession of responsive Release-related material. As explained above, Plaintiffs refused to compromise on the 113 custodians they requested Allstate search.

because not all custodians have produced Release-related ESI is logically flawed: only certain custodians are in possession of *Release-related* ESI, and Allstate has produced all such documents.

*Third*, several of the custodians Plaintiffs have identified as custodians for whom Allstate has not provided Release-related information left Allstate long before the Preparing for the Future Group Reorganization Program came into existence. William Henderson, for example, left Allstate in 1992; Thomas Tewksbury left Allstate in 1994; Jerome Choate and Charles Martin left Allstate in 1998. (*See id.* ¶ 29, Ex. 21 at 11.) Other individuals left Allstate before Plaintiffs filed their lawsuit. Louis Lower, for example, left Allstate in July 2000; Chris Rhoads left Allstate in May 2001. (*Id.*) Other custodians, George Giles and Edward Dixon, left Allstate in January 2001 and December 2001, respectively, and to the best of Allstate's knowledge, Allstate collected any relevant documents in Mr. Giles's and Mr. Dixon's possession prior to their departures. (*Id.* at 11-12) The mere fact that Allstate has not produced ESI for *all 113 custodians* does not give rise to any inference that Allstate failed to preserve documents.

*Finally*, the majority of Plaintiffs themselves have failed to produce any ESI with all accompanying metadata. Plaintiffs Benoit, Crews-Kelly, Lankford, Lawson, Maslowski, Millison, Moorehead, Peterson, Pilchak, Romero, Shirley, Trgovich, Wandner, Wiktor, Wittman, and Wolverton — sixteen (16) of the named Plaintiffs — *have not produced a single ESI document with accompanying metadata.* (*Id.* ¶ 27.) Plaintiffs Bever, Boyd, Carrier, M. Kearney, T. Kearney, Littlejohn, and Perkins have produced less than 20 ESI documents with all accompanying metadata, and Plaintiffs Cobb and Crease have produced less than 100 ESI documents. (*Id.*) Plaintiffs' criticism of Allstate for not producing ESI for relevant custodians rings hollow when the majority of Plaintiffs themselves have not produced such documents, have admitted that they did not retain all Release-related ESI, and have made no effort to disable email

auto-deletion or enhance capacity limits on personal email accounts where Release-related ESI existed. (*See id.* ¶ 25, Ex. 20.)

**2. *Allstate has not failed to preserve previously-collected documents.***

Plaintiffs also argue that Allstate “conceded” that it “failed to save previously-collected documents concerning the Release in native format.” (Pls.’ Mem. 11, 19.) As Allstate has explained, Allstate preserved and maintained documents collected in 2000-2002 in the format in which they were collected. (*See* Zolner Decl. ¶ 29, Ex. 21, at 3, 4, 13, 18-20, 40; *id.* ¶ 37, Ex. 29, at 7.) Allstate collected documents *nearly a decade ago* responsive to Plaintiffs’ document requests in a variety of formats: some custodians provided native electronic material on CDs given to Allstate’s counsel, and other custodians printed electronic documents which were then scanned into an electronic database. (*See id.* ¶ 29, Ex. 21 at 3, 4, 13, 18-20, 40.) When Allstate collected native documents from custodians, it preserved those documents in native format and has produced responsive documents to Plaintiffs with all native metadata. When custodians provided printed electronic documents, Allstate preserved the scanned version of the document because the parties had expressly agreed to produce only scanned (*not native*) copies of electronic documents. (*See id.* ¶ 36, Ex. 28 (10/1/02 S. Coler ltr. to D. Peel) (“Each side will produce its [electronic] documents in the form of single-page TIFF images....”).) That Allstate did not collect the *native* versions of all documents collected in 2000-2002 does not indicate those documents were lost or destroyed; rather, those documents have all been preserved and maintained as fixed images in a database, and Allstate has produced all Release-related documents from this collection.

Tellingly, it is clear from Plaintiffs’ own productions and from Plaintiffs’ recent responses to Allstate’s Requests for Admissions that, like Allstate, Plaintiffs collected and preserved ESI in the early stages of the case in the same way Allstate did: as scanned images. Prior to 2010, Plaintiffs had not produced any metadata that they themselves began demanding in 2010, and a

sampling of Plaintiffs' productions reveals that Plaintiffs also printed and retained emails in hard copy, as Plaintiffs have not produced native versions of countless previously-produced hard copy emails. (*See id.* ¶ 28.) In other words, Plaintiffs continue to fault Allstate's document collection protocols when Plaintiffs used the exact same methods.

