NO. 15-0903

IN THE SUPREME COURT OF TEXAS

IN RE STATE FARM LLOYDS
ORIGINAL PROCEEDINGS FROM THE
206TH JUDICIAL DISTRICT OF HIDALGO COUNTY, TEXAS
THE HONORABLE ROSE GUERRA REYNA, PRESIDING
CAUSE NO. C-3823-13-D

RELATOR'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The construction of Rule 196.4 offered by the Real Parties, and adopted by the Respondent, twists the objection procedures provided under 196.4 into a plainly absurd result: a requesting party can, for any reason (or for no reason at all), demand any production format desired and the court and the opposing party "must" honor it.[1] The Real Parties ignore the legal and practical problems presented by Respondent's application of Rule 196.4 and instead expend significant efforts to discuss non-precedential cases and parrot non-fact-based legal opinions from their paid expert in order to advance their view that they can "buy" unwarranted discovery through the cost-shifting provision of 196.4.[2]

Completely missing from the Real Parties' brief is any discussion of the central concept of proportionality in discovery. Indeed, while proportionality is one of the most basic tenets underlying the conduct of discovery in Texas—and Rule 192.4 is integral to any application of Rule 196.4—the Real Parties essentially ignore the proportionality concept with but a single citation in passing

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[1] Resp. at 9 ("if the requesting party seeks ESI in its native form, the responding party is to produce the ESI in native format.")

[2] The Real Parties go so far as to suggest that a requesting party can simply pay for any unreasonable and burdensome discovery. Resp. at 9 ("the rule merely provides a cost shifting provision). That proposition goes against the principles guiding discovery in Texas: discovery must be efficient, inexpensive Tex. R. Civ. P. 1 (APP_N0001) and proportional to the needs of the case Tex. R. Civ. P. 192.4 (APP_L0001).

to the rule.[3] The reason for this aversion is that the Respondent's order completely failed to weigh the benefits of the requested discovery against the burdens imposed. General statements concerning the value of native formats notwithstanding, the Real Parties have not (because they cannot) demonstrated a single benefit that will be derived from native formats. Real Parties will have what they need to prepare for trial from the searchable static image documents. Where the requesting parties demand ESI in a format but do not demonstrate a need, it need not be produced because "any burden incurred…in producing the information in 'native' or 'near native' format is too much.[4]"

Stripped to its core, the Real Parties' interpretation of Rule 196.4 removes any power of trial courts to weigh the benefits and burdens of proposed forms of production in a given case and will force responding parties across the state to abandon established and defensible business processes for managing discovery productions any time an opposing party requests "something else." In short, the Respondent's protocol is inconsistent with Rule 196.4, the 1999 Texas Supreme Court's commentary to that Rule, the Texas Supreme Court's interpretation of the Rule in *In re Weekley Homes*[5], and is contrary to the interests of litigants across

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[3] Resp. at 16.

[4] *Dizdar v. State Farm Lloyds*, No. 7:14-CV-523 (S.D. Tex. Jan. 7, 2015). APP_K0025.

[5] 295 S.W. 3d 309 (Tex. 2009).

Texas. When the correct construction of Rules 192.4 and 196.4 is applied, the law clearly dictates that a writ is justified in this case.

I. THE PLAIN LANGUAGE OF RULE 196.4, THE SUPREME COURT COMMENTARY, AND THE SUPREME COURT'S CONSTRUCTION OF RULE 196.4 ALL CONTRAVENE THE REAL PARTIES' INTERPRETATION OF THE RULE.

Contrary to assertions in the Response, Rule 196.4 does not mandate that the format of ESI requested ***must*** be the format produced. (*Cf.* Resp. at 9.) While Rule 196.4 directs a requesting party to "specify the form in which [it] wants [ESI] produced," there is ***nothing*** in the rule that says the responding party must comply with this request. (APP_G0001.) To the contrary, "[i]f the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection." *Id.* (APP_G0001). Such objections are not a "pass" for the responding party. (*Cf.* Resp. at 9.) When a Rule 196.4 objection is made, a responding party is obligated to produce evidence regarding its "electronic systems, electronic storage and retrieval capabilities," in support of any objection and to demonstrate an undue burden ***or*** cost. *See Weekley Homes*, 295 S.W.3d at 315, 322 (emphasis added); *see also In re Sears, Roebuck and Co.*, 123 S.W.3d 573, 575 (Tex. Ct. App.—Houston 2003)(granting mandamus because "[o]nce time, labor, and money are spent on improper production, there is no undoing them; wasteful costs may be shifted, but never retrieved).

Pursuant to Rule 196.4, after a responding party makes an objection, the Court must measure the merit of that objection based upon the evidence provided. *Weekley Homes*, 295 S.W.3d at 316. The comment to the Rule provides further explanation of the means and measure of reasonable efforts contemplated by the Rule and explains that reasonably usable formats are sufficient to meet a responding party's general production obligations under Rule 196.4. (APP_H0006.) The parallel Federal Rule of Civil Procedure 34, affirms that standard. Thus "reasonable efforts" must recognize standard business processes.[6]

Because the Real Parties incorrectly interpret Rule 196.4 as an absolute right to dictate production formats, they simply do not reach the pivotal issue presented by State Farm's Petition—what means and measures should a court use to evaluate the reasonable efforts required to produce ESI in the format requested (and what constitutes undue burden). Instead, the Real Parties go to great lengths to draw a false dichotomy of good and bad—native format versus flat images[7]—in an attempt to sidetrack the real issue presented to the Court. State Farm's Petition does not argue that native format productions are never warranted. Rather, State

[6] Contrary to the Real Parties' assertions, managing litigation is a necessary part of any insurance companies' (and virtually any other large business or governmental entities') ordinary course of business, and conscious decisions to prepare for discovery must be made to ensure all legal obligations are met in litigation and beyond. (*Cf.* Resp. at 16.)

