

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

ARTHUR C. RUPERT, LINDA K.)	
AUSTIN, LARRY L. CAMPBELL,)	Civil Action No. 07-00705
KENNETH J. HUNT and WADE C.)	
BITTNER, on behalf of themselves and)	Judge Arthur J. Schwab
all others similarly situated,)	Special Master Kevin P. Lucas
)	Mediator Louis B. Kushner
Plaintiffs,)	
vs.)	
)	
PPG INDUSTRIES, INC.,)	
)	
Defendant.)	

**CONSOLIDATED BRIEF IN SUPPORT OF PLAINTIFFS’ MOTION TO
COMPEL RESPONSES TO PLAINTIFFS’ FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND IN OPPOSITION
TO PPG’S TWO MOTIONS FOR A PROTECTIVE ORDER**

AND NOW come Plaintiffs, Arthur C. Rupert, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt and Wade C. Bittner (collectively, “Plaintiffs” or “Representative Plaintiffs”), on behalf of themselves and all others similarly situated, by and through their undersigned counsel, and file this Consolidated Brief, pursuant to Rule 37(a)(2)(B) and Local Rule 37.2. In support thereof, Plaintiffs aver as follows:

I. INTRODUCTION

On May 24, 2007, Plaintiffs initiated this collective action against Defendant, PPG Industries, Inc. (“PPG”), alleging pervasive and systemic age discrimination by PPG against its employees, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq* (“ADEA”). Plaintiffs’ First Amended Class and Collective Action Complaint is replete with averments regarding the unlawful and discriminatory patterns or practices implemented and continued by PPG for over ten years throughout its corporate structure. *See, e.g.*, Amended Complaint at 3, ¶ 9 (“[t]his is an action brought by the Representative Plaintiffs seeking redress on a

collective basis for systemic practices engaged in by PPG to discriminate against its older work force in conducting Reductions-in-Force ('RIFs') and forced retirements over an extended period of time, which practices are continuing in nature"); *Id.* at 17, ¶ 66 ("it appears that its systemic discriminating patterns and practices have been uniformly implemented in every corner of PPG's organization and in every PPG location in the United States"); *Id.* at 9, ¶ 30 ("[t]his legacy of age discrimination has become institutionalized throughout the company, and PPG's decisions, policies and plans for termination of its employees have become infected by discrimination, resulting in the termination of a highly disproportionate number of older employees, whose job duties were routinely assumed by younger workers"); *Id.* at 17, ¶ 67 (Plaintiffs refer to "the decade throughout which [PPG] has been methodically terminating its older employees").

Despite the obvious collective nature of Plaintiffs' Amended Complaint, and the continuing patterns of discrimination described therein, PPG has filed a Motion for a Protective Order which seeks to limit the discovery that Plaintiffs can obtain in a way that is fundamentally inconsistent with the nature and scope of this action. Although the Court has "phased" the discovery in this case to address certain legal and factual issues in advance of preliminary certification and notice to potential opt-in plaintiffs, the Court has not limited the scope of Phase I discovery in the arbitrarily restrictive manner urged by PPG. As set forth below, PPG's proposed approach is without basis and would significantly prejudice Plaintiffs' prosecution of this collective action.

II. PROCEDURAL BACKGROUND

On October 18, 2007, Plaintiffs served their First Set of Interrogatories and Requests for Production of Documents (the "First Discovery Requests") (Exhibit "A") on PPG. Consistent with their allegations that PPG's discriminatory practices transcend a decade and spread to every corner of the company, in Plaintiffs' First Discovery Requests seek information concerning all PPG

Reductions-in-Force (“RIFs”) occurring company-wide at any time from January 1, 1997, to the present (*See. e.g.* Interrogatory Nos., 2, 3, 6 and 7 and Document Requests 3, 7 and 10).

