

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION, : **ECF Case**
: **Civil Action No. 10-cv-0655 (LTS) (MHD)**
Plaintiff, :
:
v. :
:
KELLEY DRYE & WARREN, LLP, :
:
:
Defendant. :
-----X

DECLARATION OF JEFFREY BURSTEIN PURSUANT TO 28 U.S.C §1746

Jeffrey Burstein declares under penalty of perjury:

1. I am a Trial Attorney with Plaintiff Equal Employment Opportunity Commission (“EEOC”) representing EEOC in this litigation and have personal knowledge of the facts set forth in this Declaration.
2. I submit this Declaration in support of EEOC’s Objections to Magistrate Judge Dolinger’s Order of July 15, 2011 denying EEOC’s motion to compel Defendant Kelley Drye & Warren, LLP (“Kelley Drye” or “Defendant”) (1) to provide compensation information for younger attorneys redacted from otherwise produced documents, and (2) to provide requested documents concerning Kelley Drye’s breakdown of client receipts for ten designated attorneys similar in form to documents produced by Defendant regarding Charging Party Eugene T. D’Ablemont (“D’Ablemont”), ostensibly in support of one of Kelley Drye’s defenses.
3. Attached hereto as Exhibit A is a true and correct copy of an excerpt from EEOC’s First Document Request.
4. After EEOC reviewed Kelley Drye’s document production in response to EEOC’s First Document Request, on January 21, 2011, EEOC notified Kelley Drye that while the basic Consolidated Financial Statements requested in EEOC’s First Document Request had been provided, the Schedules containing partner compensation information had not been produced.
5. Attached hereto as Exhibit B is a true and correct copy of an excerpt from EEOC’s Third Document Request.
6. Even though the compensation information was redacted, Defendant marked as “confidential” its entire production of its Points Books and audited Consolidated Financial Statements in response to EEOC’s Document Requests (the sets of redacted documents at

issue in this application). Per the requirements of the Confidentiality Order in this case, on July 28, 2011, I contacted Bettina Plevan, counsel for Defendant, to obtain Defendant's consent to the public filing of samples of these documents labeled "confidential" in connection with these Objections so this Court could see the redactions involved in this application. Ms. Plevan did not consent to such a public filing of the documents at issue in these Objections. Rather than burden the Court with a sealing dispute, the redactions at issue are described in paragraphs 7 and 8 below. If this Court so wishes, EEOC will provide to the Court the documents at issue either in full or excerpts thereof.

7. For the requested and produced audited Consolidated Financial Statements for ten years, compensation information for all equity and stipulated payment (non-equity) partners (with the unexplained exception of two attorneys for certain years) was completely redacted by Defendant.
8. For the requested and produced Points Books for ten years, compensation information for all equity and stipulated payment partners was completely redacted by Defendant.
9. Defendant had produced earlier in discovery Earnings Allocation Committee reports that set forth attorney compensation amounts based on projections of Firm profits. While providing specific partner compensation information, these reports are not as comprehensive as the audited Consolidated Financial Statements (which contain actual, not projected, partner compensation) and the Points Books (which contain listings of attorney performance, including client revenue statistics, not contained in the Earnings Allocation Committee reports).
10. Early in discovery, EEOC produced to Kelley Drye the full Points Book for one of the ten years at issue in the current application, which D'Ablemont had provided to EEOC. These documents were marked "confidential" and have been treated as such by EEOC, without any objection by Kelley Drye.
11. I learned in the course of this motion that D'Ablemont possesses Points Books for other years, as well as the audited Consolidated Financial Statements, but he has not yet provided these documents to EEOC. In order to avoid this application, EEOC contacted Kelley Drye's counsel, Bettina Plevan, to determine if Kelley Drye would object, on the same privacy/confidentiality grounds as it raised with Magistrate Judge Dolinger, to D'Ablemont providing such documents to EEOC. Ms. Plevan stated that Kelley Drye would oppose D'Ablemont providing these documents to EEOC.
12. Attached hereto as Exhibit C is a true and correct copy of excerpts from Magistrate Judge Dolinger's first discovery ruling in this matter from October 25, 2010.
13. Attached as Exhibit D is a true and correct copy of most of the transcript of the July 15, 2011 proceeding before Magistrate Judge Dolinger, containing the complete arguments and rulings on the issues involved in this application.
14. To support its Fifteenth Affirmative Defense that D'Ablemont should not be credited for certain client revenues because he was merely the billing attorney, in discovery Kelley Drye

provided documents entitled "Fee Collection Analysis," created for each year since 2000, designating D'Ablemont's client receipts on a "billing" or "participating" attorney basis.

Dated: July 29, 2011

Respectfully submitted,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

s/ Jeffrey Burstein
Jeffrey Burstein
Senior Trial Attorney
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Newark, NJ 07102
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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION, :

Plaintiff :

v. :

KELLEY DRYE & WARREN, LLP :

Defendant. :
-----X

ECF Case
Civil Action No. 10-cv-0655(LTS)

PLAINTIFF EEOC'S FIRST DOCUMENT REQUEST

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiff Equal Employment Opportunity Commission ("EEOC") requests that Defendant Kelley Drye & Warren, LLP ("Kelley Drye" or "the Firm") produce for inspection and copying the documents described in the following requests that are within Kelley Drye's possession, custody or control. Within thirty (30) days of the date of service hereof, please produce all documents by mail, hand delivery, disc or electronic mail to: Jeffrey Burstein, Equal Employment Opportunity Commission, One Newark Center, 21st Floor, Newark, New Jersey, 07102, jeffrey.burstein@eeoc.gov. For the documents to be submitted by e-mail or disc, please specify in advance of such production the type, length, size, general contents and number of records of such electronic production.