Plaintiffs' claim that Allstate has failed to preserve native documents is also belied by Allstate's recent productions, which included a significant number of documents with all native metadata. Since November 2010, Allstate collected over 450 gigabytes of ESI and nearly half a million pages of hard copy documents. From this collection, and Allstate's collections from 2000-2002, Allstate produced nearly 6,000 documents with metadata that are responsive to Plaintiffs' Release-related document requests, including 885 excel spreadsheets that were produced in native format. (*See id.* ¶ 22.) Regardless of the form in which the documents were collected and preserved, the documents still exist, and Plaintiffs have received responsive documents.

**3. *Allstate had no legal duty to preserve "back up tapes" used only for disaster recovery.***

Plaintiffs' criticism of Allstate for not preserving "back-up tapes" (Pls.' Mem. 11, 19) is unsupported by the law. During the relevant period of time, Allstate recycled its back-up tapes and maintained such tapes solely for the purpose of disaster recovery. (*See* Zolner Decl. ¶ 29, Ex. 21 at 20, 40.) Accordingly, Allstate had no legal obligation to cease its normal recycling schedule. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y 2003) (finding that "as a general rule, [the] litigation hold [obligation] does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy"); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y 2004) (same); *see also* Zolner Decl. ¶ 35, Ex. 27 (The Sedona

Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Sedona Conference Working Group on Electronic Document Retention & Production, March 2003) at cmt. 5.h (“Absent specific circumstances, preservation obligations should not extend to disaster recovery backup tapes created in the ordinary course of business.”); *id.* ¶ 40, Ex. 32 (The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Sedona Conference Working Group on Electronic Document Retention & Production, 2d ed. June 2007 (“2007 Sedona Principles”)) at cmt. 5.h (same).

**4. *Allstate had no duty to suspend its email auto-delete function because custodians preserved relevant email.***

Plaintiffs also fault Allstate for not deactivating the auto-delete function on its email system. (Pls.’ Mem. 11, 19.) As a matter of policy, Allstate generally does not suspend its auto-delete function for any reason. (See Zolner Decl. ¶ 29, Ex. 21, at 20.) Allstate instructs its custodians in detail how to properly save emails that may be subject to a litigation hold so they are not deleted by the auto-delete function, namely, to save those emails to a personal or archive folder that is not affected by the auto-delete program. (*Id.*) As provided by the Sedona Principles, “the preservation obligation, except in extreme circumstances, should not require the complete suspension of normal document management policies, including the routine destruction and deletion of records.” (Zolner Decl. ¶ 40, Ex. 32 (2007 Sedona Principles) at cmt. 5.d.) Instead, “the preservation obligation should be limited to those steps reasonably necessary to secure evidence for the fair and just resolution of the matter in dispute.” (*Id.* at cmt. 5.g.) Allstate did just that: it took all steps reasonably necessary to secure the preservation of relevant email, and suspension of its email auto-delete functionality was not warranted.

**5. *Allstate did not fail to instruct necessary custodians to preserve documents.***

Plaintiffs also incorrectly assert that Allstate failed to “instruct all of the parties’ agreed-upon custodians to preserve relevant documents,” namely the independent members of Allstate’s Board of Directors, George Giles, Jeffrey Finley, Kevin Novak, Robert Gary, and Anise Wiley-Little. (Pls.’ Mem. 11 n.7, 19.) As an initial matter, Plaintiffs are incorrect that the independent members of Allstate’s Board of Directors are agreed-upon custodians. As Allstate has explained to Plaintiffs, independent Directors are not proper custodians because the independent Directors (1) do not have Allstate-issued computer work stations, (2) did not have Allstate network access or Allstate-issued email accounts during the relevant time period, (3) were not and are not under Allstate’s control, and (4) were not and are not agents of Allstate. (*See* Zolner Decl. ¶ 38, Ex. 30, at 3.) And regardless, Allstate has already searched for and produced all responsive documents in Allstate’s possession, custody, or control that Allstate provided to its independent Directors. Mr. Gary left Allstate on December 31, 1999, and therefore was not employed by Allstate when Allstate anticipated litigation concerning the Preparing for the Future Group Reorganization Program or the Release. (*See id.* ¶ 29, Ex. 21, at 12.) Similarly, George Giles left Allstate’s service in January 2001 — well before Plaintiffs filed their Complaint — but Allstate collected, and has produced, relevant documents in Mr. Giles’s possession. (*See id.* ¶ 29, Ex. 21 at 11-12.) Additionally, to the best of Allstate’s knowledge, Jeffrey Finley, Kevin Novak (who left Allstate’s service in January 2002), and Anise Wiley-Little were given litigation hold instructions (*see id.* ¶ 29, Ex. 21 at 11), and Allstate has produced documents from their files (*see id.* ¶ 34).