[7] Critically, State Farm did not propose it would produce unsearchable "print outs" (Resp. at 3), but widely accepted searchable static image formats. APP_A0065-66.

Farm is challenging Respondent's Protocol because it mandates native format productions[8] when the uncontroverted evidence in the record demonstrates that the reasonably usable formats State Farm produces in the ordinary course of business will provide sufficient discovery in this matter.

Not surprisingly, the Real Parties' analysis ignores uncontroverted facts in the record regarding State Farm's standard business processes. For example, the Real Parties allege evidence provided by State Farm catastrophe team manager Darren Autry is not relevant to reasonable efforts. (Resp. at 1-2.) Contrary to this contention, Mr. Autry provided evidence of standard processes State Farm follows to document claims and how that information is included in State Farm's standard production format. (APP_A0026-60.) Similarly, the Real Parties' dismissal of Mr. Opsitnick's expert testimony is also unjustified. (Resp. at 2.) Mr. Opsitnick testified that the Real Parties' proposed protocol (wholly adopted by Respondent) will require State Farm to undertake unreasonable and extensive efforts to alter tested processes for defensible discovery and to design, validate, and implement entirely new processes to comply with Respondent's ESI protocol—burdens that go beyond the significant costs such as purchasing new software but also involve extensive and invasive human efforts to implement the changes. (APP_F0065-66.)

[8] And delimited electronic format for structured ESI. APP_D0002-03 at ¶¶ 3, 5.

Unlike Real Parties' expert, Mr. Opsitnick based his burden opinions on factual evidence presented by State Farm through Mr. Autry and another State Farm employee, Mr. Husarik. Mr. Opsitnick also provided uncontroverted testimony that the alternate formats of ESI proffered by State Farm are reasonably usable formats to litigate this case. (APP_C0065-68.)[9] In contrast, Real Parties' expert advocated for native production in all cases, without respect to the facts of this case. His "one size fits all" approach is contrary to the rules and common sense.

The Respondent misapplied Rule 196.4 when she entered her ESI protocol in the face of State Farm's evidence and consequently ordered State Farm to undertake what amounts to unreasonable efforts to produce formats demanded by the Real Parties. The Respondent also clearly misconstrued 196.4 when she equated reasonable efforts with "infeasibility." (Resp. at 14.) In *Weekley Homes*, this Court did not equate "feasibility" with "reasonable effort," as Real Parties argue. Rather, when addressing the extraordinary circumstance of allowing one party's expert direct access to the opposing party's electronic storage device, this Court recognized feasibility as one criteria to consider. *See* 295 S.W.3d at 318. Feasibility was a necessary, but hardly sufficient requirement to permit such

[9] Mr. Autry testified he relied on the case documents exactly as they were produced by State Farm. There was no evidence from the Real Parties that any information was missing from that production necessary for a full and fair determination of the case on its merits.

access. Indeed, this Court discussed a number of other factors that courts must consider. *See id.* at 318-20. The Court did not hold that technical feasibility alone satisfied Rule 196.4 reasonable efforts requirement.

Finally, the Real Parties' arguments regarding cost-shifting are unavailing. (Resp. at 18-19.) The mandatory cost-shifting provision of Rule 196.4 is triggered *only if* a court orders that the producing party must expend more than reasonable efforts to produce ESI. *Weekley Homes*, 295 S.W.3d at 315-16. ("And when the court orders production of not-reasonably-available information, the court must also order the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."). Burdens imposed by the production of native formats can include disruption of a party's business processes that cannot be offset by the payment of money. *See infra* Section III. There is no provision in Rule 196.4, or other Texas jurisprudence, that allows a requesting party to get whatever it wants in discovery by suggesting that it will pay for it.

II. THE REAL PARTIES CANNOT DEMONSTRATE THAT THE BENEFITS OF NATIVE PRODUCTION FORMATS OUTWEIGH THE BURDENS IMPOSED ON STATE FARM AS REQUIRED UNDER RULE 192.4.

The Real Parties studiously avoid discussing State Farm's evidence concerning the burdens imposed by the Respondent's Protocol. Indeed, other than blanket assertions that State Farm has not "demonstrated any undue burden" (Resp. at 16), the Real Parties do not meaningfully contradict State Farm's fact and expert

testimony that the burdens that would be imposed on State Farm to change its standard processes and recollect ESI to comply with Respondent's Protocol would be nothing less than significant. (APP_A0066.)

Instead, the Real Parties seek to convince the Court that the oversimplified and academic testimony of its paid expert, Mr. Craig Ball, deserves the greatest weight in determining State Farm's burden. Whether or not Mr. Ball is an "accomplished author and lawyer" (Resp. at 18) is irrelevant; the Real Parties cannot overcome the fact that Mr. Ball did not have sufficient evidentiary foundation to provide testimony regarding State Farm's specific systems and processes. For example, the Real Parties rely heavily on Mr. Ball's generalized opinions regarding State Farm's "practices," and "costs", as well as testimony regarding whether producing in native format would "impose any additional duties" or "extraordinary steps" for State Farm. (Resp. at 5, 6, and 17.) Mr. Ball, however, has never been an employee of, or consultant to State Farm and he has certainly never accessed any State Farm system. Quite simply, Mr. Ball does not have the evidentiary foundation to offer any opinions regarding State Farm's processes and any reliance on his generalized opinions is flawed as a matter of

law.[10] *See, e.g., Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) ("[A]n expert's bald assurance of validity is not enough.").