On November 20, 2007, PPG served its Responses to the First Discovery Requests (Exhibit “B”), which are replete with standard form objections, through which PPG attempts to radically limit the scope of the information it will provide to Plaintiffs. Simultaneously therewith, PPG served a Motion for a Protective Order and Brief in Support (Exhibit “C”), as well as a Motion for Protective Order to Protect Confidential Information (Exhibit “D”). In the latter Motion, PPG seeks to create further obstacles to Plaintiffs’ use of information PPG may ultimately be willing or required to produce introduce through a procedure it purports is designed to assure the confidentiality of such information. Plaintiffs, herein, wish to address and refute each of PPG’s objections to the scope of the First Discovery Requests, whether contained in its Responses or in either of the Motions for Protective Order, to oppose the overly broad and unnecessary confidentiality provisions sought by PPG, and to request that the Court enter an Order compelling PPG to respond fully to the First Discovery Request, without limitation.

III. ARGUMENT

A. **Under the Federal Rules of Civil Procedure, Generally, and in Discrimination Cases, Particularly, Discovery is to be Expansive**

PPG asserts that, under its interpretation of both the Court’s Order and the law, Plaintiffs should only be permitted to inquire into RIFs occurring in the business unit that employed the five Plaintiffs within 300 days prior of their first-filed EEOC charge. This position is contrary to the letter and spirit of the Federal Rules of Civil Procedure and is, therefore, obstructionist. Rule 26, which is to be “construed broadly,” establishes a liberal standard for discovery regarding “any matter, not privileged, which is relevant to the subject matter involved in the pending action [so long as] the information sought appears reasonably calculated to lead to the discovery of admissible

evidence.” *Great West Life Assurance Company v. Levithan*, 152 F.R.D. 494, 497 (E.D. Pa. 1994); F.R.Civ.P. 26. Thus, the discovery permitted by Rule 26 has been held to “encompass[] any matter that bears on, or that reasonably could bear on, any issue that is or may be in this case.” *Id.* (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978)).

Plaintiffs’ discovery requests were drafted narrowly with great care to identify specific categories of information directly bearing upon the “threshold issues” addressed in Phase I. By way of example, the Court’s Order specifically permits discovery with respect to “whether the named plaintiffs’ claims are barred in whole or in part by the doctrine of waiver and/or release...” (identified as issue (1)). CMO at 1. Plaintiffs’ Interrogatory Nos. 3-6 seek information related to RIFs conducted by PPG, as well as the Decisional Unit Information (“DUI”) presented to employees affected by the RIFs at the time they were asked to sign Separation Agreements. Inexplicably, and without an adequate basis, PPG asserts, “the[se] interrogator[ies] [are] beyond the scope of Phase I discovery,” even though RIF information and data regarding severance packages and DUI are inextricably linked to the determination of issue (1) of Phase I.

Before even addressing the more substantive flaws in PPG’s position with respect to the scope of Phase I discovery, Plaintiffs observe that objections in the nature of those asserted by PPG to each of the First Discovery Requests (i.e., that they are “overly broad” and “unduly burdensome”) have been condemned by courts in this Circuit. *See, e.g., Momah v. Albert Einstein Medical Center*, 164 F.R.D. 412, 417 (E.D. Pa. 1996) (“Mere recitation of the familiar litany that an interrogatory or a document production request is ‘overly broad, burdensome, oppressive and irrelevant’ will not suffice”) (citing *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)). Courts have been particularly intolerant of such objections to discovery in employment discrimination cases:

The predominant purpose of discovery is to permit all parties to explore, in depth, a broad range of issues raised by the pleadings. Indeed the precise characterization inherent in pleadings may not, in themselves, limit or define the relevancy of a request; rather it is the subject matter and legal issues of the controversy that define its boundaries. Any material relating to the subject matter of the lawsuit may be discoverable as long as relevancy is demonstrable. Fed. R. Civ. P. 26(b)(1). *In a situation involving employment discrimination, the complainant must be permitted information sufficient to permit her to establish discrimination where such exists.* Such a liberal view of discovery does not preclude adherence to traditional notions of discoverability, rather it encourages a broad interpretation of such notions to permit the individual an adequate base of information from which to proceed. The needs of the plaintiff to gather information controlled by the corporate or governmental employee requires that the parameters of discovery be broader than the specific, individual facts upon which the claim is based.

Boose v. Hilltown Twp., 1986 U.S. Dist. LEXIS 29068, *2-3 (E.D. Pa. 1986) (holding further that the “recitation of generic objections will not permit a party to thwart the goal of discovery by refusing to answer, in good faith, reasonable discovery requests”) (*emphasis added*). Further, it is entirely disingenuous for PPG to object to the First Discovery Requests as “overly broad, unduly burdensome, and beyond the scope of Phase I,” when these Requests are directly linked to the “threshold issues” that PPG, itself, devised and articulated to the Court.

