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I. INTRODUCTION

Plaintiffs' motion demonstrated that Allstate's responses to Plaintiffs' preservation-related Requests for Admission ("Requests") are plainly insufficient under Rule 36 of the Federal Rules of Civil Procedure. Allstate's opposition brief offers nothing to dispute this conclusion.

As an initial matter, Allstate acknowledges that Plaintiffs have the right to serve Requests to confirm facts relating to Allstate's document preservation efforts. Allstate further makes clear that Plaintiffs have provided forthright and non-evasive responses to Allstate's similar preservation-related requests, exactly *as written*. Allstate, however, refuses to do the same.

Worse yet, Allstate's opposition brief makes a number of controlling admissions and erroneous legal arguments that are fatal to its position:

- *First*, although Allstate continues to object to 62 of Plaintiffs' Requests because the phrase "Program-related" is purportedly vague, ambiguous, and overbroad, Allstate acknowledges that it has served and responded to discovery that uses that very same terminology. Moreover, Allstate simply ignores that Plaintiffs have the legal right to obtain information on Allstate's preservation practices.
- *Second*, although Allstate relies upon the Court's October 21, 2010 ruling to support its objection to "Program-related" discovery, the Court's ruling expressly permits this discovery—which is clearly relevant to Plaintiffs' challenges to the Release.
- *Third*, although Allstate argues that it was entitled to rewrite at least 6 of Plaintiffs' Requests to seek admissions about whether Allstate preserved "Release-related" (rather than "Program-related") documents, Allstate concedes that its answers to these rewritten Requests are virtually meaningless, because Allstate "was not on notice of many of Plaintiffs' Release-related arguments when it first endeavored to collect documents."
- *Fourth*, although Allstate argues that it properly refused to admit or deny 14 Requests, which ask Allstate to admit that "you did not search for Program-related ESI" for certain agreed-upon custodians, Allstate concedes that it does not know whether "any one" at Allstate ever searched for ESI for these custodians—and thus, that Allstate never conducted a reasonable inquiry into these Requests.

- *Fifth*, although Allstate contends that it conducted a reasonable inquiry into 3 Requests, it still fails to describe that inquiry or to provide any explanation for why it cannot admit or deny these Requests.

Accordingly, it is clear that Allstate's improper responses are merely its latest effort to avoid admitting its preservation failures.

Finally, in an effort to deflect attention from its improper responses, Allstate makes a number of irrelevant arguments. Allstate spends more than one-third of its opposition brief attempting to rebut—with often inaccurate, misleading and unfounded assertions—that it spoliated relevant documents. It also makes other misleading assertions regarding the significance of Plaintiffs' responses to Allstate's preservation-related requests. None of that, however, has any bearing on the question that is before this Court. Because Defendants' responses to Plaintiffs' Requests are insufficient, Plaintiffs' motion should be granted in its entirety.

II. ARGUMENT

A. ALLSTATE'S FAILURE TO RESPOND TO PLAINTIFFS' REQUESTS BASED ON ITS OBJECTION TO PLAINTIFFS' "PROGRAM-RELATED" DEFINITION IS UNWARRANTED.

Plaintiffs have demonstrated that Allstate must answer, as written, Plaintiffs' "Program-related" Requests because: (a) Allstate waived its "Program-related" objection by responding to certain Requests that use this phrase and by serving and answering other discovery requests about the Mass Termination Program; (b) the phrase "Program-related" is neither vague nor ambiguous; and (c) Plaintiffs' Requests are not overbroad based on their use of the phrase "Program-related." (Pls. Br., Doc. No. 269, at 20-25).

As described below, Allstate's opposition brief fails to dispute these controlling points. In fact, Allstate acknowledges that Plaintiffs are entitled to discover the steps that Allstate did and did not take to comply with its legal obligation to preserve key custodians' documents,

including ESI, that are critical to showing that the Release is invalid and/or unenforceable.