Even more significantly, the Respondent's Protocol, and the Real Parties themselves, are noticeably silent in their Response regarding the *requirement* embedded in Rule 192.4 that a Court limit discovery when "the burden or expense of the proposed discovery *outweighs* its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." (APP_L0001.) In almost 20 pages of briefing, there is not a single instance where the Real Parties articulate a *specific need* for native formats, nor is there any discussion whatsoever regarding any specific *benefit* that would be derived from the production formats imposed by Respondent's Protocol. Relying once again on Mr. Ball's testimony, the Real Parties declare that the "Real Parties *simply want* the relevant documents in the same form as used by State Farm . . . ." (Resp. at 7; emphasis added). However, conclusory statements regarding

[10]State Farm has consistently asserted that any reliance on Mr. Ball's generalized opinions is flawed. *See* APP_A0065, APP_O0029. In any case, objections regarding Mr. Ball's testimony are preserved. Texas Rule of Appellate Procedure 33.1(d) (in a non-jury case, a complaint regarding the legal or factual insufficiency of evidence "may be made for the first time on appeal in the complaining party's brief.").

what a party merely "wants" do not suffice, nor do they meet the standard under Rule 192.4.

III. COST-SHIFTING DOES NOT PROVIDE STATE FARM WITH AN ADEQUATE REMEDY ON APPEAL.

Contrary to the Real Parties' assertion, mandamus is appropriate in this case because there is no adequate remedy on appeal. (Resp. at 18.) The Real Parties argue that Rule 196.4's cost-shifting provision provides State Farm with an adequate remedy. In doing so, the Real Parties repeat the Respondent's error in failing to apply the principle of proportionality to this case as required under Rules 196.4 and 192.4 of the Texas Rules of Civil Procedure. This Court has specifically granted mandamus when a discovery order "imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party. *See In re CSX, Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (finding no adequate remedy on appeal).

Without relief, State Farm will be forced to undertake a substantial, unduly burdensome effort to recollect ESI and develop and validate a variety of new processes to meet the demands of Respondent's ESI protocol. These burdens go beyond any conception of "reasonable efforts" under 196.4 and as in *CSX*, there is no adequate remedy on appeal.

PRAYER

Mandamus is appropriate and warranted. State Farm prays that this Court grant its request for oral argument and the relief requested in its Petition.

Dated: February 16, 2016

Respectfully submitted,

By: /s/ Brian M. Chandler
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CERTIFICATE OF COUNSEL

I certify that I have reviewed this Petition for Writ of Mandamus and that every factual statement in the Petition is supported by competent evidence included in the Appendix or Record.

DATED: February 16, 2016

/s/ Brian M. Chandler
Brian M. Chandler

CERTIFICATE OF COMPLIANCE (WORD COUNT)

Pursuant to Texas Rule of Appellant Procedure, Rule 9.4(i)(1) and (3), I certify that this Petition for Writ of Mandamus contains 2,400 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

DATED: February 16, 2016

/s/ Brian M. Chandler
Brian M. Chandler

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to all counsel of record, and interested parties, via hand delivery, USPS, CMRRR, electronic service, and/or facsimile on this 16th day of February, 2016.

The Honorable Rose Guerra Reyna
Hidalgo County Courthouse
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Respondent

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Counsel for Real Parties in Interest

/s/ *Brian M. Chandler*
Brian M. Chandler

CERTIFICATION OF APPENDIX

BEFORE ME, the undersigned authority, on this date personally appeared **Brian M. Chandler**, who, being duly sworn, deposed as follows:

"My name is Brian M. Chandler. I have personal knowledge of the facts stated herein, and they are true and correct. I am the attorney for Relators. All the documents and exhibits submitted herewith in the Appendix are true and correct copies of documents filed by the Parties in Interest in the underlying cause; Texas Rules of Civil Procedure (Tab N); and State Farm's Petition to the Thirteenth Court of Appeals (Tab O).

I have read the above and foregoing Petition for Writ of Mandamus and the factual statements contained therein are supported by competent evidence included in the Appendix or record."

Brian M. Chandler

SWORN TO AND SUBSCRIBED BEFORE ME by the above-named Affiant this 16 day of February, 2016.

NOTARY PUBLIC – STATE OF TEXAS

RICHARD BURTON
Notary Public, State of Texas
Comm. Expires 01-22-2020
Notary ID 130507637

APPENDIX

TAB

N

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part I. General Rules (Refs & Annos)

TX Rules of Civil Procedure, Rule 1

Rule 1. Objective of Rules

Currentness

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

Credits
Oct. 29, 1940, eff. Sept. 1, 1941.

Notes of Decisions (64)

Vernon's Ann. Texas Rules Civ. Proc., Rule 1, TX R RCP Rule 1
Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through December 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through December 1, 2015. Other state court rules and selected county rules are current with rules verified through December 1, 2015.

