

By UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Docket #17cv2825
TORRES,	:	1:17-cv-02825-GBD-HBP
	:	
Plaintiff,	:	
	:	
- against -	:	
	:	
THE AMERICAN MUSEUM OF NATURAL	:	
HISTORY, et al.,	:	New York, New York
Defendants.	:	February 13, 2018
-----	:	

PROCEEDINGS BEFORE
THE HONORABLE HENRY B. PITMAN
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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THE CLERK: Torres v. American Museum of Natural History, counsel, please state your name for the record.

MR. WALKER HARMAN: Walker G. Harman, Jr., the Harman Firm, for the plaintiff, good afternoon.

THE COURT: Good afternoon.

MS. CHRISTINE HOGAN: Christine Hogan from Littler Mendelson for the defendants.

THE COURT: All right, good afternoon. We are here to resolve a couple of discovery disputes. In that regard I have plaintiff's letter dated January 31, 2018, defendants' letter dated February 6, and a second letter from plaintiff dated February 9. I take it that's the universe of relevant correspondence? Is there anything else I should have from plaintiff's point of view?

MR. HARMAN: No, Your Honor, just the exhibits attached --

THE COURT: No, no, I'm not reciting all the letters attached to. Is there anything else I should have from defendants' point of view?

MS. HOGAN: Not at this time, Your Honor

THE COURT: Okay. All right, let's go through, let's start with plaintiff's letter of January 31 and go through that. The individuals identified in defendants' 26(A) (1) disclosures, are they all represented by Littler

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Mendelson?

MS. HOGAN: The vast majority are represented by Littler Mendelson, the only --

THE COURT: Who's not?

MS. HOGAN: The only people that are not are the individuals who performed the outside investigation.

THE COURT: What is that, T&M?

MS. HOGAN: Yes, Laura Kirschstein and Raffi Ginsberg.

THE COURT: All right, and all the other individuals are represented by Littler Mendelson, right?

MS. HOGAN: In their capacity as managers at the museum.

THE COURT: In their status as witnesses in connection with this litigation they're represented by Littler Mendelson?

MS. HOGAN: Correct, Your Honor.

THE COURT: Okay. All right, let me turn to Mr. Harman. I mean, Mr. Harman, if they are represented by counsel what do you do with the identifying information?

MR. HARMAN: Well that answers the question.

THE COURT: Okay, so this issue is resolved?

MR. HARMAN: It has not been stated expressly that Littler -- Your Honor, do you mind if we sit or --

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THE COURT: That's fine.

MR. HARMAN: That's the first time I've heard that they're all represented by Littler, so if they are all represented by Littler and it follows that they can only be contacted through Littler, then that resolves the issue.

THE COURT: All right.

MS. HOGAN: Your Honor, if I may --

THE COURT: I'm not sure there is anything left to talk about.

MS. HOGAN: I just want to point out that that was represented to counsel before he filed --

MR. HARMAN: That absolutely was not represented to me.

THE COURT: There is nothing more tiresome to a judge than hearing counsel bicker back and forth about what, who said what to whom. I really wanted to resolve the discovery issues on the merits. I really don't want to get back, start reviewing history about who said what to whom, who got off the phone when, who refused to talk, you know, I mean unless you want to go on the stand and testify as to, and be subject to cross examination, that kind of bickering gets us nowhere, okay, so let's try to resolve the disputes on the merits, okay?

All right, seven and eight. Seven is identify all

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individuals with knowledge of and documents concerning the manner in which defendants paid plaintiff for work performed for the museum. Mr. Harman, you're looking there for people to depose?

MR. HARMAN: Correct.

MS. HOGAN: Why is not a 30(B)(6) notice the best vehicle?

MR. HARMAN: Well, I mean --

THE COURT: You know, you could get an answer, let me just finish my, elaborate on my question a little bit, I mean you might have, if you get an answer to number seven, you might wind up getting people who perform clerical functions who have no substantive knowledge of how his compensation is set, what deductions are made, I mean why would not a 30(B)(6) witness be the best vehicle to get the appropriate deposition target, go ahead.

MR. HARMAN: We've served a 30(B)(6) notice, I don't have it in front of me, I can't tell you if it specifically gets at the question identified in seven and eight. But one of the problems that I expect to encounter is that a 30(B)(6) witness, an agent of the museum who's coming to testify generally about policies and procedures and documents is not going to have --

THE COURT: He or she is going to testify as to

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whatever topics you put in the notice. I mean a 30(B)(6), let's review, 30(B)(6) requires the parties seeking the deposition to identify the topics with reasonable particularity and then the entity receiving the 30(B)(6) notice has to prepare a witness with the knowledge of the entity on those topics. Go ahead.

MR. HARMAN: Right, I understand, and I've been doing this quite a while and I've served a lot of 30(B)(6) notices --

THE COURT: Same here.

MR. HARMAN: And I've also taken a lot of 30(B)(6) depositions, and I've had witnesses say, yes, this is a paystub, I can testify that that is a designation for sick pay or accrued leave or this is a deduction from that, that's what's on the paystub, but they, themselves, have no personal knowledge of who authorized the sick leave or who authorized the deduction, or who authorized the characterization of that particular day.

THE COURT: A 30(B)(6) witness doesn't have to have personal knowledge.

MR. HARMAN: I want someone with personal knowledge because there's an allegation in the complaint that he was, and he maintains that there were deductions from his, inappropriate deductions from his pay in

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retaliation for him raising his rights and otherwise taking leave under the Family Medical Leave Act, that they forced him --

THE COURT: What were the deductions characterized on the paystub?

MR. HARMAN: Well sometimes they were accrued leave like sick pay or personal days that he should have received FMLA leave or intermittent FMLA leave for. And so there's an allegation in the complaint that Mr. Montes, the individual defendant, either himself directed or directed someone otherwise with authority to characterize those days as sick days when they should have been accommodations falling under the FMLA.