Accordingly, Plaintiffs' motion should be granted.

1. Allstate Has Waived Its Objection To Plaintiffs' "Program-Related" Definition Because It Has Answered "Program-Related" Requests, Sought "Program-Related" Information, And Otherwise Responded To "Program-Related" Discovery.

Plaintiffs demonstrated that Allstate waived its objection to the phrase "Program-related" because Allstate has already *answered* numerous Requests (in Plaintiffs' preservation-related Requests) that use that phrase. (Pls. Br., Doc. No. 269, at 20-22). In its opposition brief, Allstate concedes this fact. (Def. Opp. Br., Doc. No. 274, at 26). Accordingly, Allstate cannot now contend that this phrase is vague, ambiguous, overbroad, or otherwise objectionable.

Despite this controlling concession, Allstate argues that it did not waive its objection, because it preceded its answers to "Program-related" Requests with the boilerplate language "subject to and without waiving [its] objections." (*Id.*). This makes little sense. Allstate cannot, in one breath, state that the phrase "Program-related" is "vague and ambiguous" but, in the next, deny Requests that seek admissions that Allstate did not instruct certain custodians "to search for and preserve all Program-related Documents." (Def. Resps., Doc. No. 269-3, at Req. Nos. 29, 36, 61, 70, and 105). If the definition were *truly* vague or ambiguous, Allstate would not have been able to deny these Requests, subject to its objections or not. Rather, it appears that Allstate selectively answered "Program-related" Requests to serve its interests: it answered those Requests that it could deny, in total, but then claimed it was unable to understand the phrase where answering would have required a damaging admission. (*Compare, e.g.,* Def. Resps., Doc. No. 269-3, at Req. Nos. 29, 36, 61, 70, 105, *with id.* at Req. Nos. 4, 13, 21, 45, 80, 96). This type of gamesmanship is impermissible.

To make matters worse, Allstate concedes that it previously served interrogatories that asked Plaintiffs to identify, for example, “all Documents *concerning the Preparing for the Future Group Reorganization Program* and/or the Release” (Def. Third Set of Interrogatories, Doc. No. 269-9, at 10; Def. Op. Br., at 26 n.11). That Allstate served interrogatories using the same terminology and seeking the same type of information to which it now objects belies Allstate’s overbroad, vague, and ambiguous objections to Plaintiffs’ “Program-related” Requests. Allstate further concedes that it “answered Plaintiffs’ interrogatories requesting that Allstate identify documents relevant to and individuals knowledgeable about the . . . Program.” (Def. Op. Br., at 26 n.11).

Despite admitting that it has served and answered interrogatories that seek “Program-related” information, Allstate contends that this did not result in a waiver, because “the permissible scope of an interrogatory is broader than the permissible scope for a request for admission” (Def. Br., Doc. No. 274, at 26-28). Allstate is incorrect. Even though interrogatories and requests for admission may generally serve different purposes, the scope of both is governed by the principles of relevance embodied in Rule 26(b), which provides:

[T]he scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents

Fed. R. Civ. P. 26(b)(1). Both Rules 33 and 36 expressly state that parties may serve interrogatories and requests for admission that fall within the scope of Rule 26(b)(1). *See* Fed. R. Civ. P. 33(a)(2); Fed. R. Civ. P. 36(a)(1). That is precisely what Plaintiffs have done.

By serving and answering discovery that sought information related to the Mass Termination Program, including the instant Requests, Allstate recognized that “Program-related” information is not vague, ambiguous, or irrelevant, and it cannot now argue that Plaintiffs’

Requests exceed the scope of relevant discovery because it does not want to make admissions about its preservation failures.

2. The Phrase “Program-Related” Is Neither Vague Nor Ambiguous.

Plaintiffs have shown that Allstate’s “vague and ambiguous” objection to the phrase “Program-related” fails for three independent reasons:

- (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.

(Pls. Br., Doc. No. 269, at 22-23, 25). For each of these three reasons, Allstate’s objection should be overruled.

