

No. 11-1450

IN THE
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED WITHIN THE
STATE OF ARKANSAS,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

**BRIEF OF 21ST CENTURY CASUALTY
COMPANY, 21ST CENTURY INSURANCE
COMPANY, 21ST CENTURY INSURANCE
COMPANY OF THE SOUTHWEST, AND 21ST
CENTURY INSURANCE GROUP AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae—21st Century Casualty Company,
21st Century Insurance Company, 21st Century In-
surance Company of the Southwest, and 21st Cen-

¹ This brief was authored by *amici* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or its counsel has made any monetary contribution to the preparation or submission of this brief. *Amici* have the consent of the parties to file this brief as indicated by the blanket consents filed by both Petitioner and Respondent.

21st Century Insurance Group (collectively “21st Century”)—are insurance companies which market under the service mark of Farmers Insurance Group of Companies.

21st Century has been hailed into the Circuit Court of Miller County, Arkansas in the case styled *Basham et al. v. American Nat’l Ins. Co. et al.* (“*Basham*”), despite not having done business within the State of Arkansas during the purported class period. However, in violation of its due process rights, 21st Century has never been afforded an opportunity to be heard regarding its lack of jurisdictional contacts with Arkansas. And, as this Brief will show, 21st Century has scant hope of ever having its rights vindicated in Miller County.

Basham has followed a similar procedural trajectory as the instant case (“*Knowles*”). Many of the same plaintiffs’ counsel filed both cases and asserted that they seek less than \$5 million dollars in damages for the purported class. In both cases, after removal to federal court, the Western District Court of Arkansas remanded the case in reliance upon the purportedly binding nature of the stipulation.² *Basham* is now being held by the Eighth Circuit Court of Appeals pending this Court’s decision in *Knowles*. 21st Century, thus, has a vested interest in the outcome of this case.

² Unlike the instant case, the *Basham* plaintiffs did not even attach a signed, sworn stipulation. Instead, plaintiffs merely have relied on assertions in their complaint that they will not seek in excess of \$5 million dollars.

SUMMARY OF THE ARGUMENT

21st Century writes separately not to re-tread the legal arguments ably made by Petitioner or by other *amici* in their briefing, but to offer this Court a unique, on-the-ground perspective regarding the manner in which the Eighth Circuit’s reflexive remand practice operates to defeat the purposes of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (“CAFA”), and to violate the due process rights of both absent putative class members and class action defendants.³ 21st Century’s counsel of record gained this experience directly as lead counsel for 21st Century and other insurance companies which market under the service mark of Farmers Insurance Group of Companies that have been hailed into Miller County, Arkansas.⁴

This Court’s decision in *Phillips Petroleum Co. v. Shutts* set forth three requirements for a binding class judgment: (1) notice, (2) an opportunity to be heard and participate in the litigation, and (3) a class representative who adequately represents the class at all times. 472 U.S. 797, 811–12 (1985). *Shutts* teaches that, absent these requirements, a class judgment will not have res judicata effect against

³ Counsel have attempted to provide this Court with a distilled but adequate record of events through the appendix, recognizing that a complete production of the records involved would be excessively voluminous.

⁴ In particular, 21st Century’s counsel also represented Farmers Insurance Company, Inc., Farmers Insurance Exchange, Texas Farmers Insurance Company, Inc. and Farmers Group, Inc. (“Farmers”) as lead counsel in the *Chivers* case discussed later in this Brief. *Evelyn J. Chivers, et al. v. State Farm Fire & Cas. Co. et al.*, No. CV-2004-294-3, in the Circuit Court of Miller County, Arkansas.

absent class members. *Id.* at 805. Thus, class action defendants have standing to raise not only their own due process challenges but also those of the absent class. *Id.*

To remand defendants back to State court on the basis of a stipulation that does not and cannot bind absent class members heightens the predicament defendants already face in Miller County. Their chances of ever reaching a final judgment or even a decision on class certification or other dispositive motions are miniscule due to the practice of deferring and delaying all dispositive or appealable judgments while allowing plaintiffs to conduct oppressive discovery. Defendants are also faced with the prospect that even if a final judgment were to be reached, it would not have res judicata effect and they could be subject to endless relitigation.

This is precisely the problem Congress intended to remedy with CAFA, Pub. L. No. 109-2, 119 Stat. 4. In order to avoid violating the due process rights of both the absent putative class members and defendants, and undermining the purposes of CAFA, this Court should conclude that Respondent's "stipulation" does not defeat jurisdiction in the federal courts under CAFA.

ARGUMENT

I. Absent putative class members are not bound by the named plaintiff's stipulation as to damages unless the requirements set forth in *Phillips Petroleum Co. v. Shutts* are met.

21st Century agrees with Petitioner's argument that a named plaintiff cannot limit the claims of absent putative class members before class certifica-

tion. Absent putative class members are not parties to the putative class action. *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (describing “argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*” as “novel and surely erroneous”) (emphasis in original); *see also Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011) (stating that “the mere proposal of a class . . . c[an] not bind persons who were not parties . . .”).

To hold otherwise—particularly in the context of limiting recovery—would violate the procedural due process rights of the absent putative class members. U.S. CONST. amend. XIV, §1. As this Court has previously ruled, “[i]f [a] forum State wishes to bind an absent plaintiff concerning a claim for money damages . . . [t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation.” *Shutts*, 472 U.S. at 811–12. In addition to these two requirements, the named plaintiff must “at all times adequately represent the interests of the absent class members.” *Id.* at 812. The stipulation of a named plaintiff in a putative class action cannot bind absent class members because they have neither received notice nor been given an opportunity to participate in the litigation. Moreover, the stipulation itself weighs against a finding that the named plaintiff is adequately representing the absent putative class members.

This inability to bind absent class members also undercuts the Eighth Circuit’s view that the stipulation of a named plaintiff would be afforded judicial estoppel effect in State court sufficient to ensure that the amount in controversy remained below \$5 million. *See Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012) (“[W]e conclude that

the stipulations are independently enforceable under the doctrine of judicial estoppel”⁵

As this Court has explained, the doctrine of judicial estoppel provides that “[w]here **a party** assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position” *Zedner v. United States*, 547 U.S. 489, 504 (2006) (emphasis added) (citing *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

Judicial estoppel, thus, cannot bind absent putative class members because they are not parties to the remand proceeding. To hold otherwise would violate the absent putative class members’ due process rights to have their claims heard. U.S. CONST. amend. XIV, §1; *Cf. Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (“The application of claim and issue preclusion to nonparties . . . runs up

⁵ Following the Eighth Circuit’s lead, the Western District of Arkansas routinely cites judicial estoppel as an alternate basis to remand, including the underlying district court opinion of the instant case. *Knowles v. Standard Fire Ins. Co.*, 4:11-CV-04044, 2011 WL 6013024, at *4 (W.D. Ark. Dec. 2, 2011) (“Plaintiff would also be judicially estopped from asserting a claim in state court for attempting to recover more than the amount contemplated in the stipulation.”); *see also, Goodner v. Clayton Homes, Inc.*, 4:12-CV-04001, 2012 WL 3961306, at *3 (W.D. Ark. Sept. 10, 2012) (“Plaintiffs respond that they are judicially estopped from amending their stipulations. The Court agrees.”); *Basham v. Am. Nat. County Mut. Ins. Co.*, 4:12-CV-04005, 2012 WL 3886189, at *5 (W.D. Ark. Sept. 6, 2012) (“[T]hat result is foreclosed in this case by judicial estoppel”); *Oliver v. Mona Vie, Inc.*, 4:11-CV-04125, 2012 WL 1965613, at *2 (W.D. Ark. May 31, 2012) (“Moreover, judicial estoppel would prevent any attempt by the Plaintiff to thwart his stipulations upon remand.”).

against the ‘deep-rooted historic tradition that everyone should have his own day in court.’”) (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

II. Defendants in a putative class action have an interest in obtaining a valid and enforceable judgment that actually binds the members of the putative class.

Further, violation of the due process rights of absent putative class members affects not only their rights but also the interests of defendants. As this Court recognized in *Shutts*:

Whether it wins or loses on the merits, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the defendant] is bound. The only way a class action defendant . . . can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

To have personal jurisdiction over these putative class members, they would have to be afforded the “minimal procedural due process protection,” which includes “that the named plaintiff at all times adequately represent the interests of the absent class members.” *Id.* at 811–12.

Where the named plaintiff has already bargained away the class’s potential recovery, there is good reason to believe that this due process requirement

has not been met. *See, e.g. Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (“A representative can’t throw away what could be a major component of the class’s recovery.”); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) (“[I]t is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney’s fees without their authorization.”).

Thus, current Eighth Circuit precedent leaves class action defendants, like Petitioner and 21st Century, with valid cause to question whether any judgment ultimately obtained would have res judicata effect on the claims of the absent putative class members. “[Defendants] could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party . . . has no res judicata effect as to that party.” *Shutts*, 472 U.S. at 805.

Moreover, the Eighth Circuit’s reflexive practice of remanding cases based upon a non-binding stipulation consigns defendants to Miller County: a venue where they are subjected to mountainous discovery and endless delays with little hope of the case progressing to an appealable ruling on class certification or a binding final judgment. The fear that any judgment rendered—after years of litigating in a forum that does not even enjoy personal jurisdiction over 21st Century—would not have res judicata effect, thus forcing defendants to re-live the same nightmare, only reinforces the quagmire defendants face in Miller County.

III. Respondent’s suggestion that the *Shutts* requirements will be met in conjunction with a certification hearing is a fallacy.

In the instant case, Respondent will argue that the requirements of *Shutts* will be addressed and satisfied at the class certification stage.⁶ The problem—one which the undersigned counsel have faced before in Miller County—is that certification will be delayed indefinitely until each defendant is forced to the settlement table in an effort to avoid further crippling discovery. This is precisely the problem that Congress intended to remedy with CAFA, and it is a violation of a class action defendant’s due process rights under the Fourteenth Amendment.

A. Congress enacted CAFA, in part, to protect class action defendants from “magnet” jurisdictions.

In passing CAFA, Congress was motivated in part to curb the “[a]buses of the class action device that have . . . harmed . . . defendants that have acted responsibly.” Pub L. No. 109-2 § 2(a)(2). Particularly troublesome to Congress were those “magnet” jurisdictions in which plaintiffs’ counsels understood they could extract maximum bounty from defendants while undergoing minimal to no scrutiny from the presiding State court. 151 CONG. REC. S1225-02 (Feb. 10, 2005) (statement of Sen. Vitter) (“There is now in our country a full blown effort aimed at min-

⁶ The underlying district court opinion of this case also relied on this argument. *Knowles v. Standard Fire Ins. Co.*, 4:11-CV-04044, 2011 WL 6013024, at *6 (W.D.Ark. Dec. 2, 2011) (“[P]utative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive.”).

ing for jackpots in sympathetic courts known as ‘magnet courts’ for the favorable way they treat [class action] cases.”); *see also* 151 CONG. REC. H723-01 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that “[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of ‘magnet’ or ‘magic’ jurisdictions”).

Knowles and *Basham* arise out of one of those “magnet” jurisdictions—the Circuit Court of Miller County, Arkansas. Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind The Statute*, 35 J. LEGIS. 76, 93 & n.115 (2009) (“The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas.”). Indeed, in 2006, Miller County received the dubious distinction of being recognized by the American Tort Reform Foundation as a potential “judicial hellhole.” Am. Tort Reform Found., *Judicial Hellholes 2006*, at v, 22 (2006), available at <http://bit.ly/LE8gxJ>.

Despite CAFA, Miller County has remained a “magnet” jurisdiction where plaintiffs’ counsel extract vast sums in attorneys’ fees from battered defendants while providing little to no benefit to the putative class members. That both Petitioner and 21st Century were haled into Miller County is not a coincidence—legions of corporate defendants continue to find themselves unable to escape the pull of this magnetic jurisdiction.⁷

⁷ *See, e.g., Oliver v. Mona Vie, Inc.*, 4:11-CV-04125, 2012 WL 1965613 (W.D. Ark. May 31, 2012) (remanding case back to Miller County); *Nicholas v. Am. Modern Home Ins. Co.*, CV-2011-0270-2 (Circuit Court of Miller County, Ark. April 24, 2011) (another putative class action filed by Respondent’s trial counsel in Miller County).

Miller County's lasting prominence even after CAFA, is fostered by allowing the "stipulation" of the named plaintiff to subvert the amount-in-controversy requirement. The gambit is simple: named plaintiffs plead allegations that far exceed a damage calculation of five million dollars, but purport to stipulate that they will not seek damages in excess of five million dollars. Per Eighth Circuit precedent, this stipulation shields them from removal to federal court.

Once remanded back to Miller County, plaintiffs then impose crushing discovery on defendants, knowing defendants have no recourse to interlocutory appeal. All the while, named plaintiffs and the court delay any decision on threshold issues (such as the standing of the named plaintiff or personal jurisdiction over the defendants) and on class certification, thereby subjecting defendants to a bleak future of unending and expensive discovery.

The ability to defeat federal jurisdiction for class actions "in which the matter in controversy exceeds the sum or value of \$5,000,000," 28 U.S.C. § 1332(d)(2), merely by stipulating (or only alleging) that plaintiffs will not seek damages in excess of \$5 million runs counter to Congress's intention that CAFA "expand substantially Federal court jurisdiction over class actions" and that "its provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant." 151 Cong. Rec. H723-01 (Feb. 17, 2005) (statement of Rep. Sensenbrenner); *id.* ("[I]f a Federal court is uncertain about whether the \$5 million threshold is satisfied, the court should err in favor of exercising jurisdiction over the case.").

B. Defendants' due process rights are also violated when forced to defend in Miller County.

Nowhere is the protection afforded by CAFA removal more vital to out-of-state insurance defendants than in Miller County, where they are routinely subjected to endless delays and unconscionably burdensome and expensive discovery, without a meaningful judicial remedy. Once trapped there by mere allegations (the merits of which are never tested), and without hope of a ruling on class certification (much less a trial), such defendants are forced to impale themselves on Morton's Fork: expending millions of dollars in complying with ever more vexatious discovery demands (and sanctions when unable to comply with them) when even the highly improbable outcome of an eventual judgment affords no true final relief, or capitulating in settlements conferring grossly inflated awards of attorneys' fees to plaintiffs' counsel out of all proportion to the merits of their claims. Not only are defendants' rights under CAFA to be free of such evils through removal defeated, but their fundamental right to due process of law is denied.

21st Century understands that the instant case is not a referendum on the practices of Miller County. However, given that Congress enacted CAFA at least in part to curb the recognized abuses of magnet jurisdictions such as Miller County, and given that these "stipulations" have become the *de rigueur* method of side-stepping CAFA, 21st Century believes that an on-the-ground perspective of the abuses that continue to transpire in Miller County adds important context to this Court's analysis of the question before it. While federal courts recognize

defendants' constitutional right to be heard in a meaningful manner and their right to protection from gross discovery abuses, Miller County does not.

A bedrock principle of due process is the right "to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Class action defendants in Miller County do not receive this right because dispositive motions regarding threshold issues are endlessly delayed and often never heard.

Federal courts recognize that the failure to rule on dispositive pre-trial motions is an abuse of discretion. *See, e.g., Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Failure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion."); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 793 (3d Cir. 1992) ("[A] district court's failure to consider the merits of a summary judgment motion is a failure to exercise its authority when it has the duty to do so.").

Indeed, the Third Circuit has recognized that the failure to rule on a motion can be more devastating to a party's rights than an erroneous ruling because the failure to rule precludes judicial review. "[R]eview after final judgment cannot force a district judge to adjudicate, and interlocutory appeal is unlikely to be available" *In re Sch. Asbestos Litig.*, 977 F.2d at 793. Thus, the procedural mechanisms that protect defendants' rights are absent when the trial court fails to issue an appealable ruling. This is precisely what occurs in Miller County. Class action defendants file dispositive threshold motions only to have them deferred time and again. Absent a reviewable

ruling, defendants have no avenue by which to vindicate their rights.

In the rare instances when dispositive motions are actually heard, the timing of the hearing is such that it loses any meaning, such as when motions to dismiss are not heard until the day of the certification hearing, as is the practice in Miller County. Due process does not just require a right to be heard. It requires a right to be heard “at a *meaningful* time and in a *meaningful* manner.” *Mathews*, 424 U.S. at 333 (emphasis added); *see also* *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987) (“Due process of law does not allow the state to deprive an individual of property where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard.”).

Compounding the injustice, defendants are not merely left to idle in judicial limbo while their pre-trial motions languish. Instead, they are bludgeoned with gross discovery abuses. This Court has previously acknowledged the threat that abusive discovery poses in the absence of an opportunity to have meritless claims dismissed. “[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Thus, this Court recognized that Rule 8 pleading requirements must be given weight “lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” *Id.* at 558 (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

This Court's concerns are routinely played out in real time in Miller County. Dispositive threshold issues such as venue, jurisdiction, and standing are cast to the side, and even the most innocent defendant must consider seriously whether to pay millions of dollars to plaintiffs' attorneys in order to avoid expending even more in defense and discovery compliance costs. The Eleventh Circuit has recognized that court-condoned discovery abuses can "materially prejudice[]" a "litigant's rights" and constitute "an abuse of discretion." *Chudasama*, 123 F.3d at 1367.

C. The Miller County court's management of the *Basham* action.

The experience of 21st Century in *Basham* is instructive of the practices in Miller County. *Basham* had its origins in another putative class action filed in Miller County in 2005, which was styled *Georgia Hensley, et al. v. Computer Sciences Corporation, et al.*, Case No. 2005-59-3 ("*Hensley*"). Named plaintiffs in *Hensley* alleged a nationwide conspiracy to underpay bodily injury claims under the UM/UIM (uninsured and underinsured motorist) coverage of automobile policies. *Hensley* included 584 insurance company defendants.

In June 2008, James Basham became a named plaintiff in *Hensley*. On June 11, 2008, Basham's claims, along with those of two other plaintiffs, were severed into what became the *Basham* case. On January 31, 2010, James Basham—who was then the only named plaintiff remaining—died. Basham's counsel—many of whom were also Respondent's trial attorneys—did not reveal this critical fact, and the defendants did not discover it until an obituary from the local newspaper was sent to one of the defendant's attorney's attention in June 2010. In July 2010,

one of Respondent's trial counsel admitted this was not disclosed for strategic reasons:

For strategic reasons and because there was no obvious efforts to find out that information, ***we didn't disclose it*** to [defendant's counsel] and she's correct, and to the extent that is considered inappropriate, I apologize to her, I apologize to the court as well, but ***we don't believe that it is inappropriate*** to do so.

(emphasis added)⁸ Thus, for approximately six months, the putative class action had continued despite the death of the only named plaintiff, and would continue two months more before Basham's estate was finally substituted as the named plaintiff in September 2010.

Having extracted their pound of flesh from nearly all of the original *Hensley* defendants, on February 7, 2011, six years after the case began as *Hensley*—a First Amended Class Action Complaint was filed under seal in *Basham* which, for the first time, named 21st Century. A protective order entered *ex parte* accompanied the complaint.

On September 16, 2011, the Miller County court entered (1) a protective order to preserve documents during the pendency of the litigation,⁹ and (2) a scheduling order,¹⁰ virtually identical in form and substance to those proposed by plaintiff's counsel.¹¹

⁸ Appendix at M, Hearing Transcript, 7/1/10, p. 81a

⁹ Appendix at C, Protective Order to Preserve Documents During Pendency of Litigation, 9/16/11, p. 10a.