12. The Firm's Consolidated Financial Statements, including all Auditors' Reports of the Firm's Consolidated Financial Statements, for each year from 2001 through the present.
13. All documents reflecting Kelley Drye's Projected Distributable Net Income for each year from January 1, 2001 through the present.
14. Kelley Drye's Earnings Allocation Committee Report for each year from 2001 through the present.
15. All documents relating to cash receipts by attorney (Partner, Of Counsel, Life Partner) by client for each year from January 1, 2001 through the present.
16. All documents concerning the Participating Attorney Basis for allocation of cash receipts for each Partner as reflected in each year's Points Books for each year from January 1, 2001 through the present.
17. Collection Realization Percentage for each Partner based on the difference between fees collected and write-offs in each year between 2001 through the present.
18. Dollar amounts of write-offs for each Partner, Of Counsel, and Life Partner by client each year during the period January 1, 2001 through the present.
19. Billable hours each year of each Partner, Of Counsel, and Life Partner during the period January 1, 2001 through the present.
20. Dollar amounts of the write-offs of the billable time and billed time of each Partner, Of Counsel, and Active Life Partner during the period from January 1, 2001 through the present.
21. Documents reflecting compensation of associates in Kelley Drye's New York office from January 1, 2005 through the present.
22. Personnel files for (1) Eugene D'Ablemont; (2) Robert Ehrenbard; (3) Bud Holman; (4) Harvey Zimand; and (5) any other attorney who has been an Active Life Partner at any time from January 1, 2001 through the present.
23. All documents reflecting any form of disciplinary action taken against Eugene D'Ablemont at any time during his tenure with Kelley Drye.
24. All reports of investigations into alleged improprieties, inappropriate conduct, or criminal conduct by a Partner, Of Counsel, or Life Partner by name each year during the period January 1, 2001 through the present.
25. Dollar amount of Client Development Allowance monies authorized each year for expenditure by name by each Partner, Of Counsel and Life Partner during the period beginning January 1, 2000 through the present.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY	:
COMMISSION,	:
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Plaintiff	:
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v.	:
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KELLEY DRYE & WARREN, LLP	:
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Defendant.	:
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**PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S THIRD
DOCUMENT REQUEST**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiff Equal Employment Opportunity Commission ("EEOC") requests that Defendant Kelley Drye & Warren, LLP ("Kelley Drye" or "the Firm") produce for inspection and copying the documents described in the following requests that are within Kelley Drye's possession, custody or control. Within thirty (30) days of the date of service hereof, please produce all documents by mail, hand delivery, disc or electronic mail to: Jeffrey Burstein, Equal Employment Opportunity Commission, One Newark Center, 21st Floor, Newark, New Jersey, 07102, jeffrey.burstein@eeoc.gov. For the documents to be submitted by e-mail or disc, please specify in advance of such production the type, length, size, general contents and number of records of such electronic production.

7. Where information is stored in electronic form, specify the form in which the information is kept. Where possible, produce the information in Microsoft Excel or ASCII format. If computer data does not exist, produce documents in portable document format (pdf).

DOCUMENTS REQUESTED

1. Defendant's complete Points Books, including all attachments, riders and exhibits thereto, for each year starting January 1, 2001 through the present (including any Points Book issued in 2011).
2. All time records, including time logs and day sheets, setting forth services rendered by Eugene T. D'Ablemont [REDACTED] from January 1, 1991 through January 1, 2001.
3. All documents reflecting compensation paid to Robert Ehrenbard, Bud Holman, Harvey Zimand, and Eugene T. D'Ablemont for each of the ten years before each such individual entered Life Partner status with Kelley Drye.
4. All documents entitled "Fees Collection Analysis" concerning the allocation of receipts as "Billing Attorney vs. Participating Attorney" (in the form of documents previously produced by Defendant concerning Mr. D'Ablemont with Bates numbers KDW 03743-KDW 03777) for each year from 2007 through 2010 for the following Kelley Drye attorneys: John Callagy; Robert Bickford; David Barry; Michael Insel; Robert Adams; Merrill Stone; John Kiley; Jon Cooperman; William MacLeod; and Paul Hoffman.

EXHIBIT C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

10 CV 655 (MHD)

KELLEY DRYE & WARREN LLP,

Defendant.

-----x

New York, N.Y.
October 25, 2010
10:17 a.m.

Before:

HON. MICHAEL H. DOLINGER

Magistrate Judge

APPEARANCES

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Attorney for Plaintiff
BY: JEFFREY BURSTEIN

PROSKAUER ROSE LLP
Attorneys for Defendant
BY: BETTINA B. PLEVAN
JOSEPH C. O'KEEFE

ALSO PRESENT: EUGENE T. D'ABLEMONT
KELLEY DRYE & WARREN

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(In open court)
THE COURT: Okay. what is the current status of this
matter?

MR. BURSTEIN: Your Honor, Jeffrey Burstein for EEOC.
We have a number of applications before your Honor. First was
EEOC's promotion letter concerning certain failures of
defendant to produce various categories of documents.

I also submitted a request that was consented to by
defendant for an adjournment of the fact -- or the delay of
fact discovery period that expires December 24. Defendant can
address their applications, but they made first some
application with regard to EEOC's alleged possession of

Dolinger_arg_10_25_10.txt

14 THE COURT: What I'm going to do is direct that the
15 defendant provide to the plaintiff with respect to these five
16 individuals documents sufficient to demonstrate what they
17 worked, if anything, during the relevant period and what they
18 were compensated for that work. And if it amounts to a
19 document saying partner X has not worked at all since he turned
20 70 or some other variant of that, so be it. I don't see any
21 reason to get into anything else with regard to personnel files
22 in this case.

23 But to the extent that defendants suggest that these
24 people ought not to be involved even in the sense of having
25 their documents produced, that seems to me to be an overreading
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1 of need of privacy at this point and is, I think, not
2 persuasive under the circumstances of this case.

3 what's the next issue that you've got?
4 MR. BURSTEIN: Your Honor, the next general issue was
5 addressed on page two of my issue, which concerns various
6 documents relating to compensation of partners and in one
7 instance associates at the firm that have only been partially
8 produced or not produced at all.

9 There are documents we have gotten in terms of overall
10 compensation of the partners at Kelley Drye that defendant has
11 produced. But in terms of more detailed analyses of partners'
12 productivity, we do not have responses to specific document
13 requests.

14 In particular, there's an issue that defendant has
15 raised on multiple occasions both in its preliminary pretrial
16 statement and in one of its affirmative defenses and otherwise,
17 that EEOC is overstating Mr. D'Ablemont's productivity since he
18 became a life partner because even though he billed his clients
19 and received substantial sums over the period, that you have to
20 look beyond the pure billings and receipts to see what the real
21 productivity of Mr. D'Ablemont was during this period and that
22 you have to determine whether he was a participating partner
23 or, rather, as they claim, just someone who was sending the
24 bills in a more ministerial fashion.

25 So we have a series of document requests that go to
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1 this issue and go to some of the specifics with reference to
2 the billings of the collections of the comparators we are
3 seeking in this case. The partners at Kelley Drye who are not
4 within the protected class.

5 And there are a number of different document requests
6 that go to issues similar to what I described. And defendant
7 has refused to produce such documents.

8 Also, there is --
9 THE COURT: Am I correct in understanding what you're
10 referring to is requests 15, 16, 21, and 42?

11 MR. BURSTEIN: Twenty-one deals with associate
12 compensation which is related. But yes, that is correct, your
13 Honor.