In its opposition brief, Allstate contends that it properly raised this “vague and ambiguous” objection when, in its general objections, Allstate “specifically objected to Plaintiffs’ ‘Program-related’ definition as vague and ambiguous because [certain words used in the definition] are ‘vague and ambiguous.’” (Def. Opp. Br., Doc. No. 274, at 29) (emphasis omitted). However, the circular reasoning in this general objection offers *no specificity whatsoever*. It says nothing about why those terms are purportedly vague or ambiguous. Accordingly, Allstate failed to properly raise this objection.

Worse yet, Allstate’s opposition brief fails to *explain* what is vague or ambiguous about the phrase “Program-related.” Instead, Allstate merely repeats its general objection—that the words and phrases “concerns,” “discusses,” “mentions,” “notes,” “reflects,” “evidences,” and “connection with” are somehow vague and ambiguous. (Def. Br., Doc. No. 274, at 29). Of

course, merely stating that a word is vague or ambiguous does not explain why that word is so. Indeed, these are ordinary, common-sense terms that Allstate has itself used in its discovery requests.¹ They need no explanation. Again, it is clear that Allstate is simply grasping at straws to avoid confirming its preservation failures.

Moreover, Plaintiffs have unambiguously clarified that “Program-related” should be interpreted in accordance with its *plain meaning*—as “information concerning the Mass Termination Program.” (Pls. Sep. 21, 2011 Letter, Doc. No. 269-6, at 2; Pls. Br., Doc. No. 269, at 23). In its opposition brief, Allstate completely ignores the common-sense clarification. This is fatal to Allstate’s objection.

Finally, Allstate simply ignores the very reason why Plaintiffs served the instant Requests: because Allstate instructed its custodians to collect and retain documents “concerning the Preparing for the Future Group Reorganization Program and/or the Release.” (Pls. Br., Doc. No. 269, at 23; Allstate’s Fourth Am. and Supplemental Resps. and Objs. to Pls. First Set of Interrogatories and Reqs. for Admis., Doc. No. 269-4, at 3-4). This is the same language to which Allstate now objects. Allstate cannot claim in good faith that preservation-related Requests that track the language that Allstate admittedly used to instruct its custodians to preserve documents are somehow vague or ambiguous.

3. Plaintiffs’ “Program-Related” Requests Are Not Overbroad.

Plaintiffs have demonstrated that their “Program-related” Requests are not overbroad, 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

¹ Indeed, Allstate has used many of these same routine terms in connection with its discovery to Plaintiffs. (*See, e.g.*, Allstate’s Third Set Of Doc. Reqs., attached hereto as Ex. A to December 5, 2011 Declaration of Brian Ercole (“Ercole Decl.”), at Definitions, at ¶ 4). For this reason alone, Allstate’s objection is frivolous.

“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. (Pl. Br., Doc. No. 269, at 24-25).²

In response, Allstate first suggests that Plaintiffs’ Requests as to the **creation, collection and preservation** of certain individuals’ “Program-related” documents are overbroad because they somehow equate to full-fledged substantive discovery on the merits of all claims asserted by Plaintiffs in this litigation. (Def. Opp. Br., Doc. No. 274, at 29-30). That is simply not so. These Requests merely seek admissions that relate to whether Allstate complied with its duty to preserve relevant documents in anticipation of this litigation, **not** merits-based or substantive admissions. (Pls. Br., Doc. No. 269, at 24-25). In making its overbreadth objection, Allstate ignores the context of the Requests.