¹⁰ Appendix at B, Initial Scheduling Order, 9/16/11, p. 17a.

¹¹ The protective order was entered ten days ***before*** the deadline for 21st Century to oppose plaintiff's motion for entry of

The protective order included the onerous requirement that “the Chief Executive Officer, Chief Operating Officer or President” of 21st Century certify under oath that a copy of the order had been provided to “all of its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved,”¹² thus exposing such high-ranking executives to potential sanctions and charges of perjury for certifying that actions took place in which they would have no direct involvement and could have no first-hand knowledge. The purpose for such a requirement is clear: to intimidate such top executives into settling to avoid potential personal liability.¹³

The September 16, 2011 scheduling order provided that briefing and hearing on defendants’ motions to dismiss for lack of personal jurisdiction or venue would be delayed eight months, and that motions to dismiss on Rule 8, 9, 10, 12(b)(1) and 12 (b)(6)¹⁴

that order, thus denying 21st Century the right to be heard. The protective order further recites in its first paragraph that “[t]he parties agreed to the terms set forth below and this Court finds the agreed terms. . .”, when in fact 21st Century objected to the executive certification requirement among other terms. Appendix at D, Letter from Stacy Allen to Hon. Kirk D. Johnson, 9/26/11, p. 17a.

¹² Appendix at C, Protective Order to Preserve Documents During Pendency of Litigation, 9/16/11, pp. 14a-15a.

¹³ To underscore the point, shortly after 21st Century filed its required certifications, one of Respondent’s trial counsel who also represents the plaintiff in *Basham* sent a letter to defendants’ counsel threatening a motion to enforce the protective order for lack of compliance. Appendix at E, Letter from Christopher R. Johnson to Defense Counsel Group, 10/25/11, p.19a.

¹⁴ The Arkansas Rules of Civil Procedure are patterned on the Federal Rules of Civil Procedure, and resemble them closely.

grounds would not be heard until the *same day* as the class certification hearing.¹⁵ This ruling was in conformity with plaintiff's earlier motion to defer response to those motions to dismiss and the court's own preference for "[t]his model [which] has worked well for the court and parties in the past. . . ."¹⁶ Also consistent with prior practice, the Miller County court emphasized that, despite the delay in hearing (much less ruling on) defendants' motions to dismiss, "[d]iscovery will continue unabated on the merits issues as well as issues relating to the pending motions."¹⁷

Respondent's trial counsel wasted little time in propounding massive written merits discovery on 21st Century and the other defendants, including 131 interrogatories, 189 requests for production of documents, and a "request for inspection and entry upon land" to physically inspect defendants' data storage facilities and computer systems.¹⁸ This discovery was outrageously overbroad, burdensome and oppressive, seeking all manner of records and information pertaining to the activities of unspecified officers,

City of Fort Smith v. Carter, 216 S.W.3d 594, 598 (Ark. 2005) ("Based upon the similarities of our rules with the Federal Rules of Civil Procedure, we consider the interpretation of these rules by federal courts to be of a significant precedential value.").

¹⁵ Appendix at B, Initial Scheduling Order, 9/16/11, p. 4a.

¹⁶ Appendix at A, Letter from Hon. Kirk D. Johnson, 8/30/11, p. 2a.

¹⁷ Appendix at A, Letter from Hon. Kirk D. Johnson, 8/30/11, p. 3a.

¹⁸ As this Court has recognized, but Miller County does not: "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

agents, employees and representatives, not only in Arkansas but across the country, since 1990.¹⁹

The prejudice to 21st Century was severe, as its motion to dismiss for lack of personal jurisdiction was predicated on the fact (supported by affidavits) that 21st Century “does not insure Arkansas citizens and has not otherwise directed any activity toward the State of Arkansas or otherwise availed itself of the privileges of doing business within the State of Arkansas.” 21st Century’s predicament was insoluble: waive its personal jurisdiction defense by moving for the affirmative relief of a protective order from the court, knowing that an interlocutory appeal from denial of that motion is unavailable under Arkansas law,²⁰ or stand on its objections, withhold production, and risk monetary sanctions upon plaintiff’s inevitable motion to compel.

On November 14, 2011, *Basham* was voluntarily dismissed by its named plaintiff and then re-filed in

¹⁹ Significantly, the discovery included an interrogatory asking each defendant to state whether it contended a file-by-file review was necessary to determine the purported underpayment to the putative class members, disclosing plaintiff’s counsel’s intention to seek production of each and every claim file from any defendant opposing the use of statistical sampling, as they had done in *Chivers* before. Appendix at F, Plaintiffs’ First Master Set of Interrogatories, Requests for Production of Documents and Request for Inspection on Defendant Insurance Companies, p. 21a (for the purposes of brevity, 21st Century has included only the set of discovery requests served again when *Basham* was refiled; however, the requests both include this onerous provision); see also Section III(D), *infra*, discussing *Chivers* in detail.

²⁰ See, e.g., *Matter of Badami*, 831 S.W.2d 905, 906 (Ark. 1992) (“An order denying a protective order to quash a subpoena is not a final order for appeal purposes.”).

Miller County under Arkansas' saving statute on December 7, 2011, this time naming an additional plaintiff and additional insurance company defendants.²¹ Despite having previously been notified that the 21st Century defendants had not conducted the business of insurance in Arkansas during the class period, Respondent's trial counsel nonetheless included 21st Century again as defendants in *Basham*. The latest *Basham* complaint was virtually identical in substance to the one dismissed three weeks earlier, and was served with two sets of discovery virtually identical to those before, including a fourteen-page appendix dictating onerous requirements for the production of electronic data.²²

The old and new defendants removed *Basham* to the Western District Court of Arkansas. That court's remand order was appealed to the Eighth Circuit Court of Appeals, which is holding its decision pending this Court's resolution of *Knowles*. As alluded to in its description of interest in this appeal, 21st Century knows through its counsel what awaits the

²¹ The additional plaintiff was Freda McClendon, who had previously filed a putative class action in Sebastian County, Arkansas, styled *McClendon, et al. v. The Chubb Corporation, et al.*, No. CV2010—1176 (Sebastian County, Ark.). Defendants in *McClendon* moved to dismiss. As they did in *Basham*, plaintiffs' counsel moved to stay briefing on those motions until after discovery and the filing of a class certification motion. When her motion to stay was denied, McClendon's trial lawyers (who also represent Basham and Respondent) dismissed the Sebastian County action and re-filed in Miller County as the second named plaintiff in *Basham*. Neither James Basham nor Freda McClendon is alleged to have had a policy of insurance issued by 21st Century nor to have had a claim adjusted by 21st Century.

²² Appendix at F, Plaintiffs' First Master Set of Interrogatories, Requests for Production of Documents and Request for Inspection on Defendant Insurance Companies, p. 21a.

defendants if the use of stipulations to bind absent class members is upheld by this Court and *Basham* is remanded to Miller County. Through their defense of Farmers in the earlier *Chivers* case, 21st Century's counsel has seen how the Miller County "model" for case management operates to stall resolution of defendants' motions to dismiss and of class certification indefinitely, while plaintiffs' withering discovery abuse grinds them into the ground.

D. The future in *Basham* is foretold in *Chivers*.

Like *Basham*, *Chivers* was a putative class action lawsuit filed on September 8, 2004, in Miller County by many of Respondent's same trial counsel against numerous insurance company defendants. *Evelyn J. Chivers, et al. v. State Farm Fire & Cas. Co. et al.*, No. CV-2004-294-3, in the Circuit Court of Miller County, Arkansas. As lead counsel for Farmers, the undersigned filed a motion to dismiss pursuant to Arkansas Rules (12)(b)(3) and 12(b)(6).

As requested by plaintiffs, consideration of those motions was also deferred. Initially, the court indicated it was deferring consideration until it could enter a comprehensive scheduling order.²³ In fact, numerous scheduling orders were ultimately entered by the court, each one further postponing any consideration of many of defendants' motions to dismiss for over **four years** until the date of the class certification hearing on June 30, 2009.²⁴ By the time the last

²³ Appendix at G, Order, 11/15/04, p. 48a.

²⁴ Appendix at H, Amended Scheduling Order, 1/10/05, p. 50a; Appendix at I, Parties' Agreed Proposed Revised Case Scheduling Order, 1/27/06, p. 57a; Appendix at J, Amended Scheduling Order, 10/16/07, p. 63a; Appendix at K, Revised Case Scheduling Order, 4/3/09, p. 68a.

defendants settled and were dismissed in 2011, the case had been pending for almost seven years, and Miller County still had not ruled on Farmers' 12(b)(6) motion to dismiss or the issue of class certification.

During those years, Farmers and the other defendants were subjected to mounting pressure to settle by virtue of increasingly burdensome discovery and the threat of sanctions when even Herculean efforts to comply proved unsuccessful. The following are two of the most egregious examples.

Plaintiffs' counsel in *Chivers* forced defendants to choose between two evils: forego the right to individualized proof of damages by consenting to statistical sampling, or expend tremendous amounts of money and effort to produce each and every claim file implicated in a putative nationwide class action extending back for a decade.²⁵ When Farmers refused to waive its right to object to the introduction of statistical sampling at a merits trial, the Miller County court ordered Farmers to produce **all** its claim files at its own expense.²⁶

The price paid by Farmers for refusing to waive individualized proof of damages was enormous. To comply with what the court characterized as plain-

²⁶ Appendix at L, Order Denying Plaintiffs' Motion for Contempt Order Granting Plaintiffs' Motion to Compel Production of Claim Files, 7/1/09, p. 78a ("The Defendant has elected to contest the validity of the statistical sampling method for damages and it cannot complain now that it will have to comply with reasonable discovery requests as it would in any other case."). Significantly, the court's July 1, 2009 order imposing this monumental discovery burden on Farmers was issued the **day after** oral argument on class certification, leaving Farmers with another choice: spend a fortune on settlement or spend a fortune producing claim files.

tiffs’ “reasonable discovery requests,” Farmers identified, examined, copied and produced approximately 480,772 “paper” claim files and many more electronically stored files.²⁷ Within five months of the court’s order, and well before project completion, Farmers had devoted 28,631 man-hours to produce the required claim files.²⁸ The cost to Farmers to comply with the court’s order included \$865,261 of internal costs,²⁹ over \$5.8 million paid to its records vendor Iron Mountain,³⁰ and over \$1.8 million paid to its counsel to review, process and produce the files. By the time production stopped a year later, Farmers had spent **over \$9 million** to produce over **55 million pages** of its claim files.³¹ It is inconceivable that a federal district court would have permitted such abusive merits discovery prior to class certification, much less required Farmers to bear the cost.

Having failed to bring Farmers to its knees, Respondent’s trial counsel turned to production of emails. Plaintiffs brought a motion for sanctions and contempt against co-defendants Chubb Lloyds Insurance Company of Texas, Chubb Indemnity Insurance Company, Chubb Custom Insurance Company and Chubb National Insurance Company (“Chubb”) for the alleged failure to search for and produce emails

²⁷ Appendix at N, Affidavit of Christopher Bulger, p. 85a, ¶¶ 8, 10.

²⁸ Appendix at N, Affidavit of Christopher Bulger, p. 95a, ¶ 43.

²⁹ Appendix at N, Affidavit of Christopher Bulger, p. 95a, ¶ 43 and n.3.

³⁰ Appendix at O, Affidavit of Kevin Werwie, p. 106a, ¶¶ 33–34.

³¹ Appendix at P, Letter from Jackson Walker L.L.P. to Plaintiffs’ Counsel, 7/1/10, p. 107a.

responsive to document requests as overbroad and burdensome as those in *Basham*. In partially granting plaintiffs' motion directed to Chubb (and only Chubb), the Miller County court also ordered that "all Defendants to this litigation comply with the discovery requests for emails pursuant to the findings set forth above within thirty (30) days of this order,"³² despite the lack of prior notice to Farmers that its interests would also be at issue and in denial of Farmers' due process right to be heard.

Given the many similarities between the tactics employed by Respondent's trial counsel and the Miller County orders in *Chivers* and *Basham*, 21st Century is confident that its motions to dismiss and the issue of class certification will not be ruled on for many years (if ever) were *Basham* to be remanded to that court, and that the *Basham* defendants would be subjected to the same crushing discovery as that in *Chivers*.

CAFA was designed to end abuses such as those inflicted in *Chivers*. Yet Miller County orders and discovery propounded in *Basham* tell us that history is repeating itself. The practice of stipulating to seek an amount below \$5 million is an end-run around CAFA's requirements and intentions. The Eighth Circuit's endorsement of this practice creates a set of circumstances whereby plaintiffs' counsel can ensure that no matter the size and national scope of their

³² Appendix at Q, Order on Motions for Sanctions and Contempt, 12/21/09, p. 115a. In response to Farmers' January 5, 2010 motion to vacate the application of the December 21, 2009 order to Farmers for denial of due process, the court agreed to rescind that provision. Shortly thereafter, plaintiffs moved against Farmers to compel the same email production extracted from Chubb.

allegations, they will never be forced to prove up the merits of those allegations as they would in a federal district court. 21st Century and its undersigned counsel understand these implications all too well, and respectfully pray that this Court put a stop to the practice of undercutting the relief provided by CAFA.

CONCLUSION

In order to avoid undermining the purposes of CAFA and violating the due process rights of both the absent class members and of defendants, this Court should conclude that Respondent's "stipulation" does not defeat jurisdiction in the federal courts under CAFA.

Respectfully submitted,

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21st Century Insurance Company
of The Southwest, and
21st Century Insurance Group

October 29, 2012

APPENDIX

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APPENDIX A

[LOGO]

CIRCUIT COURT
Eighth Judicial District - South
STATE OF ARKANSAS

KIRK D. JOHNSON, Judge
Miller County Courthouse
Texarkana, Arkansas 71854
Ph. (870) 774-7722
Fax (870) 774-0008

COUNTES:
Miller
Lafayette

August 30, 2011

Attorneys of Record

Via Email

Re: James Basham, *et al.* v. American National
County Mutual Ins. Co., *et al.* Miller Circuit
No. CV-2005-59-3A

Dear Counsel:

In reviewing my schedule for the next few weeks, I noticed that my trial court assistant had scheduled a hearing on September 19, 2011 on a Motion to Dismiss filed by Ms. Fletcher and Mr. Chambers. Due to a back injury and subsequent surgery, I have been in the office only on a very limited basis since June 25, 2011. Ms. Houser, in an effort to assist counsel, set this motion hearing without consulting with the Court.

The Court has found it to be more efficient in class action litigation to take motions in an order which will expedite resolution of many of the initial questions presented. For instance, motions relating to Rule 4, Rule 12(b)(2), Rule 12(b)(3), Rule 12(b)(4),

Rule 12(b)(5), and Rule 12(b)(8) are motions that can be heard relatively early in the litigation. If additional motion hearings are necessary after those hearings are concluded, the Court will schedule remaining motions pursuant to Rule 8, Rule 9, Rule 10, Rule 12(b)(1) and Rule 12(b)(6) at or near the time of class certification hearings. This model has worked well for the court and parties in the past and will be used in this case. Therefore, the settings on these motions are premature and that hearing is hereby cancelled.

To expedite the hearings on the first group of motions, the Court has found that it is desirable to have a scheduling order issued to provide all parties notice of the hearing dates and deadlines which shall be adhered to by the parties. The Court is aware that many of the attorneys in this case have also been counsel in previous class action litigation in this court. The court is puzzled that the experienced attorneys have not presented an agreed scheduling order. The Court can only surmise that the parties have attempted to meet and confer on this issue and have been unsuccessful.

The Court will require the parties to meet and confer before September 12, 2011 to reach agreement on the terms of a scheduling order. The parties will present the agreed order or notify the court that no agreement has been reached on September 13, 2011. If such an impasse occurs, the Court will enter a scheduling order on or before September 19, 2011 for the parties.

The Court will not set these pending motions for hearing until sufficient time for discovery has been allowed on the issues presented in the motions. However, the parties are not to interpret that discovery is

3a

limited to the issues in the pending motions. Discovery will continue unabated on the merits issues as well as issues relating to the pending motions.

Thank you for your immediate attention to this matter.

Sincerely,

/s/ Kirk D. Johnson
Kirk D. Johnson

4a

APPENDIX B

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS

No 2005-59-3A

JAMES BASHAM,
Individually and as Class Representatives
on Behalf of All Similarly Situated Persons,
Plaintiff,

vs.

AMERICAN NATIONAL COUNTY MUTUAL INS CO, *et al.*
Defendants.

INITIAL SCHEDULING ORDER

This Court requested that the parties meet and confer regarding a potential scheduling order by letter to counsel on August 30, 2011. This Court instructed the parties to submit either an agreed scheduling order or competing orders for this Court's consideration on or before September 12, 2011. This Court understands the parties met but that they were unable to reach an agreement on all terms of a proposed scheduling order.

Thus, after considering the various proposed scheduling orders presented by the parties, this Court makes the following findings and establishes the following deadlines which are to remain intact until further order of this Court:

This Court finds that no defendant's joinder in any joint or group briefs submitted in accordance with this Order or presentation of motions or defenses in

accordance with the schedule established by this Order shall waive any defense or motion. This scheduling order does not restrict the right of any party to proceed with additional motions and hearings.

This Court finds that class certification and merits discovery shall not be bifurcated but shall proceed simultaneously. This Order does not restrict the procession or timing of personal jurisdiction, class certification or merits discovery.

This Court finds that written discovery in this case shall proceed solely through the master set discovery protocol which was utilized previously in this litigation.¹ This Court believes the master set discovery protocol promoted efficiency in the discovery process for the parties and this Court. The master set discovery protocol is as follows:

- Plaintiff is allowed to submit one master set and one follow on set of personal jurisdiction discovery and another independent set of master and follow on discovery for class certification and merits issues to all Defendants without leave of court.
- Defendants may submit one master set and one follow on set of personal jurisdiction discovery and another independent set of master and follow on discovery for class certification and merits issues to Plaintiffs without leave of court.
- There will not be one master set for certification and another master set for merits

¹ The master set discovery protocol is intended to be inclusive of interrogatories, requests for production of documents and requests for admission.

discovery, but one unitary set of master and follow on discovery that will encompass both certification and merits.

Any further written discovery by the parties on any topic may only be propounded after leave of court is obtained.

I. PROTECTIVE ORDER

Oct. 24, 2011 Deadline to file Modified Protective Order Concerning the Confidentiality and Use of Documents and Information Produced in Discovery with the Court or for Defendants to file Motion for Entry of such Protective Order

Nov. 7, 2011 Deadline for Response to any Motion for Modified Protective Order

Nov. 14, 2011 Deadline for Reply on any Motion for Modified Protective Order

November 17, 2011 Hearing on any Motion for Modified Protective Order

II. FIRST MOTION GROUP: Motions to Dismiss Based on Lack of Personal Jurisdiction, Insufficiency of Process, Insufficiency of Service of Process, Improper Venue, and Forum Non Conveniens.

Dec. 16, 2011 Deadline for Defendants to file moving papers

7a

March 2, 2012 Deadline to Complete Discovery relating to first motion group

March 16, 2012 Deadline for Plaintiffs to file response

April 13, 2012 Deadline for Defendants to file reply

May 7, 2012 Hearing date

III. SECOND MOTION GROUP: Motions to Dismiss pursuant to Rules 8(a), 9(b), 12(b)(1) or 12(b)(6), Motions to Sever, Motions to Compel Arbitration and Primary Jurisdiction.

