UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

February 15, 2007

DINKO SEFIC, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 06B00014
MARCONI WIRELESS, Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO COMPEL RESPONSE TO DISCOVERY

I. PROCEDURAL HISTORY

Dinko Sefic filed a pro se Complaint alleging that he was fired from his job as a Senior Consultant in the Wireless Professional Services Group at Marconi Wireless (Marconi) in violation of the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2006). The company filed an Answer which was accompanied by a copy of a letter from John W. Thornton, identified as the Head of Legal and Commercial for Marconi Wireless, to the Office of Special Counsel (OSC), transmitting exhibits 1-14, copies of which are also appended to the Answer. The letter is dated November 11, 2005, and indicates that exhibits 1-14 are documents Marconi sent OSC in response to an initial inquiry made by the agency on September 27, 2005, regarding Charge No. 197-73-407. A copy of the underlying charge, dated July 1, 2005, is appended to Sefic's Complaint. Discovery is in progress.

Presently pending is Sefic's Motion to Compel Response to Discovery. Marconi filed a response to the motion, and Sefic filed a reply, so the motion is ripe for adjudication.

II. THE MOTION

Sefic's motion sets forth the nature of his discovery requests, the responses or objections made

by the opposing party, and his arguments in support of the motion. It was accompanied by the certification required by 28 C.F.R. § 68.23(b)(4)[1] and by copies of correspondence demonstrating attempts to resolve the issues without judicial intervention. I conclude that the motion satisfies the requirements of 28 C.F.R. § 68.23(b).

The motion reflects that Sefic propounded twenty-two requests to Marconi for the production of documents and nine requests for admission. Sefic complains that Marconi thereafter made objections to each of his document requests, that it produced no documents at all, and that the company made admissions as to only three of his requests for admission. Sefic's motion challenges the adequacy both of the company's objections to his document requests and of its responses to his six remaining requests for admission.

A. The Document Requests, the Objections Marconi Made, and Sefic's Arguments

It should be noted at the outset that most of the objections Marconi made were of a generic or boilerplate character, containing neither a legal nor a factual explanation of the basis for the objection. For example, Marconi objected to Document Requests 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20 and 22 with the claim in each instance that the request was "overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence." Objection was made to Requests 1 and 2 as "overly broad and not reasonably calculated to lead to the discovery of admissible evidence." Similarly, with respect to requests numbered 1, 2, 3, 5, 6, 9, 10, 12, and 22 seeking information pertaining to other employees or consultants of the company, Marconi claimed without more that each request "seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights." A generalized objection on the basis of relevance was made to requests numbered 5, 6, 16, and 22, again, without explanation. In addition, whole categories of documents were objected to in undifferentiated responses to requests numbered 11, 15, 16, and 19, objecting "insofar as it requests the production of documents that are confidential and proprietary and 'may' constitute trade secrets of Respondent," without identification of specific documents or portions thereof, and without explanation to provide a basis upon which a reasoned assessment of such a claim might be made. Still other objections were made to Requests 1, 3, 4, 5, 7, 16, and 17 that each was vague, or ambiguous, or "unclear as written." In no instance was there a citation of legal support or authority for these objections, whether to case law or to applicable rules.

The specific document requests, the objections made to them, and Sefic's comments include:

Request 1. Produce all writings or documents pertaining to salary surveys that Respondent sought in 2002, 2003 and 2004.

[1] *See* Rules of Practice and Procedure, 28 C.F.R. Pt 68 (2006).

Response 1: Respondent objects to this request because it is vague, as the term "salary surveys" is not defined. Further, Respondent objects to the request insofar as it seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights.

Further, Respondent objects to this request because it is overly broad and not reasonably calculated to lead to the discovery of admissible evidence.

Sefic pointed out in response to this objection that Marconi's own Resource Manager had defined the term in an e-mail dated August 10, 2004, and that he was personally aware of at least one such survey done by ERI, and of another done by Watson Wyatt Data Services. Marconi evidently did not make any further response or produce any documents in response to this explanation. Among the attachments to Marconi's Answer to the complaint is a letter on company letterhead from Chip Wagner to Sefic dated July 2, 2004 which states "for the first time in three years, Marconi Wireless has this year conducted an organization wide salary review." Sefic's base salary was apparently increased by $2500 as a result of this salary review. Marconi's objection based on the absence of a definition of the term salary surveys appears to be disingenous.

Request 2. Produce human resource documents that include names, position, immigration status and annual salary of all Consultants that were on the payroll in April 2004.

Response 2: Respondent objects to the request because it seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights. Further, this request is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, and without waiving same, discoverable, relevant, non-objectionable documents have previously been disclosed (see Tab # 8 in Respondent's Answer to Complainant's Complaint)."

Although Sefic's motion offered to accept redacted documents, no such documents were forthcoming. Examination of Tab 8 reflects that the document consists of one page which is described in Thornton's cover letter as "a list of terminated employees terminated from October 1, 2004 to the present." It is not self-evident in what way Marconi contends that a list of employees terminated in and after October, 2004 is responsive to a request for information about consultants on the payroll in April.

Request 3. All writings or documents pertaining to management's communications regarding prevailing wage, wages of consultants (for second half of 2004 only).

Response 3: Respondent objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Further, Respondent objects to the request because it seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights. Further, Respondent objects to this

request as it is unclear as written.

Sefic's motion indicates that the request is related to the request for salary surveys and communications between management about such surveys. Notwithstanding this explanation, no production was forthcoming and the alleged lack of clarity again appears evasive in light of other materials in the record.

Request 4. All writings and documents pertaining to Respondent's RF job advertisements within the U.S. (from January 2004 onward only). Include names and dates of the publications and copies of the ads. Provide the name, job title and salary of the employee for every advertised position that was filled by a non U.S. Citizen or Permanent Resident.