B. PPG Cannot be Permitted to Manipulate the Discovery Plan in this Case, Resulting in the Improper Limitation of the Scope of Plaintiffs’ Discovery

Due to the broad nature of the scope of discovery in employment cases, information bearing upon individuals other than the named plaintiffs is fully discoverable, and may be relevant to the question of a defendant’s discriminatory intent. Like other employment discrimination cases, the instant matter requires the scope of discovery to be particularly broad. As already noted, among the “threshold” issues formulated by PPG is the question of the validity of the Releases signed by the Plaintiffs. In addition to numerous other identified violations of the mandates of the OWBPA, Plaintiffs have challenged the adequacy of the information

provided to employees terminated in RIFs. In order for Plaintiffs to fully ascertain what data should have been provided, versus what was actually provided, Plaintiffs must be permitted to discover information related to PPG's general practices and operations, across its 14 business units, including PPG's treatment of other employees over the age of 40. This data will assist the Plaintiffs, and, ultimately, a jury, in determining whether PPG, with discriminatory intent or animus, altered or manipulated the information it was statutorily required to provide. This inquiry is directly tied to the first Phase I issue, regarding the effectiveness of the releases.

Additionally, discovery in this case, as in all discrimination cases, should be broad enough to permit Plaintiffs' access to information that may lead to evidence directly demonstrating PPG's systemic age discrimination, including information related to PPG's treatment of other employees. In *Momah*, 164 F.R.D. 412, 417 (E. D. Pa. 1996), a retaliation claim under Title IV, the Court granted the plaintiff, a physician, full access to the complete personnel records and performance evaluations of other physicians in order to determine whether other physicians received more favorable treatment. Concluding that broad discovery was necessary, and that the defendant would have the opportunity to make arguments as to relevance and weight later in the proceedings, the court stated that, "It is enough for us to conclude now that access to the records could reasonably lead to the discovery of admissible evidence." Similarly, in the present action, PPG should be commanded to fully and completely respond to Plaintiffs' First Discovery Requests, which seek information directly bearing upon the resolution of Phase I issues.

C. The Two Primary Limitations on Plaintiffs' Discovery That PPG Advocates in Its Motion for a Protective Order, Find no Basis in Law or in Logic

PPG argues that Plaintiffs' Phase I discovery "is limited to identifying other group workforce reductions, if any, within the ICSBU, where the reductions occurred (or notice was provided) within the 300-day period before the earliest representative charge was timely filed with the EEOC." (Brief at 10). As set forth below, these two limitations, temporal and organizational, are entirely artificial and arbitrary.

1. PPG's Artificial Limitation on the Temporal Scope of Plaintiffs' Discovery Cannot Withstand Scrutiny

PPG has erroneously concluded that the so-called "piggy back" rule, which allows terminated employees who have not satisfied the ADEA pre-requisite of filing an EEOC charge by "piggy-backing" on timely filed charges of similarly situated employees, narrows the permissible scope of Plaintiffs' discovery requests to time period of 300 days before the filing of the earliest of Plaintiffs' EEOC charges. Moreover, PPG's flawed argument is further based on its mistaken assumption that the piggy-back rule is the only basis upon which Plaintiffs might be entitled to "reach back" to discover information about prior RIFs. In fact, Plaintiffs' have an entirely independent basis for their entitlement to information regarding earlier RIFs that has nothing to do with the "piggy-back" rule potential opt-in rights of additional plaintiffs.