Aug. 10, 2012 Deadline for Defendants to file moving papers

Sept. 14, 2012 Deadline for Plaintiffs to file response

Oct. 12, 2012 Deadline for Defendants to file reply

November 19, 2012 Hearing date on Second Motion Group

IV. MOTION FOR CLASS CERTIFICATION

April 6, 2012 Deadline for Plaintiffs to designate expert witnesses in support of class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Plaintiff live or via affidavit at the class certification hearing

8a

- | | |
|----------------|--|
| June 1, 2012 | Deadline for Defendants to designate expert witnesses in opposition to class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Defendants live or via affidavit at the class certification hearing |
| Aug. 3, 2012 | Deadline for Plaintiffs to designate rebuttal expert witnesses in support or class certification, to provide rebuttal expert report summaries and to designate rebuttal fact witnesses that may be offered by Plaintiff live or via affidavit at the class certification hearing |
| Aug. 3, 2012 | Deadline for Plaintiffs to file Motion for Class Certification |
| Sept. 7, 2012 | Deadline for Defendants to file responses to Plaintiff's Motion for Class Certification |
| Sept. 28, 2012 | Deadline to complete discovery on issues of class certification |
| Oct. 5, 2012 | Deadline for Plaintiffs to file reply on Motion for Class Certification |

9a

Oct. 26, 2012	Parties to exchange and file with the Court exhibit lists and pre-marked exhibits for class certification hearing
November 19, 2012	Hearing date for Motion for Class Certification
60 days after Class Certification Hearing Date	Deadline for parties to file proposed findings of fact and conclusions of law related to class certification

DATED this the 16th day of Sept., 2011

/s/ Kirk D. Johnson
KIRK D. JOHNSON
CIRCUIT JUDGE

10a

APPENDIX C

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS

No 2005-59-3A

JAMES BASHAM,
Individually and as Class Representatives
on Behalf of All Similarly Situated Persons,
Plaintiff,

vs.

AMERICAN NATIONAL COUNTY MUTUAL INS CO, *et al.*
Defendants.

**PROTECTIVE ORDER TO
PRESERVE DOCUMENTS DURING
PENDENCY OF LITIGATION**

This action involves claims regarding the alleged use of computer software known as “Colossus” in adjusting uninsured and underinsured motorist insurance claims. This Court believes the implementation of a preservation order is essential in complex cases because of the number of persons involved who may possess information relevant to the claims asserted in this case. It is the intent of this Court that all persons who have access to relevant or discoverable information be informed through service of a preservation order of the importance of gathering and protecting information relating to this case to avoid the inadvertent or purposeful destruction of evidence. The parties agreed to terms set forth below and this Court finds the agreed terms appropriate to assure the preservation of relevant documents.

The Court finds that it has the authority to enter this Protective Order pursuant to its inherent authority to manage the conduct of litigants before this Court and pursuant to the Arkansas Rules of Civil Procedure.

The Court finds that this Protective Order will reduce the likelihood that the parties and their officers, members,¹ employees, agents,² attorneys³ or representatives⁴ will destroy, discard, abscond or dispose of documents, record or information relevant to, related to or pertaining to the allegations in Plaintiffs' First Amended Class Action Complaint. The Court further finds that it is necessary that certain of the named classes of persons associated with the parties be provided with notice and a copy of this Protective

¹ As used in this Protective Order, "member" means member of a legal entity with persons so identified.

² As used in this Protective Order, "agent" means persons who currently are licensed insurance agents selling auto insurance written by a specific insurer defendant, but not including independent insurance agent who are authorized to sell insurance for more than one insurer and who are separate persons/entities not subject to the insurer's control.

³ As used in this Protective Order, "attorney" means counsel for their parties in this action and in any underlying action relating to a UM/UIM claim brought by or against the named plaintiffs.

⁴ As used in this Protective Order, except as noted below, "representative" means persons who currently act in a representative capacity on behalf of a party and who are subject to a defendant's control. "Representative" includes third-party claims adjusters who are subject to a defendant's control. "Representative" does not include non-employee outside counsel retained by defendants; provided, however, that such persons are included in the definition of "attorney" as that term is used in this Protective Order.

Order to assure compliance with the provisions of this Protective Order.

IT IS HEREBY ORDERED, that each party to this action and their officers, employees, representatives and agents shall take all steps reasonably necessary to preserve and protect any and all documents in his, her or its possession, custody or control which are relevant to, related to or pertaining to the software program known as Colossus, (b) the consideration, evaluation, testing, licensing, tuning, implementation, development, design or use of any of the software at issue, or (c) the UM or UIM insurance claims which form the basis of the name Plaintiff's claims in the Action (the "Documents to be Preserved").

IT IS FURTHER ORDERED that each party to this action and their officers, employees, representatives, agents and attorneys and anyone who would reasonably be expected to have possession or access to the documents described below are prohibited from destroying, deleting, shredding, discarding, disposing of, absconding with, hiding, or transferring possession to someone not bound by this Order, any and all Documents to be Preserved.

IT IS FURTHER ORDERED that the term "document" as used in this Protective Order means any and all materials within the scope of the Arkansas Rules of Civil Procedure Rule 34(a)(1), and, except as specifically provided below or subsequently agreed to by the parties or ordered by the Court, is intended to be all-inclusive, including, without limitation, the original or an identical copy and non-identical copies of writings, computerized data or information (excluding for documents created or revised after the date of this order routine revisions to draft electronic document that are not otherwise kept), electronically

stored information, emails, spreadsheets, software, magnetic, electronic or optical media, memoranda, directives, communication (excluding transitory impulses such as instant messages that are not otherwise kept), letters, written materials, handwritten notices, e-mail, reports, records, audits, ledgers, financial data, drawings, graphs, charts, specifications, invoices, purchase orders, receipts, personal calendars and diaries, logs, minutes, contracts, recordings of telephonic or personal communications all other records (excluding voice mail messages that are not otherwise kept), films, prints, negatives, stenographic, notes, electronic data, storage media or printouts, other data or information compilations from which information can be obtained, and any written, printed, recorded or tangible matter of any character in the possession, custody or control of the parties and/or their antecedent entities, their officers, employees, attorneys, agents or any other person, company or entity under their control who would have access to or possession Documents to be Preserved as of the date of this Protective Order. "Document" shall also include any software or source code necessary to access or read any other document to be preserved pursuant to this order. "Document" shall not include original paper versions of documents imaged in archival form as called for by the Uniform Photographic Copies of Business and Public Records as Evidence Act (Ark. Code 16-46-101). This Order shall not be construed to prohibit access to, or use of, electronic documents in the ordinary course of business, including access or use which may alter one or more properties of stored information incident to such use.

IT IS FURTHER ORDERED that each of the parties shall take reasonable steps to assure that its

officers, agents, employees and representatives comply with the terms of this Protective Order.

IT IS FURTHER ORDERED that within twenty (20) days after the entry of this Protective Order, except as specified below, each party shall take the following steps to assure compliance with this Protective Order:

- a. Each party shall provide a copy of this signed Protective Order to all of its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved;
- b. In providing a copy of this Protective Order to all of its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved, parties may deliver such copies by mail, hand-delivery, interoffice delivery or email in either hard-copy form or electronic form.
- c. Each party shall certify to the Court that it has provided a copy of this Protective Order to all its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved in compliance with this Protective Order.

IT IS FURTHER ORDERED that if a party does not have the internal capability to deliver a copy of this Protective Order to its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved in hard-copy or

electronic form, then such party shall certify to this Court under oath that it does not have such internal capability. Such certification shall be provided within twenty (20) business days after entry of this Order.

It is further ORDERED that the Chief Executive Officer, Chief Operating Officer or President, as applicable, and the Chief Counsel for each Defendant and each Plaintiff shall execute and file in this case a certificate, under oath, that: (1) a copy of this Order has been provided in compliance with the terms of this Order and (2) the method or methods of notification.

This Order pertains only to Documents to be Preserved. Any documents described, referred to, or whose production is requested in any reasonable discovery request or response made during this litigation shall, from time of the request or response, be treated for purposes of this order as Documents to be Preserved until the court rules otherwise. Counsel are directed to confer to resolve questions as to what documents are outside the scope of this order or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the court for clarification or relief from this order upon reasonable notice. A party failing, within thirty (30) days after receiving written notice from another party that specified documents will be destroyed, lost or otherwise altered pursuant to routine policies and programs, to indicate in writing its objection shall be deemed to have agreed to such destruction.

IT IS FURTHER ORDERED that this notice requirements of this order will not apply to the ANPAC defendants since as previous parties to this litigation

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they have provided the necessary certification that the previous preservation order has been complied with by persons subject to that order.

IT IS FURTHER ORDERED that this Protective Order shall remain in effect during the pendency of this litigation or until further Order from this Court.

DATED this the 16th day of September, 2011

/s/ Kirk D. Johnson
KIRK D. JOHNSON
Circuit Judge

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APPENDIX D

[LOGO]

JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

Stacy Allen
(512) 236-2090 (Direct Dial)
(512) 391-2102 (Direct Fax)
stacyallen@jw.com

September 26, 2011

VIA HAND DELIVERY

Hon. Kirk D. Johnson
Circuit Judge
Eighth Judicial District – South
State of Arkansas
Miller County Courthouse, Room 304
400 Laurel, 2nd Floor Courtroom
Texarkana, AR 71854

Re: Case No. 2005-59-3A; *James Basham v. American National County Mutual Ins Co, et al.*; In the Circuit Court of Miller County, Arkansas

Dear Judge Johnson:

On September 16, 2011, this Court entered a Protective Order To Preserve Documents During Pendency of Litigation (the “Preservation Order”) pursuant to Plaintiff’s motion in the above-referenced action. That Preservation Order was signed and entered prior to the September 26, 2011 deadline for the 21st Century Defendants¹ to respond to Plaintiff’s

¹ Collectively, 21st Century Casualty Company, 21st Century Insurance Company, 21st Century Insurance Company of the Southwest and 21st Century Insurance Group.

motion pursuant to ARK. R. CIV. PROC. 6(c). Hence, the 21st Century Defendants were not afforded any opportunity to respond to Plaintiff's motion. Had the 21st Century Defendants been afforded an opportunity to respond as required by the rules, they would have opposed the motion, and in no event did they agree to entry of the Preservation Order. The Preservation Order signed by the Court, however, recites in the first paragraph that "[t]he parties agreed to terms set forth below and this Court finds the agreed terms" This recital in the Preservation Order is incorrect, and this letter is written to advise the Court that the 21st Century Defendants object to both the Plaintiff's motion and the inclusion of this language in the Preservation Order.

The 21st Century Defendants seek no affirmative relief, and submit this letter subject to and without waiving their Motion To Dismiss, including without limitation their objections to this Court's exercise of in *personam* jurisdiction over them pursuant to ARK. R. CIV. P. 12(b)(2).

Respectfully submitted,

/s/ Stacy Allen

Stacy Allen

Attorney for the 21st Century Defendants

cc: Mary Pankey, Miller County Circuit Clerk (*via hand delivery w/encl.*)

Lisa Houser, Court Coordinator (*via hand delivery w/encl.*)

All Counsel of Record (*via e-mail w/encl.*)

APPENDIX E

[Logo] NIX Christopher R. Johnson
PATTERSON *Licensed in Louisiana &*
& ROACH, LLP *Texas*

October 25, 2011

VIA EMAIL ONLY

Philip E. Kaplan- Infinity Joann C. Maxey Williams & Anderson PLC 111 Center St., 22nd Floor Little Rock, AR 72201	Peter H. Klee- Infinity Charles A. Danaher Luce, Forward, Hamilton & Scripps LLP 600 West Broadway, Suite 2600 San Diego, CA 92101
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Thomas T. Rogers- 21st Century Stacy Allen Marilyn M. Montano 100 Congress Avenue, Suite 1100 Austin, TX 78701	J. Dennis Chambers- 21st Century Atchley, Russell, Waldrop & Hlavinka LLP 1710 Moores Lane P.O. Box 5517 Texarkana, TX 75503
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Curtis Cheyney, III- Erie Swartz Campbell LLC Two Liberty Place 50 S. 16th Street, 28th Floor Philadelphia, PA 19102	Dan F. Bufford- Erie Laser Law Firm 101 S. Spring Street, Suite 300 Little Rock, AR 72201
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RE: *James Basham, et al v. Computer Sciences
Corporation, et al*
Miller County Circuit No. CV-2005-59-3A
Third Division

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Dear Counsel,

As you are each aware, the Court issued its Protective Order to Preserve Documents During Pendency of Litigation on September 16, 2011. In that Order, the Court set forth certain conditions which had to be met in order to be considered in compliance therewith. Plaintiff believes your clients did not comply with the terms of the Order.

Unless your client comes into full compliance with the terms of the Order by November 3, 2011, Plaintiff will commence motion practice seeking enforcement of the Court's Order.

Sincerely yours,

/s/ Christopher R. Johnson
Christopher R. Johnson
cjohnson@npraustin

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APPENDIX F

IN THE CIRCUIT COURT OF
MILLER COUNTY, ARKANSAS

No.: 2011-0623-3

EDDIE BASHAM, AS ADMINISTRATOR OF THE
ESTATE OF JAMES BASHAM, AND FRED A MCCLENDON,
INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON
BEHALF OF ALL SIMILARLY SITUATED Persons,
Plaintiffs,

vs.

AMERICAN NATIONAL COUNTY MUTUAL INS CO, *et al*
Defendants

PLAINTIFFS' FIRST MASTER SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION OF DOCUMENTS AND
REQUEST FOR INSPECTION ON DEFENDANT
INSURANCE COMPANIES

Plaintiffs, pursuant to Arkansas Rules of Civil Procedure 26, 26.1 and 33 submit the following Interrogatories to Defendants, thereby requiring that they be answered separately, in writing, under oath on or before the next business day following the expiration of thirty (30) days after the receipt of these Interrogatories.

Plaintiffs, pursuant to Arkansas Rules of Civil Procedure 26, 26.1 and 34, submit the following Requests for Production to the Defendants, thereby requiring each Defendant to produce electronic copies of all DOCUMENTS designated herein in the manner

set forth in Appendix A, Plaintiffs' Production Format Requirements, at the office of NIX PATTERSON & ROACH, L.L.P., 3600 North Capital of Texas Highway, Building B, Suite 350, Austin, TX 78746, attorneys for Plaintiffs, on or before the next business day following the expiration of thirty (30) days after the receipt of this request.

* * * *

[32]Arkansas Rule of Civil Procedure 23(a) is not satisfied in this matter, please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 123: If YOU contend that the class representative(s) in this matter is/are not an adequate class representative(s) under Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention

INTERROGATORY NO. 124: If YOU contend that counsel representing plaintiff(s) in this matter are not adequate under Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 125: If YOU contend that the claims of the plaintiff(s) in this matter do not satisfy the commonality requirement of Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 126: If YOU contend that the claims of the plaintiff(s) in this matter do not satisfy the typicality requirement of Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 127: If YOU contend there is any other reason not covered by YOUR responses

to Interrogatories Nos. 122 - 126 above that this matter should not be certified as a class action under Arkansas Rule of Civil Procedure 23, please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 128: State whether YOU believe a file-by-file review of each claim upon which COLOSSUS was utilized is necessary to calculate underpayments (assuming for purposes of this Interrogatory that underpayments do exist) on a class-wide basis.

INTERROGATORY NO. 129: State whether YOU believe it is possible to calculate class-wide underpayments (assuming for purposes of this Interrogatory that underpayments do exist) related to the use of COLOSSUS through statistical analysis.

INTERROGATORY NO. 130: State, describe and explain YOUR opinion as to how a statistically representative sample of class members could be obtained.

INTERROGATORY NO. 131: State, describe and explain YOUR belief as to what number of class members would constitute a statistically significant sample.

REQUESTS FOR PRODUCTION:

REQUEST NO. 1: Each DOCUMENT identified in YOUR response/answer to any Interrogatory above or Request for Admission served contemporaneously herewith.

REQUEST NO. 2: Each DOCUMENT relied upon, referred to or consulted by YOU in responding to or answering any Interrogatory above or Request for Admission served contemporaneously herewith.

REQUEST NO. 3: Each DOCUMENT, photograph, video clip, or other tangible item YOU anticipate using as an exhibit or demonstrative aid at a deposition, certification hearing or trial.

REQUEST NO. 4: Each DOCUMENT showing or indicating when YOU first became aware of the *Hensley v. CSC* lawsuit, Miller County Circuit Court, No. 2005-59-3.

REQUEST NO. 5: Each DOCUMENT showing or indicating when YOU first became aware of any class action that challenged the use of Colossus on UM/UIM claims.

REQUEST NO. 6: Each DOCUMENT which relates to the *Hensley* litigation obtained or created by YOU before service upon YOU of the instant suit.

REQUEST FOR INSPECTION AND
ENTRY UPON LAND

REQUEST: To inspect and examine any facilities, computer systems and electronic content on any company owned or operated system, computing resource, or other electronic device and/or files and the information contained therein as it pertains to COLOSSUS production, test and development environments as well as peripheral applications, systems and files that are used to administer, tune, maintain, test, report and measure/analyze the system and results.

Respectfully submitted,

/s/ John C. Goodson

JOHN C. GOODSON

Arkansas Bar Number 90018

MATT KEIL

Arkansas Bar Number 86099

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KEIL & GOODSON
406 Walnut Street
Texarkana, Arkansas 71854
Telephone: 870.772.4113
Facsimile: 870.773.2967

NIX, PATTERSON & ROACH, LLP
3600 N. Capitol of Texas Highway
Bldg. B, Suite 350
Austin TX 78746
Telephone: 512.328.5333
Facsimile: 512.328.5335

BRAD E. SEIDEL
Arkansas Bar No. 2007122
Attorneys for Plaintiffs

APPENDIX A

Production Format Requirements

1. Overview

This Overview section defines key terms and summarizes key points regarding document productions. All requirements are elaborated in detail in subsequent sections.

a. Definitions

For purpose of these Production Format Requirements and document requests propounded by Plaintiff(s), the following terms shall have the meanings ascribed to them below.

“Document” is defined to be synonymous in meaning and equal in scope to the usage of this term in Arkansas Rules of Civil Procedure 26, 26.1(a)(1)-(3) and Rule 34 and shall include every writing or record of every type and description in any form whatsoever and all other tangible objects. This definition is intended to compliment, not supplant, any definition of “document” contained in any discovery request submitted by Plaintiff(s). The term Document includes writings, drawings, graphs, charts, photographs, video and sound recordings, images, and other data or data compilations (electronic or otherwise) from which information can be obtained either directly or, if necessary, after translation by the producing party into a reasonably usable form. The term Document also includes electronically stored information (“ESI”) and transmission of ESI through Electronic Media. For illustrative purposes, examples of documents include each of the following: memorandum, file, communication, correspondence, study, report, working paper, record, recording, minutes,

instruction, literature, notes, notebook, diary, calendar, data sheet, work sheet, summary, tabulation, calculation, index, picture, graphic matter, agreement, contract, arrangement, understanding, invoice, bill, web page, software, and algorithm. A draft or non-identical copy or version is a separate document within the meaning of this term. A document shall be produced with any and all of the document's associated metadata.