End of Document

TAB

O

NO. 13-14-00616-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH DISTRICT OF TEXAS
AT EDINBURG

IN RE STATE FARM LLOYDS

Original Proceeding from the 206th Judicial District Court
of Hidalgo County, Texas – Trial Court Cause No. C-3828-13-D

PETITION FOR WRIT OF MANDAMUS

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RELATOR REQUESTS
ORAL ARGUMENT

IDENTITY OF PARTIES AND COUNSEL

Relator certifies that the following is a complete list of the names and addresses of all parties and their counsel:

A. Relator (Defendant In Underlying Action)

State Farm Lloyds

Represented by:
Brian M. Chandler
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B. Respondent/Trial Court Judge

The Honorable Rose Guerra Reyna
Hidalgo County Courthouse
206th Judicial District Court
100 N. Closner
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C. Real Parties In Interest (Plaintiffs In Underlying Action)

Alejos Ramirez
Ofelia Ramirez

Represented by:
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STATEMENT OF THE CASE

This petition arises from a breach of contract lawsuit between homeowner's insurance policyholders, Real Parties in Interest Alejos Ramirez and Ofelia Ramirez ("Ramirezes"), and their insurance company, Relator State Farm Lloyds ("State Farm"). Plaintiffs' Original Petition alleges that State Farm failed to properly adjust their insurance claim for damages sustained to their home during a March 29, 2012 wind and hailstorm. (App., Tab A.) The underlying case is styled *Alejos and Ofelia Ramirez v. State Farm Lloyds and Sylvia Garza*, Cause No. C-3828-13-D.

After the parties met and conferred regarding the proper protocol governing the manner and format for productions of relevant electronically stored information ("ESI") in response to document requests in this matter, the parties filed cross-motions in the district court (Respondent, Honorable Rose G. Reyna, presiding) for the entry of substantively different ESI Protocols. At the same time, Plaintiffs also sought to compel certain witness testimony. State Farm objected and sought a protective order. The parties' motions (App., Tabs B, C) were heard on July 8, 2014. (App., Tab D at July 8, 2014, *Ramirez* Hearing Transcript.) On September 30, 2014, the district court entered an Amended Order Granting Plaintiffs' Amended Motion for Entry of Production Protocol and Motion to Compel Testimony Regarding Technical Information. (App., Tab E.)

STATEMENT OF JURISDICTION

This court has jurisdiction to issue a writ of mandamus under Tex. Const. art. V, § 6 and Tex. Gov't Code Ann. § 22.221(a) (West 2004). (App., Tabs F, G.)

ISSUES PRESENTED

1. Do Texas Rules of Civil Procedure 196.4 and 192.4 allow for production of electronically stored evidence in reasonably usable forms?

2. Did the district court clearly abuse its discretion by entering an order requiring the production of all electronically stored evidence in specific formats (e.g., "native") as demanded by Plaintiffs and by refusing to allow State Farm to produce electronically stored evidence in the reasonably usable forms it proffered?

3. Did the district court clearly abuse its discretion by ordering "discovery on discovery" despite the absence of any underlying discovery request or any showing of need to justify such discovery in light of significant privilege and attorney work product issues?

STATEMENT OF FACTS

On October 22, 2012, over six months after the March 29, 2012 wind and hailstorm in Hidalgo County, the Ramirezes submitted an insurance claim for storm damage to their house. (App., Tab D at 15:16:08 10 - 15:16:12 12.) Within one week of submission, State Farm had initially adjusted the claim, acknowledged coverage for the loss, and calculated an estimated damage amount of $6,258.96

(with $5,643.08 being the estimated amount for the roof). (App., Tab C-5.) State Farm paid the Ramirezes $1,640.09, representing the actual cash value of the estimate for the damages ($6,258.96 in replacement cost benefits minus $2,318.87 in depreciation and the policy's $2,300 deductible). (*Id.*) In the course of the next two months, the Ramirezes repaired their roof and submitted receipts totaling $4,813.36, after which State Farm, in December of 2012, revised its estimate to $5,485.28. (*Id.*; App., Tab D at 15:19:40 8 - 15:20:45 2, 15:23:45 18 - 15:24:53 18.) State Farm paid the Ramirezes a total of $3,185.28 between the initial and the subsequent payments, which represented the revised estimate minus the policy's $2,300 deductible (without any reduction for depreciation). (App., Tab D at 15:27:08 13 - 15:28:30 7.) These payments made the Ramirezes whole for the damage due to the storm.

Six months after the Ramirezes received the final payment from State Farm, and without any intervening complaint or communication, State Farm received service of the complaint in this matter. (App., Tab A.)

Discovery in this case began before the case was remanded by the Multidistrict Litigation Panel from *In re Wellington Insurance Company Hailstorm Litigation*, MDL No. 13-0123. Production of a significant number of documents in this contract action has already occurred, with ESI produced in various formats,

including the core claim file information in searchable PDF. (App., Tab D at 15:18:56 17 - 15:32:42 21.)

For their part, Plaintiffs initially demanded that the ESI Protocol simply reflect that they had unequivocally sought the production of all ESI in "native"[1] formats. (App., Tab C-6 at 1, ¶ 2.) This demand later evolved during discussions into a greater demand that the district court order that State Farm must produce all ESI in "native" formats. (App., Tab B-1.)

In accordance with the request of the district court, the parties met a number of times between December 2013 and April 2014 to discuss the procedures for producing ESI. (App., Tab B at ¶ 2.) During the course of those meetings, State Farm provided Plaintiffs with information regarding how it stores and uses ESI. (App., Tabs C-3, C-4.)