Response 4: Respondent objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Further, Respondent objects to this request as it is unclear as written.

Sefic's motion expressed skepticism about how producing the RF job advertisements only from January 2004 could be overbroad or burdensome. No documents were produced.

Request 5. All writings or documents pertaining to Respondent's disciplinary actions against terminated employees, including their termination letters (terminations that were handled by Richardson HR office from June 2004).

Response 5: Respondent objects to the request because it seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights. Further, this request seeks information that is confidential, immaterial and irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Finally, Respondent objects to the request on the grounds that it is vague and ambiguous.

Sefic's motion said the request was designed to find evidence as to whether disciplinary procedures described in the employee handbook were followed prior to termination of other employees. Although the motion indicated Sefic was willing to accept redacted documents, no such documents were produced.

Request 6. All writings or documents pertaining to redundancy and termination of Brian White and Paula Sobczak.

Response 6: Respondent objects to the request because it seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights. Further, this request seeks information that is confidential, immaterial and irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

Sefic contends that if actions related to immigration employment practices played a part in the termination of these employees, this evidence would support his retaliation claim. No documents were produced.

Request 7. All writings or documents pertaining to carry over vacation hours summary for each individual employee with carry over vacation (Shelly Kohler's and Joy Pulliam's report in 2004).

Response 7: Respondent objects to this request because the request is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Further, this request is not reasonably limited in time or scope. It does not limit its request to documents relevant to the time period at issue in this case.

Sefic's motion indicates that he would abandon this request.

Request 8. All writings or documents pertaining to decision and public notification that all employees with carry over vacation hours were capped to 160 hours maximum.

Response 8: Respondent objects to this request because the request is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Further, this request is not reasonably limited in time or scope. It does not limit its request to documents relevant to the time period at issue in this case. Subject to these objections, and without waiving same, Complainant is in possession of discoverable, relevant, non-objectionable responsive documents (see Attachment #11 in Complainant's Complaint).

The reference to Attachment #11 appears to be to an e-mail sent to Sefic by Brian White on August 26, 2004. This e-mail does address the vacation hour cap, but is personal to Sefic, thus it does not pertain to "decision and public notification" of the carryover vacation policy. Also included is an exchange of e-mails in February 2004 between Sefic and Shelley Kohler about PTO hours, but these messages as well are personal to Sefic. Sefic's motion argues that his 502 carry over hours were capped at 160, and the requested documents would show whether that policy was uniformly applied to others. No production was forthcoming.

Request 9. All writings or documents pertaining to carry over vacation hours of the employees that used their carry over vacation after August 2004 and/or were granted monetary compensation for carry over vacation.

Response 9: Respondent objects to the request because it seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights. Further, this request is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Sefic evidently elected not to pursue this request.

Request 10. All so-called End Project Reports from all other consultants from January 2004 onward - (reports that are similar to the one that Respondent requested from Complainant after completion of 2004 New York project for AT&T.)

Response 10: Respondent objects to this request because it seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights. Further, this request is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Sefic's motion says the documents are needed to compare with his own NY End Project Report which he says was overscrutinized in a retaliatory manner. Although the motion offers to accept redacted documents, no production was made in response to this request.

Request 11. All writings or documents pertaining to the Nashville Optimization project for AT&T in 2003 and/or 2004.

Response 11: Respondent objects to the request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to the request insofar as it requests the production of documents that are confidential and proprietary and may constitute trade secrets of Respondent.

Sefic's motion asserts that he did not decline this project and doubts it ever existed, so it should not have been used against his performance score.

Request 12. All writings or documents from the year 2000 onward, pertaining to every employee's request to stay and work in Dallas for most or all the time, and all writings or documents from the year 2000 onward, pertaining to every employee's request to work from somewhere else or to be based at their preferred location.

Response 12: Respondent objects to the request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. It is not sufficiently limited in time or scope as six years is not reasonable. Further, this request seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights.

Sefic's motion contended that he needed to find out about other employees who submitted requests for specific project locations, as he did, and whether those employees were fired. He offered to narrow his request to ask for documents for 2003 and 2004 only, and to accept redacted documents, but no production ensued.

Request 13. For every Consultant provide a complete summary of project locations and project durations from 2000 onward.

Response 13: Respondent objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Further, Respondent objects to this request because it is not sufficiently limited in time or scope as six years is not reasonable. Subject to and without waiver of such objections, Respondent states that no such documents exist in the format specified by the request and Respondent is not obligated to create documents in response to a request for production.

Sefic's motion explained that his request is not limited to a particular format, and that he personally knows the company asks every consultant to provide a list of projects and locations they have been working on. He also narrowed the request to ask for documents for 2003 and 2004 only, and offered to accept redacted documents, but no documents were produced.

Request 14. All writings or documents pertaining to immigration status of all employees and contractors engaged on Sprint's fixed wireless project in 1999 and 2000.

Response 14: Respondent objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections and without waiving same, copies of all completed Immigration and Naturalization Forms I-9 for employees fired from October 1, 2004 to the present and for employees hired from October 1, 2004 have already been disclosed (see attachments #10 and #11 in Respondent's answer to Complainant's Complaint).

Sefic's motion asserts that the request is calculated to show Marconi's willingness to knowingly employ people who were not legally authorized to work in the United States, and that he is personally aware of two contractors who worked for Marconi while on visitor visas. No production was made, and the attachments referred to do not appear to be responsive to the request.

Request 15. All writings or documents pertaining to management comments regarding PlaNet EV performance in the second half of 2004.

Response 15: Respondent objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to the request insofar as it requests the production of documents that are confidential and proprietary and may constitute trade secrets of Respondent.