“Electronic Media” means any magnetic, flash or other storage medium or media device used to record and/or store ESI. Electronic Media includes, but is not limited to, portable media, hard disks, floppy disks, hard drives, jump drives, thumb drives, memory sticks, flash media, CDs, DVDs, zip drives, personal digital assistance devices and handheld storage devices (e.g., Palm, Blackberry, iPhone or other “smart phones”), magnetic tapes of all types, intranet and Internet repositories of all types including web-sites, cloud or web storage, software code repositories (including code vaults or other source code storage systems), and any other vehicle for digital data storage, back-up and/or transmittal. Electronic media also includes, without limitation, memory and information storage systems associated with servers, computers, handheld storage devices, iPads, tablet computers, email systems (including those hosted by ISPs), voicemail systems, instant messaging systems, social networking systems, and fax servers.

“Electronically Stored Information” or “ESI” is defined to be synonymous in meaning and equal in scope to the usage of this term in Arkansas Rule of Civil Procedure 26,1 (a)(3) and includes any information that is stored electronically, regardless of the

media or whether it is in the original format in which it was created. ESI includes, but is not limited to, any original and non-identical copies (including non-identical copies with attached comments, annotations, marks, transmission notations, or highlighting of any kind) programs (whether private, commercial or work-in-progress), programming notes or instructions, activity listings of electronic mail receipts or transmittals, output resulting from the use of any software program (including word processing documents, spreadsheets, worksheets, database files, charts, graphs, outlines, PDF files, PRF files, PST files, batch files, and ASCII files), electronic mail, operating systems, source code of all types, programming languages, logs, file layouts, web pages, HLML code, digital photographs, audio files, video files, calendars, contacts, GPS data, and RFID data, regardless of the Electronic Media on which they reside and, if reasonably accessible as contemplated by Arkansas Rules of Civil Procedure 26, 26.1 and 34 regardless of whether said ESI consists of an active file, legacy system file, backup file, archived file, deleted file or file fragment. ESI also includes, without limitation, any items stored on Electronic Media in tiles, folder tabs, or containers, and labels appended to or associated with any physical storage device associated with each original and each copy.

A “**native file**” is in the format in which ESI was originally created (e.g., Microsoft Word, Microsoft Excel, Microsoft Access, PeopleSoft, Outlook) and as it is kept in the ordinary course of business.

An “**image file**” is a file that has been created by scanning a document or electronically rendering an image of a native file. As set forth below, the format

must be TIFF for black and white images and must be either TIFF or JPG for color images.

A “**text file**” is a searchable file that is created by either (1) extracting text from the related native file (preferred), or by (2) OCR processing the related image file.¹ As set forth below, the format must be .txt.

Document “**metadata**”² is electronically stored data that describes characteristics of a document, such as how, when, and by whom a document was collected, created, accessed, modified, and how it is formatted. Metadata can be supplied by a variety of sources, such as applications, users, and file systems. As set forth below, the metadata must be included in the data load file.

The “**load files**” contain (1) information required to properly associate related native files, image files, text files and metadata, and (2) instructions to correctly load the files and metadata into the selected computer based review system.

b. Productions

Each responsive document produced in this litigation shall be produced as follows:

- (a) as a native file³;
- (b) with a corresponding image file;
- (c) with a corresponding text file;

¹ As such, text files are commonly referred to as “extracted text files” or “OCR files”.

² Some of the metadata required by this specification must be manually coded (e.g., custodian, source location).

³ Native files will typically not be produced for scanned documents.

- (d) with all required metadata; and
- (e) with well-formed image and data load files.

E-mail shall be produced in a manner that preserves the relationship between each e-mail and all of its attachments information from each e-mail header field trust be produced in the metadata Attachments to e-mail must be produced in the electronic form in which they ordinarily are maintained in an image file with the corresponding image load file, and the associated metadata.

In all document productions, you must provide all available information about unitization (including the production number of the first and last page of each document), internal linkages, information about attachments (including information sufficient to identify the parent and child relationships of all documents and ESI that are or have attachments including E-mails), and information about hyper-linked fields.

Detailed requirements governing the format of productions are provided below.

2. Applicable Data Sources

The scope of your search for responsive documents (including ESI) shall include various sources of data including, but not limited the following sources and Electronic Media relating thereto:

- i. **Computer systems**, *i.e.*, mainframe computers, local (stand-alone) computers, networked computers, laptop computers, home computers, tablet computers, iPads. PDAs, and other computer and handheld devices;
- ii. **Distributed data or removable media**, *i.e.*, information which resides on portable

media and non-local devices, including hard disks, floppy discs, hard drives, jump drives, thumb drives, memory sticks, flash media, CDs, DVDs, zip drives, magnetic tapes of all types, and Internet repositories of all types including websites, cloud and web storage;

- iii. **Network systems**, including voice mail systems and servers, email systems and servers (including those hosted by Internet Service Providers (ISPs)), Instant Messaging (IM) systems and servers, social networking systems and servers, ISP servers, network servers, and fax servers;
- iv. **Software source code repositories**, including code vaults or other source code storage systems;

Where reasonably accessible as contemplated by Arkansas Rules of Civil Procedure 26, 26.1, and 34, the scope of your search for responsive documents, including ESI, shall include the following sources of data:

- v. **Legacy data**, *i.e.*, retained data that has been created or stored by the use of software or hardware that has been rendered outmoded or obsolete;
- vi. **Forensic copy or backup data**, including archive and backup data tapes and disks; and
- vii. **Residual or deleted data**, *i.e.*, data that is not active on a computer system, including data found on media slack space, tile fragments, data found on media slack space and

data within files that have been functionally deleted.

3. Protocols for AU Submissions

The protocols in this section apply to ALL documents, including ESI, produced in this action. Additional requirements pertaining to metadata, format, etc., for certain types of documents appear in Section 4 below.

a. Load Files

With each production you must submit load files as follows:

- i. A data load file that conforms to the following requirements:
 - UTF-8 encoded;
 - Contains a separate record, on a separate line, for every document in the production;
 - Includes a file path to the associated text and native files for each document;
 - Includes all required metadata for each document;
 - Contains a field header with the delimited metadata field names in the order in which they appear in each record in the load file;
 - Uses the following delimiters:

Description	Symbol	ASCII Character
Field Separator	□	020
Quote Character	␣	254
New Line	␣	174

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- Does not include escape characters, tabs, carriage return/line feed combinations, embedded separators, or embedded carriage returns in any delimited metadata fields; and
 - Terminates each record, including the last record, with a carriage return or carriage return/line feed pair.
- ii. An **image load file** that conforms to the following requirements:
- Is Opticon (OPT) formatted;
 - Is UTF-8 encoded;
 - Production Numbers in the OPT load file must match the corresponding documents' beginning bates numbers in the data load file;
 - Contains a separate record, on a separate line, for every image file in the production;
 - Does not include escape characters, tabs, carriage return/line feed combinations, embedded separators, or embedded carriage returns in any comma delimited fields, and
 - Terminates each record, including the last record, with a carriage return or carriage return/line feed pair.

b. Text Files

Searchable text files shall be submitted for every document produced. Wherever possible, the text file should be created by extracting text from the related native file. If this is not possible (e.g., in the case of

redacted documents and certain image files), the text file must be created by OCR processing the related image file. OCR processed text files must be readable and accurately represent the text in the image files.

OCR PROCESSED DOCUMENTS THAT ARE NOT EASILY READABLE, OR DO NOT ACCURATELY REPRESENT THE TEXT IN THE RELATED IMAGE FILES, WILL BE RETURNED FOR ADDITIONAL PROCESSING BY THE PRODUCING PARTY.

All text files must meet the following additional requirements:

- i. Document-level .txt files (not one file per page);
- ii. Named for the beginning bates number;
- iii. Formatted with UTF-8 encoding;
- iv. Lines and breaks in the original image document should be preserved and lines should be separated by line feeds; and
- v. Do not include escape characters, tabs, embedded separators or embedded carriage returns.

c. Image Files

All image files must meet the following requirements:

- i. Image resolution of 300 DPI;
- ii. Named for the beginning bates number;
- iii. Single-page Group IV TIFF files. This is the required format for black and white images;

- iv. Single-page JPG files. This is the preferred format for color images. JPG files will not be accepted for black and white images;
- v. Bates numbers shall be branded to the images so that the numbers print; and
- vi. Each image shall have branded on it any applicable confidentiality language pursuant to the parties' protective order.

d. Labelling & Numbering Files

Image file names and Bates numbers must meet the following requirements:

- i. Have a consistent format including a consistent number of characters.
- ii. Have the same number of numerals to prevent issues with image display, Use leading zeros where necessary to achieve this.
- iii. Not use a space or special characters to separate the prefix from numbers.

Examples of acceptable formats (as long as they are consistently applied):

- i. ABC0001, DEF2987; and
- ii. ABC-0001, DEF-2987.

Example of unacceptable formats:

- i. ABC I, DEF2987; inconsistent number of numerals; and
- ii. ABC 0001, DEF 2987; space between prefix and number.

e. Date & Time Formats

For any specific date and/or time data:

- i. Submit date and time data in separate fields.
- ii. Dates should be submitted in the forma: MM/DD/YYYY (e.g., January 12, 201 I would be 01/12/2011).
- iii. Times should be submitted in the 24-hour format HH:MM:SS (e.g., 6:30 pm would be I 8:30:00).
- iv. Time offsets should be submitted in 24-hour format from Greenwich Mean Time (GMT) (e.g., GMT-05:00:00).

f. Virus Scanning

All electronic documents and production media shall be scanned and free of viruses prior to shipping.

g. Unlocking & De-crypting

In cases where electronic data has been encrypted, locked or otherwise protected, the producing party shall, whenever possible, de-crypt or unlock such files or data to allow full access to the data by third parties. In addition to producing in native or original form, to the extent the producing party has specialized or custom software that will allow ESI to be translated into usable form, such translated data should be produced as well. Any exceptions shall be included in the exception files as detailed below.

h. Exception Files

Any responsive documents or ESI that cannot be produced as specified in this document shall be identified in a separate exception log in Excel format that allows test searching and organization of data. This log File will include the following information for each exception:

- i. The file name;

- ii. The file type;
- iii. The custodian, and
- iv. The reason for the exception

Potential causes of exceptions include, without limitation, corruption, password protection, other forms of encryption, digital rights management, or access that requires use of proprietary software associated with the file.

Any exceptions that are encountered during the processing of an individual file, but do not prevent the file from being processed, must be captured in the Processing Exceptions metadata field related to the file.

i. Withheld Documents & Privilege Logs

If any document is withheld, in whole or in part, for any reason, including, but not limited to, any claim of privilege, whether work-product or attorney-client, confidentiality or trade secret, the Producing Party shall provide a privilege log setting forth separately with respect to each such document:

- i. The nature of the privilege or ground of confidentiality claimed;
- ii. The type of document;
- iii. The authors of the document;
- iv. The addressees of the document;
- v. All persons who received copies of the document;
- vi. The date of the document;
- vii. The general subject matter of the document;

- viii. The Bates and/or control number(s) assigned to the document; and
- ix. Any other information required by the Arkansas Rules of Civil Procedure or Local Rules of the Court.

The privilege log shall be provided in Excel format that allows text searching and organization of data. A separate privilege log relating to each production shall be provided.

j. Documents Containing Privileged and Non-Privileged Material

If a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the Producing Party must clearly indicate the portions as to which the privilege is claimed and provide the information required by Section 3(i) above.

4. Preparing Collections – Document Specific Requirements

This section includes additional format and metadata requirements pertaining to scanned documents, native files, email, and email attachments.

a. Preparing Scanned (Imaged) Documents

Required Format for Scanned Images

- i. Submit image files with associated text files and the metadata identified in Schedule 1 attached hereto.

Required Metadata for Scanned Images

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- i. Include the metadata fields identified in Schedule I attached hereto in the delimited data load file.
- ii. All metadata field names must be named consistently and in accordance with the value in the “Field Name” column in Schedule I attached hereto*

b. Preparing Native Files (other than email)
Required Format for Native Files

- i. Submit Microsoft Access files, other database files, and other multimedia files in native format with associated image files and metadata as detailed in Schedule I attached hereto. *Do not provide extracted text for these file types.*
- ii. Submit *all other files*, including Microsoft PowerPoint and Excel files, in native format, with associated image files, text files and the metadata identified in Schedule I attached hereto.
- iii. Whenever possible, text files must be extracted from native files. If this is not possible, the text file must be created by OCR processing of the associated image file.

Required Metadata for Native Files

- i. Include the metadata fields identified in Schedule I attached hereto in the delimited data load file.
- ii. All metadata field names must be named consistently and in accordance with the value in the “Field Name” column in Schedule I attached hereto.

c. Preparing Email & Attachments

Required Format for Email & Attachments

Email

- i. For each email, submit a MSG file, image file, text file and the metadata identified in Schedule I attached hereto.

Attachments

- i. Submit Microsoft Access files, other database files, and other multimedia files in native format with associated image files and metadata as detailed in Schedule I attached hereto. *Do not provide extracted text for these file types.*
- ii. Submit *all other files* including Microsoft PowerPoint and Excel files, in native format, with Associated Files, text files and the metadata identified in Schedule I attached hereto.
- iii. Whenever possible, text files must be extracted from native files. If this is not possible, the text file must be created by OCR processing of the associated image file.

Metadata Details for Email & Attachments

- i. Preserve the parent/child relationship in email by including a reference to all attachments.
- ii. Produce attachments as separate documents and number them consecutively to the parent email.

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- iii. Include the metadata fields identified in Schedule I attached hereto in the delimited data load file.
- iv. All metadata field names must be named consistently and in accordance with the value in the “Field Name” column in Schedule I attached hereto.

5. Submitting Your Production

Once you have prepared documents according to this guide, please follow the instructions below to submit the production to the other party(ies).

a. Acceptable Media

Submit any of the following:

- i. For productions under 10 gigabytes:
 - CD-R or CD-ROM optical disks formatted to ISO 9660 specifications;
 - DVD-ROM optical disks for Windows-compatible personal computers;
 - DVD DL optical disks for Windows-compatible personal computers; or
 - USB 2.0 flash drives.
- ii. For productions over 10 gigabytes:
 - IDE, EIDE and SATA hard disk drives, formatted in Windows-compatible, uncompressed data in a USB 2.0 external enclosure; or
 - USB 2.0 flash drives.

b. Production Transmittal Letter

For each production, the submission must be accompanied by a letter that includes all of the following:

- i. Case name (use the same case name for all productions in the case);
- ii. Party name (use the same defendant name for all productions from a given party);
- iii. Production number (number the productions sequentially, in order of production date);
- iv. Production date (date that the production was created by the party);
- v. Bates ranges of production;
- vi. Custodians from whom production originated;
- vii. Total number of records;
- viii. Total number of images, text and native files;
- ix. Report identifying native files in the production by file type;
- x. List of fields in the order in which they are listed in the data files; and
- xi. Confirmation that the number of files on the volume matches the load Files.

6. Quality Control & Improvement

Each production will be validated for conformance to the requirements in this document. Any issues shall be identified to the Producing Party. Both parties shall work together in good faith to expedite resolution of any such issues, and implement any

changes necessary to reduce issues on future productions.

7. Sources Relied Upon in Preparing Requirements

- a. Bureau of Competition Production Guide - An eDiscovery Resource (2010), <http://www.ftc.gov/bc/guidance/bcproductionguide.pdf>.
- b. *Nat'l Day Laborer Organizing Network, et al., v. United States Immigration and Customs Enforcement Agency, et al.*, 10-cv-3488 (S.D.N.Y. filed Feb. 3, 2011), available at <http://www.courthousenews.com/2011/02/04/DayLaborer.pdf>.
- c. Plaintiff's Production Format Requirements - Comments; (Studeo Legal, May 31, 2011).
- d. EDRM Production Form (Electronic Discovery Reference Model (2011), http://edrm.net/wiki2/images/EDRM_Production_Form.pdf).
- e. The Sedona Conference Glossary, E-Discovery & Digital Information Management, The Sedona Conference (3rd Ed., Sept. 2010).

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Appendix A: Production Format Requirements

Schedule 1: Metadata Requirements for Scanned Images, Native Files, Emails, and Attachments⁴

Row No.	Metadata	Description	Field Name	Metadata Required for:			
				Scanned Images	Native Files	Emails	Attachments
1	Beginning Bates Number	Beginning bates number for the document	BegDoc	X	X	X	X
2	Ending Bates Number	Ending bates number for the document	EndDoc	X	X	X	X
3	Beginning Attachment	Beginning bates number of the first document in the family group	BegAttach	X	X	X	X
4	Ending Attachment	Ending bates number of the last attachment in the family group	EndAttach	X	X	X	X
5	Case Name	Same name to be used on all productions within the case	CaseName	X	X	X	X
6	Party Name	Same name to be used on all productions from the producing party	PartyName	X	X	X	X
7	Production Number	Productions to be numbered sequentially, in chronological order	ProductionNumber	X	X	X	X
8	Production Date	Date the production was created by the producing party	ProductionDate	X	X	X	X
9	Confidentiality Designation	Confidentiality designation assigned to the document	ConfDesignation	X	X	X	X
10	Custodian	Name of person who had custody of the document at point of collection	Custodian	X	X	X	X
11	File Name	Name of the native file or attachment	FileName	-	X	-	X
12	Document Extension	Extension type of the document (e.g., xls, doc, mmap, msg)	DocExt	-	X	X	X
13	File Size	Size of the document in bytes	FileSize	-	X	-	X

⁴ Where metadata other than that listed in this Schedule 1 exists for any document, the parties shall meet and confer about whether and how such metadata will be produced (e.g., metadata revealing geographic location where a digital picture was taken or the name/type of the device from which the picture was taken).