Moreover, although Plaintiffs have repeatedly identified how certain information related to the Mass Termination Program is substantively relevant to Plaintiffs’ various challenges to the Release, Plaintiffs’ Requests about Allstate’s compliance with its duty to preserve cannot and should not be limited to those particular subsets of documents that Allstate adjudges today as substantively relevant at this stage of litigation. (*Id.*). At a minimum, Plaintiffs are entitled to confirm the facts concerning Allstate’s efforts to preserve “Program-related” documents (which it knew would be relevant to the litigation it anticipated over the Mass Termination Program) because its failure to take certain steps years ago to preserve key players’ documents about the Mass Termination Program directly impacts Plaintiffs’ present ability to challenge the validity of the Release. (*Id.*). Plaintiffs are entitled to this discovery as a matter of law. *See* Fed. R. Civ. P.

² Allstate’s baseless contention that Plaintiffs’ Requests are overbroad because they seek “Program-related” information serious concerns as to whether Allstate has, in fact, produced all relevant documents, including documents concerning the Mass Termination Program, to which Plaintiffs are entitled to support their challenges to the validity of the Release.

26(b)(1) (providing for discovery of “the existence description, nature, custody, condition, and location of any documents or other tangible things. . . .”); *Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-LRL, 2011 U.S. Dist. LEXIS 88977, at *7 (D. Nev. Aug. 19, 2011) (“Plaintiffs are entitled to know ‘what kinds and categories of ESI [defendant’s] employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end.’”) (quoting *In re eBay Seller Antitrust Litig.*, No. 07-01882 JF, 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007)).

Second, Allstate does not dispute that it instructed its custodians to preserve documents “concerning the Preparing for the Future Group Reorganization Program and/or the Release,” which is the equivalent of “Program-related” documents. (Pls. Br., Doc. No. 269, at 25). This concession negates the argument that Plaintiffs’ Requests are overbroad. Plaintiffs’ Requests tracked Allstate’s language, consistent with the litigation hold instructions that Allstate purportedly provided in the 2000-2002 period. To accurately confirm the steps Allstate did and did not take to preserve documents when the duty attached, the Requests *had* to employ language consistent with the litigation hold instructions.

Finally, Allstate’s attempt to rely upon the Court’s October 21, 2010 Order for the assertion that Plaintiffs’ “Program-related” Requests are overbroad is grossly misplaced. Although Allstate tries to reduce Plaintiffs’ right to get discovery about the Mass Termination Program to its theory that that the Release is “part and parcel” of an illegal scheme and then contends that this Court’s October 21, 2010 Order “bifurcated discovery on the part and parcel theory” (Def. Opp. Br., Doc. No. 274, at 30-31), Allstate is wrong. As Plaintiffs have explained in their opposition to Allstate’s pending Motion for a Protective Order,³ this Court

³ See Doc. No. 296, at p. 10-11, 17-21.

expressly recognized that “*nothing in [the Court’s April 2010 Case Management Order] can remotely be construed as limiting or precluding Plaintiffs’ ability to take discovery on its ‘part and parcel’ theory at this stage of the litigation.*” (Oct. 21, 2010 Op., Doc. No. 237, at 8-9 (emphasis added) (holding that Plaintiffs are “fully entitled to briefing on their theory that the Releases are void because they are ‘part and parcel of an illegal scheme’”). The Court’s mandate—that Plaintiffs are entitled to “Program-related” information, at this juncture, pursuant to Plaintiffs’ part and parcel challenge to the Release—could not be clearer.

Moreover, Allstate’s misplaced reliance on this Order to support its overbreadth objection is troubling for yet another reason—it ignores all of Plaintiffs’ other challenges to the Release. Plaintiffs have demonstrated in detail why these challenges entitle Plaintiffs to “Program-related” information at this juncture. (Pls. Br., at 24-25; Pls. Br. In Opp. To Def. Mot. For Protective Order, Doc. No. 276, at pp. 17-21). Allstate simply ignores the relevance of these challenges.

Put simply, because Plaintiffs have demonstrated their entitlement to this discovery, Allstate’s objection to Plaintiffs’ “Program-related” Requests must fail as a matter of law.