Sefic's motion says that one of the reasons given for his termination was that he was negative about the product performance, but that it was his job to identify and report imperfections in Planet EV. He thus seeks information about others who expressed negative opinions about this project, and whether they too were sanctioned. Sefic offered to accept redacted documents, but no documents were produced.

Request 16. All writings or documents pertaining to consequences and cost of mistakes made by wrong choice and/or setup of the drive test equipment for model tuning projects for AT&T in 2004.

Response 16: Respondent objects to this request because it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Further, Respondent objects to this request as it is unclear as written. Respondent further objects to the request insofar as it requests the production of documents that are confidential and proprietary and may contain trade secrets of Respondent.

Sefic's motion explained the request as being designed to lead to the discovery of high cost mistakes made at Marconi and to ascertain whether any sanctions were taken against the people responsible for those mistakes. His purpose would presumably be to show that other employees were not sanctioned for more serious mistakes than any he made. Sefic offered to accept redacted documents, but no documents were produced.

Request 17. All writings or documents pertaining to discrimination complaints that Respondent has received from its employees.

Response 17: Respondent objects to the request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Further, this request is not sufficiently limited in time or scope. Further, Respondent objects to the request as it is vague and ambiguous.

Sefic's motion says the documents might show a history and tendency of discrimination, and show the way that Marconi acted with respect to such complaints. No documents were produced.

Request 18. All writings or documents pertaining to Complainant's performance review for 2001/2002 - (my HR file does not contain this performance review).

Response 18: Complainant's personnel file is located at Tab #13 in Respondent's Answer to Complainant's Complaint.

Sefic's motion points out that the response is patently unresponsive to the request. No documents were produced.

Request 19. All writings or documents pertaining to January 2005 project for Nextel NY (project that Respondent had scheduled for Complainant).

Response 19: Respondent objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to the request insofar as it requests the production of documents that are

confidential and proprietary and may contain trade secrets of Respondent.

Sefic's motion pointed out that the project was referred to in his termination letter and in other documents. He said the request is designed to show that his termination was prepared before the project was even known. Sefic offered to accept redacted documents, but no production was made in response to this request.

Request 20. All writings or documents pertaining to Respondent's action to inform Complainant of the start date of Nextel mentoring project in November 2004.

Response 20: Respondent objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Sefic's motion states only "I do not agree with the objections but I give up on this request."

Request 21. Company travel and expense policy for all employees, excluding policy for consultants.

Response 21: Respondent objects to this request because it is overly broad and is not restricted as to time. Subject to and without waiver of such objection, Respondent states that the Complainant is in possession of discoverable, relevant, non-objectionable documents (see Attachment #6 in Complainant's Complaint).

The reference is evidently to an e-mail dated November 1, 2004 from Paula Sobczak to Consultants-Dallas captioned "New Per Diem Policy" to which the policy for consultants was attached. The request, however, was for the policy for employees <u>other</u> than consultants, so the document is not responsive. No documents were produced, however.

Request 22. Performance reviews for all consultants (reviews completed in 2004).

Response 22: Respondent objects to this request because it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Further, this request seeks information regarding third-parties that, if disclosed, might result in a violation of their privacy rights. No production was made in response to this request.

Sefic's motion contends that the documents would show that consultants with lower scores than his on performance evaluations are still with the company, and would show that his termination was not based on his performance as Respondent claims. He agreed to accept redacted documents, but no production was made.

Sefic sought in the motion to accommodate the objections Marconi raised. For example, he offered to accept redacted documents in response to Requests 2, 5, 10, 12, 15, 16, and 19, where

issues were raised respecting confidential or proprietary documents, trade secrets, or privacy rights of third parties. He narrowed the time frames with respect to Requests 12 and 13, to seek documents only for 2003 and 2004, and he abandoned Requests 7 and 9 altogether. Nevertheless, no production of documents was made thereafter in response to any of his requests.

B. The Requests for Admission and the Responses

Sefic propounded nine requests for admissions, in response to which Marconi admitted three, and denied or objected to the remainder. The motion seeks to determine the adequacy of the objections to the requests numbered 1, 2, 5, 6, 7, and 8. The disputed requests and objections are:

Request 1. E-mail from Lane Wooldridge dated November 9, 2004, that confirms he had approved Complainant's vacation.

Response 1: Respondent admits the genuineness of the document attached as Attachment 1 to Complainant's Requests for Admissions. Respondent otherwise denies the request.

Sefic's motion says he finds the response confusing in light of the admission of the genuineness of the document.

Request 2. Document indicating that Complainant was granted 300 shares for an exercise price of $2.06 per share.

Response 2: Denied.

Sefic's motion says he finds the response confusing in light of the response to his ninth request for admission in which Marconi appears to admit he was granted the 300 shares.

Request 5. Respondent has engaged contractors and non U.S. based employees to work at Respondent's premises in Richardson, Texas who were not legally authorized for employment in the United States.

Response 5: Respondent denies that it has knowingly engaged any person to work at Respondent's Richardson, Texas facility who is or was not legally authorized for employment in the United States. Respondent relies upon the entities with whom it contracts to ensure that their contractors, agents or employees they dispatch to work for Respondent are authorized for employment in the United States. Respondent therefore denies the request.

Sefic's motion states that he is personally aware of a U.K. based employee who worked in the United States while unauthorized and that there may be others. He seeks an unequivocal denial or admission.

Request 6. Respondent has had to address multiple complaints from its employees alleging discrimination in the work place.

Response 6: Respondent objects because the request is vague and ambiguous as written. Therefore, Respondent can neither admit nor deny the request.

Sefic's motion says he is aware of at least two such instances.

Request 7. Respondent was accommodating employees in terms of their choice of project locations and/or project duration.

Response 7: Respondent objects because the request is vague and ambiguous as written. Therefore, Respondent can neither admit nor deny the request.

Sefic's motion says that his request to work at preferred locations was used as an excuse to fire him, but others making similar requests were not fired.