**6. *Plaintiffs inaccurately portray the testimony of Karleen Zuzich.***

Plaintiffs misleadingly refer to the testimony of Karleen Zuzich to support the proposition that “Allstate has not retained all relevant documents.” (Pls.’ Mem. 18-19.) Ms. Zuzich did not

testify that “relevant emails were deleted.” Rather, in response to the question whether “any” of her emails were deleted in the third quarter of 2002, Ms. Zuzich responded that “some” of her emails were deleted after Allstate implemented its email auto-delete policy, and never stated that any were relevant to this litigation. (*See* Deposition of K. Zuzich (Dkt. No. 262-21), at 62-63.) Plaintiffs also claim that Ms. Zuzich did not have “certain documents, including a 2000 draft rehire policy.” (Pls.’ Mem. 19.) But again, Plaintiffs misstate the testimony. Ms. Zuzich testified as to one document that she had searched for and was unable to locate. Allstate has confirmed, however, that there were no “drafts” of the Rehire Policy; rather, the only “draft” that ever existed was the one that has already been produced by Allstate, including with its metadata. (*See id.* ¶ 39, Ex. 31.) Notably, one of these documents (ARI 087828) came from Ms. Zuzich’s own computer. (*Id.* ¶ 40.) Thus, Allstate is not aware of any “drafts” of the Rehire Policy for Preparing for the Future Agents that have been lost or destroyed.

**7. *Allstate has preserved ESI of relevant custodians that are no longer employed by Allstate.***

Plaintiffs also incorrectly allege that Allstate failed to confirm that it preserved ESI of former employees, including Plaintiffs. (Pls.’ Mem. 9-10, 19.) Allstate made reasonable and diligent attempts to collect information from custodians who departed from Allstate. Allstate has had a detailed policy in place to collect documents from non-agent employees who depart the company. (*See* Zolner Decl. ¶ 29, Ex. 21 at 17.) Based on Allstate’s investigation to date, this policy was followed to preserve relevant, appropriate materials. (*See id.* ¶ 41.)

As an initial matter, many Plaintiffs left Allstate prior to threatening litigation against Allstate:

<b>Plaintiff</b>	<b>Date Terminated Contract with Allstate</b>	<b>Date Allstate Notified of EEOC Charge</b>
Roger Boyd	June 30, 2000	November 2000
Dwight English	May 31, 2000	January 12, 2001
Larry Lankford	July 31, 2000	August 22, 2000
James Moorehead	April 30, 2000	November 6, 2000
Christopher Perkins	June 30, 2000	February 2001
James Pilchak	July 31, 2000	August 22, 2000
Paula Reinerio	June 30, 2000	Approx. September 25, 2000
Paula Schott	June 30, 2000	November 6, 2000
Paul Shirley	April 30, 2000	Approx. October 20, 2000
Donald Trgovich	July 31, 2000	October 16, 2000

Allstate therefore was not on notice that these individuals threatened litigation until months after they departed Allstate.

Furthermore, without regard to any obligation to preserve Plaintiffs' ESI, Allstate is in possession of ESI for certain Plaintiffs, specifically James Bever, Richard Carrier, Craig Crease, Nathan Littlejohn, John Wittman, and Ralph Wolverton. Allstate applied the agreed-upon search terms against the ESI for these Plaintiffs; however, no documents hit upon the Release-related search criteria. (*See* Zolner Decl. ¶ 42.)