B. ALLSTATE CANNOT REWRITE PLAINTIFFS’ REQUESTS AND MUST ANSWER THEM AS WRITTEN.

As Plaintiffs have demonstrated, it was improper for Allstate to re-write 6 Requests by using the term “Release-related,” rather than “Program-related,” for each of the following reasons:

- (a) Plaintiffs’ definition of “Program-related” was proper, thereby requiring Allstate to answer these Requests as drafted;⁴

⁴ It is well-settled that a party must answer a Request *as written*, not as he wished it would have been written. 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.”); see also *United States v. Lorenzo*, No. 89-

- (b) 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;” and
- (c) Allstate’s definition of “Release-related” is too amorphous and narrow.

(Pls. Br., Doc. No. 269, at 26-29). Allstate cannot refute these assertions.

In its opposition brief, Allstate concedes that “it was not on notice of many of Plaintiffs’ Release-related arguments when it first endeavored to collect documents—and therefore had no duty to preserve documents about then-unarticulated legal theories.” (Def. Br., Doc. No. 274, at 31). This concession confirms Plaintiffs’ very point—that any admissions to preservation-related Requests that use Allstate’s definition of “Release-related” would be meaningless. Allstate has defined “Release-related,” in large part, according to its interpretation of the *legal theories* underlying Plaintiffs’ challenges to the Release (*see* Pl. Br., Doc. No. 269, at 26-27), yet Allstate concedes that it was not aware of all of Plaintiffs’ legal theories when it was first obligated to preserve and collect documents. Thus, Allstate necessarily would not have preserved all “Release-related” documents from that time period, before certain “Release-related” theories were even articulated. Plaintiffs had to frame their Requests using terminology such as “Program-related”—the very terminology that Allstate acknowledges that it used for its custodians—because that represents the scope of what Allstate sought to preserve at the time it reasonably anticipated litigation.

Despite this controlling concession, Allstate argues in conclusory fashion that its definition of “Release-related” consists of a “discrete and identifiable body” of documents. (Def. Br., Doc. No. 274, at 32). Tellingly, Allstate makes no effort to identify the universe of

6933, 1990 WL 83388, at *1 (E.D. Pa. June 14, 1990) (Courts “should not allow the responding party to make ‘hair-splitting distinctions’ that frustrate the purpose of the Request.”) (internal citations omitted). Additionally, a party’s denial must “fairly meet the substance of the requested Admission.” *See Anthony v. Cabot Corp.*, No. 06-CV-4419, 2008 U.S. Dist. LEXIS 51144, at *8 (E.D. Pa. July 3, 2008) (internal citations omitted). Thus, Allstate’s “Release-related” answers are impermissible.

documents that are encompassed by its amorphous definition. More fundamentally, Allstate fails to offer any legal or factual support for its idea that it is permitted to re-write a Request for Admission only to give an answer that means nothing to the requesting party. Allstate's argument ignores the nature of Plaintiffs' Requests and the strictures of Rule 36.

Finally, Allstate remarkably argues that "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.'" (*Id.*). Yet, this is *precisely* why they are non-responsive. Allstate has rewritten each Request to respond to something different, based on its own separate and unworkable definition of one of Plaintiffs' key terms. It could not be any plainer that Allstate's maneuvering is meant to avoid answering these fundamental and critical discovery requests about Allstate's preservation failures.

C. ALLSTATE STILL FAILS TO PROVIDE A SUFFICIENT EXPLANATION FOR ITS INABILITY TO ADMIT OR DENY CERTAIN REQUESTS.

Plaintiffs established that Allstate's responses that it can neither admit nor deny 18 Requests are improper because: (a) Allstate has not given *any* explanation, yet alone a detailed explanation, as to why it cannot admit or deny these Requests; and (b) it is simply inconceivable that Allstate could neither admit nor deny those Requests. (Pls. Br., Doc. No. 269, at 29-30). As described below, Allstate *still* fails to offer a valid explanation as to why it cannot admit or deny each of these Requests, and all but concedes that it has failed to conduct any reasonable investigation. For this reason alone, Plaintiffs' motion should be granted.