Request 8. Respondent was running two separate travel and expense policies: one especially for consultants and one for all other employees.

Response 8: Respondent objects because the request is vague and ambiguous as written. Therefore, Respondent can neither admit nor deny the request.

Sefic's motion contends that Marconi should have admitted this request.

III. MARCONI'S RESPONSE TO THE MOTION TO COMPEL CONSIDERED

Marconi's response to the motion is deficient in several respects, most notably for its disregard of pertinent case law and applicable rules. It asserts at the outset that Sefic "failed to demonstrate the relevance or discoverability of most of the information he seeks," but this assertion conflates the relative burdens on the requesting party and the resisting party in OCAHO discovery proceedings. Both our procedural rules and our case law make clear that it is the party resisting discovery, not the party seeking it, which has the initial burden of supporting its position. 28 C.F.R. § 68.23(a) (2006); *United States v. Allen Holdings, Inc.*, 9 OCAHO no. 1059, 13 (2000)[2] (citation omitted); *United States v. Westheimer Wash Corp.*, 7 OCAHO no. 989, 1042,

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to

1045 (1998) ("The party objecting to a discovery request has the burden to demonstrate that the objection is justified" (citation omitted)). Unless the objecting party sustains its burden of showing the objection is justified, the requested discovery will be compelled. This standard does not differ from the practice in the federal courts. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (stating that an objecting party must have a valid objection to each request to escape its production (citing *Josephs v. Harris Corp.*, 677 F2d. 985, 991-92 (3d. Cir. 1982)). It is thus Marconi's burden, not Sefic's, to make the initial demonstration here. A party resisting discovery in OCAHO proceedings cannot succeed in shifting this burden merely by the mechanical recitation of formulaic conclusions that the request is irrelevant, unduly burdensome, or overly broad, without more. Instead, the resisting party must make a specific showing with respect to each objection.

Here Marconi's response to the motion alleges that Complainant is seeking to engage in a "fishing expedition," citing *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992), but other than the citation to *Hofer*, the response is wholly devoid of relevant legal authority to support the objections made. As was explained long ago in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), after the enactment of the federal rules, "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." A party resisting discovery is expected not only to explain its objection with particularity, but also to cite to relevant legal authority in support of its argument.

Marconi's response to the motion argues generally that "Marconi has previously produced nearly three hundred (300) documents as exhibits to its Answer dated June 1, 2006." Examination of the documents attached to the Answer reflects, however, that those attachments consist collectively of 290 pages, not 290 documents. Some of those pages are blank, or contain only a number. Some say "[t]his page intentionally left blank." There are in fact 264 pages of actual text, 167 of which consist of copies of employee I-9 Forms and the documents those employees used to verify their work eligibility. Although the attachments are numbered 1-14, there is no attachment 2 or 11, and no document for attachment 13. The cover letter indicates that the attachments are materials originally sent to OSC by John W. Thornton on November 11, 2005 in response to a letter from that office to Marconi dated September 27, 2005.

The fact that the company took the trouble in its Answer to attach copies of documents it had previously sent to OSC in response to the agency's investigation does not mean, as Marconi appears to suggest, that the company should consequently be relieved from complying with the

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Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

requirements of the discovery process in this proceeding. Marconi's effort to unilaterally define the parameters and content of discovery to be conducted in this case is rejected. If compliance with an initial investigatory inquiry from OSC were sufficient for a respondent to avoid discovery proceedings in this forum, there would be no need for the discovery rules set out at 28 C.F.R. §§ 68.18-23, and OCAHO cases would then be decided exclusively on the basis of evidence preselected by the respondent. It is unclear why Marconi appears to believe that this novel mode of jurisprudence would be adopted here.

Two affidavits accompanied the response. The affidavit of John Thornton states that the affiant is employed by Ericsson, Inc. in the position of Legal Counsel, that he formerly was the Head of Legal and Commercial for Metapath Software International (US) Inc., a Marconi company d/b/a Marconi Wireless, but that his employment with Marconi Wireless ended on January 23, 2006. The affidavit states further that Ericsson, Inc. bought the assets of Marconi PLC worldwide on January 23, 2006, that all assets were transferred to Ericsson, and that what was formerly Marconi was renamed telent, Plc, so that Marconi subsidiaries are now owned by telent. The affidavit states further that the majority of the records kept at the Richardson office of the former Marconi Wireless are contained in approximately 800 boxes and archived for safekeeping at Texas Archives in Richardson, Texas, and that to the best of the affiant's knowledge there is no current custodian as former Marconi personnel who maintained the documents are no longer employed by Marconi.

The affidavit raises more questions than it answers. Although it is asserted that to the best of the affiant's knowledge there is no current custodian of Marconi's documents, the more pertinent question of the current ownership and control of the company's documents is not addressed. As to the key question of the relationship between Marconi and the entity in possession of the documents, the affidavit is silent. It is silent as well about the actual current relationship of Marconi Wireless, Ericsson, Inc., or telent, Plc to Metapath Software International (US) Inc., or to each other. Although Marconi's Answer states that Marconi Wireless is "now known as MP Software International, Inc.," the case has proceeded under the name Marconi and no assignees or successors-in-interest with respect to this proceeding have been identified as such. There is no indication as to whether Marconi's liabilities were acquired by Ericsson along with its assets or whether there is a continuity of operations between the two companies, or as to what relationship, if any, Ericsson, telent, or MP International has to the archived documents.

More importantly, precisely when and by whom Marconi's documents were placed in the custody of Texas Archives is not disclosed in this affidavit either. The record, however, reflects that the underlying OSC charge in this matter was filed on July 1, 2005. Applicable regulations call for OSC to serve notice of a charge on the respondent within ten days of the agency's receipt of the charge. 28 C.F.R. § 44.301(e). Marconi was thus in all probability put on notice of the Sefic charge some time in mid-July of 2005, but in any event Marconi was clearly aware of the charge at the very latest by September, 2005 when OSC made its first investigatory inquiry to the company, in response to which John W. Thornton sent materials in early November, 2005.