THE COURT: Why would not then the appropriate 30(B)(6) notice seek a witness with knowledge of the calculation of plaintiff's sick leave and personal days from date A to date B?

MR. HARMAN: I have no objection to that, Your Honor, I mean that's a fair enough solution to the problem, I just didn't understand why without waiving any rights they couldn't have identified those individuals who would sign off on a sick day or a personal day. But if Your Honor would prefer that we do it by deposition I have no objection to that.

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THE COURT: You're looking for who calculated his sick leave and who calculated his personal days --

MR. HARMAN: No, who authorized any alterations on his paystub. So a pay increase, a decrease, a personal day, a sick day, usually it's not very many people that are involved in that, usually it's a manager or supervisor and maybe there's someone in charge of payroll who would then put their initials or put their electronic stamp on some sort of authorization for a characterization of a sick day, or a personal day, or disability leave, or FMLA, or something else.

THE COURT: Did you get any response to seven?

MR. HARMAN: No.

THE COURT: All right. Ms. Hogan, what's the problem with identifying who set Mr. Torres' pay and calculated his leave and vacation and personal days?

MS. HOGAN: So, Your Honor, if you look at the actual request and counsel's description --

THE COURT: Where is the actual request?

MS. HOGAN: It's summarized in counsel's January 31st letter on page 2.

THE COURT: I'm looking at that.

MS. HOGAN: He rights that the action alleges, and I'm in the last paragraph, that defendants penalized Mr.

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Torres by making illegal deductions from his wages. We produced pay records that demonstrated there were no deductions to his wages.

THE COURT: No, but that doesn't get to the question of who determined what his pay was and who calculated his accrued leaves and personal days and vacation days.

MS. HOGAN: Well that description, Your Honor, is not the description that we were given as to why plaintiff wanted us to respond. That's, in fact, a different request.

THE COURT: Well is there a problem with providing that information as to who determined his rate of pay and who determined his accrued leave, personal days, vacation days, is there a problem with identifying who did that?

MS. HOGAN: No, Your Honor, and, in fact, as plaintiff knows, Mr. Montes, his supervisor, was the person who made those determinations.

THE COURT: All right, so Mr. Harman, you want to know who determined plaintiff's pay, accrued sick leave, accrued personal days, accrued vacation days, anything else with respect to seven?

MR. HARMAN: Yes, any characterization of FMLA or disability leave.

THE COURT: When you say, was there a notation on

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his paystub for FMLA leave or disability leave?

MR. HARMAN: As I sit here, I don't know, but what I'm asking for is anyone, if it's just Mr. Montes that would authorize a characterization of his workday --

THE COURT: Characterization where?

MR. HARMAN: Well, Your Honor, let me back up because I do want to be clear.

THE COURT: Go ahead.

MR. HARMAN: His understanding, when he describes deductions --

THE COURT: Talking about plaintiff?

MR. HARMAN: Yeah, Mr. Torres, his allegation is that Montes, defendant Montes would force him to take accrued leave like a medical, like a sick day or a personal day when he should have been entitled to FMLA leave or otherwise paid disability leave. So he was in essence robbing him of a valuable personal day or sick day.

So when counsel says they looked at the payroll records and they don't show any illegal deductions, the payroll records, themselves, don't necessarily on their face show illegal deductions. So that's why we are asking for decision makers, and, in fact, before this case was filed I received or was copied on correspondence from HR discussing the fact that they believed that he didn't have any paid

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2 days left and that they were going to stop paying him if he
3 didn't return to work. So I know, I have personal knowledge
4 that more than Mr. Montes, more people than Mr. Montes are
5 involved in analyzing and making decisions about what type
6 of paid days he has available to him. And all I wanted was
7 --

8 THE COURT: Maybe, maybe not, I don't know if the
9 people, I don't know who you spoke to, maybe they just
10 repeated what Montes told them, do we know that they made an
11 independent determination?

12 MR. HARMAN: I would hate to get into Mr. Montes'
13 deposition and say, no, all he does is email HR, so and so
14 in HR, that person's never been identified and it just
15 prolongs the discovery period. It's very simple for counsel
16 to go back to the museum and say how does this work, when
17 Mr. Montes who is the chief information officer says that
18 one of his employees that he supervises should take a
19 personal day. He doesn't, I would imagine, go into the
20 computer and do that, he would direct someone else to do
21 that.

22 MS. HOGAN: Your Honor, may I respond?

23 THE COURT: Hold on a second. I'm going to get to
24 you in one second. But you're looking to find out who
25 determined plaintiff's pay, who calculated his accrued sick

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days, his accrued personal days, his accrued vacation days, his FMLA leave, was there anything else?

MR. HARMAN: Disability.

THE COURT: All right, and what did you want to say, Ms. Hogan?

MS. HOGAN: Your Honor, I just want to make sure the record is clear, Mr. Montes set Mr. Torres' pay. The decisions regarding accrued sick leave, personal days, vacation days, that was pursuant to policy. We provided that policy I believe. Characterization of FMLA --

THE COURT: No, but I mean I presume though if an employee doesn't show up one day someone makes a determination or somehow a determination is made as to what reservoir of days that day off gets charged against.

MS. HOGAN: I believe FMLA runs concurrently with all these different types of leave. And so you can't just --

THE COURT: It doesn't run concurrently with vacation.

MS. HOGAN: Pursuant to policy, employers can set a rule where vacation and sick leave runs concurrently with FMLA, and the deductions that apply are automatic. But just to be clear, yes, we are happy to designate someone from HR to discuss these HR policies and Mr. Montes, during his

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deposition, can testify with respect to Mr. Torres' pay and also whether he participated in the decision to choose what type of personal day, sick day, or vacation day was applied.

THE COURT: All right.