State Farm stores much of its information in centralized repositories. (App., Tab D at 17:02:12 8 - 17:03:02 23.) Importantly, the evidence reflected that the primary repository of relevant information – that is, information concerning the Ramirezes' claim – is in State Farm's Enterprise Claim System ("ECS").[2] The

[1] *The Sedona Conference Glossary: E-Discovery and Digital Information Management* (4th ed. April 2014), *available at* https://thesedonaconference.org/download-pub/3757, provides this description of a "native format": "Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the native format of the document. . . . It should be noted that not all ESI may be conducive to production in either the Native Format or imaged format, and some other form of production may be necessary. Databases, for example, often present such issues." *Id.* at 30.

[2] State Farm also identified seven other data sources where information requested in

ECS is a complex relational database "that consists of a web-based front end that accesses a DB2 database and a FileNet repository to retrieve claim file information." (App., Tab C-2, at Ex. C ¶ 7.) Operationally, it is a proprietary central application that is used "to create, store, manage and access [State Farm] claim information." (*Id.*) Notably, it is the "system of record" at State Farm for claim handling information, including the claims that are at issue in this suit. (App., Tab C-2, at Ex. C ¶ 5.) "By consolidating information from different sources into ECS State Farm provides its personnel (such as claim handlers and independent adjustors) with ready access to the claim file information to process claims on behalf of policyholders and otherwise manage the claims process efficiently." (*Id.*)

Information such as "file notes, photographs, estimates, letters, and other correspondence are all included in ECS." (App., Tab D, at 15:43:38 22 - 15:44:31 15.) Evidence also showed that much of that information (the letters, estimates, or pictures) exists in the form of images of documents, rather than the "native" format in which the documents or pictures were originally created. (App., Tab D, at 17:00:52 7 - 17:01:10 12.) Other information, such as the claims representative's

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discovery might be located: Online Reinspection Tool, Management Closed Assignment Review, Messaging Archive (Email and Instant Messages), Enterprise Complaint Tracking, Fire Master Record, Information from State Farm Human Resources data sources, and Enterprise Claim Survey Tool. (App., Tab C-1 at ¶ 9.) For each of these sources, State Farm identified reasonably usable production formats. (*Id.*)

file notes chronicling daily activities, are stored in database fields within ECS. (App., Tab D at 17:01:35 21 - 17:02:11 7). State Farm had developed a process to produce all ECS information together into a searchable PDF file that is "reasonably usable." (App., Tab C-2, at ¶ 43.)

Notwithstanding this information, Plaintiffs ultimately proposed an ESI Protocol that made it mandatory that all ESI be produced in "native" format, defined by Plaintiffs as the format created, used, and stored by the application used to create the ESI; and proposed that all database information be produced in "delimited electronic format."[3] (App., Tab B-1 at ¶¶ 2, 5.) State Farm agreed to produce in the format requested to the extent it could reasonably comply with the request, even though some of the requested formats would require State Farm to modify its existing litigation production procedures. (App., Tab C-2 at ¶ 29.) Much of the ESI that State Farm stores and uses in the ordinary course of business, however, does not meet Plaintiffs' definition of native, as it is stored or used in a format that is different than the format created by the relevant application. (App., Tab D at 16:59:45 9 - 17:01:10 12.) Therefore, State Farm proffered an alternative

[3] "Text delimited files are closely related to, if not often virtually the same as, database 'load files'; they are generically formatted sets of fielded information." The Sedona Conference, *Database Principles: Addressing the Preservation and Production of Databases and Database Information in Civil Litigation* ("*Sedona Database Principles*") at 23 (Sept. 2014), *available at* https://thesedonaconference.org/download-pub/3814.

ESI Protocol that specifically identified the data source and category reasonably available at State Farm. (App., Tab C-3; App., Tab C-2, at ¶ 17 i.)

Despite State Farm's efforts to tailor the ESI Protocol to the data sources likely to contain relevant information, the parties reached an impasse regarding the "form of production." The dispute was centered on a fundamental disagreement regarding the interpretation of the Texas Rules of Civil Procedure, which led to competing motion practice. (App., Tabs B, C.) Plaintiffs' motion proffered an interpretation of Texas Rule of Civil Procedure 196.4 that would provide the requesting party with a unilateral right to receive its chosen form of production – regardless of how information is stored in the ordinary course of business or whether another reasonably usable format can be produced by the responding party. (App., Tab B at ¶¶ 9, 10.) On this theory, Plaintiffs also requested that the district court mandate specific software functionality be used in the production, that all ESI and documents with color be reproduced in color regardless of need, and that database information also be produced in a specifically defined format without regard to how information in the databases is viewed or used in the ordinary course of business. (App., Tab B at ¶ 11; App., Tab B-1 at ¶ 2.)

State Farm, based on Texas Rule of Civil Procedure 196.4, as well as Texas Rule of Civil Procedure 192.4 and relevant case law, objected to Plaintiffs' specific

file format requests,[4] and sought entry of a compromise order that reflected, *inter alia*, the following:

- Texas Rule of Civil Procedure 196.4 does not mandate "native" file default even if Plaintiffs request it for all ESI productions;
- Plaintiffs' view of Texas Rule of Civil Procedure 196.4 is incorrect and a responding party is allowed to object to "native file" requests (and other specific file formats) and produce information in reasonably usable formats; and
- State Farm followed the specific objection process provided for in Texas Rule of Civil Procedure 196.4 and identified reasonably usable production formats for each source of relevant ESI.

(App., Tab C at ¶¶ 11, 17.)