Marconi was therefore clearly on notice as well of the prospect that the charge might result in a complaint, either by the Special Counsel or by Sefic himself, *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977) (stating that unlike a litigant in a private suit who may get notice only when a complaint is filed, a Title VII defendant gets notice of the possibility of a suit when the charge is served), and consequently on notice as well of its duty to preserve evidence relevant to this matter. Marconi's assets were not purchased by Ericsson until January of 2006, so the company was thus aware of its obligations well before that event, and accordingly well before the archival of its records, whenever that actually occurred. Nothing in the Thornton affidavit suggests otherwise, and nothing in the affidavit explains when or why Marconi chose to archive documents it had reason to know might be subject to discovery in this matter, or who made the decision to do so.

The second affidavit is that of Lauren Johnson, who is identified as being employed by Fulbright & Jaworski L.L.P. and as "one of the attorneys employed by Marconi Wireless who works on the case." The affidavit states further that it is the affiant's understanding that Marconi's assets were purchased by Ericsson and that the former Marconi was renamed telent, Plc, and "[c]onsequently, all of the people identified by the parties as having knowledge of relevant facts are no longer employed by Marconi Wireless. As such, there currently are no Marconi 'business records' that are in regular use in any Marconi office or are being managed by a records custodian."

The affidavit states further that Johnson spoke with former employees John Thornton, Cathy Woodson, Lane Wooldridge, Paul Gregory, Todd Bartz, and Betsy Halbach, and reviewed an index of 800 boxes of archived Marconi records. It says the affiant also reviewed "nearly three hundred (300) documents produced to Mr. Sefic by Marconi in this case," and concluded by stating the affiant's belief that Marconi has produced "all non-privileged, relevant documents in its possession, custody or control that can reasonably be located, assimilated and produced."

Let us be clear, however. Contrary to the claim that 300 documents were "produced to Mr. Sefic in this case," the number of documents which have actually been produced to Mr. Sefic in this case is more accurately described as zero. No production has been made in response to the document requests at issue here, and the record reflects that the 264 pages of documents referred to in the affidavit are the same documents as are attached to Marconi's Answer to the Complaint, and that these are the same documents which Marconi initially submitted to OSC in response to its first inquiry to Marconi in September of 2005. In no meaningful sense then, can these documents fairly be described as 300 documents "produced to Mr. Sefic in this case."

This affidavit too, raises more questions than it answers. It, too, is silent as to who made the decision to archive Marconi's business records and when that was carried out. Marconi's corporate representative for purposes of this action is not identified, nor is the relationship of MP Software International (US), Inc., Ericsson, Inc., telent, or other entities to the documents in question explained. The relationship of Cathy Woodson, Lane Wooldridge, Paul Gregory, Todd Bartz, or Betsy Halbach to Marconi, to its successors-in-interest, or to this case, is unelaborated

beyond the fact that they are former employees. Omitted from the affidavit are any facts detailing the length, subject matter, or substance of the affiant's conversations with those individuals or with Thornton. No information whatever was provided about the index to the archived documents, who prepared the index, when it was prepared, or under whose direction. No portion of that index was submitted, and no information was provided about the types and categories of files or about what system of organizing the documents was utilized. Presumably the requested documents are not randomly distributed among the 800 boxes, but without the index it is impossible to make a reasoned assessment about the degree of difficulty involved in locating them.

Marconi's response to the Motion to Compel now argues for the first time that it should be relieved from production because the requested documents are not in its possession. Why it did not raise this objection in response to Sefic's request for production as an initial matter is unexplained, but the fact that the records are not currently in Marconi's possession has no bearing on this matter in any event, because whether the documents are in Respondent's physical possession is not the appropriate inquiry. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 164 n.6 (1980) (Stevens, J., concurring in part and dissenting in part). A party resisting discovery may not avoid the obligation to produce documents merely by stating that the documents are not in its possession. Contrary to what Marconi appears to believe, putting the company's records in the hands of an agent, contractor, or depository does not relieve a litigant from its discovery obligations, including the obligation to preserve evidence. A party controls documents when it has the right, authority or ability to obtain them upon demand; physical possession is not the issue. *Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 671 (1997) (citation omitted). Neither the location nor the ownership of the documents is determinative, *id.* (citing *M.L.C., Inc. v. N. Am. Philips Corp.*, 109 F.R.D. 134, 136-37 (S.D.N.Y. 1986)), and a litigant may not nullify discovery rules by contracting with a third party, *see generally Bank of New York v. Meridien Biao Bank Tanz., Ltd.*, 171 F.R.D. 135, 146-49 (S.D.N.Y. 1997), or by making access to the documents difficult, *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984) (explaining that the defendant cannot shield documents from discovery by storing them with an affiliate located abroad).

A. Objections to Sefic's Document Requests

The objections Marconi raised in response to the Motion to Compel are not entirely congruent with the objections it previously made to Sefic's document requests. Marconi's response to the motion did not raise, and appears to have abandoned, its previous opaque claims about trade secrets or confidential and proprietary information, as well as its claims that certain of the requests are vague, ambiguous, or "unclear as written." Some of the disjunctures between Marconi's responses to the discovery requests and its response to the Motion to Compel are sufficient to raise serious questions about whether the standard set forth in *Quarles,* 894 F.2d at 1486, requiring diligent, good-faith responses to legitimate discovery requests has been met. For example, if Marconi didn't even have its business records to review before responding to Sefic's

document requests, it has to be questioned how the company was able to determine which of those unexamined documents contained trade secrets or proprietary information as was asserted in those responses.