MR. HARMAN: So it doesn't look like I'm going to get a clear answer to the question.

THE COURT: No, I'm going to direct the defendant to identify who determined plaintiff's pay, who determined his accrued sick days, his accrued personal days, his accrued vacation days, his accrued FMLA leave and disability leave from -- Montes' employment is when the problem started, Mr. Harman?

MR. HARMAN: Yes, Your Honor.

THE COURT: And Montes started when?

MR. HARMAN: I believe January, 2015, but I don't have that --

THE COURT: All right, I think it was 2015 is I believe what the correspondence said.

MR. HARMAN: Right.

THE COURT: So from January, 2015, to through the end of plaintiff's employment. Am I correct in my assumption, Mr. Harman, that there is no issue with respect to the deduction for withholding tax, FICA, that kind of thing?

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MR. HARMAN: We have not raised any issue nor has one been planned.

THE COURT: Okay, good. All right, number eight, identify all individuals who reviewed or approved plaintiff's compensation. I think that's wrapped up in what I'm ordering with respect to number seven.

MR. HARMAN: I agree.

THE COURT: Okay. Twenty-five, you know, I looked at the case law on this kind of interrogatory because it's something that's frequently posed and the case law is all over the place. You can find cases going every which way. There's a recent case from the Western District of New York, *Equal Opportunity Employment Commission against Sterling Jewelers*, 2010 WL 2803017 in which Magistrate Judge McCarthy concluded that such an interrogatory should be answered at the same time citing a case from the Eastern District, *Weiss against National Westminster Bank*, 242 FRD 33, which reached the opposite conclusion and there's another case decided by the late Judge Ward in 1973, 60 FRD 587, in which he concluded that an interrogatory seeking the identification of any and all persons who helped prepare the answers to these interrogatories or were consulted in connection therewith was overbroad. And instead he ordered the identification of persons consulted in the preparation of

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their answers who have knowledge of the relevant facts. Then there are a number of other cases that have reached conflicting results.

Is your goal here, Mr. Harman, to get, to find deposition targets, individuals to be deposed?

MR. HARMAN: In part, Your Honor, I'm perfectly fine with the additional language that the decision that you've cited reached. I just, I don't, we're obviously not seeking the name of a paralegal who made copies, we want anyone who provided substantive information in response to the interrogatories. And I think it's pretty straightforward, in, you know, nearly two decades I don't think I can think of instances that would, you know, more than one hand where there has been an objection to this. All I want is anybody at the museum who has provided substantive information in response to the interrogatories. I think it's pretty straightforward.

THE COURT: No, but I mean -- all right, Ms. Hogan, why don't I hear from you.

MS. HOGAN: Your Honor, there are much more targeted interrogatories that are requesting the identification of persons with knowledge as to the actual allegations. That should be the focus, Your Honor, not who helped collect documents or provide information that helped

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counsel in the process of performing their litigation duties, prepare these interrogatories.

MR. HARMAN: Again, I'm not asking for that.

THE COURT: The specific areas your looking for, are there specific areas with respect to which you are looking for who has knowledge?

MR. HARMAN: Are you asking me?

THE COURT: Yes.

MR. HARMAN: I mean areas that address the issues that are in dispute in the case. I mean, you know --

THE COURT: What topics are you looking for witnesses on?

MR. HARMAN: Anybody who had decision making authority over decisions that were made regarding Mr. Torres. So, for example, I've received communication from an HR person, I know that there's another HR person involved. I know that there are two lawyers involved, many of --

THE COURT: What kind of decisions?

MR. HARMAN: Decisions about whether to commence an investigation, decisions about the conclusion of an investigation, decisions about whether to hire a third party investigator. Decisions about whether to put Mr. Torres on leave. Decisions about whether to terminate Mr. Torres. Decisions about whether to discipline Mr. or not discipline

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Mr. Montes related to Mr. Torres. Decisions about whether anybody else's conduct was relevant to the claims that Mr. Torres made and the defenses asserted by the museum. I can go on, but I think that my examples illustrate those issues that rise out of the complaint and the defenses raised in the answer.

THE COURT: Well, you know, again, the purpose of discovery is for each side to find the facts underlying the other side's case, the other side's claims or defenses, and it's not to get lost into discovery on discovery. I think the best, having just heard Mr. Harman's explanation, I think the best resolution for 25 is for plaintiff to serve a revised interrogatory identifying the subject matters for which he's looking for knowledgeable individuals, and for defendant to identify the three most knowledgeable individuals with respect to those specific topics. Tell me why that doesn't work, Mr. Harman?

MR. HARMAN: I think that's fine.

THE COURT: Okay, Ms. Hogan, is there a problem with that from your end?

MS. HOGAN: No, Your Honor.

THE COURT: Okay. Just let me make a note. That takes us to document request number three, I'm on page four of plaintiff's January 31 letter. My understanding is the

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Montes file is being produced, is that right?

MS. HOGAN: Your Honor, it has been produced.

MR. HARMAN: It was produced yesterday.

THE COURT: Okay.

MR. HARMAN: I haven't personally had a chance to review what was produced, but there was, it was a PDF I think that was sent yesterday.

THE COURT: All right. The documents produced to a third party investigator. Why don't I hear from Mr. Harman first and then I'll hear from Ms. Hogan.

MR. HARMAN: The issue is very straightforward, we've consistently asked and followed up on our request to either A) which I think is more efficient and less expensive, produce a copy of the documents that were collected and produced to T&M, the third party investigator, or identify those documents by Bates number, which I think would be time consuming and unnecessary work. Counsel has consistently acted like the issue was resolved because they claim we already have the documents, we have thousands of documents, I don't know which documents in those documents are the ones that were provided to the third party. I think it's a fair request, it comports with the history of discovery which is you produce things as they were kept in the ordinary course of business, and yet there just remains

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a disconnect on this issue.