14 MS. PLEVAN: Well, Mr. Burstein ought to be more
15 specific, your Honor, because we did produce a lot of
16 information and I could show you a sample of just one year's
17 worth of partner statistics that we produced.

18 And there is other -- and it showed for each partner
Page 8

19 the -- all kinds of data about their receipts, on a
20 participating basis, on a supervisory basis, their billable
21 hours, collection, realization, their own time, the time value
22 of their time billed.

23 I mean we produced all kinds of data for all partners
24 for eight years, I think, is --

25 THE COURT: And what is your understanding of document
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1 request 16? Does it ask for something other than what you've
2 produced.

3 MS. PLEVAN: I was going more by the letters that we
4 exchanged. And my understanding is what -- Mr. Burstein did
5 not say it this way, but my understanding is what we are in
6 dispute about is that they've asked that we break down each
7 number by client so that we would be -- we would disclose for
8 each partner for every year by client what their receipts were.
9 And our position is that's just going too far; that it's not
10 useful. It's not what the firm has and distributes to all its
11 partners.

12 THE COURT: Does the firm actually maintain such data
13 at that level of specificity?

14 MS. PLEVAN: Yes. It could be obtained. But we're
15 talking about over a period of time, hundreds of people. And
16 an effort to get that information for each person -- I'm not
17 suggesting it's not on our database -- but there's a limit to
18 what we should have to do in this case.

19 Mr. Burstein, I am confident, at the end of the day is
20 not going to compare Mr. D'Ablemont to each and every one of
21 the hundreds of partners. They're going to zero in on
22 somebody.

23 THE COURT: Are you saying that you have produced --
24 as I thought you were saying a few moments ago -- data showing
25 receipts by partner?

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1 MS. PLEVAN: Yes.

2 THE COURT: And you're objecting to receipts by
3 partner by client?

4 MS. PLEVAN: Exactly.

5 THE COURT: Okay.

6 MS. PLEVAN: That's the -- as far as I understand from
7 our discussions and correspondence, that's what's in dispute.
8 And we see no reason for that level of detail.

9 THE COURT: Okay.

10 MR. BURSTEIN: Your Honor, I just want to briefly
11 address Ms. Plevan's comments.

12 First of all, we offered to compromise on this in
13 light of their over-breadth request by limiting the number of
14 years to three in terms of --

15 THE COURT: why do you need a breakdown by client as
16 distinguished from a breakdown by partner.

17 MR. BURSTEIN: The aggregate data is not enough for us
18 to deal with the claim that they are making with regard to
19 Mr. D'Ablemont's compensation that clients that he is billing
20 for are not really his. We need to see that with reference to
21 the other partners because that's --

22 THE COURT: what you say that you need logically is
23 data showing for whatever the limited list of clients

24 purportedly of Mr. D'Ablemont, the receipts, total receipts
25 received by the firm other than from Mr. D'Ablemont, and then
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1 the amount received through Mr. D'Ablemont, right?
2 MR. BURSTEIN: We're also looking for a breakdown by
3 client of the partners on matters that Mr. D'Ablemont was not
4 involved in.

5 The reason for that is we need to compare the
6 treatment of Mr. D'Ablemont, who they are saying, despite the
7 receipts from all of his billings, this is wildly exaggerated
8 because clients A, B, and C really aren't his clients.

9 Well this is a defense that defendant has raised.

10 THE COURT: But the logic of your position would seem
11 to suggest, as I think I articulated two seconds ago, that you
12 take a look at the clients that Mr. D'Ablemont says are his and
13 see where client receipts for those particular clients went to.
14 Did they go to Mr. D'Ablemont? Did they go to somebody else?

15 I don't understand why you need everyone's clients
16 broken down by client.

17 MR. BURSTEIN: Your Honor, we need to compare the way
18 that they are treating Mr. D'Ablemont and the way they are
19 calculating what his productivity is with the way they
20 calculate the productivity in the compensation of partners with
21 whom we will be comparing Mr. D'Ablemont to.

22 THE COURT: You'll be seeing that by looking at
23 Mr. D'Ablemont's receipts and what he was compensated versus
24 some other attorney. You don't need the per client breakdown
25 for that.

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1 I mean what difference does it make whether they've
2 understated client A if they've overstated client B?

3 The matter is whether or not someone in
4 Mr. D'Ablemont's circumstances, perhaps other than his age, is
5 being treated better than he is. But that doesn't require a
6 client-by-client breakdown.

7 So the answer is you're not going to get that. If you
8 want, you will get, specific with respect to the limited number
9 of -- and I don't know how many there are -- but some clients
10 that Mr. D'Ablemont has claimed as his, a breakdown of how much
11 revenue went through him and how much went through the other
12 lawyers at the firm. That's it.

13 what's your next issue?

14 MR. BURSTEIN: The next issue is broad, your Honor,
15 deals with a number of different document requests.

16 Namely, it relates to the affirmative defense of
17 defendant that Mr. D'Ablemont's engaged in various kinds of
18 misconduct or behavior that is contrary to the firm's
19 expectations.

20 They've trumpeted this defense both in their 15th
21 affirmative defense and certain others. And we do not have
22 full production of that. We don't have full production of how
23 they have treated other individuals who have committed
24 improprieties.

25 THE COURT: Are you talking about specific

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21 case regarding other income. We've got sort of snippets,
22 excerpts of his tax returns, not the entire tax return.
23 THE COURT: When you say you've got snippets, you got
24 snippets in what context?
25 MS. PLEVAN: In response to our request, he produced
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1 for the EEOC -- I should say again produced pages, several
2 pages. And it's the page on miscellaneous income. It looks
3 like it might have even been redacted, but we can't tell. But
4 we don't have all income lines.
5 And we do have K1 I think for some years. But not
6 all -- one year. We have it just for one year. Produced it --
7 it's -- you know for 2007, it was attached to his tax return.
8 But I don't believe there's any dispute that he has these
9 documents and we ask that they be produced.
10 MR. D'ABLEMONT: The firm prepares these documents.
11 THE COURT: I'm sorry?
12 MR. D'ABLEMONT: The firm prepares these documents.
13 It's a firm prepared document.
14 THE COURT: Right.
15 MR. D'ABLEMONT: All right. They have produced
16 already the Deloitte Touche, which the firm's outside
17 accountants, all the financial reports from the last ten years.
18 Deloitte Touche prepares a K1. I don't have anything to do
19 with the K1. They prepare it for every partner in the firm.
20 Now they're asking me to produce what the firm has given me.
21 THE COURT: Yes.
22 MR. D'ABLEMONT: And it seems to me that's ridiculous.
23 The K1 is already there. It's attached to my income tax
24 return. Kelley Drye & Warren prepares my income tax returns.
25 So, to -- what is the purpose of asking me to produce a
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1 document which the firm already produces?
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1 THE COURT: The purpose is to ensure that when it
2 comes time to litigate the merits of this case, and they put
3 into evidence or propose to put into evidence the K1 they have
4 in their file that you don't then get on the stand with a
5 different version of the K1. In other words, by producing the
6 document your copy of document, everyone is confirmed as to
7 what your copy of the document shows. In the ordinary world we
8 assume, in most cases, it should be identical to what the firm
9 has. But to guard against any possibility of a conflict at the
10 time of trial, defendant is entitled to seek your version of
11 document.