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Appendix A: Production Format Requirements

14	Document Title	Title field from the document metadata	Title	-	X	-	X
15	Author	Author field from the document metadata	Author	-	X	-	X
16	Document Subject	Subject field from the document metadata	Subject	-	X	-	X
17	Company	Company field from the document metadata	Company	-	X	-	X
18	Category	Category field from the document metadata	Category	-	X	-	X
19	Keywords	Keywords field from the document metadata	Keywords	-	X	-	X
20	Comments	Comments field from the document metadata	Comments	-	X	-	X
21	Date Created	Date from the document metadata (Created field)	DocDate	-	X	-	X
22	Time Created	Time from the document metadata (Created field)	TimeCreated	-	X	-	X
23	Date Modified	Date from the document metadata (Modified Date field)	DateModified	-	X	-	X
24	Time Modified	Time from the document metadata (Modified Date field)	TimeModified	-	X	-	X
25	Date Last Accessed	Date from the document metadata (Last Access Date property)	DateLastAccessed	-	X	-	X
26	Time Last Accessed	Time from the document metadata (Last Access Date property)	TimeLastAccessed	-	X	-	X
27	Date Printed	Date the file was last printed from the document metadata (Printed field)	DatePrinted	-	X	-	X
28	Time Printed	Time the file was last printed from the document metadata (Printed field)	TimePrinted	-	X	-	X
29	Time Offset	Time offset of the source system relative to Greenwich Mean Time	TimeOffset	-	X	X	X
30	Embedded Data	Message indicating that tracked changes, hidden fields, or data are present	EmbeddedData	-	X	-	X
31	Hash Value	Unique identifier created for electronic file	HashValue	-	X	X	X
32	Parent Document ID	Beginning Bates number of parent for child items in family group	ParentID	-	-	-	X
33	Has Attachments	Indicates if email has attachments	HasAttachments	-	-	X	-

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Appendix A: Production Format Requirements

34	Number of Attachments	Number of attachments for a particular record	AttachmentCount	-	-	-	X	-
35	Attachment IDs	Beginning Bates of all child items in family group	Attachment	-	-	-	X	-
36	Attachment Name(s)	Lists the file name(s) of each attachment	AttachmentNames	-	-	-	X	-
37	From	Author of the email message	From	-	-	-	X	-
38	To	Recipient(s) of the email	To	-	-	-	X	-
39	CC	Person(s) copied on the email	CC	-	-	-	X	-
40	BCC	Person(s) blind copied on the email	BCC	-	-	-	X	-
41	Email Subject	Subject of the email	EmailSubject	-	-	-	X	-
42	Date Received	Date the email was received	DateReceived	-	-	-	X	-
43	Time Received	Time the email was received	TimeReceived	-	-	-	X	-
44	Date Sent	Date the email was sent	DateSent	-	-	-	X	-
45	Time Sent	Time the email was sent	TimeSent	-	-	-	X	-
46	Email Header	Contents of the email message header	Header	-	-	-	X	-
47	Message ID	Unique identifier of emails in mail stores	MessageID	-	-	-	X	-
48	Email Conversation	Normalized subject of e-mails (RE and FW are removed)	EmailConversation	-	-	-	X	-
49	Email Conversation Index	E-mail thread created by the email system	ConversationIndex	-	-	-	X	-
50	Importance Flag	Importance field extracted from the email	ImportanceFlag	-	-	-	X	-
51	Read Flag	Read status of an email	ReadFlag	-	-	-	X	-
52	Message Class	Determines the form that the email system (e.g., Outlook) uses to display the item	MessageClass	-	-	-	X	-
53	Flag Status	Status of any flags associated with the email	FlagStatus	-	-	-	X	-
54	Delivery Receipt	Indicates if the email author turned on delivery receipt request notification	DeliveryReceipt	-	-	-	X	-
55	Read Receipt	Read receipt request notification	ReadReceipt	-	-	-	X	-

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Appendix A: Production Format Requirements

56	Source Media Type	Type of media used to store the document at point of collection (e.g., hard drive, thumb drive, cloud storage, paper (hard copy))	SourceMedia Type	X	X	X	X
57	Source Media Location	For scanned images, physical location of source document at point of collection (e.g., identification of file cabinet and file folder) For ESI, location of source Electronic Media at point of collection (e.g., remote server, home office server, iphone)	SourceMediaLoc	X	X	X	X
58	Source Folder Path	Path to document or email within source electronic media or source mail file structure	SourceFolderPath	-	X	X	X
59	Native File Path	Path to native file within production electronic media	NativeFilePath	-	X	X	X
60	Text File Path	Path to the text file within the production electronic media	TextFilePath	X	X	X	X
61	Page Count	Total number of pages in document. If scanned image, number of pages of image. If native file, number of pages of native file.	PageCount	X	X	X	X
62	Processing Exceptions	Exceptions for document with issues related to processing or extraction	Exceptions	X	X	X	X
63	Redacted	Indicates if document contains redacted information (yes/no)	Redacted	X	X	X	X
64	Privileged	When privileged document has been replaced by slip sheet, indicates that document has been withheld on basis of privilege (yes/no)	Privileged	X	X	X	X

APPENDIX G

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS

NO.: CV-2004-294-3

EVELYN J. CHIVERS, HAVEN and LINDA TYSON,
MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE
SHERROUSE, BILL FEELY, DALE DROSTE, JARL
CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA
LANG, PHILLIP and CYNDI ALEXANDER, BERNE
FRANCIS, and DIANE THORNTON, Individually and as
Class Representatives on Behalf of All Similarly
Situated Persons,
Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

ORDER

ON THIS DAY, the Court considered Plaintiffs' Motion to Defer Consideration of Defendants' Motions to Dismiss and Other Substantive or Procedural Motions Pending Entry of Scheduling Order.

After reviewing the pleadings, arguments of counsel, and other matters before the Court, the Court finds that Plaintiffs' Motion to Defer Consideration of Defendants' Motions to Dismiss and Other Substantive or Procedural Motions Pending Entry of Scheduling Order should be GRANTED.

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IT IS THEREFORE ORDERED ADJUDGED AND DECREED that all responses, replies and other briefing deadlines related to all Defendants' motions to dismiss and other substantive or procedural motions are hereby suspended until such time as the Court holds a scheduling conference and enters a comprehensive scheduling order that will address briefing deadlines for all motions and issues.

DATED this 15th day of November, 2004.

KIRK D. JOHNSON
HONORABLE KIRK D. JOHNSON
Miller County Circuit Judge

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APPENDIX H

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS CIVIL DIVISION

DOCKET NO. CV-2004-294-3

EVELYN CHIVERS, HAVEN and LINDA TYSON,
MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE
SHERROUSE, BILL FEELY, DALE DROSTE, JARL
CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA
LANG, PHILLIP and CYNDI ALEXANDER, BERNE
FRANCIS, and DIANNE THORNTON, Individually and as
Class Representatives on Behalf of All Similarly
Situated Persons,
Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

AMENDED SCHEDULING ORDER

It is hereby Ordered that the following schedule of deadlines are in effect until further order of this Court since the parties were unable to agree to an agreed scheduling order. This schedule will be strictly adhered to by all parties. Parties may present a Scheduling Order that amends this order by agreement if it does not interfere with the Court's scheduled hearing dates. The Court will not deviate from this order without good cause shown except by agreement of the parties.

- February 25, 2005; Hearing on Motions of *Forum Non Conveniens*;
- April 11, 2005; Deadline for completion of jurisdictional or venue discovery for Defendants who have filed Rule 12(b)(2) and Rule 12(b)(3) pleadings;
- April 12, 2005; Deadline for Plaintiffs to file Responses to Defendants' Motions to Dismiss pursuant to Rule 12(b)(2) and Rule 12 (b)(3);
- April 22, 2005; Deadline to file Responses to Plaintiffs' Responses to Defendants' Motions to Dismiss pursuant to Rule 12(b)(2) and/or Rule 12 (b)(3);
- May 2, 2005; Hearing on Defendants' Motions to Dismiss pursuant to Rule 12(b)(2) and Rule 12 (b)(3);
- May 20, 2005; Deadline to add additional parties;
- June 1, 2005; Deadline for Plaintiffs to designate expert witnesses for Class Certification hearing;
- June 10, 2005; Deadline for Defendants to designate expert witness for Class Certification hearing;
- June 20, 2005; Deadline for Plaintiffs to designate Rebuttal experts to Defendants' expert witnesses for Class Certification hearing;

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- June 25, 2005; Deadline for Plaintiffs to file Amended Class Action Complaint without leave of Court;
- June 30, 2005; Deadline for Plaintiffs to file Motion for Class Certification;
- July 5, 2005; Deadline for Defendants to file any supplemental or amended Motion to Dismiss pursuant to Rule 8(a) and Rule 9(b);
- July 6, 2005; Deadline to complete discovery on issue of class certification;
- July 10, 2005; Deadline for Defendants to file Responses to Plaintiffs' Motion for Class Certification;
- July 15, 2005; Deadline for Plaintiff to file Response to any supplemental or amended Rule 8(a) or Rule 9(b) Motions;
- July 20, 2005; Deadline for Plaintiffs to File Replies to Defendants' Responses to Plaintiffs' Motion for Class Certification;
- July 25, 2005; Deadline for Defendants to file Replies to Plaintiffs' Response to Defendants' Motions to Dismiss under Rule 8(a) and Rule 9(b);
- July 26, 2005; Plaintiffs to make all of their witness available for deposition prior to this date;

- August 1, 2005; Defendants to make all of their witnesses available for deposition prior to this date.
- August 12, 2005; Parties to exchange exhibit lists and pre-marked exhibits for class certification hearing and Rule 8(a) and Rule 9(b) hearings.
- August 22, 2005; Hearing date for Motions to Dismiss under Rule 8(a) and Rule 9(b);
- August 23, 2005; Hearing date for Motion for Class Certification;
- September 5, 2005; Deadline for parties to file proposed findings of fact and conclusions of law;
- September 9, 2005; Plaintiffs to designate Expert Trial Witnesses and provide Defendants with copies of Experts Reports.
- October 10, 2005; Defendants to designate Expert Trial Witnesses and provide Plaintiffs with copies Expert's Reports and Deadline for Motions for Summary Judgment;
- November 1, 2005; Deadline for Motions for unresolved Discovery issues and Plaintiffs to file Response to Defendants' Motions for Summary Judgment;
- January 5, 2006; Deadline for Plaintiffs to amend pleadings and to identify trial witnesses;

<u>January 25, 2006;</u>	Deadline for Defendants to file Response to amended pleadings and to identify trial witnesses;
<u>February 1, 2006;</u>	Discovery deadline;
<u>February 15, 2006;</u>	Deadline for parties to file Motions in Limine and to Exchange Pre-marked Trial Exhibits;
<u>March 20, 2006;</u>	Final Pre-trial Conference
<u>March 30, 2006;</u>	Trial Date

The Court has extended some scheduling dates beyond the dates of the scheduled hearings in August. The Court, in extending the scheduling order beyond the August hearing dates, wants to give the parties adequate notice of important deadlines should the class be certified and the litigation continues. The Court wants counsel to have reserved the scheduled trial date on their calendars to avoid any potential conflicts. The Court fully expects amendments to the scheduling order after the class certification and other hearings are completed in August should this be necessary to more appropriately address discovery issues.

The Court finds that class and merits discovery should proceed forthwith. The Court is aware that this finding could result in short term expenses being greater for some Defendants. However, in the long run, the Court is convinced that proceeding with merit discovery in conjunction with class discovery will ultimately be more convenient and less expensive to all parties remaining in the litigation. The Court believes that it will save duplication of effort in the scheduling of the witnesses, travel expenses,

reporter expenses and will reduce the difficulties in coordinating the schedules of counsel for the multiple parties.

The Court finds that Defendants may have legitimate concerns over proprietary information and trade secrets that might be required to be disclosed during the discovery process. The Plaintiffs shall attempt to reach agreement with the individual Defendants for the entry of a Protective Order to maintain the confidentiality of trade secrets of that Defendant which might be disclosed to other Defendants, competitors or the public during the discovery process. The Court will enter such Protective Orders that are deemed fair, proper and necessary to protect the confidentiality of trade secrets or proprietary information of any Defendant. If the parties cannot agree on documents that should be given this status, a privilege log may be prepared and submitted to the Court for an in camera review of the alleged privileged material. The Court admonishes the Defendants to refrain from a wholesale designation of documents as privileged which do not meet the standards of trade secrets pursuant to Arkansas case law. Each document which is designated must include a detailed and specific explanation of why it should be accorded treatment as a trade secret. General explanations will not suffice and submissions that do not meet these standards will be denied.

The Court further finds that it is the duty of each attorney in this litigation to provide complete and truthful arguments in behalf of their clients. The Court will not tolerate attempts to mislead the Court as to status of similar litigation in this or other jurisdictions or for counsel to lack good faith in the arguments he or she makes in this litigation. Violation

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of this standard will be dealt with pursuant to Rule 37 or other appropriate method.

The parties are Ordered to have their individual clients present at the final Pre-trial conference. Corporate clients are Ordered to have an officer with full authority to act for the client present at the final Pre-trial hearing.

Dated this the 10th day of January, 2005.

KIRK D. JOHNSON
KIRK D. JOHNSON
Circuit Judge

APPENDIX I

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS

Case No. 2004-294-3

EVELYN J. CHIVERS, *et al.*, AS CLASS REPRESENTATIVES
ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,
Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

**PARTIES' AGREED PROPOSED REVISED CASE
SCHEDULING ORDER¹**

February 10, 2006	Deadline for Parties to Submit An Agreed Protective Order
February 24, 2006	Deadline for Parties to object or answer any discovery that was outstanding at the time

¹ The Defendants expressly reserve and do not waive the arguments set forth in their prior filings regarding the appropriate scheduling, timing and sequencing of deadlines and hearings, including but not limited to their constitutional and due process arguments. *See, e.g.*, State Farm Defendants' Motion for a Scheduling Conference (filed Nov. 18, 2004); Defendants' Response to Plaintiffs' Motion for Entry of Scheduling Order (filed Dec. 16, 2004). However, notwithstanding those arguments and objections to the scheduling orders the Court ultimately issued, the Defendants recognize that the Court implicitly overruled Defendants' arguments in the Scheduling Order (entered Jan. 7, 2005), the Amended Scheduling Order (entered Jan. 10, 2005), and the Second Amended Scheduling Order (entered Feb. 16, 2005).

	this action was removed to federal court; Deadline for the Parties to supplement any discovery response that had been answered before this action was removed to federal court. (The Court will not entertain motions to compel discovery filed prior to February 24, 2006.); ²
April 3, 2006	Deadline to add additional parties without leave of court; ³
June 23, 2006	Deadline for Plaintiffs to designate expert witnesses in support of class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing;
July 21, 2006	Deadline for Defendants to designate expert witnesses in opposition to class certification, to provide expert report summaries and to designate fact

² This deadline is not intended to prevent the parties from: (a) further supplementing discovery; (b) filing motions for sanctions; (c) serving new discovery; (d) serving third-party discovery; (e) taking depositions prior to February 24, 2006; (f) meeting and conferring regarding outstanding discovery.

³ Plaintiffs reserve the right to seek leave of court to add additional parties after this date. In addition, this deadline should not be deemed to preclude any Defendant from filing an objection to the addition of further parties.

	witnesses that may be offered by Defendants live or via affidavit at the class certification hearing;
August 11, 2006	Deadline for Plaintiffs to designate rebuttal expert witnesses in support of class certification, to provide rebuttal expert report summaries and to designate rebuttal fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing;
August 26, 2006	Deadline to complete depositions of Plaintiffs' expert witnesses in support of class certification and any fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;
September 8, 2006	Deadline to complete depositions of Defendants' expert witnesses in opposition to class certification and any fact witnesses Defendants intend to call live or via affidavit at the class certification hearing;
September 15, 2006	Deadline for Plaintiffs to file Amended Class Action Complaint without Leave of Court;
September 21, 2006	Deadline to complete depositions of Plaintiffs' rebuttal expert witnesses in support of class certification and any rebuttal

	fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;
September 29, 2006	Deadline for Plaintiffs to file Motion for Class Certification; ⁴ and Deadline for Defendants to file renewed Motions to Dismiss under Rules 8(a), 9(b), 12(b)(6) and 12(b)(1) and Motions to Sever.
October 13, 2006	Deadline to complete discovery on issue of class certification, except for the depositions of certain expert and fact witnesses addressed by separate preceding deadlines (the inclusion of this deadline is not meant to imply that discovery is in any way limited to class certification discovery or that merits discovery will be stayed after this deadline);
October 27, 2006	Deadline for Plaintiffs to file Responses to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(6) and 12(b)(1) and Defendants' Motions to Sever; Deadline for Defendants to File Response to Plaintiffs' Motion for Class Certification;

⁴ Without conceding that Arkansas law requires the submission of a trial plan, Plaintiffs agree to submit a trial plan with their Motion for Class Certification.

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November 10, 2006	Deadline for Defendants to file Reply Briefs to Plaintiffs' Response to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(6) and 12(b)(1) and Defendants' Motions to Sever; Deadline for Plaintiffs to file Reply to Defendants' Response to Plaintiffs' Motion for Class Certification;
November 17, 2006	Parties to exchange and file with the Court exhibit lists and pre-marked exhibits for class certification hearing and Rule 8(a), 9(b), 12(b)(1), 12(b)(6) and Motion to Sever hearings;
November 28, 2006	Hearing date for Motions to Dismiss under Rule 8(a), 9(b), 12(b)(1), 12(b)(6) and Motions to Sever; ⁵
November 29-30, 2006	Hearing date for Motion for Class Certification;
January 12, 2007	Deadline for parties to file proposed findings of fact and conclusions of law related to class certification.
	PARTIES DO NOT PROPOSE ANY DATES BEYOND CLASS CERTIFICATION.

⁵ Defendants reserve the right to request that briefing and hearing on the above-referenced motions be scheduled on a earlier date.

Dated: January 27, 2006

Agreed to in substance and form:

[Illegible]
One of the Attorney's for Plaintiffs

[Illegible]
One of the Attorneys for Allstate
Defendants

[Illegible]
One of the Attorneys for State Farm
Defendants

[Illegible]
One of the Attorneys for the Foremost
Defendants

[Illegible]
One of the Attorneys for Nationwide
Defendants

[Illegible]
One of the Attorneys for Farm Bureau
Defendants

[Illegible]
One of the Attorneys for Chuob
Defendants

[Illegible]
One of the Attorneys for Farmers
Defendants

/s/ Kirk D. Johnson 1/27/06
Circuit Judge

APPENDIX J

IN THE CIRCUIT COURT OF
MILLER COUNTY, ARKANSAS
CIVIL DIVISION

NO. CV-2004-294-3

EVELYN CHIVERS, HAVEN and LINDA TYSON,
MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE
SHERROUSE, BILL FEELY, DALE DROSTE,
JARL CARTWRIGHT, BRAD SCHOONOVER, JOHN and
GLORIA LANG, PHILLIP and CYNDI ALEXANDER,
BERNE FRANCIS, and DIANNE THORNTON,
Individually and as Class Representatives on
Behalf of All Similarly Situated Persons,
Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

AMENDED SCHEDULING ORDER

It is hereby Ordered that the following schedule of deadlines are in effect until further order of this Court since the parties were unable to reach agreement upon a mutually agreeable scheduling order. This schedule will be strictly adhered to by all parties. Parties may present a Scheduling Order that amends this order by agreement if it does not interfere with the Court's scheduled hearing dates. The Court will not deviate from this order without good cause shown except by agreement of all of the parties.

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- November 1, 2007: Deadline to add additional parties without leave of Court;
- November 26, 2007: Deadline for Plaintiffs to designate expert witnesses in support of class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing.
- December 13, 2007: Deadline for Defendants to complete production of claim files and file under seal with the Court a list containing the names and addresses of the policyholders whose files have been provided, as more fully explained in the Court's September 14, 2007;
- January 14, 2008: Deadline for Defendants to designate expert witnesses in opposition to class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Defendants live or via affidavit at the class certification hearing;
- February 15, 2008: Deadline for Plaintiffs to designate rebuttal expert witnesses in support of class certification, to provide rebuttal

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expert report summaries and to designate rebuttal fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing;

April 14, 2008:

Deadline for Plaintiffs to supplement expert reports to include analysis of claim files;

May 14, 2008:

Deadline for Defendants to supplement expert reports to include analysis of claim files;

May 15, 2008:

Deadline to complete depositions of Plaintiffs' expert witnesses in support of class certification and any fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;

June 16, 2008:

Deadline to complete depositions of Defendants' expert witnesses in opposition to class certification and any fact witness Defendants intend to call live or via affidavit at the class certification hearing;

June 23, 2008:

Deadline for Plaintiffs to file Amended Class Action Complaint without leave of Court;

July 1, 2008:

Deadline to complete depositions of Plaintiffs' rebuttal expert witnesses in support of

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class certification and any rebuttal fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;

August 1, 2008:

Deadline for Plaintiffs to file Motion for Class Certification; and deadline for Defendants to file renewed Motions to Dismiss under rules 8(a), 9(b), 12(b)(1) and 12(b)(6) and Motions to Sever;

August 1, 2008:

Deadline to complete discovery on issue of class certification and fact witnesses addressed by separate preceding deadlines (the inclusion of this deadline is not meant to imply that discovery is in any way limited to class certification discovery or that merits discovery will be stayed after this deadline);

September 1, 2008:

Deadline for Plaintiffs to file Responses to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(1) and 12(b)(6) and Defendants' Motions to Sever; Deadline for Defendants to File Response to Plaintiffs' Motion for Class Certification;

September 21, 2008:

Deadline for Defendants to file Reply Briefs to Plaintiffs'

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Response to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(1) and 12(b)(6) and Defendants' Motions to Sever; Deadline for Plaintiffs to file Reply to Defendants' Response to Plaintiffs' Motion for Class Certification;

September 28, 2008: Parties to exchange and file with the Court exhibit lists and pre marked exhibits for class certification and Rule 8(a), 9(b), 12(b)(1), 12(b)(6) and Motion to Sever hearings;

October 28, 2008: Hearing date for Motions to Dismiss under Rule 8(a), 9(b), 12(b)(1) and 12(b)(6) and Motions to Sever;

October 29, 2008: Hearing date for Motion for Class Certification;

November 13, 2008: Deadline for parties to file proposed findings of fact and conclusions of law related to class certification.