The remaining Plaintiffs, Paul Cobb, Sylvia Crews-Kelly, Ronald Harper, Michael Kearney, Thomas Kearney, David Lawson, Rebecca Maslowski, Craig Millison, Edwin Murray, Carolyn Penzo, Richard Peterson, Gene Romero, Richard Wandner, Timothy Weisman, and Anthony Wiktor, continued to work for Allstate — and remained in possession of their Allstate-

issued computers — when they anticipated litigation against Allstate. (*See id.* ¶ 48, Ex. 37 at 2-7.) To the extent that Plaintiffs contend that their Allstate-issued computers contained potentially responsive information and that Allstate had an obligation to search Plaintiffs’ computers, their contention is baseless because those computers were in the possession, custody, and control of Plaintiffs, and not of Allstate. Moreover, if such information existed, Plaintiffs had a duty to inform Allstate of this fact. “[I]f a party cannot fulfill th[e] duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence of or the possible destruction of the evidence if the party anticipates litigation involving that evidence.” *Silvestri v. Gen. Motors*, 271 F.3d 583, 591 (4th Cir. 2001). At no time prior to this case being remanded, however, did Plaintiffs tell Allstate that their Allstate-issued computers contained information potentially responsive to the Preparing for the Future Program or the Release.

Finally, and most importantly, Plaintiffs have not identified a single document that was on their Allstate-issued computers, but no longer exists and is not available from another source. There is no indication that any relevant documents in the possession of Plaintiffs on Allstate-owned equipment or in the possession of other former employees has been lost or destroyed.

In sum, Allstate’s collection and preservation practices were in accordance with best practices at the time and Plaintiffs’ own preservation practices for this litigation. Plaintiffs cannot point to a single document that was not preserved. Plaintiffs’ statement that “the limited record indicates that Allstate has not retained all relevant documents that existed in its possession, custody or control” (Pls.’ Mem. 18) has no basis in fact.

### **III. ARGUMENT**

Setting aside Plaintiffs’ side show of unfounded accusations about Allstate’s document preservation and collection practices, the question presented by Plaintiffs’ Motion centers on

whether Plaintiffs’ “Program-related” definition is proper. As explained below, Plaintiffs’ “Program-related” definition is both ambiguous and well beyond the scope of permitted discovery. Moreover, Allstate has timely and properly objected to Plaintiffs’ definition, and has attempted to provide an alternative definition as well as discuss other potential options for a “Release-related” definition with Plaintiffs in order to craft Requests for Admissions and responses that pertain to the Release and Release-related issues — the only discovery germane at this time.

**A. Allstate Properly Objected To Plaintiffs’ Overly Broad And Ambiguous “Program-Related” Definition.**

**1. Allstate has not waived its objection to “Program-related.”**

Contrary to Plaintiffs’ claim that Allstate waived its “Program-related” objection, Allstate asserted objections to Plaintiffs’ definition of “Program-related” throughout its responses — in its General Objections, Objections to Definitions, and as a Specific Objection in *each* response to *each* Request that incorporated Plaintiffs’ overly broad “Program-related” definition.

*First*, Plaintiffs’ argument that Allstate has waived its objection because it answered certain Requests for Admission that incorporate Plaintiffs’ “Program-related” definition is puzzling. In each and every Request cited by Plaintiffs (Request Nos. 29, 36, 61, 70, and 105), Allstate specifically objected to Plaintiffs’ definition and use of “Program-related” as vague, ambiguous, overly broad, and unduly burdensome, and answered the Request “*subject to and without waiving*” those objections.

*Second*, Plaintiffs’ claim that Allstate has somehow waived its objection to Plaintiffs’ “Program-related” definition because Allstate answered general background interrogatories about the Preparing for the Future Program is also misguided.<sup>11</sup> Interrogatories seeking background