In its opposition brief, Allstate simply states that it cannot answer 3 of the 18 Requests that Plaintiffs have identified, yet continues to offer no reason—much less any proof—for not being able to do so. (Allstate's Resps., Doc. No. 269-3, at Req. Nos. 53, 123, 124; *see also* Def. Opp. Br., Doc. No. 274, at 34). Nor does Allstate even attempt to explain how its actual

responses “set forth ‘in detail’ the reasons why the answering party cannot truthfully admit or deny the matter.” *Kutner Buick, Inc. v. Crum & Foster Corp.*, No. 95-1268, 1995 WL 508175, at *2 (E.D. Pa. Aug. 24, 1994) (internal citation omitted). Accordingly, Request Nos. 53, 123, and 124 should be deemed admitted.

Allstate further contends that it cannot answer 14 additional Requests,⁵ which ask Allstate to admit that “you did not search for Program-related ESI from the Relevant Time Period by conducting electronic searches . . . against the ESI” of particular agreed-upon custodians, because the word “You” is supposedly overbroad. (Def. Br., Doc. No. 274, at 33).⁶ This is frivolous. Because a corporation can act only through its agents, Plaintiffs clearly 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.” (Pls. Second Set of Reqs. for Admis., Doc. No. 269-2, at p. 2). As a matter of law, Allstate cannot refuse to answer this Request because it seeks information about Allstate and its agents. *See, e.g., Desoto Health & Rehab, L.L.C. v. Phila. Indem. Ins. Co.*, No. 2:09-cv-599-FtM-99SPC, 2010 WL 2330286, at *1 (M.D. Fla. June 10, 2010) (denying defendant’s overbreadth objection to plaintiff’s definition of “you” in document requests, defined as “the person to whom these requests are addressed including its divisions, departments, subsidiaries, affiliates, predecessors, present or former

⁵ Allstate supplemented its response to Request No. 87 *after* Plaintiffs filed the instant motion. (*See* Allstate’s Supplemental Response, attached hereto as Ex. B to Ercole Decl.). Allstate’s supplemental response provides an answer, but to a different Request. Consistent with its other improper responses, Allstate substitutes its “Release-related” language for Plaintiffs’ “Program-related” language. (*Id.* at 2-3). As described above (and in Plaintiffs’ opening brief), this unilateral rewriting of Plaintiffs’ Request is inappropriate. Because Allstate’s supplemental response remains defective, this Request should be deemed admitted.

⁶ These include Requests Nos. 10, 19, 26, 34, 42, 50, 58, 67, 76, 85, 93, 102, 111, 119.

officers, directors, owners or agents and all other persons acting or purporting to act on its behalf as well as each partnership in which it is a partner”).⁷

Moreover, Allstate’s selective invocation of its objection to the definition of “You” makes this objection even more baseless. Allstate has either admitted or denied other Requests about preservation-related efforts that use the same common-sense definition of “You.” (*See* Allstate’s Resps. and Objs., Doc. No. 269-3, at Resp. Nos. 4, 7, 8, 9, 13, 16, 17, 18, 21, 24, 25, 29, 31, 32, 33, 36, 39, 40, 45, 48, 49, 53, 56, 57, 61, 64, 65, 66, 70, 73, 74, 75, 80, 82, 83, 84, 90, 91, 92, 96, 99, 100, 101, 105, 108, 109, 110, 118, 125, 127, 129, 131, 133, 135, 142, 144, 145). As such, Allstate cannot now invoke this objection to avoid admitting that it failed to run electronic searches for ESI of agreed-upon custodians. Because such gamesmanship is prohibited by Rule 36, Allstate’s objection should be overruled.

Worse yet, Allstate concedes that it did not do a reasonable investigation before answering these Requests, as is required by Rule 36. *See* Fed. R. Civ. P. 36(a)(4) (requiring “reasonable inquiry” before asserting “lack of knowledge or information”). Allstate contends that it “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.” (Def. Opp. Br., Doc. No. 274, at 33) (emphasis added).