12 So, that is to be produced.

13 MS. PLEVAN: And the same rights to the 1040 to which
14 it would be attached because it would have Mr. D'Ablemont's
15 signature on it and it is an important admission. He has
16 acknowledged he is receiving it.

17 MR. D'ABLEMONT: We have produced the 1040 portion of
18 my income tax returns.

19 THE COURT: For what years are we talking about, 2009
20 and 2010? That's been produced in the context of this
21 litigation?

22 MR. D'ABLEMONT: Yes.

23 MS. PLEVAN: Not in entirety, your Honor.

24 MR. D'ABLEMONT: The 1040s show compensation and the
25 other 1040s which show investment or whatever which relate to
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OAP5EE02 conference

1 compensation have been produced.

2 MS. PLEVAN: No.

3 MR. D'ABLEMONT: That's all to which they are
4 entitled.

5 MS. PLEVAN: I respectfully disagree. I don't know if
6 there is a glitch between Mr. D'Ablemont and Mr. Burstein, but
7 what Mr. Burstein produced was one or two pages for each year,
8 not the 1040. He produced some income schedules.

9 THE COURT: You know, this really is something that
10 should have been spoken and maybe it was, discussed between
11 counsel before this. But, in any event, I suggest strongly
12 that before you leave this court house you sit down and go over
13 1040 by 1040 what lines have been produced that defendant says
14 it has and what lines haven't been that reflect income.

15 MS. PLEVAN: This was discussed. The EEOC took the
16 position they didn't have to produce it.

17 THE COURT: The short answer is they have to produce
18 it but the question is if they produced some of it they don't
19 have to re-produce what they've already produced, but there has
20 to be a meeting of the minds as to what it is defendant now has
21 in hand from the plaintiff.

22 MR. BURSTEIN: Your Honor, we have produced excerpts,
23 we fully admit it, two page excerpts usually for each year of
24 Mr. D'Ablemont's 1040s that show his compensation but there is
25 a significant amount of case law, including in the Southern

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OAP5EE02 conference

1 District, and I have briefed this issue, your Honor, if you
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Exhibit D

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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 EEOC,

4 Plaintiff,

5 v. 10 CV 0655

6 KELLEY DRYE & WARREN,

7 Defendant.

8 -----x

8 New York, N.Y.

9 July 15, 2011

9 2:00 p.m.

10 Before:

11 HON. MICHAEL H. DOLINGER,

12 Magistrate Judge

13 APPEARANCES

14 JEFFREY BURSTEIN

15 Attorney for Plaintiff

16 BETTINA B. PLEVAN

16 Attorney for Defendant

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1 (Case called)

2 (In open court)

3 THE COURT: I gather the principal topic for the day
4 has to do with EEOC's request for compensation information and
5 some other stuff regarding various partners at Kelley Drye.

6 Maybe you could just briefly explain, Mr. Burstein --

7 MR. BURSTEIN: Certainly, your Honor.

8 THE COURT: -- where the situation is now.

9 MR. BURSTEIN: EEOC has received from defendant
10 certain types of compensation discovery in the past, but there
11 are two that in essence are the gold standard at the firm as
12 far as I understand it as far as comprehension in terms of
13 attorney compensation and the bases therefor and even
14 attempting to get these documents from early on in discovery,
15 particularly the audited financial statements as well as
16 something called the points books. Finally, at the beginning
17 of June these documents for the ten-year period we requested
18 were produced by defendant but redacted in them were the, was
19 the data that was of most interest to EEOC, namely the
20 information about compensation, and needless to say
21 compensation of attorneys younger than Mr. D'Ablemont and the
22 other life partners at the firm is of central relevance to this
23 litigation.

24 Not only does EEOC need this in terms of establishing
25 discrimination, in terms of assessing what damages are, it's

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1 also relevant information to show facts related to another
2 issue, which is what the firm actually values in making
3 compensation decisions. The points book, for example, has a
4 list of various factors that go into compensation, and
5 obviously we need the compensation information itself. And
6 this issue is important because we are claiming that the client
7 revenues are the key factor in attorney compensation and
8 defendant seems to be arguing to the contrary, that that is not
9 nearly as significant as EEOC and as Mr. D'Ablemont has
10 imparted to the EEOC is in terms of how attorneys are paid.

11 So it's clearly relevant. It obviously is not
12 burdensome to produce. The only burdensomeness involved here
13 is the defendant itself redacting this information. It's also
14 information that in the past has not been treated as so highly
15 confidential and private that it could not be part of discovery
16 when we have a very thorough and extensive discovery order and
17 confidentiality order in this case that protects the privacy
18 interests. They have turned over, as I said initially, your
19 Honor, a number of documents that do show certain attorneys'
20 compensation, but now for some reason they're doing a U-turn in
21 not providing these most important compensation documents.

22 THE COURT: What is your understanding of what
23 compensation information is contained in these withheld
24 documents that is not available to you through the documents
25 that have already been produced?

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1 MR. BURSTEIN: We have, the one comprehensive set of

2 documents that show compensation of attorneys that we do have I
3 believe are called the earnings allocation committee reports.
4 What they show, as I noted in the letters, are projected
5 compensation for partners and I think it comes out at some
6 point before the end of the year and it makes projections based
7 on potential earnings of the firm that year. And so you have
8 different columns based on what I think are, although it's not
9 totally clear from the document itself, different projections
10 of the firm's profits.

11 The two documents or sets of documents at issue, my
12 understanding is, EEOC's understanding is these are the central
13 documents showing the definitive bases for compensation and the
14 compensation itself. All the other information has been turned
15 over. It's just the compensation that is missing, and
16 obviously a compensation discrimination case you can't find any
17 information that's more relevant than that.