---

<sup>11</sup> Allstate answered Plaintiffs’ interrogatories requesting that Allstate identify documents relevant to and individuals knowledgeable about the Preparing for the Future Program. (See Zolner Decl. ¶45, Ex. 34 (Allstate’s 8/23/10 Resps. to Pls.’ First Set of Interrogs. & Reqs. for Adm. Directed to Validity of Release) Nos. 1(a) & 2(a) (seeking identification of individuals knowledgeable about the structure of the Program), No. 3(a) (seeking the

discovery information are different from binding requests for admission: interrogatories are discovery tools, whereas requests for admission are not. *See Am. Charities for Reasonable Fundraising Regulation, Inc. v. Gundersen*, No. 2:08-cv-875, 2011 WL 652477, at \*3-4 (D. Utah Feb. 15, 2011) (“Requests for Admission are ill-suited to resolve disputed factual issues. . . . ‘Although Rule 36 is included in the division of the Rules of Civil Procedure covering depositions and discovery, requests for admission are distinguishable from other discovery devices. While the basic purpose of discovery is to elicit facts and information and to obtain production of documents, Rule 36 was not designed for this purpose. Instead, requests for admission are used to establish admission of facts about which there is no real dispute.’”) (quoting 7 Moore’s Federal Practice § 36.02[1], [2] (2010)); *Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998) (“[R]equests for admissions are not principally discovery devices . . . . ‘A party who desires to discover what the facts are should resort to other discovery rules rather than Rule 36.’”) (quoting 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, § 2252, at 524–525); *Ghazarian v. United States*, No. 89-8900, 1991 WL 30746, at \*1 (E.D. Pa. Mar. 5, 1991) (“[Rule 36] is not properly speaking a discovery device, rather it is ‘a procedure for obtaining admissions for the record of facts already known’ by the seeker.”). The permissible scope of an interrogatory is broader than the permissible scope of a request for admission due to the fact that interrogatories often serve as a fact-gathering device. Thus, Allstate’s decision to respond to limited background discovery on the Program is not a basis to require Allstate to conclusively admit facts that are plainly irrelevant to the current scope of discovery.

Furthermore, requests for admission are held to a higher standard of clarity than other forms of discovery. Thus, Plaintiffs’ vague definition of “Program-related,” as explained in

---

identification of documents relating to the Program). Indeed, Allstate served similar background interrogatories on Plaintiffs.

Section 2 below, makes the Requests for Admission incorporating that term improper. *See Zen Invs., LLC v. Unbreakable Co.*, No. 06-4424, 2008 WL 4489803, at \*1 (E.D. Pa. Oct. 7, 2008) (“To compel answers to vague and indefinite questions capable of more than one interpretation and which require an explanation thwarts the purposes of Rule 36(a.)”); *McCarthy v. Darman*, No. 07-cv-3968, 2008 WL 2468694, at \*2 (E.D. Pa. June 17, 2008) (“Plaintiffs may not present ... a broad and non-specific request for admissions of facts.”) (quoting *In Re Bell Atl. Corp. Sec. Litig.*, 1996 WL 47970, at \*1 (E.D. Pa. Feb. 2, 1996)); Moore’s Federal Practice, § 36.10[6] (“Requests for admission should be simple and direct. Parties are not required to admit or deny requests that consist of statements that are vague or ambiguous.”).

*Finally*, Allstate *did* object to Plaintiffs’ interrogatories requesting background information concerning the Program as beyond that permitted in Release-related discovery. (*See, e.g.*, Zolner Decl. ¶ 45, Ex. 34 at Resps. to Interrog. Nos. 1(a), 2(a).) Allstate only agreed to withdraw its Release-related objection as a compromise after several letters and meet and confers with Plaintiffs, and it only withdrew its objection with respect to the interrogatories at issue, not all future potential discovery. (*See id.* ¶ 46, Ex. 35, at 1.)

**2. Allstate properly objected to Plaintiffs’ definition of “Program-related” as vague and ambiguous.**

For ease of reference, Allstate reminds the Court of Plaintiffs’ “definition” of “Program-related”:

The phrase ‘Program-related’ means, *without limitation*, information that constitutes, concerns, records, discusses, mentions, notes, reflects, memorializes, evidences, analyzes, describes, documents, comments upon, refers to, or has any relevance to or connection with the Program, including the Release and the Rehiring Moratorium.

(Zolner Decl. ¶ 30, Ex. 22 (Pls.’ Second Set of Reqs. for Adm.) at 6 (emphasis added).) Plaintiffs’ use of the phrase “without limitation” leaves “Program-related” virtually undefined: Allstate and

the Court are left to guess what Plaintiffs might consider “Program-related” to mean above and beyond the terminology in Plaintiffs’ “definition.” And even if Plaintiffs’ definition was limited to just information “that constitutes, concerns, records, discusses, mentions, notes, reflects, memorializes, evidences, analyzes, describes, documents, comments upon, refers to, or has any relevance to or connection with the Program, including the Release and the Rehiring Moratorium,” the scope of such information is boundless. For example, it is by no means certain that Allstate and Plaintiffs would agree on the universe of information that “has any relevance to” the Program.