⁷ Moreover, Allstate provides no explanation as to why it cannot answer these Requests based upon the information in its possession, including information within the possession of its information technology and legal departments and any other agent within its control. Plaintiffs repeatedly has requested this information. (*See* Pls. Sep. 21, 2011 Letter, Doc. No. 269-6, at 4 n.3). At a minimum, Allstate must answer these Requests based upon that information. *See, e.g. Transcon. Fertilizer Co. v. Samsung Co.*, 108 F.R.D. 650, 653 (E.D. Pa. 1985) (“A party cannot plead ignorance to information that is from sources within its control A corporation must supply information in the hands of its agents and others within its control.”) (internal citation omitted); *Zenith Radio Corp. v. Matsushita Electric Indus. Co. Ltd.*, 505 F. Supp. 1190, 1257 n.82 (E.D. Pa. 1980) (similar).

This acknowledgment—that Allstate does not know whether *anyone* searched for ESI using electronic searches at all—raises serious concerns about whether Allstate properly preserved and/or collected documents. It also confirms that Allstate did nothing to respond to these 14 Requests. Because Allstate cannot merely recite the language of Rule 36 without actually making the reasonable inquiry, Requests Nos. 10, 19, 26, 34, 42, 50, 58, 67, 76, 85, 93, 102, 111, 119 should be deemed admitted. *See, e.g., Louis v. Martinez*, No. 5:08-CV-151, 2011 WL 1832808, at *3 (N.D. W.Va. May 13, 2011) (stating “even if Defendants had used the ‘magic words’ that they had conducted a ‘reasonable inquiry’ in keeping with [Rule] 36(a)(4), the discovery process is still subject to the overriding limitation of good faith”); *Kutner Buick, Inc.*, 1995 WL 508175, at *2 (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”) (emphasis added).

D. ALTHOUGH NOT CRITICAL TO THIS MOTION, ALLSTATE MAKES NUMEROUS CONCESSIONS ABOUT ITS PRESERVATION FAILURES.

While asserting that Plaintiffs’ evidence of Allstate’s preservation failures is irrelevant to the merits of Plaintiffs’ motion, Allstate spends at least ten pages of its opposition brief attempting to explain away these failures.⁸ (*See* Def. Opp. Br., Doc. No. 274, at 16-25). Yet,

⁸ For instance, while admitting that nothing in its document productions links a single document to the custodial files of Barry Hutton, Allstate now asserts, without identifying even one document by Bates number, that it has produced hard copy documents—including some that were originally ESI—“from the custodial files” of Mr. Hutton. (Def. Opp. Br., Doc. No. 274, at 16-17, 17 n.9). Because Allstate produced its historic documents (*i.e.*, those produced prior to 2010) as they were maintained in the ordinary course of business, not in response to specific requests, it was obligated to provide source information pursuant to Rule 34(b)(2)(E). Despite Allstate’s initial commitment to provide this information (*see* Def. Nov. 13, 2002 Letter, attached as Ex. C to Ercole Decl., at 3-4), Allstate has repeatedly refused to do so. (*See* Def. Sep. 16, 2011 Letter, attached as Ex. D to Ercole Decl., at 2-3). Thus, Allstate cannot make reference to this information to defend against its preservation failures. To the extent that Allstate now suggests to the Court that it has this information (Def. Opp. Br., Doc. No. 274, at 16-17), Plaintiffs respectfully request that Allstate be compelled to provide it immediately.

despite its best efforts, Allstate either acknowledges or fails to offer sufficient evidence to dispute the basic facts concerning these preservation failures, including that Allstate:

- failed to produce ESI in native format, with metadata, from sixty-three (63) of the parties' eighty-two (82) agreed-upon custodians;⁹
- failed to save previously-collected documents concerning the Release in native format;
- failed to instruct all of the parties' agreed-upon custodians to preserve relevant documents;¹⁰
- 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;
- failed to suspend its e-mail systems' auto-delete function for any key player; and
- failed to save back-up tapes of the ESI, including e-mails, that resided on its servers during the relevant time period.