18 Would your Honor like me to address the second issue
19 as well?

20 THE COURT: Sure.

21 MR. BURSTEIN: The second issue goes to an affirmative
22 defense of defendant. They are claiming that Mr. D'Ablemont
23 and EEOC have an extraordinarily inflated view of the client
24 revenues for which he should be credited in terms of the
25 bonuses that he has received since he's become a life partner

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1 once he turned the age of 70. That's flat out in the 15th
2 affirmative defense and has been raised in various other
3 contexts by defendant. And Mr. D'Ablemont essentially is
4 taking credit for client revenues where he simply is sending
5 out the bills but is not really participating in providing
6 legal services and therefore his views of his client revenues
7 vastly exceeds what the firm's view is. And they provided in
8 discovery a number of months ago documents that break down
9 Mr. D'Ablemont's client revenues for a ten-year period on what
10 is called a participating attorney basis versus a billing
11 attorney basis, obviously with a participating attorney basis
12 being, according to defendant at least, the critical number.
13 And all we are asking for now are these same kinds of documents
14 not for the entire firm, because we tried to get something
15 analogous early on, but we asked for that for all the attorneys
16 and that was viewed as being an overbroad request and overly
17 burdensome, so what we did in this third document request was
18 simply select ten attorneys and see how, for a three-year
19 period, and see how the firm has treated their clients revenues
20 on a participating attorney versus merely a billing attorney
21 basis and that information has not been produced at all.

22 So those are the two issues involved in the current
23 application, your Honor.

24 MS. PLEVAN: My turn?

25 Let me just start with the first issue with respect to
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1 compensation. Several times Mr. Burstein said the compensation
2 and the basis for it. I think we should be clear that he has
3 everything that's in a document that deals with the basis of
4 compensation. He doesn't know everything he will want to know
5 because he hasn't taken any depositions yet.

6 THE COURT: There was a reference that Mr. Burstein
7 made to some sort of a book, I forget the term.

8 MS. PLEVAN: Points book.

9 THE COURT: What is that?

10 MS. PLEVAN: It's a -- I think I can describe it. It
11 contains various statistical information as opposed to
12 narrative or descriptive information, but it contains a lot of
13 statistical information. For example, fees collected, hours
14 billed, I believe it has non-billable hours as well. I don't
15 have all excerpts. It also would have information about
16 writeoffs, what we call realization.

17 THE COURT: Is this done on a partner by partner
18 basis?

19 MS. PLEVAN: Yes. And I'm looking for other examples;
20 how long it took for the bills to be collected for their
21 respective clients and it's done on a person-by-person basis,
22 and this other detail on fees selected. I would also say, I
23 would disagree with counsel's statement that we're saying that
24 client revenues are not relevant or an important factor. I
25 think all we've said is that when any compensation committee

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1 sits down and discusses what the factors are, there are a lot
2 of factors. Hours is one factors, winning an important case
3 for an important client is another factor, there are all kinds
4 of things that are taken into account. So what's at issue
5 here, and I don't think the fact that we've been very generous
6 in what we have produced should mean that we don't get to draw
7 the line someplace if it's appropriate to draw the line, which
8 I think is what Mr. Burstein was suggesting, that somehow we
9 were precluded from objecting to this one last most sensitive
10 item, which is the actual dollar amount that each of the
11 partners was paid during the period in question.

12 THE COURT: What is the period in question here?

13 MS. PLEVAN: I don't have the request in front of me.

14 THE COURT: Could you refresh our collective
15 recollections?

16 MR. BURSTEIN: I believe the request, it's either 2001
17 or 2000. I believe it's 2001, which is the year cited in the
18 complaint.

19 MS. PLEVAN: Ten years.

20 THE COURT: Okay.

21 MS. PLEVAN: And our position in discussions with the
22 EEOC, and I continued that discussion here in the hopes of

23 maybe getting somewhere on this, is that compensation for
24 someone else might be relevant if that person is similarly
25 situated to Mr. D'Ablemont, but it's a bit too general and
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1 glib, frankly, to say that he's entitled to hundreds of
2 people's compensation because he's brought a compensation suit,
3 if at any given company it would not be unusual for the Court
4 to limit discovery to a group of people. It wouldn't be
5 everybody in the company, it would be who are the people who
6 are reasonable comparators.

7 THE COURT: Well, on that point, I read your letter on
8 this topic as seeming to suggest there are no comparators,
9 because Mr. D'Ablemont is pretty unique, and the problem I had
10 with that was it seemed to me, and again, it may be a
11 misperception of what the issues are, but it seems to me that
12 the plaintiff is asserting Mr. D'Ablemont suffered monetary
13 injury by virtue of the system that the law firm had in place
14 at a certain time, I believe when he hit 70 years old, that as
15 a result he was placed in a situation that he lost income, and
16 if that be the case, that implicit in that is the notion which
17 presumably the plaintiff will pursue at summary judgment or
18 more likely at trial if there isn't summary judgment granted,
19 that in measuring damages what you look at is what
20 Mr. D'Ablemont earned under this allegedly improper regime
21 compared to what he would have earned if he had been treated as
22 a regular partner and not forced in effect to stand down. And
23 the only way, arguably, that you can determine what
24 Mr. D'Ablemont would have done, assuming a trier of fact would
25 find that he was ambitious enough to have been a full-time
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1 partner throughout but for this system, is to look at what
2 other full-time partners were earning during that period of
3 time. And if that's the case, then I'm not sure that saying no
4 one is quite like Mr. D'Ablemont during this period of time
5 answers the question.

6 MS. PLEVAN: I don't think that's -- and I have a
7 specific proposal to make and I don't think that is all we said
8 because we said to Mr. Burstein, come up with some approach,
9 tell us what your theory is, tell us how are you -- you're not
10 going to compare him at trial to 150 or 200 other lawyers,
11 you're going to come up with an approach. And they just
12 absolutely refused to it.

13 I have an approach to suggest and it is as follows:
14 Because Mr. D'Ablemont was not required not to work. In fact,
15 he did work. He didn't have to work but he continued to work
16 and he continued to have client relationships. So our, what we
17 think is a rational approach is to take a group that I'll call
18 a peer group of people who generated -- he thinks billings are

19 important -- take the people each year who billed, the five
20 people who billed closest -- well, ten people, five people
21 above him and five people below him, who had the collections
22 from clients at the same level that he did. Not the same, you
23 know, five -- so let's just hypothetically, if he collected a
24 million dollars from clients that year, according to the points
25 book, not according to him, but according to the firm's

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1 records, then the five people above a million and the five
2 people below a million, just below each year and they already
3 have the other statistical information. We would give them the
4 compensation that each of those people earned. That's his
5 theory of damages. It's not necessarily our theory, but that
6 would be a rational, reasonable approach to take.