At the July 8, 2014 hearing, the court heard extensive testimony from a fact witness employed at State Farm about how information regarding claims handling is used and accessed in the ordinary course of business at State Farm. (App., Tab D at 15:09:12 16 - 16:40:16 25.) Affidavit testimony from another State Farm employee knowledgeable about State Farm's main source of claim information, its Enterprise Claim System, was also submitted. (App., Tab C-2 at Ex. C.) An expert witness also submitted an affidavit and testified on behalf of State Farm at the hearing regarding best practices and the reasonableness of State Farm's positions regarding the proposed forms of production. (App., Tab D at 16:52:21 7

[4] Plaintiffs requested "native" formats for unstructured data and delimited electronic file format for databases.

- 17:47:05 15.) The evidence adduced at the July 8 hearing demonstrated that under State Farm's proposed production protocol:

- Much of the production would be in the native form accessed in the ordinary course of business, if that format was reasonably available for a source (App., Tab D at 16:59:55 13 - 17:00:16 19);

- Specific database productions in Excel format provide adequate searchability (App., Tab D at 17:10:21 5 - 17:11:10 19);

- Mandating use of a particular document production tool (Adobe Acrobat) or functionality over objection is novel and unjustified (App., Tab D at 17:12:45 25 - 17:13:52 23);

- Mandating "all color" productions regardless of need is novel and unjustified (App., Tab D at 17:11:11 20 - 17:12:44 24);

- Requiring re-collection of previously collected institutional materials is not needed (App., Tab D at 18:46:02 15 - 18:46:24 23); and

- Requiring State Farm to track down the genesis of materials that exist in one data source to other data sources in a different format (if they even exist) is unduly burdensome and any benefits would not outweigh the burdens (App., Tab D at 17:03:48 12 - 17:05:04 9).

Plaintiffs did not call any fact witnesses at the hearing but proffered the testimony of their own expert witness, who improperly offered opinions regarding the law in Texas as well as his views regarding how document productions should proceed when a party seeks "native file" productions. (App., Tab D at 17:53:33 2 - 18:43:01 9.)

The Respondent did not make any findings of fact in her order on these motions. (App., Tab E.) Instead, on September 30, 2014, the Respondent adopted

Plaintiffs' proposed order that they had modified and submitted at the conclusion of the July 8, 2014 hearing. (*Id.*)

SUMMARY OF ARGUMENT

This petition seeks mandamus relief from two separate aspects of the district court's September 30, 2014 amended discovery order. (App., Tab E.)

The first aspect of the order involves the discovery of ESI and the district court's improper imposition of an "ESI Protocol" governing the form of document production that violates the letter and spirit of Texas law. At its root, the district court's order requires production in the singular and particular "native" format for unstructured documents – regardless of the manner in which the information is used and stored in the ordinary course of business or whether it is reasonably available for production in native format. The order also failed to address whether Plaintiffs have a need for native format of a particular document or set of documents, or whether other formats reasonably available would provide the same information and usability to Plaintiffs. In doing so, the district court undermined the protections of Texas Rule of Civil Procedure 196.4 and ignored the interrelationship of this rule with the other rules governing civil discovery in Texas. In particular, Texas Rule of Civil Procedure 192.4 sets forth principles of proportionality that the district court failed to account for in ordering onerous and

unnecessary discovery in a simple contract dispute where the original insurance claim for damages was approximately $6,000.

By adopting the approach to ESI advocated by Plaintiffs, the district court essentially substituted a "one size fits all" procedure governing the format in which information should be produced, without due regard to the reasonable availability of information in the ordinary course of State Farm's business or the reasonableness of the production formats proposed by State Farm. It also imposed a substantial and unfair burden on State Farm without a showing of any real benefit to Plaintiffs, in violation of the fundamental principle of Texas Rule of Civil Procedure 1 that discovery should be performed in a manner that will minimize, not maximize, the burden on the parties. Because the district court's order was based on an incorrect interpretation of the Texas Rules of Civil Procedure, and State Farm has no adequate remedy by appeal, mandamus is required to correct the court's error.

Moreover, the record below demonstrates that State Farm's proposed production protocol fully accords with the letter and spirit of Texas law; best reflects the prevailing practice in state and federal courts across the country for document productions; and provides for production formats that are reasonably usable. The district court's order is entirely inconsistent with this record. These errors are, individually and together, clear abuses of discretion.

State Farm also seeks mandamus to correct another aspect of the order, pursuant to which the district court compelled the production of witnesses for deposition testimony concerning State Farm's discovery efforts in abrogation of settled Texas law. This too represents a clear abuse of discretion. First, the district court's dictate is procedurally inappropriate, as there was no pending discovery request seeking such testimony upon which to base the order. Second, the mandated testimony directly intrudes upon attorney-client privilege and attorney work product protection. Third, the district court's abusive order permits an intrusive and unwarranted inquiry into "discovery about discovery," a practice that is strongly disfavored under Texas law.

Relief on both aspects of the district court's order is crucial, as the order will impede the discovery process in this case, waste resources, and cause irreparable harm to State Farm. Given the severity of the consequences of the district court's order, State Farm also respectfully requests (in a contemporaneously filed motion) that this Court stay ESI discovery while this petition is pending.

STANDARD OF REVIEW

Mandamus is a proper remedy where a trial court has abused its discretion by committing a clear error of law for which appeal is an inadequate remedy. *See In re Ford Motor Co.*, 211 S.W.3d 295, 297-98 (Tex. 2006). The burden is on the party resisting discovery to establish the trial court abused its discretion and there

is no adequate remedy on appeal. *See In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003). "Under an abuse of discretion standard, we defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations de novo." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009).