The objections now made in response to the Motion to Compel are that the document requests numbered 1, 3, 4, 9, 10, 12, 13, 14, 15, 16, 17, and 22 are unduly burdensome (although Marconi's response to Sefic's requests for production failed to interpose this objection to Request 1, and Marconi apparently no longer claims that the requests numbered 7, 8, 11, 19, and 20 are unduly burdensome, as claimed in the initial responses), that the requests numbered 9, 10, 12, 13, 14, 15, 16, 17, and 22 seek information that is irrelevant (although a relevancy objection was interposed to Sefic's production requests only in response to his requests numbered 5, 6, 7, 8, 16, 22, not to those numbered 10, 12, 13, 14, 15, and 17), that the requests numbered 2, 5, 6, 9, 12, and 22 seek confidential information about non-parties (although it evidently no longer makes this claim with respect to the requests numbered 1, 3, and 10), that documents in response to 8, 18, 19, and 21 have been produced to the extent they exist, and that documents in response to requests numbered 1, 11, and 18 do not exist.

The objections raised might well be treated as a failure to respond as they were for the most part not adequately explained and were unsupported by authority. They will nevertheless be considered and addressed seriatim in the interest of making clear for future reference the standards which apply in these proceedings. These standards should come as no surprise; even a cursory review of the case law or applicable rules would have revealed them.

1. Undue Burden - Requests 3, 4, 9, 10, 12, 13, 14, 15, 16, 17 and 22

Marconi states that the "cumulative scope" of the discovery requests renders them unduly burdensome under the circumstances of this case because "the burden and expense placed upon Marconi to locate additional documents far outweighs the likely benefit to Sefic." The nature of the burden which must be shown in order to avoid discovery, however, is not readily met by mere conclusions. Ordinarily a demonstration of undue burden requires a showing that compliance with the discovery requests would threaten disruption to or hinder a respondent's normal business operations. *In re Univ. of S. Fla.*, 8 OCAHO no. 1055, 843, 848 (2000) (citing *In re Fla. Azalea Specalists*, 3 OCAHO no. 523, 1252, 1255 (1993), *aff'd* 19 F.3d 620 (11th Cir. 1994); *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981)). Specific facts must be shown. Here, it appears that Marconi no longer has any normal business operations to hinder or disrupt, and no facts are set out to specify what the alleged expense involved in compliance would be. Marconi has thus failed to support its conclusion because it failed demonstrate specifically either the burden or the expense it claims.

The affidavit of Lauren Johnson represents that nearly fifteen hours of attorney time have been spent "searching for documents responsive to Mr. Sefic's Requests for Production." The explanation of how the time was actually spent, however, reflects that the affiant did not look for

or review any of the archived documents. Rather, the affidavit says that Johnson reviewed an undescribed index to Marconi's boxes of documents, had conversations of unspecified length with Thornton and six other former Marconi employees the substance of which is not reported, and reviewed the same documents Marconi sent OSC in 2005 and attached to its Answer. Precisely how many of the fifteen hours were allocated to each of these activities is not disclosed. The only actual documents the affidavit identifies as having been reviewed are thus the self-same documents already produced to OSC in November 2005 in response to the agency's investigation; these documents were presumably reviewed at that time as well as being reviewed again at the time the Answer was filed. I do not agree that viewing these same documents again for the third time is a "search" for documents responsive to Sefic's document requests. No specific facts are asserted which reflect a genuine effort "to locate additional documents" other than the same documents already attached to the Answer and sent to OSC in 2005.

The affiant is not one of the attorneys previously of record in this matter, and the activities reflected in the affidavit were doubtless necessary for a new attorney to become familiar with the case, but it is not at all clear from the affidavit that any of those efforts are appropriately characterized as having been specifically directed to producing documents responsive to Sefic's discovery requests. Neither do these assertions establish any undue burden or expense to Marconi. I conclude in any event that the burden of searching for and producing documents in response to the requests in this case is entirely self-inflicted. If Marconi, while clearly on notice by September 2005 of the prospect of this action and of its duty to preserve evidence, nevertheless chose to archive the company's records in a manner that made them difficult to retrieve, the burden thus created should not be permitted to serve as an excuse for failure to respond to discovery requests. *Cf. In re Tropicana Casino & Resort*, 9 OCAHO no. 1060, 7 (2000) (observing that whatever burden fell upon Respondent to produce records was a result of its own recordkeeping system).

2. Requests 9, 10, 12, 13, 14, 15, 16, 17 and 22 Seek Information that is Irrelevant

Marconi's response to the motion asserts that Sefic's requests 9, 10, 12, 13, 14, 15, 16, 17 and 22 seek information that is irrelevant to his case, but it made this objection to Sefic's discovery requests only with respect to his Requests 5, 6, 7, 8, 16, 22. Marconi suggests that discovery should be limited to matters related only to Sefic's employment and the decision to terminate it, but the scope of discovery under 28 C.F.R. § 68.18(b) is exceedingly broad. Any matter which is relevant to the subject matter of the proceeding is discoverable, as long as it is not privileged, and the burden of showing that an objection to discovery is justified falls on the objecting party. Marconi again made little attempt to make this showing or to support the objection with any degree of specificity. Its arguments are of a generic nature, except with respect to Request 16, which it explains by way of "example."

As to that request, Marconi argues that the costs and consequences of mistakes made by wrong

choice and/or setup of the drive test equipment for model tuning projects for AT&T in 2004 are irrelevant because unintentional mistakes in technically-advanced consulting projects were not subject to sanction. Sefic argues that the documents would show that serious mistakes made by others were not sanctioned, while he was fired for lesser offenses. Marconi is correct in pointing out that Sefic was not fired for technical mistakes and that the comparison is therefore inapposite. Marconi acknowledges that the mistakes Sefic identifies were not sanctioned, and production in response to Request 16 will not be required.