The validity of the Releases (an undeniable Phase I issue) depends on their satisfaction of *all* the requirements set forth in § 626(f)(1) of the OWBPA, including the informational requirements of subpart (H), relating to group terminations:

if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in

a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

PPG has conceded that these informational requirements related to PPG's "Decisional Unit Information" are a "factor requiring some phase I discovery." (Brief at 8). However, PPG appears prepared to ignore the more specific and instructive requirements of the implementing regulations which accompany the OWBPA:

An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. 29 C.F.R. § 1625.22(f)(4)(vi).¹

Thus, in circumstances involving successive RIFs within a decisional unit, employers are required to provide cumulative information regarding employees affected by the RIF that extends back to the beginning of the group termination program. If Plaintiffs are to determine whether PPG provided accurate, and, where necessary, cumulative, information concerning involuntary terminations in a decisional unit, they must first obtain discovery from which they can ascertain whether successive RIFs are related to a single group termination program. The companion regulations to the OWBPA require that "the question of the existence of a 'program' ... be

¹ "A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver." 29 C.F.R. § 1625.22(f)(3)(i)(B).

decided based upon the facts and circumstances of each case.” 29 C.F.R. § 1625.22(f)(4)(vi). At a minimum, a “‘program’ exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees.” *Id.*

Plaintiffs are not required to simply accept the unsupported, self-serving statements of PPG with respect to the existence of a group termination program, but are, rather, entitled to test the validity of such statements through discovery. Thus, even if PPG is to be believed in its bald assertion that “[s]ince May 13, 2003, the Salaried Severance Plan has stated that ‘Participants will be given the opportunity to execute a valid release of claims and liability against the Company (‘Release’) in exchange for maximum severance benefits,’”² Plaintiffs are at least entitled to discovery related to RIFs dating back to May, 2003. However, if, as Plaintiffs believe, the implementation of PPG’s severance-for-release program was implemented earlier than May 2003, the temporal scope of Plaintiffs’ RIF-related discovery must be expanded.

In fact, Plaintiffs’ permissible discovery “reach-back” period should not be so strictly tied to the commencement of PPG’s severance-for-release program:

The fact that some of the information sought [in discovery] concerns events occurring outside the prescriptive limit for actionable claims is not a bar in light of the Supreme Court's observation that “[a] discriminatory act which is not made the basis for a timely charge ... may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.”

Trevino v. Celanese Corporation, 701 F.2d 397, 405 (5th Cir. 1983) (quoting, *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977)). See, also, *Twyman v. Dilks*, No. Civ. A. 99-4378, 2000 WL

² In fact, the need to verify PPG’s claim that it only began requiring releases in exchange for full severance benefits in May, 2003, provides an independent basis for Plaintiffs’ entitlement to discovery concerning involuntary terminations – individual, as well as group terminations - that *preceded* that date. Beyond the usual, conceptual problem with basing any legal holdings on unverified self-serving facts set forth in the parties’ briefs, is the fact PPG has already demonstrated a particular propensity to stretch its statement of the facts to suit its purposes. See discussion *infra* at 13-15.

1277917, at *4 (E.D. Pa. Sept. 8, 2000)(“It is well-settled that in discrimination cases, evidence of discrimination occurring outside an actionable time period or included in a previous settlement agreement may constitute relevant background evidence in determining discriminatory and retaliatory conduct.”).

To fully understand Plaintiffs’ entitlement to ascertain through discovery PPG’s compliance (or lack of thereof) with the cumulative informational requirements of 29 C.F.R. § 1625.22(f)(4)(vi), it is important to note that PPG’s failure to provide that information to terminated employees is a failure to satisfy the statutory requirements of 29 U.S.C. § 626(f)(1)(H). That failure, in turn, would render ineffective *any* releases executed by the terminated PPG employees that received such faulty or flawed information. Accordingly, because Plaintiffs’ discovery requests seeking historic information about PPG RIFs, relate directly to the efficacy of the releases, Plaintiffs’ discovery falls squarely within the purview of the first of the four Phase I “threshold issues” set forth in the September 26, 2007 Case Management Order: “whether the named plaintiffs’ claims are barred in whole or in part by the doctrine of waiver and/or release.”

2. There is No Basis for Circumscribing the Organizational Breadth of Plaintiffs’ RIF-Related Discovery as Urged by PPG

In addition to advocating an untenable temporal limitation on Plaintiffs’ discovery, PPG also seeks to impose an equally untenable limit on the organizational scope of Plaintiffs’ RIF-related discovery. PPG “magnanimously” states that it “does not object to the Discovery Requests to the extent that they seek to identify such other work force reductions, if any, within the ICSBU,” but refuses to allow inquiries into terminations in any of the other 13 business units. (Brief at 10). Notably, PPG doesn’t even attempt to explain why Plaintiffs should only be able to obtain information concerning RIFs in the ICSBU. OWBPA subpart H provides the

foundation for the organizational breadth of Plaintiffs' First Discovery Requests, which, as already noted, PPG has conceded is a "factor requiring some phase I discovery." (Brief at 8).