THE COURT: Okay. Ms. Hogan.

MS. HOGAN: Your Honor, defendants have produced all the documents that they had provided to T&M and they produced it as --

THE COURT: My understanding, let me just make sure I understand what's happened, my understanding is there are a number of documents you produced, let's assume they're 1 through 2,000.

MS. HOGAN: Sure.

THE COURT: And my understanding is of those 2,000 documents there's been a subset produced to T&M and you've produced the 1 through 2,000 to Mr. Harman but you haven't told Mr. Harman which of the 1 through 2,000 went to T&M, is that right?

MS. HOGAN: Correct.

THE COURT: Okay, go ahead.

MS. HOGAN: And nothing in the rules, or as far as I can tell, case law, suggests that we need to actually affirmatively identify which documents we provided to T&M in the course of a privileged investigation. The underlying documents, themselves, are not privileged but the decision as to what document to provide to T&M is privileged and we satisfied --

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THE COURT: Who made the decision as to what documents to produce to T&M?

MS. HOGAN: I believe it was both the in-house counsel and Ms. Kirschstein who did the privileged investigation decided --

THE COURT: Is Ms. Kirschstein an attorney?

MS. HOGAN: She is.

THE COURT: Okay, go ahead.

MS. HOGAN: Decided what documents she would need to perform her investigation. So it was --

THE COURT: So counsel cherry picked the documents that went to T&M?

MS. HOGAN: That's not what I'm suggesting, Your Honor, Ms. Kirschstein requested --

THE COURT: Usually an investigator decides what he or she wants.

MS. HOGAN: Yes. So requested the documents which were provided to her by in-house counsel.

THE COURT: But Ms. Kirschstein is with T&M?

MS. HOGAN: Correct. T&M was hired for the purposes of producing, of investigating Mr. Torres' post litigation demand letter allegations.

THE COURT: Say that again.

MS. HOGAN: Ms. Kirschstein and her firm, T&M,

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were hired for the distinct purpose of performing a privileged investigation that occurred after Mr. Torres threatened litigation, so it would be covered by attorney-client privilege.

MR. HARMAN: The investigation report would but not the documents that were reviewed to prepare the report, and all we're asking for is those documents.

MS. HOGAN: But we have --

THE COURT: Hold on a second. Are you going to make affirmative use of the investigation in any way, shape or form here?

MS. HOGAN: No, Your Honor, we are not waiving attorney-client privilege with respect to that investigation.

THE COURT: So you're not asserting that that investigation gives rise to some kind of Faragher defense?

MS. HOGAN: No, Your Honor, because Mr. Torres was no longer working at that time.

MR. HARMAN: That's not true, he was employed until very recently.

MS. HOGAN: He was not physically present, he was on a leave.

THE COURT: Okay. Well Mr. Harman, if they're not going to be relying on the T&M investigation as a defense in

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this litigation, and if the documents given to T&M -- well if the documents given to T&M were selected by counsel, I guess the two questions I have in my mind is why, first of all, how is it relevant, how is the -- the selection of documents given to T&M, how is it relevant, and second, why is it not work product within the meaning of *Spork against Peil*?

MR. HARMAN: We had to research this issue a couple of months ago because of defendants' motion to quash and we came across a string of decisions that parsed out the investigative reports as privileged and the underlying documents as being not privileged. I can't cite to those cases, Your Honor, right now, but I'm happy --

THE COURT: No, but you've gotten the underlying documents, you just don't know what went to T&M.

MR. HARMAN: That is correct, but this is the first time I've heard counsel say I believe they were selected by counsel, I have not heard that.

THE COURT: But if they're not, maybe you ought to turn to the first question, if they're not, if the defendant is not relying on the T&M investigation in any way, shape or form, which is what Ms. Hogan just said, what does it matter what documents were given to T&M?

MR. HARMAN: Well from our perspective, Your

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Honor, given that we just heard now that it's Ms. Hogan's belief that only counsel selected the documents, we had imagined --

THE COURT: Answer my question on relevance.

MR. HARMAN: No, but I am telling you --

THE COURT: Okay.

MR. HARMAN: We believed that the museum and its agents collected the documents that it believed were relevant and handed them over to that third party investigator and in that sense I think that that is highly relevant and not privileged. If Mr. Montes, for example --

THE COURT: That's work product under *Spork against Peil*. *Spork against Peil* arose out of a deposition, if you may recall, it's a Third Circuit case which has been cited approvingly in the Second Circuit, I don't remember the citation. But *Spork* involved a deposition question to a witness, essentially if I recall correctly what documents did your lawyer show you in preparation for the deposition. And that was held to be work product because it indirectly, the answer to the question would have indirectly communicated the identification of the documents counsel believed were important. You can ask a witness what documents did you review prior to the deposition but you can't ask what documents did the lawyer select to show you.

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And if what you're seeking are documents that the lawyer selected to show T&M, I think that probably treads on work product.

MR. HARMAN: Yes, but that's not what we're seeking, we're seeking documents that were provided to T&M. If they want to produce an affidavit --

THE COURT: We've just been told they were selected by counsel.

MR. HARMAN: Well she said she believes they were. If they produced an affidavit by some in-house counsel at the museum saying I personally selected and directed the selection of all of the documents, then the issue can be put to rest, but --

THE COURT: You still haven't answered my question about relevance though.

MR. HARMAN: It's relevant if they weren't selected by a lawyer --

THE COURT: How is it relevant?

MR. HARMAN: Because it is, it goes to the state of mind of the decision makers at the museum as to what they believed was important to an investigation of my client, the plaintiff, Mr. Torres.

THE COURT: How is relevant?

MR. HARMAN: It's relevant to, this is a case

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about discrimination and the defense of claims about discrimination that involves two investigations about Mr. Torres' claim.