Although Marconi's initial objection to the request for production did not specifically raise an issue as to the relevance of the documents sought by Request 14, it is nevertheless reasonably evident in the context of this case that the documents sought reflecting information about the immigration status of persons engaged on the Sprint wireless project in 1999 and 2000 are not sufficiently related to the subject matter of this case to warrant their production. No response will be required to this request.

With respect to Request 17 for documents related to other complaints of discrimination made against Marconi, it is apparent that some, but not all, of the documents requested might be related to Sefic's case. Production will be compelled, but only as to documents reflecting other claims of the same type of discrimination. *See Jackson v. Montgomery Ward & Co.*, 173 F.R.D. 524, 526-28 (D. Nev. 1997). A time limitation will be imposed as well, so that the request will be limited to complaints or charges made from 2002 to 2004. No production will be required respecting claims of discrimination based on sex, race, age, or disability, but production will be required with respect to complaints or charges made during the specified time frame where national origin or citizenship status discrimination is alleged, as well as documents reflecting complaints or charges that Marconi retaliated against an employee for engaging in protected conduct, regardless of the nature of any underlying claim.

3. Requests 2, 5, 6, 9, 12, and 22 Seek Confidential Information About Non-Parties

With respect to Marconi's generic objections regarding the privacy rights of third parties, the short answer is that it is clear on the highest authority that there is no general privilege for personnel records, even for confidential tenure peer-review materials maintained in an academic setting. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 191 (1990). Sefic requests documents containing information respecting other employees or consultants for the purpose of comparing his treatment to theirs. These are the kinds of records which are routinely requested and produced in employment discrimination cases. *See In re Conoco, Inc.*, 8 OCAHO no. 1049, 738 (2000). Marconi cites no legal authority to the contrary.

Marconi could have, but did not, make a request for a protective order pursuant to 28 C.F.R. § 68.18(c) or for in camera review of the documents pursuant to 28 C.F.R. § 68.42 if it genuinely believed that the requested materials needed to be protected. Even when Sefic offered to accept

redacted materials however, the company nevertheless consistently failed to produce any documents in response. When objection is made only to part of an item, the objecting party should specifically identify that part, and make production of the remainder of the document; Marconi's response to the motion instead continued to assert the same blunderbuss objection without acknowledgment of Sefic's offer to accept redacted documents and without reference to legal authority in support of its position. Production will accordingly be compelled. Sefic is cautioned that the responsive documents are to be used only for the purposes of this litigation and that information contained in them are not to be disclosed to third parties for any other purpose. Any belated request by Marconi for a protective order will be considered, but will not be permitted to delay production.

4. Documents in Response to 8, 18, 19, 21 Have Been Produced to the Extent they Exist

Marconi captions the next set of objections under the heading, "Documents in Response to Complainant's Requests Numbers 8, 18, 19, and 21 Have Been Produced to the Extent they Exist." The caption is somewhat misleading, because Marconi does not really contend that all the responsive documents have been produced. Rather, it states with respect to Request 8 that Sefic already has an e-mail demonstrating that the policy was distributed to employees, and with respect to Request 21, that Sefic "possesses documents, in response to Request No. 21, that clearly state Marconi's travel and expense policy." Evidently the suggestion is that if Sefic has one document that is responsive to the request, there is no need for him to obtain any others. The pertinent question, however, is not what documents Sefic already possesses, but what other responsive documents exist which he does not yet possess because Marconi elected not to produce them.

With respect to Request 18, Marconi reiterates its assertion that it has produced every document in Sefic's personnel file, and that "[a]s such, Complainant's performance review for 2002 does not exist." The fact that a document is not contained in a particular file does not necessarily establish that the document doesn't exist. It might have been removed from the file, or never put in the file in the first place. Production will be compelled. If no performance review was completed for Sefic in 2002, Marconi should simply say so.

In its initial objections to Request 19, Marconi claimed that the documents pertaining to the January 2005 project for Nextel NY were "confidential and proprietary and may contain trade secrets." Marconi now claims in response to the Motion to Compel that "relating to Request No. 19, Marconi has produced to Mr. Sefic all documents in its possession pertaining to Mr. Sefic's willingness and ability to participate in the January 2005 project for Nextel in New York, as well as Mr. Sefic's suitability for that project." As previously explained, the request for documents is not limited to documents currently in Marconi's possession. Neither is the request limited to documents "pertaining to Mr. Sefic's willingness and ability to participate in the January 2005 project for Nextel in New York, as well as Mr. Sefic's suitability for that project." The request

was for documents pertaining to the January 2005 project for Nextel NY, and responsive production will be compelled. If it has to do with the January 2005 project for Nextel in New York, and if it is a document, it must be produced.

5. Documents in Response to Requests 1, 11, and 18 Do Not Exist

Marconi's last group objection appears under a heading captioned "Documents in Response to Complainant's Requests Number 1, 11, 18 Do Not Exist." Again, the argument made is at odds with the caption.

Sefic's Request 1 was for any salary surveys for 2002, 2003, and 2004. Marconi initially objected to this document request on the grounds that the term "salary survey" was not defined. It appears to have learned what the term means, but its response to the motion now contends that the salary surveys referenced in those documents are not in Marconi's possession. Documents do not cease to exist because they have been placed in a storage facility, and, for reasons previously explained, the discovery requests here are not limited to the documents in Marconi's possession. Sefic identified two such surveys, one by ERI and one by Watson Wyatt Data Service; the letter from Chip Wagner indicates in July of 2004 Sefic got a raise because of "an organization wide salary review." Marconi's initial response to Sefic's Document Request 1 appears to have been evasive. So does this one.