Section 626(f)(1)(H)(i) speaks of "any class, unit, or group of individuals covered by" the group termination program. Determining the contours of the "class, unit, or group" is critical to any analysis of the adequacy of the "Decisional Unit Information," which is intended to provide data from which the employee (and, if necessary, parties and a jury) can determine whether age discrimination has infected a group termination. In its Brief, PPG recites that:

The PPG business unit that employed the five named plaintiffs is known as the Industrial Coatings (North America) Strategic Business Unit ("ICSBU"). The ICSBU implemented a Cost-Out Initiative in 2005 and early 2006. This initiative included a reduction throughout various groupings of the workforce within the ICSBU. PPG's employment of four of the named plaintiffs ended in early 2006 in connection with this group workforce reduction. (Brief at 2).

Based exclusively on this unsupported statement, PPG facilely concludes that "the appropriate discovery on this subject is limited to identifying other group workforce reductions, if any within the ICSBU." (Brief at 10). Again, however, Plaintiffs are not bound to accept PPG's definition of the "class, unit, or group" from which the termination victims were selected. They are entitled to discovery to test that definition. As the Court of Appeals for the Sixth Circuit has recognized, "it is certainly possible that an employer will want to fiddle with the definition to mask the possible evidence for age discrimination." *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1263 (6th Cir.1997). The *Raczak* court further explained that:

Thus, as a speculative example, if the company had actually decided to fire all the old tax lawyers, but not to touch other lawyers, or to be non-discriminatory in its treatment of all other lawyers, it would be in its interest to use a wider category such as all lawyers, to disguise the smaller sub-unit of discrimination. One the other hand, using very small sub-units could also mask discrimination because it is much more difficult to show or perceive discrimination when only very small numbers are involved. *Id.*

The only way for Plaintiffs to assure that PPG did not “fiddle” with the contours of the purported “class, unit, or group” from which the termination victims were selected, is to seek discovery concerning all of the RIFs that PPG conducted, company-wide. Again the question of PPG’s possible failure to provide accurate information to terminated employees, in violation of OWBPA § 626(f)(1)(H), is critical to a determination of whether the Releases executed by the terminated PPG employees are valid. Thus, any discovery related to this inquiry falls squarely within the scope of the first of the four Phase “threshold issues” regarding “whether the named plaintiffs’ claims are barred in whole or in part by the doctrine of waiver and/or release.”

D. PPG has Already Demonstrated Why Plaintiffs Must be Permitted to Conduct Discovery Designed to Test Statements That PPG Would Have the Court Accept at Face Value.

Concurrently with its Motion for a Protective Order, PPG served on Plaintiffs its Responses to Plaintiffs’ First Set of Interrogatories and Requests for Production of Documents. PPG’s response to Plaintiffs’ Interrogatory No. 3 is particularly germane to the issue of Plaintiffs’ entitlement to the unfettered discovery they request:

3. For each RIF occurring between January 1997 and the present, provide the following information:
 - (a) The date(s) on or during which the RIF occurred;
 - (b) The business unit(s) to which the RIF applied;
 - (c) Whether the RIF was related to or a continuation of one or more prior RIFs or successive RIFs;
 - (d) The stated and/or actual objectives of the RIF.

Answer: PPG incorporates by reference its answer to Interrogatory No. 2. The workforce reduction identified in response to Interrogatory No. 2 occurred in 2006, applied to various groupings of the ICSBU workforce, and was not a continuation of earlier or successive workforce reductions.

As noted above, the ICSBU is the PPG organizational unit in which the Plaintiffs were employed and the 2006 ICSBU work force reduction, or RIF, terminated the Plaintiffs from their

employment with PPG. According to PPG's response to Interrogatory No. 3, the 2006 ICSBU RIF was not a continuation of an earlier RIF. However, PPG's unsubstantiated and self-serving response cannot serve as the measure of Plaintiffs' rights to test the veracity of such a statement. Otherwise, under PPG's view of the world, if it declares that this RIF was not a continuation of an earlier RIF, Plaintiffs are not entitled to the discovery that might demonstrate that it *was* a continuation of an earlier RIF. By this circular reasoning, PPG attempts to insulate itself from *ever* having to account for its discriminatory conduct.