Dated this the 16th day of October, 2007.

/s/ Kirk D. Johnson
CIRCUIT JUDGE

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APPENDIX K

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS

No. CV-2004-294-3

EVELYN J. CHIVERS, *et al.*, Individually and
as Class Representatives on Behalf of
all Similarly Situated Persons,

Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,

Defendants.

REVISED CASE SCHEDULING ORDER

It is hereby Ordered that the following schedule of deadlines are in effect until further order of this Court. This schedule will be strictly adhered to by all parties. The Court will not deviate from this Order without good cause shown.

March 30, 2009	Deadline for the Chubb Defendants to file a renewed motion to dismiss for lack of subject matter jurisdiction.
April 3, 2009	Deadline for the Foremost Defendants to file a renewed motion to dismiss for lack of subject matter jurisdiction.

April 29, 2009	Deadline for Plaintiffs to file Motion for Class Certification. Deadline for Plaintiffs to file and serve expert reports and/or expert affidavits for any expert Plaintiffs intend to rely upon at the class certification hearing. The filing of Plaintiffs' expert reports and/or expert affidavits shall constitute Plaintiffs' designation of expert witnesses in support of class certification.
April 29, 2009	Deadline for Defendants to file renewed Motions to Dismiss under Rule 8(a), 9(b), and 12(b)(6) and Motions to Sever.
April 14, 2009	Deadline for Plaintiffs to file their Response to the Chubb Defendants' renewed motions to dismiss for lack of subject matter jurisdiction.
April 20, 2009	Deadline for Plaintiffs to file their Response to the Foremost Defendants' renewed motion to dismiss for lack of subject matter jurisdiction.
April 24, 2009	Deadline for the Chubb Defendants to file their Reply on their renewed motions to dismiss for lack of subject matter jurisdiction.

May 20, 2009	Deadline for Defendants to complete depositions of Plaintiffs expert witnesses who have submitted expert reports and/or expert affidavits in support of class certification.
April 29, 2009	Deadline for the Foremost Defendants to file their Reply on their renewed motion to dismiss for lack of subject matter jurisdiction.
May 4, 2009 at 9:00 a.m.	Hearing on the Chubb and Foremost Defendants' renewed motions to dismiss under Rule 12(b)(1) ¹ ; Hearing on the Farmers' claim file production issue.
May 27, 2009	Deadline for Defendants to File Response to Plaintiffs' Motion for Class Certification; Deadline for Defendants to file and serve expert reports and/or expert affidavits for any expert Defendants intend to rely upon at the class certification hearing. The filing of Defendants' expert reports and/or expert affidavits

¹ The Plaintiffs have stated they intend to seek deferral of Chubb's and Foremost's renewed motions to dismiss under Rule 12(b)(1) because these motions potentially delve into the merits of the litigation prior to class certification. The Court will examine this issue prior to the May 4, 2009 hearing and may cancel the hearing if the issues presented by the Rule 12(b)(1) motions delve into the merits.

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	shall constitute Defendants' designation of expert witnesses in support of class certification.
May 27, 2009	Deadline for Plaintiffs to file Responses to Defendants' renewed Motions to Dismiss under Rules 8(a), 9(b), and 12(b)(6) and Defendants' Motions to Sever;
June 12, 2009	Deadline for Plaintiffs to complete depositions of Defendants' expert witnesses who have submitted expert reports and/or expert affidavits in opposition to class certification.
June 17, 2009	Deadline for Plaintiffs to file Reply to Defendants' Response to Plaintiffs' Motion for Class Certification; Deadline for Plaintiffs to file and serve expert reports and/or expert affidavits for any rebuttal expert Plaintiffs intend to rely upon at the class certification hearing. The filing of Plaintiffs' rebuttal expert reports and/or expert affidavits on this date shall constitute Plaintiffs' designation of rebuttal expert witnesses in support of class certification.
June 17, 2009	Deadline for Defendants to file Reply Briefs to Plaintiffs' Re-

	<p>response to Defendants' Motions to Dismiss under Rules 8(a), 9(b). and 12(b)(6) and Defendants' Motions to Sever;</p>
<p>June 24, 2009</p>	<p>Deadline for Defendants to complete depositions of Plaintiffs' rebuttal expert witnesses who have submitted rebuttal expert reports and/or expert affidavits in support of class certification.</p>
<p>June 24, 2009</p>	<p>Deadline to complete discovery on issue of class certification (the inclusion of this deadline is not meant to imply that discovery is in any way limited to class certification discovery or that merits discovery will be stayed after this deadline);</p>
<p>June 26, 2009</p>	<p>Parties to exchange exhibit lists and pre-marked exhibits for the class certification hearing and Rule 8(a), 9(b) and 12(b)(6) and Motion to Sever hearings. The Court will only consider argument of counsel and written submissions, including affidavits and deposition testimony, at the June 30th and July 1st hearings. All exhibits Plaintiffs and Defendants intend to rely upon in support or opposition to Plaintiffs' Motion for Class Certification and Defendants'</p>

	Motions to Dismiss under Rule 8(a), 9(b) and 12(b)(6) and Motion to Sever hearings shall be exchanged between the parties on June 26, 2009, and then offered into evidence at the June 30th and July 1st hearings.
June 30, 2009 at 9:00 a.m.	Hearing date for Defendants' renewed Motions to Dismiss under Rule 8(a), 9(b) and 12(b)(6) and Motions to Sever. ²
June 30 - July 1, 2009 at 9:00 a.m.	Hearing date for Plaintiffs' Motion for Class Certification.
July 20, 2009	Deadline for parties to file proposed findings of fact and conclusions of law related to Plaintiffs' Motion for Class Certification. Deadline for parties to submit proposed orders related to Defendants' renewed Motions to Dismiss under Rule 8(a), 9(b) and 12(b)(6) and Motions to Sever.

² Plaintiffs have stated that they intend to seek deferral of certain motions to dismiss filed by Defendants on the basis that these motions delve into the merits of Plaintiffs' claims prior to class certification. The Chubb Defendants and Foremost Defendants contend that the Court should hear the threshold issue of subject matter jurisdiction at this time and that such issue does not require a determination of the merits of Plaintiffs' claims. The Court will examine this issue prior to the May 4, 2009 hearing and may cancel the hearing if the issues presented by the Rule 12(b)(1) motions delve into the merits of Plaintiffs' claim.

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	IF AND WHEN IT MAY BECOME NECESSARY, THE COURT WILL SCHEDULE ADDITIONAL DEADLINES.
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The Court fully expects amendments to this Revised Scheduling Order after the June 30 - July 1, 2009 dates currently scheduled for the Class Certification Hearing.

Dated this 3rd day of April, 2009.

/s/ Kirk D. Johnson
Honorable Kirk D. Johnson
Circuit Court Judge

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APPENDIX L

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS CIVIL DIVISION

NO.: CV-2004-294-3

EVELYN J. CHIVERS, HAVEN and LINDA TYSON,
MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE
SHERROUSE, BILL FEELY, DALE DROSTE, JARL
CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA
LANG, PHILLIP and CYNDI ALEXANDER, BERNE
FRANCIS, and DIANE THORNTON, Individually and as
Class Representatives on Behalf of All Similarly
Situated Persons,
Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

**ORDER DENYING PLAINTIFFS' MOTION
FOR CONTEMPT ORDER GRANTING
PLAINTIFFS' MOTION TO COMPEL
PRODUCTION OF CLAIM FILES**

On the 4th day of May, 2009, came on for hearing the Plaintiffs' Motion for Contempt and Motion to Compel against Farmers and Defendant's Motion for Protective Order and Motion to Enforce Discovery Agreement and after a careful consideration of the Motions, Responses, exhibits, briefs and arguments of counsel, the Court finds as follows:

Motion for Contempt

The Court finds that the parties entered into an agreement to produce a statistical sampling of case files to help reduce litigation costs in this case. The parties agreed that two thousand case files would be produced in lieu of all claim files as requested in Plaintiffs' discovery requests. The Court recalls that the ostensible premise for this agreement was that a statistical sampling would be used to establish damages in this case if the class were certified thus saving the Defendant millions of dollars in production costs.

To establish that the Defendant should be found in contempt, Plaintiffs must show that the Defendant failed to meet its obligations under the agreement. The Defendant, under the terms of the agreement, was required to provide Plaintiffs a numbered list of all case files where property damage claims were made during the class period. The Defendant provided the numbered list per the agreement. The satisfaction of this condition placed the burden onto the Plaintiffs to select two thousand case files from this list before additional conditions were required to be met by Defendant. The Plaintiffs failed to select the two thousand files as required in the agreement claiming a lack of data to assist in the selection process. However, in the original agreement, there was no requirement that Defendant produce the additional data requested by Plaintiffs. Since Plaintiffs did not satisfy their duties under the agreement, the Court finds that the Defendant has not failed in its obligations pursuant to the agreement and the Plaintiffs' Motion for Contempt is DENIED.

Motion to Compel

During the course of the litigation, the Court reviewed a number of objections by the Defendant to Plaintiffs' Motion for Discovery. Defendant has alleged that the production of all claim files as requested in Plaintiffs' discovery would be overly burdensome and expensive to the Defendant. The Court was advised that a statistical method of calculating damages had been followed in the Burgess case in Oklahoma and that a statistical sampling would suffice in this case. Based upon this understanding, and the agreement between the parties, the Court found that each Defendant should be allowed to produce two thousand case files to reduce the legal fees and costs of production which were alleged by the Defendant to be exorbitant.

The Defendant acknowledges that Plaintiffs may have had the impression that by producing these limited case files it was agreeing to use of the statistical method of calculating damages at the trial of this case. At this point, the Defendant had a duty to advise the Court that it would object to this method of calculating damages so the Court could determine if the modified discovery procedure would be sufficient to allow resolution of the issues at trial. The Defendant chose to "lie behind the log" and keep silent about its intentions to object to the use of the statistical sampling method and reduce their costs of discovery. By this tactic, the Court was left with the distinct understanding that it was approving a procedure helpful to the Defendant by substantially reducing the costs of this litigation, helpful to the Plaintiff to allow reduced time and expense in examining all claim files, and streamlining damage issues at trial if the class were certified and to help

conserve valuable trial time for the Court in the process.

Rule 29(2) allows the Court to approve or reject any modification of discovery procedures. The comments to that section are clear that the Court has the discretion to modify, amend or reject those agreements if the situation is not conducive to a fair resolution of the case. The Court does not believe that the gamesmanship portrayed by the Defendant towards the Court is acceptable conduct of established principals of fair play and plain dealing. The Court finds that the agreement between the parties to provide two thousand case files in lieu of production of hundreds of thousands of case files is hereby rejected. The Defendant has elected to contest the validity of the statistical sampling method for damages and it cannot complain now that it will have to comply with reasonable discovery requests as it would in any other case.

The Plaintiffs' Motion to Compel is hereby GRANTED. Therefore, Farmers is ORDERED to produce to Plaintiffs all claim files requested by Plaintiffs in their July 7, 2006 discovery requests within 180 days. It is further ORDERED that Defendant shall produce these files to Plaintiffs in single page .TIFF files with a load file with document boundaries. All costs of this production shall be borne by the Defendant, Farmers.

The Defendant's Motion for Protective Order and Motion for an Order to Enforce Discovery Agreement is hereby DENIED in its entirety.

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs' Motion for Contempt and Sanctions is hereby denied; the Plaintiffs' Motion to

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Compel is granted; the Defendant is ordered to produce all claim files in the format stated above within 180 days, Defendant's Motion for Protective Order and Order to Enforce Discovery Agreement is denied.

Dated this 1st day of July, 2009.

/s/ Kirk D. Johnson
KIRK D. JOHNSON
CIRCUIT JUDGE

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APPENDIX M

IN THE CIRCUIT COURT OF
MILLER COUNTY, ARKANSAS

Case No. CV-2005-59-3A

JAMES BASHAM, *et al*
Plaintiffs

v.

COMPUTER SCIENCES CORPORATION, *et al*
Defendants

HEARING

Held July 1, 2010

On the 1st day of July, 2010, the above styled
cause comes on to be heard before the
Honorable Kirk D. Johnson, Circuit Judge of the
Eighth Judicial District–South, held in
Texarkana, Miller County, Arkansas.

Tabbetha A. Kopech, CCR#548
Official court Reporter
Circuit Court, Eighth Judicial District-South
Miller County Courthouse
400 Laurel Street, Room 304
Texarkana, Arkansas 71854

* * * *

[16] February 22nd, before we appeared here and made the agreements that we did on May 10th, we should have been told that Mr. Basham is no longer with us.

And our position is we can go ahead and present our arguments on the pending motions, but we don't believe the Plaintiffs have authority at this point in time to be representing anybody in this Court and they have not had the authority to represent anybody since January 31, 2010 because the power of attorney terminated on death. So I can proceed and am prepared to proceed. We don't really know what to do about the Motion to Compel, but I felt like I needed to bring this to the Court's attention. We can go ahead and present our arguments on the motions, but I wanted to make sure everybody understood what our position on this is going to be. And let Mr. Johnson respond.

THE COURT: Mr. Johnson?

(Mr. John Goodson enters the hearing.)

MR. JOHNSON: Your Honor, I can understand Ms. Fletcher's frustration with that, and all I can say is, in addition to the fact that we are within the year to do so, to supplement, that we—the administrator, it's my understanding, is full willing to participate. We plan on him participating. We have every intent of maintaining the lawsuit. For strategic reasons and because there was no obvious efforts to find out that information, we didn't disclose it to her, and she's correct, and to the extent that is considered inappropriate, I apologize to her, I apologize to the Court as well, but we don't believe that it is inappropriate to do. And in terms of whether these motions still are applicable and appropriate, we

believe that they absolutely are, and that's why we're
sere is because if we submit pleadings to substitute
parties, all of these motions are still valid. I mean,
the litigation is still active. And none of the motions,
with the exception of perhaps the one that's seeking
to redepose Mr. Basham, are still -- none of them are

* * * *

CERTIFICATE

I, Tabbetha A. Kopech, Official Court Reporter for
the Circuit Court of Miller County, Arkansas, Eighth
Judicial District-South, certify that I recorded the
proceedings by stenomask in the case of Basham, et
al v. Computer Sciences Corporation, et al, Case No.
CV-2005-59-3A, on July 1, 2010, before the Honorable
Kirk D. Johnson, in Texarkana, Miller County,
Arkansas;

That said recording has been reduced to a
transcription writing by me, and the foregoing pages
numbered 1 through 51 constitute a true and correct
transcript of the proceedings held to the best of my
ability, with attached exhibits.

WITNESS my hand and seal as such Court
Reporter on this 11th day of July, 2010.

/s/ Tabbetha A. Kopech
Tabbetha A. Kopech, CCR#548
Miller County Courthouse
400 Laurel Street, Room 304
Texarkana, Arkansas 71854
Telephone: (870) 774-7722

APPENDIX N

AFFIDAVIT OF CHRISTOPHER BULGER

STATE OF MICHIGAN §
§
COUNTY OF KENT §

I, Christopher Bulger, after having been duly sworn, do under oath depose and state as follows:

1. “I am over the age of 21 years and am otherwise competent to make this affidavit.

2. “I am employed as the Claims Records Manager by Farmers Insurance Exchange. As the Claims Records Manager, I either have personal knowledge of the facts stated herein, or my statements are based upon my review of the business records of Farmers Insurance Exchange, Texas Farmers Insurance Company, Farmers Insurance Company, Inc., and Farmers Group, Inc. (hereinafter, “Farmers”).¹

ORDER COMPELLING PRODUCTION OF ALL CLAIM FILES

3. “In Plaintiffs’ July 7, 2006 Requests for Production of Documents to Farmers, Plaintiffs requested that Farmers produce (in single page TIFF format with document boundaries and load files) the following documents: ‘for each State in the United States where you conduct business . . . each and every closed HOMEOWNER’S CLAIM file’ during the ‘RELEVANT TIME PERIOD,’ which is defined as the period from ‘September 6, 1996 to the date these

¹ Farmers Group, Inc. does not write insurance and, consequently, has no responsive homeowners’ closed claim files.

Interrogatories or Requests for Production are answered or supplemented.’

4. “On July 1, 2009, Farmers was ordered “to produce to Plaintiffs all claim files requested by Plaintiffs in their July 7, 2006 discovery requests within 180 days . . . in single page TIFF files with document boundaries.”

FARMERS’ STRATEGY FOR PRODUCING ALL CLAIM FILES

5. “Upon receiving the Court’s Order, Farmers’ management began determining the most expedient way in which it could produce all of the claim files. After review of the file retention structure, Farmers planned three parallel processes to locate relevant files: (1) production of electronically stored files; (2) indexing of two vendor locations; (3) detailed search of remaining vendor locations.

6. “Prior to 2001, all closed claim files were stored as paper files (referred to as “Legacy files”). Beginning in 2001, Farmers began a two-year process of transitioning to electronic files for most closed claim files. Because not all closed claim files were stored as electronic files during this period of transition, it was necessary to review the computer record of approximately 143,000 claim files stored during the two-year transition period to determine whether they were stored as paper or electronic files. In addition, closed claim files for catastrophic losses were not stored as electronic files until 2005.

7. “Most of Farmers’ Legacy files are stored in boxes off-site with Iron Mountain. In addition, Farmers contracts with Records Center Innovation and Cintas to store additional paper records, including Farmers’ Legacy files.

8. “Farmers electronic files (“CRN files”) are stored using two different mechanisms. A “live” CRN claim file (i.e., one that has had activity within the previous six months) contains both individual data fields, which are stored in XML format in tables, as well as scanned documents or photographs that were generated or received in connection with each claim, which are stored in PDF format. When a CRN file has been inactive for six months, it is archived. Upon archiving, the data field elements are stored as an XML “blob” in Farmers’ Siebel structure.

Legacy Files

9. “For Legacy files, approximately three years ago, Farmers began indexing its closed claim files so that Farmers’ personnel could determine, for a particular claim file, the box in which it was stored. Prior to approximately 2006, many of Farmers’ boxes in off-site storage were not indexed in a way that reliably and accurately indicated which Legacy files were stored in which storage boxes. Instead, Farmers’ records only indicated, for example, a range of policy years and range of policy numbers for a particular box. For fully indexed files, Farmers could request that Iron Mountain retrieve a particular claim file. But for most Legacy files, Farmers was left with no choice but to request entire boxes of claim files so that they could determine whether responsive claim files were located within the box.