7 THE COURT: Let me ask this hypothetically, because I
8 don't know what the detailed facts are. Assuming for the
9 moment that Mr. D'Ablemont because he was in 2000, 2001 or
10 whenever it was placed in this somewhat restricted position in
11 the firm, did not pursue with the same assiduity that he might
12 otherwise have had of the acquisition of or the continuing
13 servicing of clients, would it not then bias the ultimate
14 result to measure or determine the pool, the relevant pool by
15 what client collections there were during this period when he
16 was in his view of things sidelined?

17 MS. PLEVAN: I think -- well, I think our approach is
18 a reasonable approach to take, and I would say certainly at
19 this point in time, and let the EEOC come back and argue some
20 theory on which they need some other person, not to say
21 wholesale we want the chairman of the firm down to the most
22 junior lawyer, no matter what, junior partner, it's all
23 relevant, that's what they're saying and it clearly is not all
24 relevant.

25 This would I think be sufficient. I can respond to
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1 your argument further by saying not just that it's premature,
2 but I don't think in fact that it's correct that, I mean, he
3 did maintain these client relationships and that's the basis on
4 which he's repeatedly saying I'm entitled to more money. So I
5 don't think he's going to come in and say there's something I
6 could have done or that I gave up a client. He didn't turn the
7 clients over to someone else. And even if he did, I don't
8 think that would facilitate a comparison with some other
9 partner. It would only say my numbers actually should have
10 been a little different. I mean, I, you know, and therefore I
11 should have earned a little more. And let him --

12 THE COURT: By the way, just as a factual question, if
13 you know, does the data indicate that the client collectables
14 attributable to him in the period let's say the five years

15 before he turned 70, were significantly higher than after he
16 turned 70 and went into this new status?

17 MS. PLEVAN: I don't recall. I don't think radically
18 there was -- there were clients that were lost to the firm, but
19 not as a result of his achieving this status. But I don't
20 think there was an immediate drop in his receivables.

21 THE COURT: All right. And is it correct to
22 understand that to the extent that the firm was, in terms of
23 deciding the compensation was looking at collections, that a
24 client would be attributable to a partner for this purpose if
25 that partner was somehow instrumental in bringing the client in

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1 or did the partner also have to be a dutiful and energetic
2 participant in the representation of the client thereafter?

3 MS. PLEVAN: I don't know that there's a uniform
4 answer to that question. I think my understanding is that
5 there is a lot of situations where those collection numbers are
6 shared among partners because someone who brought the client in
7 may not be the one who is actually servicing the client, so
8 there's sort of a sharing approach. And so I don't think we
9 can say for sure. There's a lot of getting behind the numbers
10 when they sit down and do the compensation like that.

11 THE COURT: There was reference by Mr. Burstein to the
12 prior disclosure by the law firm of projected compensation.

13 MS. PLEVAN: Yes.

14 THE COURT: Was that information for all partners,
15 some partners? Was it sculpted and limited in the way that
16 you're now suggesting?

17 MS. PLEVAN: It was for all partners for those years,
18 I believe. Which, frankly, is, we thought would be sufficient,
19 and, you know, I think that it's close, it is a projection, but
20 it was, and -- I think I have it here. Yes, it's, by name,
21 it's everybody.

22 THE COURT: And was it for the same period of time
23 that we're talking about as being the relevant period now?

24 MS. PLEVAN: I believe so. I only have one year as a
25 sample, but I believe so. So that would be another way in

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1 which, if Mr. D'Ablemont wanted to adopt the approach that you
2 suggested, he'd certainly be able to get very close to what he
3 wants by looking at that.

4 THE COURT: If defendant has disclosed projected
5 payments for all the partners for this period of time, I'm a
6 little puzzled as to what makes the actual payments irrelevant,
7 unless you're thinking that maybe you've overproduced and
8 somehow this is really all, it never was relevant to begin
9 with.

10 MS. PLEVAN: I think we did overproduce. I think we

11 did overproduce, but we shouldn't be penalized for that.

12 THE COURT: No. I'm just trying to understand the
13 rationale, though.

14 MS. PLEVAN: I think we did, but I think that it was
15 not the actual number, and there's -- I mean, I think
16 despite -- we produced a lot of material we don't think is
17 relevant and without coming to Court for a ruling to that
18 effect, so we thought that that was going to suffice. And now
19 the EEOC is pressing for the most precise actual compensation
20 information. The firm is very adamant that they want that to
21 be as limited as possible and on a relevance basis our view was
22 that it's not the whole universe. It clearly won't ever be
23 argued that he would be comparable to those people. I even
24 offered to defer until they came up with what their damages
25 theory was and then we could see what we need to do.

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1 THE COURT: I was going to ask is it the assumption on
2 both sides that if the case proceeds to trial that there will
3 be economists with a damages theory?

4 MS. PLEVAN: We haven't decided. We may be able to do
5 it with someone from in house, but I think if there were a
6 damages presentation, there would need to be at least an
7 accountant type. It's not a sophisticated analysis.

8 THE COURT: Let me ask one other thing about this
9 current schedule. What is the current projection in terms of
10 when depositions are supposed to begin?

11 MS. PLEVAN: Well, we actually started getting there.
12 We are going to start Mr. D'Ablemont in August and we've also
13 scheduled a 30(b)(6) deposition of the managing partner for
14 also August 23rd, 25th, I can't remember which day. And we
15 have an agreement that we will have three days of
16 Mr. D'Ablemont, we're going to take two of them in August and
17 wait, defer to a third day at a later date.

18 THE COURT: Okay. Anything else at this point?

19 MS. PLEVAN: Well, on the other issue.

20 THE COURT: Yes.

21 MS. PLEVAN: Because it's a different issue, although
22 similar in nature, and I will define the request maybe slightly
23 differently. We did, the firm when it does compensation, looks
24 at revenue collections that the lawyer is credited with on
25 what's called a participating basis. And that participation,

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1 as I said earlier, could be because they brought the client to
2 the firm or because they're now primarily responsible for that
3 client or much of their work and it could be on a shared basis.
4 Mr. D'Ablemont has kept other records and often used what's
5 called on a billing partner basis and the firm in its computer
6 has the capacity to generate that information.

7 THE COURT: What is the distinction between a billing
8 partner basis --

9 MS. PLEVAN: Billing partner just means who sent the
10 bill.

11 THE COURT: Would it not be likely to be a
12 participating partner, one that brought the client in or that
13 participated in the work?

14 MS. PLEVAN: One would hope that would be the case,
15 but sometimes over a long period of time the person who has
16 been sending the bills, as client relationships change and new
17 people come to the client, it may be that the person, and in
18 this case this is in fact the case, that Mr. D'Ablemont no
19 longer for some of these clients had any relationship with the
20 client whatsoever. He wasn't doing any work, didn't know the
21 people, wasn't involved with the client, but he was
22 nevertheless sending the bills.