Unfortunately for PPG, Plaintiffs have good reason to conclude that PPG's response is likely entirely false. Plaintiffs have, fortuitously and independent of PPG's evasive discovery response, uncovered evidence that the 2006 RIF *was*, in fact, a continuation of a previous workforce reduction. Former PPG employee, Kenneth Barnard was terminated by PPG on November 1, 2004 (Barnard Termination Letter, Exhibit E), and was offered full severance benefits in exchange for his execution of a Release (Exhibit F), which he executed on November 12, 2004. Records indicate that, while at PPG, Mr. Barnard was employed in the same strategic business unit in which the five Representative Plaintiffs were employed (Exhibit G). Thus, PPG's discovery response, asserting that the 2006 RIF that claimed the five Representative Plaintiffs was not a continuation of an earlier workforce reduction, is demonstrably false.

Even if PPG were to assert that Mr. Barnard was subject to an individual, rather than a group, termination, , Plaintiffs have similar information related to another former PPG employee. Frank DePoli was terminated on December 20, 2001 (Exhibit H) from his position in the same business unit that employed the Representative Plaintiffs and Mr. Barnard (Exhibit I). Mr. DePoli has provided an affidavit (Exhibit J), in which he states that eleven other employees in the Industrial Coatings Business Group were also involuntarily terminated on the same day.

Thus, PPG's assertion that the 2006 ICSBU RIF was not a continuation of previous workforce reductions becomes even more unlikely. PPG will, undoubtedly, also argue that the 2001 termination of a dozen ICSBU employees was entirely separate from the 2006 termination of a group of ICSBU employees whose number PPG has still refused to divulge.³ However, absent the discovery that PPG is attempting to cut off, how will Plaintiffs ever be able to learn whether there were a whole series of group terminations, on three-month intervals, in the ICSBU between November, 2001 and January, 2006?

Plaintiffs must be given the opportunity to explore and challenge the veracity of PPG's unfounded responses with regard to any and all RIFs that may be interrelated or successive. After all, Plaintiffs take seriously the warning that "it is certainly possible that an employer will want to fiddle with the definition to mask the possible evidence for age discrimination." *Raczak*, 103 F.3d at 1263.

E. PPG's Argument that the Currently-Defined Phase I Discovery Period Is a Basis for Limiting Plaintiffs' Discovery Simply Make No Sense

Plaintiffs have demonstrated why it is imperative that PPG be required to fully respond to the discovery requests that Plaintiffs have propounded. Limiting Plaintiffs' discovery in the way suggested by PPG would simply cement PPG's ability to conceal from the Court's scrutiny any evidence of the pervasive age discrimination that Plaintiffs have alleged.

PPG makes much of the fact that the Court adopted PPG's proposed Case Management Order, rather than the one proposed by Plaintiffs. From this, PPG presumptuously infers that *its* understanding of that Order, as well as *its* understanding of *Plaintiffs'* theories (notwithstanding

³ Even under its own unjustifiably restricted view of discovery, PPG should have provided information concerning the single, 2006 RIF in the ICSBU. It has not.

that such understanding is, as set forth above, completely wrong) should control the resolution of this discovery dispute. In fact, PPG goes so far as to argue that:

It would be impossible for PPG to provide the information and documents requested within thirty days, let alone in 60 or even 90 days, let alone for plaintiffs to review it, or for plaintiffs to take a Rule 30(b)(6) deposition on the staggering range of noticed topics. Simply put, there is not sufficient time in Phase I for PPG to answer the discovery served by plaintiffs, even if plaintiffs had not waited until nearly one month of Phase I had passed before serving their discovery, and even if PPG had nothing to do during Phase I except answer plaintiffs' written discovery. (Brief at 6).⁴

PPG's suggestion that the timeframe contemplated by the Court's CMO should operate to curtail Plaintiffs' discovery rights is preposterous. If, as Plaintiffs have demonstrated above, Plaintiffs' requested discovery is appropriate and necessary for Plaintiffs to prove their case, PPG's argument that discovery should be artificially limited so that it can be accomplished within the time constraints of Phase I, is the epitome of the tail wagging the dog. The answer to this quandary is not to improperly narrow Plaintiffs' requests for discoverable information related to Phase I, but, rather to extend the amount of time allocated for Phase I discovery.