THE COURT: You've just been told they're not going to rely on the T&M investigation in any way, shape or form.

MR. HARMAN: I understand, but the museum, up until today I believe that the museum had gathered documents and given them to T&M, I didn't know that they were selected by a lawyer. I didn't know that. And so, if, in fact, they were selected by a lawyer, then, and the museum produces an affidavit that says I'm a lawyer, I selected the documents, then the issue, you're right, Your Honor, it will be dead in the water.

As far as relevancy, I maintain that the documents, whether privileged or not, are highly relevant because it shows the documents that the museum believed were important and to investigation of the allegations in the complaint, which are identical --

THE COURT: Well your relevance argument seems to concede that they're work product.

MR. HARMAN: If they were selected by --

THE COURT: Under 26(B) it can be prepared, I think it's 26(B), it can be either the party's work product

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or the attorney's work product. And I mean looking at the body of documents concerning a claim and picking out what's important, that's I think the core of what work product protection protects.

MR. HARMAN: Your Honor, frankly I think that's extending the work product doctrine far broader than my understanding of it, but, you know, if Your Honor wants supplemental briefing on this --

THE COURT: I don't want supplemental briefing on it, go ahead, I cut you off, go ahead, what do you want to say, go ahead?

MR. HARMAN: Again, there is little else that I have to say substantively except that I believe that it was a fair and straightforward request to produce a file of documents that had been collected. I did not know that now, according to Ms. Hogan, she believes they were selected by a lawyer. I don't know what else to say and I don't presently have briefing on the issue of whether, even if they weren't selected by a lawyer, they are somehow still consumed within the work product doctrine. That's not an issue I researched in preparation for today's conference, Your Honor.

THE COURT: All right, based on defense counsel's representation that the documents provided to T&M were selected by counsel, and based on the additional

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representation that defendant is not going to be relying on the T&M investigation in any way, shape or form, I'm going to sustain the objection to document request 21. Obviously, Ms. Hogan, I'm also going to direct that you go back to your client and confirm that the documents provided to T&M were selected by counsel. If that's not the case, I am sure you are going to write to me and Mr. Harman and correct any inadvertent misstatement you made today. Am I correct?

MS. HOGAN: Yes, Your Honor. And just to make sure I understand, I'm confirming that the documents were requested by either in-house counsel or Ms. Kirschstein, herself, who is also a lawyer.

THE COURT: No, my understanding is your representation was that the documents that went to T&M were selected by counsel, either in-house counsel or Ms. Kirschstein.

MS. HOGAN: Yes, that's correct, Your Honor, I can't imagine any other scenario where the documents would not have been, the document collection would have been initiated by anyone else other than those two parties.

MR. HARMAN: But I'm not asking about initiation or imagination, I'm asking specifically who selected the documents.

THE COURT: Okay, well, the representation has

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been made by Ms. Hogan that they were selected by counsel, either in-house counsel or Kirschstein, and if it turns out that her representation today was incorrect, I'm sure as a good attorney she's going to write to you and to me and to tell us that she made an inadvertent misstatement at today's conference, okay?

MS. HOGAN: And to be clear, Your Honor, if Ms. Kirschstein asked one of the individuals she interviewed in the context of this investigation what documents do you have regarding these claims, and so requested that an individual actually collect and give her documents, that would still be covered by privilege.

THE COURT: If she initiates the process that by which the documents go to her, yes.

MS. HOGAN: Yes, I just wanted to clarify so there are no misunderstandings going forward.

THE COURT: All right, that takes us I guess to ESI. I'm looking at IV on plaintiff's letter of January 31. Now my understanding, and tell me if I'm wrong, my understanding is that the defendant is going to run these search terms against the custodians identified at pages 5 and 6 of defendants' letter, or at least against their work emails, and then tell Mr. Harman how many documents are generated by those search terms, is that right?

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MS. HOGAN: Yes, Your Honor, and I actually have the report in front of me if you'd like me to continue.

THE COURT: All right, do you have a copy for Mr. Harman and myself?

MS. HOGAN: I have a copy that I could provide to Your Honor, I only have one copy here with me, it was just produced.

THE COURT: All right, well why don't you tell us -- how many pages is it?

MS. HOGAN: It's two pages.

THE COURT: All right, well tells us what, and this is the number of documents, responsive documents that came up in response to those search terms?

MS. HOGAN: Yes, Your Honor. So I would, after today's conference is over, I would give the results per search string to Mr. Harman, but the total amount of documents that are included in the results, including family members which are attachments and such, are 15,042.

THE COURT: What you have there, do you have them broken down by search term?

MS. HOGAN: Yes, Your Honor.

THE COURT: Can you go through Mr. Harman's letter and tell us how many -- I guess it's really hard to do this.

MS. HOGAN: There are 91 unique search strings. I

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think, Your Honor, defendant's position here would be that 15,000+ documents is not a small enough number and proportional to the needs of this case to actually do a linear review of document by document in order to produce responsive non-privileged hits. And what I would like to do is give this report to plaintiff's counsel and then meet and confer about which search strings seem to be hitting on too broad an amount of documents and go from there.

THE COURT: Mr. Harman?

MR. HARMAN: I have no objection to that, we've been trying to do that for some time.

THE COURT: Okay, good. Let's talk about, well my understanding is there is still a disagreement about Mr. Montes' personal emails.

MR. HARMAN: And his cell phone.

THE COURT: Let me start with Ms. Hogan, what, if anything has been done with respect to Mr. Montes' personal emails and his cell phone, I guess?

MS. HOGAN: So there are no text messages related to any of the document requests that would be responsive, so that's easy. And he's searched his personal email even though we've already informed counsel that he did not use his personal email account to send work related emails. But he did look through them and determine that, in fact, that

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was true.

THE COURT: Have you served a separate document request on Mr. Montes, Mr. Harman?