23 THE COURT: Was he sending the bills by virtue of the
24 fact that he had brought the client in?

25 MS. PLEVAN: 30 years earlier, right. Yes.

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1 THE COURT: But you indicated the participating base
2 analysis might encompass someone who brought the client in.

3 MS. PLEVAN: I shouldn't have said that. It might not
4 necessarily be and I don't recall why all the differences in
5 his case, whether -- in one client that I can think of, the
6 participation is shared substantially, and it has been for
7 decades. But if you look at the billing, he was sending the
8 bills for all of it, so his billing partner column, I don't
9 think it's disputed, his billing partner column is
10 substantially higher than his participating partner column.

11 So what we did when Mr. Burstein's -- in response to
12 one of his requests, we actually generated a document that
13 showed the comparison for our own purposes and we produced it
14 to him.

15 THE COURT: Comparison, that is, between the billing
16 partner numbers and the participating partner number?

17 MS. PLEVAN: I think that's client by client.

18 THE COURT: This is limited to Mr. D'Ablemont?

19 MS. PLEVAN: The one we produced was limited to
20 Mr. D'Ablemont. We had generated it much earlier in the case
21 and it was arguably responsive so we produced it.

22 And then we were asked to produce compare information
23 for ten other people, and we did object on the grounds that we
24 didn't understand what was relevant about these people, who
25 these people were, why they were on the list, and we've gotten

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1 a number of different explanations for that and I'm still not
2 sure what the explanation is.

3 In the letter, two of them were identified as, well,
4 they had other agreements with outside third parties, so that's
5 why we're asking about them. Somebody else allegedly had lower
6 billable hours but I don't know why that's relevant and for
7 five of them we were given no explanation whatsoever. And
8 we're just, I'm not making a burdensomeness argument, but sort
9 of it's more like enough is enough and we're just concerned
10 about going down rabbit holes constantly in this case over
11 things that we don't think are pertinent and I don't think the
12 EEOC has come up with any basis for arguing why we should
13 produce this information for the people they have identified or
14 how they're going to use it or what is it for. I didn't hear
15 other than a conclusory statement why it would be relevant in
16 this case and how it would be used.

17 THE COURT: Okay. Thank you.

18 MR. BURSTEIN: If I may briefly respond, your Honor.

19 THE COURT: Sure.

20 MR. BURSTEIN: First of all, I don't want to get
21 bogged down in side issues, but we certainly disagree with
22 Ms. Plevan's characterization of Mr. D'Ablemont sending out
23 bills and having nothing to do with clients, but that's an
24 issue for another day.

25 In terms of the second issue before your Honor,
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1 initially we were looking for how the firm on a partner-wide
2 basis dealt with this differentiation they are making for
3 Mr. D'Ablemont between merely being the billing partner and
4 being the participating partner. This was early on in the case
5 and the first discovery dispute that was brought before the
6 Court, your Honor, said after hearing from defense counsel
7 that's just too burdensome, so we lowered the number to a
8 number of 10 which was a representative cross section of the
9 firm seeking some very simply generated documents, I think
10 Ms. Plevan can essentially confirm that this is not going to be
11 terribly burdensome to do for a much smaller period than the
12 ten-year period we had asked for originally. Some of these
13 individuals are generally similarly situated to Mr. D'Ablemont
14 insofar as one of the claims throughout this litigation is that
15 Mr. D'Ablemont's compensation has not been discriminatorily low
16 because his billable hours are so low. Some of the people who
17 were chosen, as Ms. Plevan said, we chose them because their
18 billable hours relative to other partners are on the low side.
19 Others, we picked--

20 THE COURT: Who are these individuals?

21 MR. BURSTEIN: The individual we identified were
22 Mr. Bickford and Adams, Barry and Insoll who had relatively low
23 hours compared to other partners. Some of this is from the
24 information most recently provided by defendant.

25 But the point is we don't need to and I don't think

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1 there is any requirement for us to have similarly identically
2 situated individuals to get the information. The purpose of
3 getting the information is to see the bona fides of how
4 defendant is treating Mr. D'Ablemont in terms of making this
5 differentiation between the, being the billing partner and
6 being the participating partner and how they treated our other
7 attorneys. So the fact that some of these other attorneys
8 might not be purely similarly situated or identically situated,
9 they may not be similarly situated at all, but that does not
10 matter in terms of the bona fides of EEOC wanting to see
11 legitimacy and how this is done firm wide in terms of the split
12 that is being made between participating partners and billing
13 partners.

14 MS. PLEVAN: Could I just interject here, Judge? I
15 apologize, but I think there's a mistaken impression on
16 Mr. Burstein's part. This is not something that the firm is
17 treating someone in a particular way. In the accounting
18 department they keep records and the records are based on who
19 sends the bills out and who has participating credit. It's not
20 something the firm does. It's the partners themselves record
21 that information or they're sending the bills. The accounting
22 department has a record of who's supposed to send bills out and
23 that's a function of however that evolved for that particular
24 client.

25 THE COURT: Are you suggesting --
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1 MS. PLEVAN: It's not somebody sitting there and
2 saying we're giving you billing partner credit or we're giving
3 you participating -- well, the participating is something the
4 partners tend to agree on I'm told. So it isn't going to tell
5 Mr. Burstein anything. It's just going to be some numbers.

6 THE COURT: The question I guess to the extent of
7 whether there's an issue of relevance is whether or not these
8 numbers are ever considered by the people deciding
9 compensation.

10 MS. PLEVAN: That's the other point. The records show
11 and I don't think Mr. Burstein necessarily knew this before he
12 got the points books, but the points book show what they
13 consider is participation credit which is what is in those
14 books. They don't consider the billing partner numbers. And
15 that's, we're not -- I don't know if it would even be fair to
16 say we're making an issue out of it, we're just saying in
17 Mr. D'Ablemont's case when we wrote letters claiming certain
18 dollar figures that should be credited, he was using the
19 billing partner numbers, not the other numbers. That's just a
20 fact. But whether another partner has more participation than
21 billing or less? It's not going to tell us anything. It's
22 really irrelevant. And I think, again, it's a situation where
23 maybe depositions will enlighten Mr. Burstein even more and he

24 will recognize that this is another avenue that does not need
25 to be pursued.