Austin and Kansas City Locations

10. “Based upon the master list of Legacy files, Farmers determined that the Austin, Texas (covers Texas and Louisiana), and Kansas City, Missouri (covers Arkansas, Iowa, Kansas and Missouri, as well as all catastrophe files for every state since 1999),

locations contained approximately 77% of the approximately 480,772 total paper files. The responsibility for locating, preparing and scanning these files was directed to Iron Mountain and the efforts, resources and costs associated with those tasks are set forth in the Affidavit of Kevin Werwie of Iron Mountain.

Remaining Locations

11. “Farmers’ personnel were tasked with locating the remaining 23% of the Legacy files, representing in excess of 110,071 claim files². As explained below, this is an extraordinarily time-consuming process that requires personnel who have experience with Farmers’ claim files and record storage methods.

12. “Farmers also tasked its legal counsel, Jackson Walker LLP, with the responsibility for actually producing all of the Legacy and CRN files that it could collect and is working closely with Jackson Walker LLP to facilitate that future production.

PRODUCTION OF CLAIM FILES

CRN Files

13. “As previously noted, Farmers’ more recent claim files are stored electronically and are referred to as “CRN files.” A CRN file contains two components: data entered and stored in fields electronically as well as images of documents or photographs that were generated within the system or received exter-

² While it was initially expected that this number of files would be located by Farmers’ personnel, it has subsequently been learned that approximately 40-45,000 files were not located in the Austin or Kansas City locations by Iron Mountain, and now will likely be added to the 110,071 files for which Farmers’ personnel are searching. For purposes of this discussion, we assume there are 155,000 files to find in this group.

nally and scanned into the system. At the time the Court entered its order compelling production of Farmers' claim files, Farmers had the capability to produce an image of the stored documents (similar to a PDF) and a relatively rudimentary procedure to export the data fields. However, this could only be accomplished on a file-by-file basis. There was no mechanism in place that would allow Farmers to print, for example, all claim files for a particular state within a particular time frame. More importantly, Farmers had no mechanism in place that would allow Farmers to convert its electronic claim files into the single page TIFF format with load boundaries as ordered by the Court. With its resources at that time, Farmers could only print all of its electronic records—one at a time—before then scanning and converting them to single page TIFF format documents.

14. “Thus, on July 9, 2009, Farmers began the expensive process of developing software that could convert Farmers' electronic files to the format in which the Court ordered Farmers to produce its claim files. The Farmers' department responsible for this task was the Claims Information Technology department (Claims IT). The Claims IT department devoted twenty-seven (27) people to the project and expended more than 3,855 hours in designing, analyzing, constructing, testing and executing the new process.

15. “Initially, Farmers' Claims IT department had to build a software program to “read” the master list of CRN files and query the system for “live” CRN files and archived CRN files to determine in which system each claim file was stored, and then to retrieve the claim and convert the XML files into single-page TIFFs with load boundaries.

16. “To do this, the software program reads each XML file line by line and converts it into a PDF structure. The resulting PDF (created from the XML data) is very large (an average of over 100 pages per file).

17. “The remaining documents within each claim file (as noted above) are stored differently, and are found within Filenet, which is Farmers’ document processing system. The multiple PDF documents within each claim file must then be “matched” to the corresponding electronic data fields that were previously stored as XML files. Finally, Farmers employs a TIFF converter to break down each very large PDF into single-page TIFFs and engages in manual auditing and quality control measures to ensure the conversion of files is working properly.

18. “The TIFFs are stored locally before being copied to send to Jackson Walker LLP for further processing and future production. Because the data being transferred contains such large volumes of highly sensitive information, special procedures have been implemented for the transfer of data to Jackson Walker LLP.

19. “The project required the creation of a new claim report generation process, a master tracking database, 25 document retrieval workstations, a job processing engine and multiple external hard drives for storing the final claim files output.

20. “Farmers Claims IT department endeavored to automate as much of the above process as possible, but many manual activities are still required. For example, manual monitoring is required to ensure that the system continues to run properly twenty-four (24) hours a day, seven (7) days a week (except

for required maintenance). Manual monitoring has been necessary because the processes described above have repeatedly caused network, system and server failures. Building and implementing new networks, systems and servers would have required 6-7 months. With such a short time frame, Farmers was unable to do so and was forced to run its CRN conversion processes through the same networks, systems and servers its personnel use to perform its day-to-day operations. Whenever a failure occurs, Farmers cannot access its open claim files to obtain information, generate or view documents or store documents that have been received. These crashes have affected or can affect every claim being handled in the CRN system. Moreover, after each failure, manual clean-up is required to delete all the files that were corrupted by the failure and re-start or re-queue the process when the server, system or network is back "online." In addition, each weekend there is a ten-hour maintenance window that must continue in order to keep the systems running for the processing of current open claims.

21. "In addition to the tremendous business interruption, Farmers has expended a great deal of time and money to develop, implement, test and run the processes described above. Farmers purchased twenty-five new desktop computers, a separate server and seven terabytes of storage. In addition, Farmers purchased new software to convert PDFs to TIFFs. Farmers' former software simply could not perform quickly enough. Farmers also obtained thirty-eight (38) external hard drives in order to ship the CRN files to Jackson Walker. Thirteen (13) of these hold one (1) terabyte each while the remaining twenty-five (25) hold 512 gigabytes.

22. “Responsive claim files are being downloaded by the programs described above 24 hours per day, 7 days a week (except for maintenance). These files are downloaded to hard drives and delivered to Jackson Walker LLP on a twice per week delivery schedule at this time for further processing and future production.

23. “At this time, Farmers has had 27 individuals including individuals located offshore—working on the CRN files alone. Those individuals have expended approximately 3,855 hours in working on this aspect of the project at a cost to Farmers at this time of approximately \$214,261.00.

24. “At this time, Farmers has expended over half a million dollars (approximately \$535,261—which sum also includes infrastructure costs) to comply with the Court’s order requiring production of electronic claims files alone.

25. “Farmers has delivered approximately 20 million pages to Jackson Walker LLP and expects to deliver approximately 13 million additional pages to Jackson Walker LLP before December 28, 2009.

26. “Farmers expects to complete conversion of its electronic files before December 28, 2009.

Legacy Files

27. “As mentioned above, Iron Mountain was tasked with retrieving, sorting and imaging the Legacy files found in the Austin and Kansas City locations, while Farmers’ personnel are responsible for locating, requesting and sorting the remaining Legacy files before returning them to Iron Mountain for imaging. The department responsible for obtaining these files is the Claims Specialized Services

(“CSS”) department, which falls under the Claims Support and Solutions division.

28. “These files are being pulled from Iron Mountain storage sites in the following states: Arizona (covers Arizona, Nevada and New Mexico); Ohio (covers Alabama, Georgia, Indiana, Kentucky, Ohio, Mississippi, Tennessee, Virginia, plus occasionally files from other states); Colorado (covers Colorado, Nebraska, North Dakota, South Dakota and Wyoming); Texas (other than Austin facility and includes Louisiana); Michigan; California; Illinois (covers Illinois, Wisconsin and subrogation files from multi-states); Minnesota; Oregon (covers Oregon and Washington); Utah (covers Idaho, Montana, Utah and is a multi-state repository); Maryland (covers Georgia, Kentucky, Maine, Maryland, Mississippi, New Hampshire and North Carolina). In addition, files are also being pulled from the Records Center Innovation location in Arizona (covers Arizona, Nevada and New Mexico), as well as from the Cintas location in Ohio.

29. “This task would prove even more difficult for the storage facilities in Colorado and Arizona. The Colorado facility contains claim files from five different states (Colorado, Nebraska, North Dakota, South Dakota and Wyoming). Thus, Farmers’ personnel had to check the contents of the box against the master lists for responsive claim files from five different states. A similar process was employed for the Arizona storage facility, at which claim files from three different states (Arizona, Nevada and New Mexico) are stored.

30. “Of the approximate 155, 000 files, approximately 44,392 files did not have a claim number. A claim file would not have a claim number if, for

example, the agent paid the customer (an “agent-paid” file). Upon encountering a claim file with no claim number, Farmers’ personnel would have to access Farmers’ Automated Claims Tracking System (“F.A.C.T.S.”) to verify that the claim occurred and was reflected on the policy. Because of the age of some of these claim files, F.A.C.T.S. did not always contain this information. In that situation, additional manual review was required to determine the type of loss, state of loss and date of loss before a claim file could be determined to be responsive.

31. “To obtain the approximate 155,000 claim files, Farmers’ personnel would request the boxes in which it was most likely the claim files would be located. When the box was delivered, Farmers’ personnel would then manually review the box in an attempt to locate the claim file. In addition, if Iron Mountain was unable to locate a claim file that was expected to be in a particular box, Farmers’ personnel would attempt to locate those files as well. For experienced Farmers’ personnel, searching a storage box requires approximately thirty minutes.

32. “To date, approximately 10,832 boxes have been ordered from Iron Mountain and Farmers’ other vendors. Through manual review, Farmers has been able to retrieve approximately 42,000 responsive claim files.

33. “In addition, any boxes pulled by Iron Mountain in the Austin and Kansas City locations in which they cannot determine with certainty if the box contains possible class claim files, are diverted for review by Farmers. To date, Farmers has received a total of 613 boxes from Austin and 268 boxes from Kansas City as diversion boxes requiring individual review.

34. “Farmers maintains two on-site locations where Legacy claim files might be stored—Pocatello, Idaho, and Simi Valley, California. Farmers’ personnel searched these two locations first for any potential class claim files.

35. “A few Branch Claims Offices might have a few Legacy claim files that have not been sent for storage to Pocatello, Idaho, since Farmers converted to the CRN system between 2001 and 2002, but this possibility is highly doubtful. Annual surveys are sent to the Branch Claims Offices requesting any Legacy claim files in their possession be sent to Pocatello, Idaho, for indexing, preparation for storage and finally to storage.

36. “Responsive claim files are then sent to a dedicated Iron Mountain scanning facility in Salt Lake City, Utah, every two weeks. After Iron Mountain completes its imaging of the claim files, the claim files are delivered electronically to Jackson Walker LLP for further processing and future production.

37. “Based upon past experience, Farmers would expect to locate between 85% and 95% of the claim files it has been ordered to produce. There are many reasons it may not be feasible to produce a particular claim file. For example, the claim file may be in a different storage location due to a misfiling, or the claim file may not be in storage because it is being used elsewhere, such as in a branch claims office, as part of a quality assurance review, or in connection with litigation. Also, the expected location of a claim file may be inaccurate, which may be because of a clerical error, such as recording the incorrect box number, recording the incorrect storage vendor, or recording the incorrect storage location, or because

the person identifying the expected box location did so inaccurately. Moreover, despite the highest degree of precautionary measures, some claim files may have been irreparably damaged by the elements, pests or other natural causes.

38. “The CSS department consists of a Legacy file group, a stale and escheat team, and a bill paying unit. Cheri DeWall is the Legacy File Manager and is responsible for the Legacy file group. In addition to herself, Ms. DeWall has nine (9) full-time employees and another supervisor/manager. All nine (9) full-time employees have been working on this project. Because of the enormity of this project, the CSS-Legacy employees typically are able to spend only two (2) hours per day on their normal tasks and have been devoting 75% of their time to this project. Ms. DeWall has regularly been working sixty hours a week on this project, routinely working past 10:00 p.m. and on weekends, since she received the first list of files she was responsible for pulling in mid-July, 2009. In addition, Ms. DeWall has one (1) contract employee and twenty-four (24) temporary employees working full-time to complete this project. Most of the CSS-Legacy group works in Pocatello, Idaho, while some work in Simi Valley, California.

39. “These employees have spent approximately 24,776 hours working on this project as of the date of this affidavit. Many of the CSS-Legacy group’s usual business tasks and responsibilities have been postponed so that this group—with the experience and knowledge necessary to locate and retrieve the paper files—can dedicate their resources to this task. For example, the CSS-Legacy group can no longer consolidate and transfer Farmers’ on-site paper files to

off-site locations of Iron Mountain for long-term storage.

40. “Farmers reasonably expects to locate between 5,000 and 7,000 additional files (in addition to those from the Austin and Kansas City locations) by December 28, 2009.

41. “At this time, Farmers has expended over \$330,000.00 on Legacy files to comply with the July 1, 2009 Order. These costs will continue to be incurred until further orders are entered in this case.

CURRENT STATUS AND EXPECTED COMPLETION

42. “Farmers has delivered in excess of 20 million pages of CRN claim files to Jackson Walker LLP as of the date of this affidavit, and anticipates delivering approximately 13 million additional pages to Jackson Walker LLP before December 28, 2009. Farmers has located approximately 42,000 Legacy claim files to be delivered to the Iron Mountain facility in Salt Lake City for imaging and then delivery to Jackson Walker LLP for future production. Farmers anticipates being able to locate 5-7,000 additional Legacy files before December 28, 2009.

43. “Farmers has expended in excess of 28,631 hours working on this project through the date of this affidavit, at a cost in excess of \$865,261 to date.³ The projected total cost cannot be ascertained until the total project is completed.

³ In addition, Farmers has incurred costs with Iron Mountain of \$4,798,349.37 for their assistance it: this project, and anticipate being billed another \$1,077,634.63 by the completion of the project as more fully described in the affidavit of Kevin Werwie.

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FURTHER AFFIANT SAYETH NOT.

/s/ Christopher Bulger
Christopher Bulger

SUBSCRIBED AND SWORN BEFORE ME on this
4th day of December, 2009

/s/ Patricia C Roempke
Notary Public, State of Michigan
My commission expires: 3-11-2015

[NOTARY STAMP]
Patricia C Roempke
Notary Public, State of MI
County of Barry
My commission expires: Mar 11, 2015
Acting in County of Kent

APPENDIX O

AFFIDAVIT OF KEVIN WERWIE

STATE OF MINNESOTA

COUNTY OF DAKOTA

I, Kevin Werwie, after having been duly sworn, do under oath depose and state as follows:

1. "I am over the age of 21 years and am otherwise competent to make this affidavit.

2. "I am an Enterprise Account Executive for Iron Mountain.

3. "I have been employed by Iron Mountain for almost eight years, beginning in 2002.

4. "I either have personal knowledge of the facts stated herein, or my statements are based upon my review of the business records of Iron Mountain.

5. "As an Enterprise Account Executive, I am responsible on a worldwide basis for the Zurich account with Iron Mountain, including the storage and, if necessary, retrieval of paper claim files of Farmers Insurance Exchange, Texas Farmers Insurance Co., and Farmers Insurance Co., Inc. ("Farmers"). In that role, I have been personally involved in managing the overall Zurich/Farmers account relationship for approximately five years. As the Enterprise Account Executive, my role is to support the client's strategic program objectives and advise on records and information management best practices. This includes oversight of large project implementations or other program development initiatives.

6. "Iron Mountain is a global leader in the records management, secure shredding and digital information

protection and storage solutions industry. For example, Iron Mountain has:

a. “Over 1,000 record centers and data vaults comprising 64 million square feet worldwide;

b. “335 million cubic feet of hard copy records stored;

c. “Over 10 million linear feet of medical records under management;

d. “60 million pieces of data stored in highly secure data protection vaults;

e. “1.4+ petabytes of mirrored digital data;

f. “Over 2.5 million PCs backed up and 70 million digital files restored to date; and

g. “3,500 vehicles making 18 million trips a year worldwide.

7. “Iron Mountain currently stores approximately 1.1 million total cubic feet of hard copy records for Farmers in North America. On July 9, 2009, Farmers contacted Iron Mountain to obtain our assistance in producing the approximately 440,000 homeowner’s claim files that were being stored by Iron Mountain.

8. “Iron Mountain stores Farmers’ hard copy records in 37 Iron Mountain markets. Iron Mountain and Farmers entered into a statement of work whereby Iron Mountain undertook the task of retrieving , indexing, imaging and delivering relevant Legacy hard copy claim files, most of which—289,253 files—were initially expected to be in Austin, Texas, and another 85,394 files were initially expected to be in Kansas City. These two markets were expected to comprise approximately 85% of the volume of the

claim files to be produced.¹ The remainder of the responsive claim files stored by Iron Mountain and requested by Farmers, of which there were expected to be approximately 110,000, are spread out among 10-12 different states.

9. “In order to identify the claim files that would be produced, it was first necessary to manually identify the file and compare each file to the list of claim files that Farmers provided to determine whether a particular file would or would not be imaged for production. Although initial estimates suggested an average of 40 claim files would be contained in each box, actual experience revealed there were closer to an average of 60 claim files per box.

Austin and Kansas City Markets

10. “As the project progressed, Iron Mountain learned that over 100,000 of the files thought to be in Austin, Texas, were actually located in Kansas City. Consequently, Iron Mountain had to re-allocate and shift resources to support the dramatic increase in claim files in Kansas City. This re-allocation impacted the personnel hired and utilized, the shifts that were working and the number of scanners and other necessary equipment in both Austin and Kansas City.

11. “At project peak, Iron Mountain had approximately 464 individuals dedicated to this project in Austin and Kansas City alone. These individuals have been tasked with sorting through the boxes to identify responsive claim files, preparing the respon-

¹ In Iron Mountain’s experience, both with Farmers and other clients, it is not realistic to expect 100% find rates because some files may be in a different location than Farmers identified, or records may be out to users, or records may be misplaced, etc.

sive claim files to be imaged, imaging the claim files and performing quality control measures to ensure the imaged files are responsive files and comply with the technical specifications required for production. Approximately 28,000 square feet of space has been dedicated for this project in Kansas City and approximately 16,000 square feet in Austin. These various project stages are explained in greater detail below.

12. “In addition, Iron Mountain personnel at the other locations where Farmers’ files are stored have been pulling boxes as requested for review by Farmers’ personnel in Pocatello, Idaho, as is more fully detailed in the Affidavit of Christopher Bulger.

13. “Because there was limited indexing of files within a box, Iron Mountain personnel had to go through each box believed to contain responsive claim files to identify and list the claim file numbers that were within each box. This list was then compared to the list of claim files that Farmers provided in order to isolate responsive claim files. Approximately 6.3 million files had to be listed by claim number and then compared to the list of claim files to be produced in order to identify the responsive claim files. This is referred to as the sorting process. After the sorting process, a quality control (“QC”) supervisor in both Austin and Kansas City performs QC on a percentage of the total sorted material validating 100% systematic alignment between a box and listed files contained within the box.

14. “Initially, estimates suggested that it would take an average of fifteen (15) minutes per box to perform the sorting process. Actual experience revealed that each box required approximately twenty-two minutes to perform this process, representing nearly

50% more time per box that was required. In order to meet our deadlines, this increase required Iron Mountain to increase the number of sorting workstations by approximately thirty percent (30%) and employ the sorting personnel in two shifts, six days a week.

15. “Throughout the project, the Austin location has had up to 100 sorters working per day between two shifts on Monday through Saturday. The Kansas City location had up to 88 sorters working per day between two shifts on Monday through Saturday. Between these two locations, at project peak, Iron Mountain was devoting 1,410 person-hours a day (7.5 hours per shift per employee), six days a week, or approximately 8,460 hours each week to sorting alone. In addition, each week, approximately twenty-nine (29) Iron Mountain supervisors from across the United States have been flown to either Austin or Kansas City to oversee the sorting process, ensuring that experienced personnel are “on-location” to oversee the sorting process.