MR. HARMAN: No. I don't know why I would have to do that, but I will.

THE COURT: Well, I mean when you're searching his, when you want --

MR. HARMAN: He's an individual defendant represented by Ms. Hogan and firm, I don't see the need for a separate independent redundant document request, but I'm happy to do that.

THE COURT: Well let me just come back to Ms. Hogan for a minute. Were Mr. Montes' personal emails and his cell phone searched for the search terms that are set out in Mr. Harman's letter?

MS. HOGAN: Mr. Montes' emails were not loaded along with the museum related emails and search terms were applied. But as I stated earlier, Mr. Montes did not use his personal email for work related purposes. Now if plaintiff's counsel wants to depose Mr. Montes and ask him this question and get something on the record, I think that that makes sense, but any response to a document request requesting emails from Mr. Montes' personal account would be answered the same way, there are no emails, we have not located any

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emails.

MR. HARMAN: Just to be clear, we're not asking, it is not the full breadth of our inquiry as to whether Mr. Montez used his personal email account, or text messaging feature or other messaging features for work purposes. What we want is responsive documents and information as to whether Mr. Montes communicated about Mr. Torres, about his claims, about the media accounts of his claims, about anything related to the lawsuit or Mr. Torres. That's what we're asking for, it's an entirely appropriate and fair inquiry, especially given that he's an individual defendant.

THE COURT: Do you have your document request?

MR. HARMAN: I believe we do.

THE COURT: Is it attached to one of the submissions here?

MR. HARMAN: I just have it in my binder, Your Honor, I don't believe we attached any of the requests or responses to --

THE COURT: Can I just take a look at your document request for a second, please?

MR. HARMAN: You know, okay, well there -- they're going to be repeated I guess in defendants' doc responses, but I don't have our request, do you understand?

THE COURT: Yes, let me see defendants' responses

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then, please. And Ms. Hogan, I understand you to be representing that Mr. Montes' personal emails and his messages on his phone have been checked for documents responsive to the document requests and there are none, is that right?

MS. HOGAN: I believe that the documents, excuse me, the personal emails have been searched for work related emails. In other words, Mr. Montes has represented that he did not use his personal email account for work related reasons so would have no reason to have any documents relevant to this case in those emails.

MR. HARMAN: That's not answering the document request though, that's just saying it's his belief that he didn't use the text messaging feature or the personal email for work purposes.

THE COURT: Well --

MR. HARMAN: If --

THE COURT: Hold on a second. Well have they been checked, this is to Ms. Hogan, have they been checked to determine whether or not there are documents responsive to the document request?

MS. HOGAN: I can't say for certain and I don't want to make a misrepresentation on the record that they have been searched in relation to the document request

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specifically, they certainly have not been searched using the search terms that we agreed to.

THE COURT: Well I suspect probably that Mr. Montes' personal email and text messages are probably a much smaller universe than -- they are probably a much smaller universe of documents than what's on the museum's servers.

MS. HOGAN: My understanding is that it would be more difficult to actually pull his emails because they are not on a museum server. There's complications with respect to pulling emails out of such email addresses as gmail or hotmail or AOL.

MR. HARMAN: We have to search them for clients all the time, Your Honor, and we ask the client to come into the office and we sit with them and instruct them on how to do searches within a gmail, or Yahoo or similar account, and we have not encountered challenges doing that. We've been doing it for years.

MS. HOGAN: Your Honor, if we were to proceed I'd ask that Mr. Harman actually identify which document requests he believes would call for the search and production of documents from Mr. Montes' personal account.

THE COURT: He served all of them on the defendant.

MS. HOGAN: That's correct, but not all of the

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document requests relate to documents that could be found in personal emails.

THE COURT: Well anything could be found in someone's personal email. Mr. Harman, has defendant served a document request that requires review of Mr. Torres' personal emails?

MR. HARMAN: Yes.

THE COURT: Well why isn't sauce for the goose, sauce for the gander?

MS. HOGAN: Your Honor, as I stated before, Mr. Montes searched for work related emails, if Your Honor directs us we will search his personal email account for non-work related emails that could potentially be relevant.

THE COURT: Well it's not a question of work related or non-work related, it's a question of responsiveness to the document request.

MS. HOGAN: Well I'm not sure what documents in a personal email account that don't have anything to do with work for Mr. Torres, how they would be responsive to the document requests.

THE COURT: I don't know who Mr. Montes writes to or communicates to with his email account and I don't know what he talks about with his email account. But the question really is not whether it's work related or not work

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2 related, it's a question of whether it's responsive to the
3 document request. You know, characterizing it as work
4 related or not work related really is not the issue, it's a
5 question of responsiveness and relevance.

6 All right, I'm going to direct that Mr. Montes'
7 emails and cell phone messages, text messages, be reviewed
8 for responsive documents.

9 MR. HARMAN: Your Honor, if I may, is it possible
10 that we could agree upon a date certain for that, and also
11 describe exactly what that means? In other words, is it
12 done in the presence of a lawyer which we do and we would
13 prefer?

14 THE COURT: Well --

15 MR. HARMAN: One of the reasons I say this, Your
16 Honor, is not to be difficult, and we're not trying to be
17 difficult, and it's just that what we've found and why we
18 have over the years begun personally sitting down with our
19 clients to review text messages and emails is that we find
20 that our clients, even in acting in good faith, generally
21 and regularly forget what they've texted because people have
22 the tendency to text hundreds of times a day in some
23 instances and can't begin to recall emails that they sent a
24 year ago. And so that is why we always find that it's
25 helpful to have another person and if it's not a third party

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2 vendor, which we don't think is necessary for this case, we
3 believe it should be a lawyer sitting down with Mr. Montes
4 to explain to him the process and confirm that the process
5 was completed. The process of looking for and producing
6 responsive documents and information to plaintiff's document
7 requests.