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1 MR. BURSTEIN: Your Honor, depositions might enlighten
2 me, but certainly prior to taking the depositions I'm entitled
3 to these documents. In terms of Mr. D'Ablemont, the firm
4 itself, the firm itself has credited in terms of the
5 mathematical client development allowance that he's allotted,
6 which is 1 percent of his revenues, they have credited based on
7 Mr. D'Ablemont's revenues as Mr. D'Ablemont sees them, which
8 the firm is saying now is merely billing revenues for which he
9 should not be credited, so there's a disconnect here and this
10 is something that we are clearly entitled to explore. Will the
11 story be clearer after depositions? I absolutely think so, but
12 prior to taking the depositions I think we're entitled to see
13 how the firm treats other partners in terms of the breakdown of
14 the designation of these revenues.

15 The fact that there may not be one solitary individual
16 making these decisions from on high doesn't mean that this
17 information no longer is relevant. It's the partners making
18 the decision. The defendant is a partnership. We're entitled
19 to see how other partners treated these revenues.

20 MS. PLEVAN: Just to add, your Honor, that
21 Mr. D'Ablemont's squeaky wheel approach to life is what got him
22 the higher reimbursement to his clients as I told Mr. Burstein
23 over and over again. But once again these are not documents
24 that anybody whose deposed will ever have seen before. They
25 don't know they exist. We will have to go into the system and

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1 create that. Nobody looks at that information, so it's not
2 needed for depositions.

3 THE COURT: At this point I'm not going to order
4 production for this material. If it turns out that anyone
5 testifies that they use this data in documents that are
6 currently existing that would be referred to by the decision
7 makers reflecting the data, it will have to be produced. If in
8 fact there are no such documents and indeed they would have to
9 be created, that in itself suggests that no one is looking at
10 them. So that takes care of that.

11 Let me ask Mr. Burstein with regard to the proposal
12 made by defendant concerning compensation partners, any
13 objection at this point to the approach that Ms. Plevan is
14 suggesting? That is, ten partners, five above and five
15 immediately below in terms of collectables?

16 MR. BURSTEIN: Your Honor, the approach both suggested
17 today by Ms. Plevan and as also we have discussed in attempts
18 to resolve this prior to coming to court essentially is putting
19 the cart before the horse is saying all right you're going to

20 be putting on at trial or in summary judgment five or ten
21 individuals you're going to point to who are similarly
22 situated. In discovery we want you to limit your request to
23 those individuals. Again, that's not how it should work. We
24 are in discovery, we're at a point where we haven't taken
25 depositions. We still don't fully understand defendant's

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1 theory as to what the bases for compensation are, both for life
2 partners and otherwise, and for us to be limited, particularly
3 when defendant's already given the information at least on a
4 projected basis, for us to be limited to a designated number,
5 five or ten individuals for whom we could get compensation
6 information when it may turn out that based on depositions and
7 otherwise, there are lots of other individuals who we think we
8 should compare not only Mr. D'Ablemont, but the other life
9 partners for whom EEOC is bringing this action to. There is no
10 reason we should be limited. The information is there, it's in
11 the books that defendant has already produced, and it also goes
12 to the second issue that I was raising with your Honor in terms
13 of what is important in terms of compensation. So even if, for
14 example, we're not going to use the chairman of the firm,
15 Mr. Callagy, as a comparator at trial to Mr. D'Ablemont, it's
16 important to see how various attorneys are compensated and what
17 factors are critical. Are the hours billed critical or,
18 rather, are the revenues generated from clients billable, the
19 clients receive, is that the critical element? Is it something
20 else? We are entitled to the compensation information because
21 this is a compensation discrimination case and at this stage
22 prior to depositions we shouldn't be limited to five or ten
23 individuals for whom we can get the most basic information in
24 this case.

25 THE COURT: Okay. My problem with this is that

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1 ultimately it is going to be the plaintiff's burden to show
2 what his losses were. To show what his losses were, he has to
3 at least offer some evidence supporting a hypothesis as to what
4 he would have done during this ten years, but for his being
5 stuck in this particular challenged category. Whatever
6 Mr. D'Ablemont thinks he would have done and presumably would
7 testify to if asked at deposition would it seem to me define
8 for purposes of a damages case for the plaintiff the universe
9 of partners at the firm to whom he could reasonably be
10 compared.

11 What I think is the problem with the way EEOC is
12 talking about is to essentially say, well, there may be, and I
13 don't know how many partners there are at the firm, but I
14 assume it's a fairly substantial number, that we are not, we
15 don't even have a hypothesis as to what the universe is of

16 people who Mr. D'Ablemont would have resembled for the last ten
17 years but for this discrimination, and it doesn't seem to me
18 that in normal Title 7 type cases you get as a plaintiff
19 unlimited employee disclosures based upon the fact you don't
20 yet have a theory as to what the relevant universe is.

21 I'm not necessarily wedded to the theory the defendant
22 has espoused here which I think undergirds its proposal, but it
23 seems to me it's more reasonable than simply saying we get
24 everything because we haven't yet figured out anything and I'm
25 not prepared to grant unlimited disclosure of compensation.

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1 I'll leave it to you to figure out a universe that makes some
2 sense, based even just on Mr. D'Ablemont's own contentions in
3 this case as to what he would have done during these ten years
4 that would have triggered an assessment of how much he should
5 have earned each year. But I'm not just awarding carte blanche
6 at this point because I don't think the plaintiff has laid a
7 basis for it. My inclination would be to say for the moment
8 take what the defendant has proposed and if you think there's
9 more that legitimately should be given, ask for it. And I
10 think we're going to leave it at that.

11 I gather there's another issue related to
12 Mr. D'Ablemont or not, as the case may be.

13 MS. PLEVAN: I suppose -- I was also going to ask the
14 Court about the schedule, whether, do you want us to submit an
15 order on the change of dates that you agreed to the last
16 conference or --

17 THE COURT: Did we specify dates at that point?

18 MS. PLEVAN: We just specified an end of fact
19 discovery date and not sort of all the other dates.

20 THE COURT: The end of fact discovery date, if you
21 would refresh your recollection about --

22 MR. BURSTEIN: I believe it's the end of November.

23 THE COURT: And what is --

24 MR. BURSTEIN: Yes.

25 MS. PLEVAN: Right.

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1 THE COURT: What is left the experts?

2 MS. PLEVAN: The original order we wanted to have
3 experts, summary judgment date, and I've forgotten what else.

4 THE COURT: I assume plaintiff will be designating
5 some experts?

6 MR. BURSTEIN: Your Honor, EEOC, we haven't
7 affirmatively decided whether we're going to use an expert or
8 not. It's certainly something that's possible. We just
9 haven't reached the point where we affirmatively could say we
10 would do that.

11 THE COURT: Okay, December 14 for plaintiff's expert