Plaintiffs’ additional argument that Allstate’s objection “has not been sufficiently stated” (Pls.’ Mem. 22-23) is also baseless.<sup>12</sup> Allstate *specifically* objected to Plaintiffs’ “Program-related” definition as vague and ambiguous because “the following terms and phrases are vague, ambiguous, and/or undefined: ‘concerns,’ ‘discusses,’ ‘mentions,’ ‘notes,’ ‘reflects,’ ‘evidences,’ and ‘connection with’” (*see* Zolner Decl. ¶ 31, Ex. 24 at 5), and in each Request where Plaintiffs employed their “Program-related” definition, Allstate reiterated its objection that the phrase “Program-related” is overly broad, vague, and ambiguous (*see, e.g., id.* ¶ 31, Ex. 24 at Resp. to No. 3). Allstate also provided its own initial definition of permissible Release-related discovery, and offered to answer Plaintiffs’ Requests for Admission in accordance with this definition — an offer Plaintiffs refused.<sup>13</sup>

---

<sup>12</sup> Tellingly, Plaintiffs’ own vagueness objections to Allstate’s discovery requests cite no additional specific reasons for Plaintiffs’ objections — indeed, they state *less* specific reasons — than Allstate’s “Program-related” objection complained of above. *See, e.g.,* Zolner Decl. ¶ 47, Ex. 36 (G. Romero Resp. to Allstate First Req. for Adm., at Resp. No. 7 (“Plaintiff further objects to this Request as vague and ambiguous because it does not define the phrase ‘change his mind.’”).

<sup>13</sup> Plaintiffs’ reliance on *Duchesneau*, *Creely*, and *Porter* is misplaced. Each of these opinions warns against responses that fail to “state specific reasons” supporting vagueness objections. *See, e.g., Duchesneau v. Cornell Univ.*, No. 08-4856, 2010 WL 4117753, at \*2 (E.D. Pa. Oct. 19, 2010). Allstate’s objections not only state the specific terms and phrases within Plaintiffs’ “Program-related” definition that are vague, but Allstate provides its own definition of “Release-related” as an alternative to Plaintiffs’ ambiguous and overly broad definition of “Program-related.” Simply put, Allstate goes beyond merely “stating specific reasons” and proposes a workable alternative (that Plaintiffs outright rejected without any attempt to compromise).

**3. *Allstate properly objected to Plaintiffs' "Program-related" definition as overbroad.***

The Third Circuit and this Court have directed the parties to focus on the validity of the Release. *See* 3d Cir. Op., 344 Fed. Appx. at 793 (“We believe the District Court should reexamine the validity of the release, after allowing further discovery into the facts surrounding the signing of the releases.”); 4/8/10 Case Mgmt. Order (Dkt. No. 199) at 3 (“[A]ny party may serve discovery requests relating to the validity, enforceability, and applicability of the Release (hereinafter ‘Release-related discovery’).”). Yet Plaintiffs’ definition of “Program-related” would leave no discovery off the table. Indeed, when asked several times during a meet and confer whether any case-related discovery would fall outside Plaintiffs’ definition, Plaintiffs’ counsel stated only that “damages and class certification discovery” would be excluded. (*See* Zolner Decl. ¶ 32.)

Plaintiffs’ Motion identifies certain Release-related information Plaintiffs believe is relevant at this stage of discovery — Plaintiffs’ misrepresentation arguments, that the Release was “part and parcel” of an alleged illegal or improper scheme, that Plaintiffs did not execute the Release “knowingly and voluntarily,” and that the Release is unconscionable (Pls.’ Mem. 24) — but then Plaintiffs ask this Court to permit discovery on anything that “has any relevance to or connection with the Program” (Zolner Decl. ¶ 30, Ex. 22 at 6 (definition of “Program-related”). Moreover, Plaintiffs also assert that this Court “already declared that Program-related documents — beyond those that merely reference the Release — are relevant at this stage of discovery” because Plaintiffs claim the Court permitted discovery on Plaintiffs’ purported “part and parcel” theory. (Pls.’ Mem. 25.) As briefed in more detail in Allstate’s pending Motion for a Protective Order filed October 31, 2011 (Dkt. No. 273), while Plaintiffs are correct that the Court has permitted some discovery on the “part and parcel” theory, the Court did not hold that anything Program-related would be the proper subject of discovery. To the contrary, the Court bifurcated