8 THE COURT: Ms. Hogan.

9 MS. HOGAN: Respectfully, Your Honor, I am not
10 sure that the Court has authority to direct counsel on how
11 exactly to go about a search of this nature. I understand
12 plaintiff's counsel's point and we will conduct the searches
13 reasonably and defensibly.

14 THE COURT: Well, at this stage I'm reluctant to
15 order defendants' counsel to conduct the search in a
16 particular matter, but I will point out that, look, I don't
17 know when counsel graduated law school and when I graduated
18 law school in the late 1970s, the abject lesson with respect
19 to the importance of honesty and discovery was a case called
20 *Berkey against Kodak*, in which a partner at what was then a
21 major New York law firm, Donovan Leisure, his name was
22 Perkins, he was a veteran of the Office of Strategic
23 Services in World War II and had a distinguished career at
24 Donovan Leisure, and he wound up withhold documents that
25 should have been produced, and he wound up getting disbarred

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and going to jail for obstruction of justice. So doing a lackadaisical job in reviewing and producing documents or intentionally withholding documents that should be produced can have dire, dire consequences. I will leave it to defense counsel to figure out the best way to do it, but at the end, at the end of the day if Mr. Harman raises this issue again, he is entitled to a representation that a diligent search has been made of all reasonable repositories and there are no responsive documents.

MS. HOGAN: Your Honor, I take my ethical duties very seriously --

THE COURT: I'm sure you both do.

MS. HOGAN: And will be sure that, again, the search is conducted reasonably and defensibly.

THE COURT: All right. I think those are all the issues in your January 31 letter, Mr. Harman, have I overlooked anything?

MR. HARMAN: No, I don't believe so, no.

THE COURT: There are some issues that defense counsel raises in their February 6 letter with respect to plaintiff's discovery which I believe start on page 6 of defendants' February 6 letter. Who is Tiffany Ma?

MR. HARMAN: Tiffany Ma is a lawyer who was retained to represent Mr. Torres in the third party

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investigation. With respect to those documents, those documents have been made available and I understand that my associate and Ms. Hogan's associate are making arrangements to turn over those documents and have them inspected. The only issue really was that we wanted to review them for privilege and there weren't any privilege documents in the collection. There are a lot of binders and things that are hard to copy, so I think we agreed that we would just produce the file and they could make copies of what they want and then return the file, and that's been done.

THE COURT: Okay. Is request 36 moot?

MS. HOGAN: Your Honor, we haven't received copies of those documents yet, I just am concerned because any of these documents would have been responsive to other document requests and we have been told that there are so many documents that they cannot be emailed in response to this particular request, so I'm not sure what to do with that except for --

THE COURT: I'm not sure I understand what your problem is.

MS. HOGAN: These documents, documents provided to Ms. Ma --

THE COURT: Right.

MS. HOGAN: Have not yet been produced, but I

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presume that any of these documents should have been produced in response to other document requests that we propounded on plaintiff. I don't understand why they haven't been produced yet and that there is such an enormous amount of documents that they can't be emailed to us.

THE COURT: But they are producing them.

MR. HARMAN: We are producing them. We've made them available for days. I don't, I mean --

THE COURT: The fact that they're paper, I'm not, are you suggesting that's not reasonably useable?

MS. HOGAN: I'm suggesting that they should have been produced already in response to other requests.

THE COURT: Well Montes' personnel file should have been produced before yesterday.

MS. HOGAN: We made an objection.

THE COURT: All right, I'm not sure there is anything to resolve on 36. All right, 54, what's the story on number 54, documents supporting plaintiff's claims for damages?

MR. HARMAN: Are you asking me?

THE COURT: Yes.

MR. HARMAN: We produced all of them.

THE COURT: Is there an issue on 54, Ms. Hogan?

MS. HOGAN: My understanding from plaintiff's

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counsel's reply letter is that he was making an objection and withholding documents on the basis of his objections.

MR. HARMAN: We aren't withholding any documents, Your Honor.

THE COURT: All right, well, I'm not sure there's a basis for granting relief then with respect to 54. If it turns out that you want to renew your application if you think that there's something out there you haven't got, you can produce them -- you can make that objection, excuse me.

Sixty-nine, documents from plaintiff's social media accounts?

MR. HARMAN: We produced them all.

THE COURT: Ms. Hogan?

MS. HOGAN: Again, Your Honor, if you look at the reply it specifically says that plaintiff is standing on his objections, so this is the first time we've heard that they've been all produced. I'm willing to accept plaintiff's representation on the record on that.

THE COURT: Okay.

MR. HARMAN: Your Honor, we did cite some law both to --

THE COURT: Well you just told me you're producing them so I'm not sure --

MR. HARMAN: No, no, we already have, it's just

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that there was one part, like, for example, I just want to explain very briefly because we produced everything but I want to explain briefly our thinking. For example, there was a request that we produce all social media related to defendants' claim for damages. We maintain that that is overbroad and we don't know exactly what that means. But to the extent that there are any social media postings that say anything expressly or obviously related to an allegation or defense in the lawsuit or his work at the museum, we've produced all of that.

THE COURT: I'm not sure what there is to discuss then with respect to 69.

MS. HOGAN: Your Honor, we're comfortable with waiting until plaintiff is deposed to ask him additional questions about potential social media activity, and then potentially renew our request if we've determined that there are documents that haven't been produced that we believe are relevant to the case.

THE COURT: All right, 70, documents identified in plaintiff's initial disclosures.

MR. HARMAN: We produced all of them.

THE COURT: Ms. Hogan?

MS. HOGAN: I will accept plaintiff's counsel's representation.

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THE COURT: All right.

MR. HARMAN: And then I just have a few more issues, Your Honor.

THE COURT: One second. Is there anything in your February 9 letter that we need to talk about, Mr. Harman?