Texas appellate courts have repeatedly affirmed that "mandamus relief is available when the trial court compels production beyond the permissible bounds of discovery." *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009); *see also In re CSX*, 124 S.W.3d at 152 ("[T]he trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure.") (citation omitted); *In re Fulgium*, 150 S.W.3d 252, 254 (Tex. App.—Texarkana 2004, no pet.) (holding mandamus "will issue . . . to correct a discovery order if the order constitutes a clear abuse of discretion"). A "'failure by the trial court to analyze or apply the law correctly, as when a discovery order conflicts with the Texas Rules of Civil Procedure, constitutes an abuse of discretion.'" *In re Titus Cnty.*, 412 S.W.3d 28, 32 (Tex. App.—Texarkana 2013, no pet.) (citation omitted).

A party will not have an adequate remedy on appeal when a discovery order commands the production of patently irrelevant information or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the

requesting party. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992); *General Motors Corp. v. Lawrence*, 651 S.W.2d 732, 734 (Tex. 1983) (demand for information about all vehicles for all years). The Texas Supreme Court has found that discovery is patently irrelevant and can be remedied only by mandamus if it is impermissibly overbroad and irreparably harmful. *See In re CSX Corp.*, 124 S.W.3d at 152. The Court has also found that "the harm that might result from revealing private conversations, trade secrets, and privileged or otherwise confidential communications, [from an unreasonable forensic inspection] cannot be remedied on appeal." *In re Weekley Homes*, 295 S.W.3d at 322-23.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY REQUIRING PRODUCTION IN SPECIFIC FORMATS OVER THE PRODUCING PARTY'S VALID OBJECTIONS AND PROFFERS OF REASONABLY USABLE PRODUCTION FORMATS

A. Texas Rules of Civil Procedure Permit Production of Electronically Stored Information in a Reasonably Usable Format

1. Texas Rules of Civil Procedure 196.4 and 192.4 do not permit the requesting party to dictate native production

Texas jurisprudence has long recognized that discovery must be reasonably limited. The Texas Supreme Court, in *In re Alford Chevrolet-Geo*, 997 S.W.2d 173 (Tex. 1999), held that discovery requests must be reasonably tailored, may not be used as a fishing expedition, and that courts may "issue a protective order to protect the movant from undue burden, unnecessary expense, harassment,

annoyance, or invasion of personal, constitutional, or property rights." *Id.* at 180-81 (internal quotation marks omitted). Over the years, this issue has been increasingly pushed to the forefront, and the courts have expressed particular concern that discovery may be improperly leveraged to harass or become "'a weapon capable of imposing large and unjustifiable costs on one's adversary.'" *Id.* at 180 (quoting Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U.L. Rev. 635, 636 (1989)). Indeed, improper leverage is a particular concern here, given that the cost of discovery threatens to dwarf the claim itself, which involves an insurance claim based on damages of approximately $6,000. Thus, ordering an onerous and unnecessary production format in this case would encourage litigants to seek abusive discovery in an attempt to increase the value of an otherwise small claim.

When the Texas Supreme Court amended the Texas Rules of Civil Procedure in 1999, it changed the Rules to address these concerns. It noted that the Rules provided "both adequate access to information and effective means of curbing discovery when appropriate to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism." (App., Tab H.) The revisions were intended to "recognize the importance of discovery as well as the necessity for reasonable limits." (*Id*.) The Supreme Court, clearly frustrated with the trajectory discovery practice had taken up to that time, further noted:

> Discovery provides access to . . . information, but at a price. Recent years' experience has shown that discovery may be misused to deny justice to parties by driving up the costs of litigation until it is unaffordable and stalling resolution of cases. As any litigant on a budget knows, the benefits to be gained by discovery in a particular case must be weighed against its costs.

(*Id.*) Thus, any interpretation of the Texas Rules of Civil Procedure must keep in mind the problems the Rules are designed to solve.

Rule 196.4 requires that a party seeking electronic discovery specify the form in which it prefers to have ESI produced.[5] (App., Tab I.) However, by requiring the requesting party to expressly state when it prefers a specific form of production, Rule 196.4 was not intended to and does not allow the requesting party to dictate the form of production.

Rule 196.4 not only directs the parties to focus discovery on ESI from sources that are "reasonably available," but also on a format of production that is available through "reasonable efforts." (*Id.*) Specifically, the producing party is allowed to object to any form requested and offer an alternative format. The rule does not specify a default format (or any specific formats for that matter) and

[5] Rule 196.4 states: "To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information." Tex. R. Civ. P. 196.4.

certainly does not dictate "native" file productions. (*Id.*) Critically, the rule was specifically designed to support the election, by the producing party, of a reasonably usable format to produce reasonably available information. (App., Tab H; App., Tab C-2 at ¶ 23.) The Texas Supreme Court, in its Explanatory Statement Accompanying the 1999 Amendments to the Rules of Civil Procedure Governing Discovery, made it abundantly clear that the rule changes were designed to "streamline discovery procedures" and "to reduce costs and delays." (App., Tab H.) Indeed, the Texas Supreme Court was so particularly focused on achieving these desired goals that it specified "[t]he notes and comments appended to the rules, unlike most notes and comments in the Rules of Civil Procedure, are **intended to inform their construction and application**." (*Id.* (emphasis added).)

The full comments included in the 1999 Rulemaking History for Rule 196.4 support State Farm's position by stating:

> A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. **Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form**.