discovery on the part and parcel theory, and only granted Plaintiffs' request to take discovery as framed in Plaintiffs' 2010 Document Requests. (*See* 10/21/10 Op. (Dkt. No. 236) at 9 (“*In the event that the Court finds that the part and parcel doctrine is applicable to this case*, Plaintiffs shall have the opportunity to take *further discovery* on this theory in an effort to prove its underlying claims of an illegal scheme.”) (emphasis added).)

Simply put, Plaintiffs' present attempt to take discovery on whether the Program “was, in application, retaliatory, unlawful, or illegal” (Pls.' Mem. 29) is far broader than the discovery contemplated by either this Court or the Third Circuit.<sup>14</sup> Only in the event that the Court finds “that the part and parcel doctrine is applicable to this case” (which the Court has not addressed or found) will the parties reach the second stage of “part and parcel” discovery, entitling Plaintiffs to discovery “in an effort to prove its underlying claims of an illegal scheme.” (10/21/10 Op. (Dkt. No. 236) at 9.)

Finally, Plaintiffs make a strained argument that “the Requests must employ terminology — such as ‘Program-related’ — that represents the scope of what Allstate itself sought to preserve at that time” because otherwise Allstate’s responses are “arguably meaningless.” (Pls.' Mem. 27-28.) Plaintiffs contend this is the case because “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).” (*Id.* at 27.) “Release-related” documents, however, constitute only a subset of “Program-related” documents, and many custodians in possession of “Program-related” documents never acquired documents relating to the Release. And while Allstate agrees that it was not on notice of many of Plaintiffs'

---

<sup>14</sup> Plaintiffs' current interpretation of what discovery is relevant to their “part and parcel” theory is also far broader than Plaintiffs' past positions on the issue. Plaintiffs previously sought information whether “Allstate *knew* the Release, which was created as part of Allstate’s ‘Preparing for the Future’ program, was improper, unfair, and intended to insulate Allstate from liability for breaching Plaintiffs' contracts.” (*See, e.g.*, 8/13/10 Pls.' Reply in Supp. of Mot. to Compel (Dkt. No. 225) at 12 (emphasis added).)

Release-related arguments when it first endeavored to collect documents — and therefore had no duty to preserve documents about then-unarticulated legal theories — Plaintiffs incorrectly contend that the scope of Allstate’s preservation communications define the scope of Release-related discovery. Simply put, the fact that Allstate’s preservation communications did not employ the term “Release-related” does not make Allstate’s responses to the Requests for Admissions any less “responsive.” To the contrary, responding to Plaintiffs’ Requests based on a “Release-related” definition allows Allstate to specifically confirm or deny its collection and preservation practices with respect to a discrete and identifiable body of Release-related documents, which are the only documents relevant at this stage. Far from a “hair-splitting” distinction, Allstate’s answers to Plaintiffs’ Requests are directly impacted by whether Allstate responds based on a “Program-related” or a “Release-related” definition. (*See* Pls.’ Mem. 26; Zolner Decl. ¶ 31, Ex. 24 at Resp. Nos. 4, 13, 21, 45, 80, 96.)

**B. Allstate Properly Asserted That It Can Neither Admit Nor Deny Various Requests.**

Plaintiffs contend that some of Allstate’s responses are “inaccurate” because they fail to specifically admit or deny Plaintiffs’ Requests, and should thus be deemed admitted. (Pls.’ Mem. 30.) Allstate’s responses are not only accurate, but they also fully comply with the Rules. Rule 36 permits a party to “assert lack of knowledge or information” as a reason for failing to admit or deny a request so long as the party also “states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny” a request. FED. R. CIV. P. 36(a)(4); *Panara v. Hertz Penske Truck Leasing, Inc.*, 122 F.R.D. 14, 17 (E.D. Pa. 1988) (“lack of information or knowledge” may be a reason for failure to admit or deny a request where the party “has made ‘reasonable inquiry’ to obtain information”).