(See Def. Opp. Br., Doc. No. 274, at 16-23; *see also* Oct. 6, 2011 Meehan Decl., Doc. No. 269-1, at ¶ 9; July 13, 2011 Meehan Decl., Doc. No. 262-3, at ¶ 9; Pls. Apr. 26, 2011 Letter, Doc. No. 262-10, at 8-9).

More troublingly, in a last-ditch effort to shift the focus away from itself, Allstate tries to raise a number of irrelevant arguments about what Plaintiffs purportedly have and have not

⁹ Allstate's suggestion that Plaintiffs asked it to search for 113 custodians is not correct. (Def. Opp. Br. at 9-10, 17 n.10, 18). The parties "agreed upon" 82 custodians. The letter correspondence between the parties confirms this point. (See Pls. Nov. 4, 2010 Letter, Doc. No. 275-12, at 3-4; Pls. Nov. 10, 2010 Letter, Doc. No. 275-13, at 2; Pls. Nov. 15, 2010 Letter, Doc. No. 275-14, at 9). More troublingly, although Allstate now attempts to justify its failure to produce ESI from key agreed-upon custodians because four custodians left Allstate before the Program and some unidentified number of custodians purportedly "may have" had no role in the Program (Def. Br., at 17-18), Allstate not only ignores the many other custodians from whom no ESI has been produced, but also the parties' discussions concerning custodians. Recognizing that Allstate should have superior knowledge as to who would have responsive documents, Plaintiffs relied upon Allstate's input for the proposed custodian list. (See, e.g., Pls. Nov. 4, 2010 Letter, Doc. No. 275-12, at 4). Allstate never suggested that any of the parties' agreed-upon custodians had no connection to the Program or did not have Release-related documents. Thus, it is disingenuous for Allstate to do so now. Indeed, this is precisely the reason why Plaintiffs have noticed a Rule 30(b)(6) deposition that seeks, in part, deposition testimony on these very preservation-related issues.

¹⁰ Although Allstate contends that it produced responsive document provided to the independent members of its Board of Directors and from George Giles's custodial files (Def. Opp. Br., at 22), this means very little if Allstate never instructed these individuals to preserve relevant documents.

preserved. These arguments, however, have no bearing on this Court's determination of the insufficiency of Allstate's responses to Plaintiffs' Requests. If and when those issues are properly before this Court, Plaintiffs will address them in detail.¹¹ Meanwhile, it suffices to say that Plaintiffs complied with Rule 36 and provided forthright, non-evasive answers to Allstate's preservation-related requests for admission. Allstate should have done the same. Accordingly, Plaintiffs' motion should be granted.

III. CONCLUSION

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

¹¹ Allstate's suggestion that Plaintiffs' answers to Allstate's requests for admission evidence any preservation-related failures on the part of Plaintiffs is simply incorrect. (*See, e.g.*, Def. Opp. Br., Doc. No. 274, at 13). To the contrary, Plaintiffs' admissions that they did not, for example, collect or retain all "Release-related" (as defined by Allstate) ESI over the 21 years that Allstate identifies as the "Relevant Time Period"—which includes on average a decade prior to when any duty to preserve would have attached—are far from probative of spoliation. (*See, e.g.*, Pls. Resps. to Allstate's Second Set of Reqs. for Admis., Doc. No. 275-20, at ¶ 14).

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2011, a true and correct copy of this Reply Brief in Support of Plaintiffs' Motion to Determine the Sufficiency of Allstate's Answers and Objections to Plaintiffs' Second Set of Requests for Admissions was served via ECF on all counsel of record.

Date: December 5, 2011

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