PPG is playing the proverbial shell game, in which it hopes to hide the pea representing the evidence of its pervasive age discrimination. In its Motion for a Protective Order, PPG has offered to give Plaintiffs a look under one of the shells – a shell of PPG's choosing – that represents those RIFs occurring in the ICSBU less than 300 days before Plaintiffs' earliest EEOC charge was filed. Plaintiffs, however, are entitled to look under *all* of the shells, at once. If, at that time, there is no pea present, then, and only then, will Plaintiffs' claims fail.

⁴ PPG's lamentations that it cannot possibly collect and produce the information requested, in part due to an asserted "delay" by Plaintiffs in making the requests, ring hollow when one considers that Plaintiffs advised PPG as early as August 29, 2007 of the categories of information Plaintiffs intended to seek (Exhibit K). Moreover, Plaintiffs decision to serve its First Discovery Requests on PPG in mid-October is merely indicative of the fact that Plaintiffs were hoping to first have an opportunity to review the documents produced by PPG in its Rule 26 Initial Disclosures. Plaintiffs, however, were forced to proceed without the benefit of that review, as PPG's initial production did not occur until October 22, 2007.

F. There is No Justification for the Confidentiality Provisions that PPG Seeks

As Plaintiffs have shown, all of their First Discovery Requests are directly relevant to the instant matter. Because Plaintiffs have met their initial burden, PPG bears the burden of persuading the Court that the requested documents are not subject to discovery. PPG cannot meet this burden and Plaintiffs' Motion to Compel must be granted and sanctions should be imposed. *Hicks v. Big Brothers/Big Sisters of America*, 168 F.R.D. 528, 529 (E.D. Pa. 1996) (granting motion to compel production of personnel files after noting that "the party resisting discovery[] bears the burden of persuasion on its objections") (citing *Bayges v. SEPTA*, 144 F.R.D. 269, 271 (E.D. Pa. 1992); *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 297 (E.D. Pa. 1980)); *McGinley v. Baratta*, No. 06-510, 2006 WL 2289791, *1 (E.D. Pa. Aug. 8, 2006) ("The onus is on the party objecting to discovery to state the grounds for the objection with specificity") (citing Fed. R. Civ. P. 33(b)(4)).

With its Motion for Protective Order to Protect Confidential Information, PPG attempts to bar Plaintiffs' access to evidence vital to their claims. The mere fact that such evidence may be contained in the personnel files of other employees is not sufficient grounds for refusing to fully respond to Plaintiffs' First Discovery Requests. Multiple jurisdictions, including the Western District, have concluded that such personnel information, when it may be relevant to the issues involved in an employment discrimination case, is the proper subject of discovery. *See, e.g., Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) (holding that the District Court abused its discretion by unduly limiting the plaintiff's ability to secure information from other personnel files relevant to the employer's more favorable treatment of other employees, directly evidencing defendant's predisposition and directly relevant to the plaintiff's claims); *Lynch v. Johnstown Wire Technologies*, 2006 U.S. Dist. LEXIS 9376 (W. Dist. Pa. 2006) (ordering the defendant

therein to produce personnel files and confidential information for all salaried management personnel in an age discrimination case after the Court determined that such individuals were similarly situated with the plaintiff therein); *Northern v. City of Philadelphia*, 2000 U.S. Dist. LEXIS 4278 (E. D. Pa. 2000) (compelling defendant to produce personnel files of similarly situated individuals as well as compile and release confidential information relevant to the plaintiff's sex discrimination case). PPG should, therefore, be compelled to produce the information sought in Plaintiffs' First Discovery Requests as they are inextricably intertwined with issue (1) of the Phase I discovery proposed by PPG.