Request 11 was for documents pertinent to the Nashville Optimization Project. Marconi's response states that Sefic's motion "informed Marconi . . . that documents in response to this request do not exist." But this is not what Sefic's motion says. Sefic's motion asserts that he did not decline this project and doubts it ever existed, but it was nevertheless used against his performance score. His 2004 performance review reflects an entry stating that Sefic "was offered the opportunity to optimize AWS Nashville," but that he declined the assignment. Production will be compelled. If there ever was such an assignment Marconi should produce documents pertaining to it. If there was no such assignment, Marconi should say so.

Similarly, with respect to Request 18 for Sefic's performance review for 2002, the fact that the document is not in a particular file does not establish its non-existence; if the review was not done, Marconi should say so.

B. The Requests for Admission

In response to the Motion to Compel, Marconi admitted the rest of Sefic's first request for admission, but as to the remainder it said "Respondent confirms and reasserts all other responses to Complainant's Requests for Admissions, i.e., Requests 2 through 9, are correct and accurate." Marconi did not address the arguments and explanations made in Sefic's motion. No legal or other authority was provided in support of the sufficiency of Marconi's responses to 2, 5, 6, 7 and 8 which are challenged in Sefic's motion.

With respect to Request 2, Sefic asserts that he would like clarification of Marconi's denial in light of its admission to a seemingly related matter. Where a party has unequivocally admitted or denied a request for admission however, the rules do not provide for further inquiry or for the testing of the accuracy of the admission or denial made. Marconi denied this request and thus satisfied the requirement of the rule. *See* 28 C.F.R. § 68.21(b). Whether the response is accurate can only be determined at a hearing, not in a ruling on a Motion to Compel.

Sefic similarly challenges the response to Request 5 because he says he has information contrary to that given in the response. There are problems here with respect to both the request and the response. The request is not sufficiently specific and the answer given is equivocal. Sefic's argument basically seeks to redraft the request. This request appears to be related to Document Request 14 seeking documents related to the employment of certain unauthorized contractors in 1999 and 2000, a subject matter which I have already found to be insufficiently related to this case to warrant production of the documents. Notwithstanding the fact that the response to Request 5 does not fairly meet the substance of the request, no additional response is warranted.

The response made in each instance to Requests 6, 7, and 8 is that the request is "vague and ambiguous as written. Therefore, Respondent can neither admit nor deny the request." No explanation is provided, although where a party is unable either to admit or deny a request for admission, the rules plainly require "a written statement setting forth in detail the reasons why he/she can neither truthfully admit or deny" the request. 28 C.F.R. § 68.21(b)(2) (emphasis added). Amorphous claims of ambiguity without identification of the particular ambiguity or the specific reasons for difficulty in responding are insufficient to constitute a proper objection. Marconi does not explain, and I do not discern, wherein lies the ambiguity in these requests. In each instance, Sefic's motion attempted to clarify any alleged ambiguity, and Marconi simply ignored his explanations.

Each of these requests is clearly linked to a document request. Request 6, asking for an admission as to complaints of discrimination, is linked to Document Request 17 for documents reflecting other complaints of discrimination made against Marconi. Request 7, that other employees were permitted to choose project locations or durations, is linked to Document Request 12 for documents reflecting requests by other employees for assignments in Dallas or other preferred locations. Request 8, regarding the existence of two separate travel and expense policies, is linked to Document Request 21 for documents reflecting the travel and expense policy for employees other than consultants. The meaning of the requests appears to be reasonably clear, and Marconi will have the opportunity to file an amended response to these requests pursuant to 28 C.F.R. § 68.23(a). For purposes of any ensuing response, each of the requests should be construed as relating to the time period 2003 and 2004. Request 6 should be construed as being additionally limited to documents reflecting charges or complaints of discrimination based on national origin or citizenship status, or charges and complaints alleging retaliation.

IV. CONCLUSION

Let me be clear about the intent of the order to be issued in this matter. First, the order for production is limited to documents which are not already a part of the record as attachments to the Answer or to the Complaint. That is to say, Marconi is not to produce more copies of the same documents, but is to produce any other existing responsive documents. Second, the order is explicitly to search for and produce documents. It is not an invitation or authority to seek reconsideration, or to attempt belatedly to do what should have been done in the first place and provide legal or factual support for Marconi's opaque objections. Third, any request for additional time or for any other relief from this order must be accompanied by 1) a copy of the index to the archived boxes of documents or the relevant portions thereof, 2) an affidavit or affidavits explaining in detail and with specificity: a) when and by whom the decision was made to archive the documents, b) who is authorized to obtain the archived documents, with sufficient address information for a subpoena, c) precisely what efforts have been made to locate and produce responsive documents, and when and by whom those efforts were made, and d) the reasons why full compliance with the order has not yet been achieved.

Failure to comply with an order to compel discovery is a predicate for the sanctions set out at 28 C.F.R. § 68.23. Marconi is cautioned that there will be no hesitation in applying these provisions in the event of a failure to comply.

ORDER

The Motion to Compel is granted in part and denied in part. Marconi is directed to produce within thirty days of the date of this order documents responsive to Sefic's requests for production of documents numbered 1, 2, 3, 4, 5, 6, 8, 10, 11, 12 (as modified), 13 (as modified), 15, 17 (as modified), 18, 19, 21, and 22. Production in response to Document Requests 1, 2, 3, and 10 is subject to an instruction to Sefic that the documents are intended only for use in this litigation and that information in them is not otherwise to be disclosed by him. The Motion to Compel is denied with respect to Sefic's requests for production of documents numbered 7, 9, 14, 16, and 20.

Marconi is given the opportunity within thirty days of the date of this order to make amended responses to Sefic's requests for admission numbered 6 (as modified), 7 (as modified), and 8 (as modified). The motion is denied with respect to the remaining requests.

SO ORDERED.

Dated and entered this 15th day of February, 2007.

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Ellen K. Thomas
Administrative Law Judge