16. “After the boxes have been sorted to identify responsive claim files, the responsive claim files must be prepared for imaging. In addition to loose standard letter-sized papers, Farmers’ claim files contain irregularly sized items such as loose photographs, receipts, rolls of register tape and envelopes. In addition, documents within a claim file may be stapled, paper-clipped or folded. Prior to scanning the file, all paper clips and staples must be removed, and small irregularly-sized items must be taped to another sheet of paper before they can be scanned. Once the scanning is complete, all of the papers must be returned to the claim file.

17. “The Austin location had between 110 and 130 individuals total working between two shifts, six days

a week to prepare the claim files for imaging. The Kansas City location has had up to 80 individuals working between two shifts, six days a week to prepare the claim files for imaging, in addition to 30 individuals utilized in St. Louis. Between these locations, Iron Mountain is devoting between 1,650 and 1,800 person-hours a day, six days a week, or approximately 9,900-10,800 hours each week to preparing the claim files for imaging.

18. "On November 30, 2009, Iron Mountain increased the number of individuals working to prepare the claim files in Kansas City for imaging in order to add a third shift. This added approximately 24 persons at 7.5 hours per day, seven days a week, for a total of approximately 1,260 additional hours per week to preparing the claim files for imaging.

19. "Initial estimates suggested that preparing a box of files as outlined above would require approximately two hours. Actual experience revealed that each box required approximately four hours to prepare the files contained therein. This was a 100% increase and required Iron Mountain to again increase the number of personnel devoted to the project. Iron Mountain utilized the resources of three different temporary agencies to secure the necessary personnel to prepare the claim files in Austin alone.

20. "After a file has been identified and prepared for imaging, the scanning process begins. Iron Mountain has dedicated 24 scanning machines at project peak in Austin, Kansas City and Salt Lake City. In Austin, there are 38 individuals who are employed to scan claim files, converting them to digital format. In Kansas City, there are 18 individuals who are employed to scan claim files, converting them to digital format. In Salt Lake City, there are 6 individuals

who are employed to scan claim files, converting them to digital format. These individuals work in two shifts each day, six days a week, devoting approximately 2,790 hours each week to imaging the claim files. In addition, Iron Mountain has three (3) dedicated imaging engineers flying to and from the various locations as needed, working a combined 120+ hours per week, to support set-up, daily data uploads, back-end QC, trouble-shooting and take-down.

21. On November 30, 2009, Iron Mountain increased the number of individuals working on the imaging of the claim files in both Austin and Kansas City in order to add a third shift. This added approximately 11 persons in Austin and 6 persons in Kansas City at 7.5 hours per day, seven days a week for a total of approximately 892 additional hours per week to the imaging of the claim files.

22. "Iron Mountain employs quality control measures to ensure that the imaged claim files are suitable for production. The Austin location has eight (8) quality control stations and two (2) validation/ verification stations. Kansas City has four (4) quality control stations and one (1) validation/verification station. At the quality control stage, Iron Mountain personnel look at the electronic images to confirm that the hard copy documents have been electronically captured in a manner that conforms to the quality and technical specifications required for production. Finally, at the validation/verification stage, Iron Mountain ensures that separator sheets are included and that the claim file being scanned is a claim file on the list provided by Farmers with the claim number captured accurately. Iron Mountain

employs the ANSI/ASQ² standard Z1.4 for quality control which is a well-accepted practice within the industry.

23. “In total, at project peak, Iron Mountain has dedicated between 511 and 531 individuals to the task of producing and imaging the hard copy claim files from Austin and Kansas City. By deploying such a large number of individuals and equipment, the Austin location has been able to ramp up capacity to approximately 350,000 images per day, while the Kansas City location is able to produce approximately 275,000 images per day.

24. “After the claim files have been imaged at the Austin location, the electronic data is transferred onto a “flash drive.” Each flash drive has a capacity of 16 to 32GB of information. Iron Mountain sends the flash drives with images produced for the day on Tuesdays-Thursdays to Jackson Walker LLP in Dallas, Texas, so that Jackson Walker LLP can upload them for further processing and future production. Because of the incredibly sensitive nature of the information contained on the flash drives, Iron Mountain utilizes FedEx White Glove delivery service and encrypts and password protects the drive to ensure high security and places them in secure locked transport containers to maintain the chain of custody. The keys to such containers are in the possession of Iron Mountain personnel and Jackson Walker LLP personnel.

25. “The delivery of electronic data from the Austin location on Friday-Sunday is done over a secure FTP

² ANSI is the American National Standards Institute. ASQ is the American Society for Quality and was formerly known as ASQC (American Society for Quality Control).

site directly from Iron Mountain to Jackson Walker LLP.

26. “After the claim files are imaged in Kansas City, the electronic data is transferred to Jackson Walker LLP through the secure FTP site six days per week.

Remaining Markets

27. “To retrieve the remaining claim files not located in Austin or Kansas City, Farmers’ personnel request particular boxes from the various Iron Mountain storage facilities. These requests are submitted electronically through Iron Mountain Connect. Iron Mountain employees then retrieve the requested boxes and ship them to Pocatello, Idaho, where Farmers’ personnel isolate the responsive claim files. Iron Mountain then retrieves the responsive claim files and transports them to Salt Lake City for imaging.

28. “In Salt Lake City, Iron Mountain personnel then prepare and image the files before returning the files to storage. To date, approximately 39,000 claim files have been identified by Farmers’ personnel, approximately 23,000 of which have been received by Iron Mountain in this fashion. There are three (3) scanners and seven (7) individuals working in Salt Lake City and this location is capable of producing an average of approximately 25,000 images per day.

29. “After the claim files are imaged at the Salt Lake City location, the electronic data is transferred to Jackson Walker LLP through the secure FTP site up to six days per week.

30. “At this time, Iron Mountain has finished the process of identifying and sorting the claim files from the Austin and Kansas City locations. A total of

327,842 responsive claim files were found at these two locations. A total number of 193,296 files, from these two locations as well as Salt Lake City, have been imaged and transmitted to Jackson Walker LLP as of December 3, 2009.

31. "At this time, based on average file size, Iron Mountain has 107,840 claim files in the imaging process, and 38,269 claim files in the post-imaging QC and validation process.

32. "Iron Mountain expects to complete and transmit 341,523 claim files to Jackson Walker LLP on or before December 28, 2009.

33. "As of the date of this Affidavit, Iron Mountain has billed Farmers \$4,798,349.37.

34. "Under the terms of the initial agreement with Farmers, Iron Mountain anticipates billing another \$1,077,634.63 to Farmers."

FURTHER AFFIANT SAYETH NOT.

/s/ Kevin Werwie
Kevin Werwie
Enterprise Account Executive,
Iron Mountain

SUBSCRIBED AND SWORN BEFORE ME on this 4th day of December. 2009.

/s/ Kristen Ann Randall
Notary Public, State of Minnesota
My commission expires: 1/31/14
[NOTARY STAMP]
Kristen Ann Randall
Notary Public
Minnesota
My commission expires: January 31, 2014

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APPENDIX P

[LOGO]

JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

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lzander@jw.com

July 1, 2010

Nix, Patterson & Roach, LLP Hand Delivered
3600 North Capital of Texas Highway
Building B, Suite 350
Austin, TX 78746

Re: Case No. CV-2004-294-3 - *Evelyn J. Chivers, et al. v. State Farm Fire & Casualty Company, et al.* - In the Circuit Court of Miller County, Arkansas

Dear Plaintiffs' Counsel:

Pursuant to the court's July 1, 2009 Order, and its letter of December 23, 2009, we are delivering herewith a hard drives (labeled FCO27) containing supplemental document production bearing Bates Nos. Farmers_CF_033671339-Farmers_CF_034270570, Farmers_CF_054593217- Farmers CF 055729677 and Farmers CF 120000001-Farmers CF 120689236. This supplemental production represents an additional 24,000 claim files or 2,424,929 pages. These documents are also being produced pursuant to the terms of the Protective Order entered by the court and filed of record on or about February 10, 2006, subject to Rule 26(b)(5), and without waiving any outstanding objections. Pursuant to the terms of the Protective

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Order, Farmers is designating all of these documents
as "Confidential."

Very truly yours,

/s/ Linda C. Zander
Linda C. Zander, Paralegal

/LCZ/5853841

Enclosure

cc Plaintiffs' Counsel of Record
(by e-mail delivery) – without enclosure
Judge Kirk Johnson
(by fax) – without enclosure

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IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS

CASE NO. CV-2004-294-3

EVELYN J. CHIVERS, HAVEN AND LINDA TYSON,
MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE
SHERROUSE, BILL FEELY, DALE DROSTE, JARL CART
WRIGHT, BRAD SCHOONOVER, JOHN AND GLORIA LANG,
PHILLIP AND CYNDI ALEXANDER, BERNE FRANCIS,
AND DIANE THORNTON, INDIVIDUALLY AND
AS CLASS REPRESENTATIVES ON BEHALF OF ALL
SIMILARLY SITUATED PERSONS,
Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

On this the 1st day of July 2010, I, Lisa Baldwin,
received from Jackson Walker, LLP a hard drive
(labeled FC027) containing supplemental document
production bearing Bates Nos. Farmers_CF_0336
71339-Farmers_CF_034270570, Farmers_CF_05459
3217-Farmers_CF_055729677 and Farmers_CF_
12000001-Farmers_CF_120689236.

Nix, Patterson & Roach, LLP
3600 North Capital of Texas Highway
Building B, Suite 350
Austin, TX 78746

By: /s/ Lisa Baldwin

Printed name: _____

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APPENDIX Q

IN THE CIRCUIT COURT OF MILLER COUNTY,
ARKANSAS CIVIL DIVISION

DOCKET NO.: CV-2004-294-3

EVELYN J. CHIVERS, HAVEN and LINDA TYSON,
MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE
SHERROUSE, BILL FEELY, DALE DROSTE, JARL
CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA
LANG, PHILLIP and CYNDI ALEXANDER, BERNE
FRANCIS, and DIANE THORNTON, Individually and as
Class Representatives on Behalf of All Similarly
Situated Persons,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

**ORDER ON MOTIONS FOR
SANCTION AND CONTEMPT**

On the 10th day of November, 2009, the Court has considered the Plaintiffs' Motions for Sanctions filed against the Defendant, Chubb, and Defendant, Chubb's, Motion for Sanctions against the Plaintiffs, and from the pleadings, statements of counsel, briefs of the parties, exhibits and finds as follows:

Issues

The Plaintiffs in their Motions for Sanctions and Contempt allege that the Defendant, Chubb, has engaged in a course of conduct to prevent discovery of

relevant material. The Plaintiffs argue that emails which were requested in Interrogatories and Requests for Production in 2005 and in subsequent requests for discovery have not been provided, the Defendant has engaged in a course of conduct to disrupt depositions by the providing of documents to be used in the deposition at the last minute, Defendant has failed to produce qualified or knowledgeable witnesses for depositions, Defendant has abused the attorney client privilege to thwart discovery and Defendant has failed to produce a privilege log as previously ordered. The Plaintiffs maintain the position that the Defendant, Chubb, was provided a copy of the Foremost order and should have complied with the findings as they related to Chubb.

The Defendant, Chubb, has filed a Motion for Sanctions against the Plaintiff for failure to meet and confer on these issues pursuant to Rule 37.

History

Plaintiffs acknowledge that they did not file a Motion to Compel because of reliance on previous rulings of the Court regarding production of emails pursuant to discovery. The Plaintiffs assert that the sanctions are appropriate since Defendant continues to refuse to produce the emails even with the Court's order pertaining to discovery issued on March 26, 2009 to Defendant, Foremost. On March 26, 2009, the Defendant, Foremost, was ordered to produce all discovery requested in Plaintiffs' First Set of Interrogatories and Requests for Production of February 11, 2005 (Interrogatory No. 21 and Requests No's. 23, 27, 67, 98, and 102), Plaintiffs' Interrogatories and Requests for Production of June 21, 2007 (Interrogatory No. 3 and Request No. 2), Plaintiffs' First Set of Interrogatories No. 50, Plaintiffs' Interrogatories and

Requests for Production of November 1, 2006 (Interrogatory No. 1 and Request No's 1 and 2), and Plaintiffs' Discovery Requests to Defendants of June 21, 2007 (Interrogatory No's 1, 3, and 5 and Request No's 1, 2 and 3). These are identical discovery requests that were propounded to this Defendant. The order of March 26, 2009 specified that the Defendant, Foremost, would produce to Plaintiffs the documents requested in discovery within thirty (30) days. The Defendant, Chubb, has previously produced quality assurance documents or their equivalent pursuant to the Plaintiffs' discovery requests and that is not an issue in this case as it was in Foremost. At issue in these motions is the failure of the Defendant, Chubb, to produce all discovery requested in Plaintiffs' First Set of Interrogatories and Requests for Production of February 11, 2005 (Interrogatory No. 21 and Requests No's. 23, 27, 67, 98, and 102).

Emails

The facts show that the Defendant, Chubb, has refused for years to comply with discovery requests of Plaintiffs regarding production of emails unless it could dictate the parameters of the search. The Defendant has refused to provide emails as requested unless the Plaintiffs agreed to allow the Defendant to comply by using a limited list of key words and by designating a limited number of employees or officers to be subjected to the search for relevant emails. This unilateral position regarding production was challenged by Plaintiffs in a Motion to Compel and Motion for Contempt against the Defendant, Foremost, leading to the order of March 26, 2009. In that order, the Court rejected this unilateral approach and ordered the Defendant, Foremost, to produce all emails and quality assurance documents requested in

Plaintiffs' First Set of Interrogatories and Requests for Production of February 11, 2005 (Interrogatory No. 21 and Requests No's. 23, 27, 67, 98, and 102) and Plaintiffs' Interrogatories and Requests for Production of June 21, 2007 (Interrogatory No. 3 and Request No. 2).

After the Foremost order was entered on March 26, 2009, the Defendant, Chubb, made no effort whatsoever to comply with the order to produce the emails set forth in Plaintiffs' discovery requests taking the position that it was not a party to that order (Foremost) and was not ordered to produce its emails. The Defendant does not contest the relevancy of the emails but objects to their production as unduly burdensome, time consuming and expensive. The Defendant, Chubb, continued to refuse to produce the emails even though it knew that a codefendant had been ordered to produce the emails after taking a similar position. The Defendant distinguishes its conduct from that of Foremost arguing that it has many divisions totally unrelated to the property damage issues in this case and it should not have to produce all emails from those divisions. The Court believes that the Defendant has a valid point regarding the production of divisions of the company that do not involve property damage issues. If the Defendant had good faith issues regarding production of emails from divisions of the company totally unrelated to the issues in this case as argued, the production of the emails from the property division would have been produced and a hearing requested to resolve the objections for production of emails from unrelated divisions of the company such as workers compensation, marine and auto. Although the Foremost order was not directed to Chubb, the Court is convinced that lack of compliance with the

direction given by the Court to all parties was for the purpose of obstructing discovery. However, since the Defendant, Chubb, was not a party to that order and since the Court did not expressly extend the order to all other Defendants, the Court will not impose sanctions in this instance.

It is Ordered that Chubb fully and completely respond to Interrogatory No. 21 and Request No's. 23, 27, 50, 67, 98, 102, and 105 contained in Plaintiffs' First Set of Interrogatories and Requests for Production of Documents to Chubb within thirty (30) days;

It is further Ordered that Chubb provide Plaintiffs a list of search terms utilized by it during its search for responsive documents, the extent of the search conducted and a description of the method by which the search was undertaken (i.e. the name of any computer software or program utilized in conducting such search and the identities of any person(s) conducting such search). Chubb is further Ordered to include in its search terms, the terms already used by the thirteen (13) employees previously offered to be searched, as well as, the search terms referenced by Plaintiffs in their Foremost Motion and Reply brief. The search terms which must be included is not a limitation but is a minimum of what is expected.

Further, Chubb is Ordered to immediately instruct all of it's employees in the property division, all employees in any division of the company who have in the past worked in the property division and all employees who have had any input whatsoever into the formulation of policies regarding the adjusting of damage claims of the property division to conduct a search of their respective email systems and produce all other documents that may be responsive to

Plaintiffs' discovery requests. At this time, the Court will exclude emails any employees or officer in all other divisions who do not meet the qualifications set forth above. The Plaintiffs may seek a hearing to determine if relevant information can reasonably be expected to be discovered from employees of other divisions.

The Court further Orders that Chubb shall include all of the following information on all subsequent privilege logs; a Bates range, or other identifying information sufficient to identify the document, the date, author(s) (including his/her title if known), recipient(s) (including his/her title if known), and an adequate description of the allegedly privileged document and the specific privileges under which such documents are being withheld.

To avoid other piecemeal litigation on this issue, the Court Orders that all Defendants in this litigation comply with discovery requests for emails pursuant to the findings set forth above within thirty (30) days of this order.

*Production of Knowledgeable
Witnesses for Depositions*

The Court finds that the Defendant, Chubb, has not provided knowledgeable witnesses for depositions in the past, The Court believes this conduct is a continuing effort to thwart meaningful discovery in this case. Henceforth, the Defendant shall produce witnesses who are knowledgeable of the issues upon which they are to be deposed. This Defendant and all other Defendants are put on notice that such a course of conduct will result in sanctions being imposed by the Court.

The Plaintiffs also allege that documents are withheld until the last minute prior to depositions of defense witnesses. The Court does not make any finding on this issue but will require all documents to be used in the deposition be submitted to the Plaintiffs at least ten (10) days prior to the deposition. If such documents are not provided in a timely manner or knowledgeable witnesses are not produced, the deposition may be suspended by the deposing party with the other party or parties to pay all costs associated with the preparation and attendance at the deposition of the deposing parties counsel. The deposition shall be rescheduled within ten days of the date of suspension at a place and time of deposing parties convenience.

*Defendant's Motion for Sanctions
Pursuant to Rule 37*

The Court does not believe that Rule 37 was intended to allow sanctions for failure to meet and confer although the trial court has the discretion to impose sanctions for failure to abide by the specific rules of discovery implemented in this case. On that basis, the Defendant's Motion for Sanctions is denied.

The Court agrees with Defendant that it may impose sanctions based upon the order which it issued regarding the requirement that the parties meet and confer. However, the Court will not impose sanctions in this instance because there are indications that even though there was no formal meeting between the parties, the issue was discussed, at least to some degree, in person and through correspondence.

It is the Court's belief that a meet and confer on the various issues which may arise is necessary for

the efficient administration of this lawsuit. The Court believes that a meet and confer is necessary even though the chances of resolving the issue may appear remote without court intervention. The Court does not believe that correspondence between the parties is sufficient to satisfy the requirements even when the parties positions appear to be intractable. The Court is satisfied if the meet and confer is accomplished by a conference call or by a formal meeting between the parties. Henceforth, neither correspondence nor informal conversations will suffice to comply with the Court's order to meet and confer. However, the Court expects that the meet and confer will be expedited and not used to delay the resolution of the issue. Further, the Court advises the parties that it will not consider any future motion until the parties have met and conferred prior to the filing of the motion or made a good faith effort to meet and confer with the other party.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Motion for Sanctions filed by Plaintiffs' is denied; that the Motion for Sanctions filed by the Defendant, Chubb, is denied; Plaintiffs shall submit key words for the Defendant to use in the search of emails within 48 hours of this order being entered; the parties will comply with the above provisions relating to production of emails and other electronically stored information, production of knowledgeable witnesses and the meet and confer guidelines and comply with all other findings set forth above.

Dated this 21st day of December, 2009.

KIRK JOHNSON
KIRK JOHNSON
Circuit Judge