MR. HARMAN: Not specifically as it relates to discovery disputes, no.

THE COURT: All right, so we've covered all the issues that are addressed in the three letters, right?

MR. HARMAN: Well, there is a couple, there are a couple of issues that are raised, at least one of them that's raised in the February 9th issue that I'd like to address and that is the fact that we have not received any copies of any documents that defendants received in response to authorizations.

THE COURT: These are the medical authorizations?

MR. HARMAN: Yes.

THE COURT: Did you get those pursuant to subpoena, Ms. Hogan?

MS. HOGAN: I believe we made the request by attaching the authorization and I'm not aware of any documents received pursuant to that request yet. But of course we would turn those over when we receive them.

THE COURT: All right, so you are going to produce

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to Mr. Harman whatever you get as a result of the medical authorizations?

MS. HOGAN: Yes, Your Honor.

THE COURT: Mr. Harman, does that cover that?

MR. HARMAN: Yes, and then there's just a couple of other issues that aren't raised in any of the letters but I think would be helpful to have Your Honor address since we're all gathered and that is the discovery deadline which is in a couple of weeks, I think it's February 28, I'm not sure but it's soon. And the fact that we are obviously going to need an extension and I don't think there's a dispute there because we haven't started depositions. It's been Ms. Hogan's position that she didn't want to take the plaintiff's deposition until we completed document discovery. In general I would agree to that but I just don't want it to be indefinite and I don't want to run into the same problem again in a couple of months that we're having now which is we haven't completed document discovery and we can't start depositions.

So I would like to join Ms. Hogan in what I believe is going to be here request for an extension and try to set some dates or periods of time for depositions so we can aim for that, like no later than or on or about the plaintiff's deposition will take place, that kind of thing.

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THE COURT: All right, well why don't you and Ms. Hogan confer regarding a proposed revised schedule and send me a revised, hopefully it will be a joint proposed revised scheduling order.

MR. HARMAN: Okay.

THE COURT: All right, can you do that, you think?

MR. HARMAN: I'm sorry?

THE COURT: Can you do that, do you think you can do that?

MR. HARMAN: Ms. Hogan, when are you available for a meet and confer?

MS. HOGAN: I don't have my calendar in front of me.

THE COURT: Do you want to go in the back right now and chat?

MS. HOGAN: My calendar is downstairs with my phone at security but I will be sure to email with plaintiff's counsel about our --

THE COURT: Don't email each other, have a viva voce conversation, talk to each other either in person or by phone, okay?

MS. HOGAN: Yes.

THE COURT: Really, it's much more effective, synchronous communication is far more effective than sending

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emails, or sending letters or sending faxes, talk to each other, all right?

MR. HARMAN: Okay.

THE COURT: Okay?

MR. HARMAN: Thank you.

THE COURT: Mr. Cancillari (phonetic), would you give these back to Mr. Harman, these are his discovery documents.

MS. HOGAN: Your Honor, I just have one thing that I'd like to mention on the record.

THE COURT: Go ahead.

MS. HOGAN: Mr. Harman continually places in his submissions to the Court which are available publicly allegation that my associate, who is a fifth year associate, made a misrepresentation to the Court. I'd ask that plaintiff's counsel stop defaming my associate by including this information in submissions where --

THE COURT: What are you referring to?

MS. HOGAN: I'm referring to February 9, footnote 2.

THE COURT: Hold on. There's a large body of case law about prior restraint, and I can't tell anyone what to say or what not to say. Unfortunately, lawyers say nasty things about their adversaries all the time, so much so I'm

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not sure anybody in the general public really takes much notice of it if anything. But given the first amendment, I don't think I can tell anybody not, I can order anyone not to say something.

MR. HARMAN: Your Honor, if I may just briefly be heard on this topic?

THE COURT: I'll hear you, Mr. Harman, I'm not making any finding as to whether or not anything is true or not true and I really don't want to get into a fight about who said what to whom and whether somebody said something that was accurate, whether somebody said something that was inaccurate, it doesn't get us anywhere. But having said that, go ahead.

MR. HARMAN: I understand Your Honor, but this information that I have provided to the Court, including misrepresentations in their letter, are about the facts as they relate to decisions that the Court is making. This is not about badmouthing another lawyer, this is about our duty bound delivery of truthful information to the Court as compared to information that is not truthful. And I will continue to do that as long as I'm a member of this bar and litigate cases in this court.

MS. HOGAN: Your Honor, may I respond?

THE COURT: Well I can tell you, well footnote 2

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in the February 9 letter has not entered into my decisions here in any way, shape or form. And Ms. Hogan, I'm happy to hear you respond, but I'm not sure where this is going. Does somebody want some kind of relief here that I can give?

MS. HOGAN: No, Your Honor, my only point is that that footnote has nothing to do with the issues that we're discussing in these letters to the Court. The sole purpose of that footnote in my mind is an inappropriate harassment of a junior lawyer who on the record I believe to be ethical and honest. And I feel compelled to point that out on the record so that it becomes part of the case here.

THE COURT: Okay, well, you've done that.

MS. HOGAN: Thank you, Your Honor.

THE COURT: You know, again, I'm not sure anyone outside of this case is going to ever either read the transcript of today's proceedings or read footnote 2 of the February 9 letter, but everyone has vented so. All right, so you'll confer, have a conversation, don't just exchange emails, or faxes or letters, have a conversation about the schedule and hopefully you'll send me a proposed joint schedule, or if not send me a proposed revised schedule with your respective positions on what the date should be. Okay?

MR. HARMAN: Okay.

MS. HOGAN: Yes.

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MR. HARMAN: Thank you.

THE COURT: Thank you both.

(Whereupon the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Torres versus The American Museum of Natural History, et al., Docket Number 17cv2825, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature_____

Date: February 21, 2018