Allstate's responses comply with this requirement. *First*, Plaintiffs' broad definition of the word "You" has prevented Allstate from admitting or denying Requests asking if "You ... search[ed] for Program-related ESI from the Relevant Time Period by conducting electronic searches" of various custodians' documents. (*See* Zolner Decl. ¶ 30, Ex. 22 at Nos. 10, 19, 26, 34, 42, 50, 58, 67, 76, 85, 93, 102, 111, 119.) Plaintiffs have defined the word "You" as "Allstate Insurance Company and The Allstate Corporation, along with all members of the Board of Directors, officers, employees, agents, consultants, attorneys, or other representatives acting or purporting to act on behalf of either company." (*Id.* ¶ 30, Ex. 22, at 2.) Allstate lacks the knowledge or information necessary to allow it to conclusively admit or deny with certainty whether any one of the multitude of individuals encompassed within Plaintiffs' definition of "You" searched for ESI using electronic searches. Allstate therefore accurately responded that "after reasonable inquiry into the information Allstate knows or can readily obtain, Allstate is unable to admit or deny [Plaintiffs' Requests]." (*Id.* ¶ 33, Ex. 24 at Resp. Nos. 10, 19, 26, 34, 42, 50, 58, 67, 76, 85, 93, 102, 111, 119.)<sup>15</sup>

Plaintiffs' claim that "Allstate has not given any explanation as to why it cannot admit or deny these Requests" (Pls.' Mem. 29) is disproven by the plain record. Allstate not only objected to the definition of "You" as overly broad and unduly burdensome (Zolner Decl. ¶ 33, Ex. 24, at 4), but also explained Allstate's objection in detail during the parties' September 15, 2011 meet and confer. Since then, Allstate has additionally offered to revise its responses to Plaintiffs' Requests if Plaintiffs agree to limit the definition of "You" to individuals within Allstate's

---

<sup>15</sup> Tellingly, several of Plaintiffs' own responses to Allstate's Requests for Admission mirror Allstate's language. (*See, e.g.*, Zolner Decl. ¶ 26, Ex. 20 (D. Lawson, G. Romero, D. Trgovich Resps. to Allstate's Second Set of Reqs. to Adm. at Nos. 6, 7, and 24 (stating that "after reasonable inquiry [/investigation], Plaintiff lacks sufficient knowledge or information to admit or deny" Allstate's Request).)

information technology and legal departments (*see id.* ¶ 33, Ex. 26 at 4-5 n.3), but Plaintiffs completely ignored Allstate's offer.

**Second**, after reasonable inquiry, there are three Requests that Allstate has been unable to conclusively admit or deny.<sup>16</sup> (*See id.* ¶ 31, Ex. 24 at Allstate Resp. Nos. 53, 123, 124.) As explained above, Allstate's response that it cannot admit or deny these Requests after reasonable investigation is entirely appropriate, and Allstate fully explained its inability to admit or deny these Requests during the parties' September 15, 2011 meet and confer.

#### **IV. CONCLUSION**

The principal question presented by Plaintiffs' motion is whether Plaintiffs are permitted to expand discovery and seek information in Requests for Admission on all of Allstate's collection and preservation efforts concerning electronically-stored information, regardless of its relevance to the Release or Release-related discovery. The simple answer to this question should be no, as the Third Circuit and this Court have defined the scope of current discovery as that which is related solely to the issue of the validity of the Release. Accordingly, this Court should deny Plaintiffs' Motion and Plaintiffs' request that Allstate's responses be found insufficient. If the Court determines that any of Allstate's responses are insufficient, Allstate requests a reasonable period of time to submit amended responses consistent with the Court's direction on the proper scope of discovery.

---

<sup>16</sup> Allstate supplemented its response to Request for Admission No. 87 after Plaintiffs filed the instant Motion.

Dated: November 10, 2011

/s/ Jordan M. Heinz

Richard C. Godfrey, P.C.

Sallie G. Smylie, P.C.

Erica B. Zolner

Jordan M. Heinz

KIRKLAND & ELLIS LLP

300 N. LaSalle

Chicago, IL 60654

(312) 862-2000

(312) 862-2200 (fax)

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)

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 the Allstate Defendants*

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing was served on November 10, 2011, by the Court's Electronic Case Filing system and by electronic mail on all counsel of record.

/s/ Jordan M. Heinz