IV. SANCTIONS

PPG's conduct and refusal to respond to written discovery is sanctionable. Pursuant to Fed. R. Civ. P. 53 (c)(2), the Special Master possesses the power to impose several types of sanctions, including default, when the conduct giving rise to the sanction is clearly taken without consideration of the rules and in an obstructive approach. *See, e.g. Buchanan v. Bowman*, 820 F.2d 359 (11th Cir. 1987) and *Truck Treads, Inc. v. Armstrong Rubber Co.*, 818 F.2d 427 (5th Cir. 1987); *Bluitt v. Arco Chem. Co.*, 777 F.2d 188 (5th Cir. 1985).

A. Default as a Sanction

PPG is employing an improper litigation strategy by withholding vital information. Even if, as Plaintiffs believe is proper, PPG is compelled to respond fully to Plaintiffs' First Discovery Requests, PPG's stonewalling efforts should not simply be ignored. Courts have applied the sanction of default, even where discovery was later supplemented. *See Factory Air Conditioning Corp. v. Westside Toyota, Inc.*, 579 F.2d 334, 337-338 (5th Cir. 1978); *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1374 (10th Cir.), cert. denied, 439 U.S. 833 (1978).

In *Boose v. Hilltown Twp.*, 1986 U. S. Dist. LEXIS 29068 (E. D. Pa. 1986), the Court stated that: “Pursuant to Fed. R. Civ. P. 37(a)(4), a federal district court is directed to require the party whose conduct necessitated an order compelling discovery to pay the moving party’s reasonable expenses incurred in obtaining the order, unless the federal district court finds that opposition to the motion was substantially justified. Expenses may be assessed against the party, his attorney, or both. Expenses should ordinarily be awarded unless the federal district court finds the losing party justified in carrying his point to court.”

Courts have also imposed default sanctions for unruly conduct during discovery. By way of example, the Court in *Columbia Public School District v. United States Gypsum Co.*, 1989 WL 87086 (W.D. Mo.)(8th Cir. 1989), struck the defendant’s answer and entered a default judgment as a discovery sanction for the defendant’s failure to organize and produce documents in categories responsive to the plaintiff’s requests. PPG too has failed to segregate documents and communicated its intention to abandon this obligation.⁵ Therefore, PPG should be, likewise, sanctioned.

B. Preclusion Order as a Sanction

An alternative option for sanctioning PPG is preclusion. Courts have been willing to enter preclusion orders for simple failures to identify documents or witnesses, regardless of whether that conduct constitutes flagrant or repeated violation of court orders. *See, e.g., Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir. 1987) (preclusion ordered for incomplete interrogatory answers); *Admiral Theatre Corp. v. Douglas Theater Co.*, 585 F.2d 877, 897 (8th Cir. 1978); and *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290 (S.D. Cal. 1981).

⁵ Attached hereto as Exhibit L is email correspondence between Bruce C. Fox and Alan Pittler, where PPG counsel states, “As I said, we will be producing documents, some of which are confidential and some of which are non-confidential. However, we do not have the documents segregated or processed along these lines.”

C. Costs

Plaintiffs should be compensated for being forced to expend their limited resources in pursuit of their discovery rights. PPG, a Fortune 500 company, is fully cognizant of the limited resources of the Plaintiffs, yet has strategically chosen to engage in unnecessary discovery disputes which tax both Plaintiffs' resources and ability to pursue their legitimate claims against PPG. In this type of scenario, the rule favors the award of expenses, including attorneys' fees, to the party bringing a meritorious motion, and courts have been willing to enter appropriate orders compelling payment of substantial costs. *See, e.g., Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686 (D.C. Cir. 1987); *National Assn. of Radiation Survivors v. Turnage*, 114 F.R.D. 543 (N.D. Cal. 1987); *Goodsons & Co. v. National Am. Corp.*, 78 F.R.D. 721, 723 (S.D.N.Y. 1978). There exists no justification for PPG's refusal to provide complete responses to interrogatories. Certainly, the gamesmanship employed by PPG negates any good faith or justification it may claim exists.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this court enter an Order denying PPG's two Motions for a Protective Order and compelling PPG to produced complete discovery responses to Plaintiffs.

Respectfully submitted,

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Date: November 21, 2007

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of November, 2007, the Consolidated Brief in Support of Plaintiffs' Motion to Compel Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents and in Opposition to PPG's Two Motions for a Protective Order was served via E-Mail as follows:

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