(*Id.* (emphasis added).)

Furthermore, the discovery of ESI must be conducted pursuant to all the principles set out in the Rules, including Texas Rules of Civil Procedure 1, 192.3, 192.4, 196.1, and 196.4. Courts routinely recognize that these rules must be read

together. *See, e.g.*, *In re M.*, No. 09-12-00179-CV, 2012 WL 1808236, at *2 (Tex. App.—Beaumont May 17, 2012, no pet.) (interpreting the ESI discovery provisions of Rule 196.4 in conjunction with the limitations of Rule 192.4).

In particular, all of the Texas rules of discovery must be construed in light of the principles of proportionality set forth in Rule 192.4, which states:

> The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:
>
> > (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
> >
> > (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(App., Tab J, Tex. R. Civ. P. 192.4.) Thus, the Texas discovery rules "explicitly encourage trial courts to limit discovery when 'the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'" *In re Alford Chevrolet-Geo*, 997 S.W.2d at 181 (quoting Tex. R. Civ. P. 192.4(b)). "A discovery order that compels overly broad discovery 'well outside the bounds of proper discovery' is an abuse of discretion for which

mandamus is the proper remedy." *In re Harris*, 315 S.W.3d 685, 696 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (quoting *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995)).

Taken together, Texas's discovery rules require that an ESI Protocol impose as minimal a burden, inconvenience, and expense as possible on the parties so that litigation may be "attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable." (App., Tab K, Tex. R. Civ. P. 1.) Indeed, if a party produces "data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business," Tex. R. Civ. P. 196.4, in "reasonably usable form" (App., Tab H, Tex. R. Civ. P. 196, comment 3 to 1999 change), then the mandate of the rule is satisfied and no further production can be compelled.[6] And, as discussed above, State Farm has already produced ESI documents in a reasonably usable format.

[6] The ultimate incongruity of Plaintiffs' position, which could only result in the imposition of even greater burdens, lies in the reality that, under Plaintiffs' construction of Rule 196.4, parties such as State Farm that are frequent litigants could be faced with limitless numbers of production format demands made by different plaintiffs in similar cases, each of which the company would be forced to accommodate despite the company's existing and long-standing ability to produce the same, reasonably usable format in every case. Acceding to the multiple whims and demands of different plaintiffs is a result that makes no sense, practically or legally, and there is no reason to believe that the Texas Supreme Court would countenance such an interpretation.

2. "Reasonably Usable" forms of production represent the appropriate best practice standard for ESI production

Although what constitutes a reasonable usable form of ESI is an issue of first impression in Texas, it has been addressed by various federal courts. The Supreme Court of Texas has expressly looked to the federal courts for guidance on ESI issues. *See In re Weekley Homes*, 295 S.W.3d at 317. In *In re Weekley Homes*, the Supreme Court went to great lengths to consider the federal rules and the notes of the advisory committee, as well as federal case law interpreting the rules, as they relate to the discoverability of ESI. *See id.* at 317-22. The federal rules include two general default production formats for ESI – a form or forms that are "ordinarily maintained" or a "reasonably usable" form or forms. (App., Tab L, Fed. R. Civ. P. 34(b)(2)(E)(ii).) Neither default format specifically requires a "native" production. In fact, the rule was modified in the rule-making process to ensure the "ordinarily maintained" language was not used as a cudgel to require "native" file production. *See* House Rep. Doc. No. 109-105, 109th Cong., 2d sess., at 159-60 (2006) (App., Tab M) (amendment of Rule 34(b) meant to address, *inter alia*, concerns that "'electronically searchable form' might exert pressure for 'native format' production").

Many courts have considered the accuracy of production formats and found that formats other than "native" are "reasonably usable." Specifically, courts have found that the reasonably usable form of data is a form that provides both parties

equal ability to review the probative facts in the matter. *See, e.g.*, *Covad Commc'ns Co. v. Revonet, Inc.*, 267 F.R.D. 14, 20 (D.D.C. 2010) (finding that native production was not required where it was not in the interest of judicial expediency); *Rahman v. Smith & Wollensky Rest. Grp., Inc.*, 2009 WL 773344, at *4 (S.D.N.Y. Mar. 18, 2009) ("[PDF] format – a familiar format for electrical files that is easily accessible on most computers – is presumptively a 'reasonably usable form.'"); *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 559-60 (N.D. Ill. 2008) (production of documents in PDF and TIFF format "complie[d] with the ordinary meaning of Rule 34"); *United States v. O'Keefe*, 537 F. Supp. 2d 14, 23 (D.D.C. 2008) (assuming PDF format is "reasonably usable form" for Rule 34 purposes).

For example, in *Covad*, the requesting party moved the court to order the responding party to produce the ESI for over two thousand documents that were originally produced in paper form. *Id.* at 20. The requesting party argued that "electronically stored data produced in hard copy is inherently unusable and unacceptable under the [Federal] Rules, because it lacks the metadata available in the native format." *Id.* The magistrate judge rejected this argument and found that production of native ESI was not required in order for the information to be reasonably usable because the requesting party "[did] not offer a word as to why it needs native format to analyze and use the 2,832 pages it already has. There is no

question presented by them that only the metadata can answer." *Id.* Here, in this wind/hail case involving repairs of approximately $6,000, State Farm has already produced hundreds of pages of the core documents addressing claims handling in this case in reasonably usable, searchable PDF form. (App., Tab D at 15:18:56 7 - 15:32:42 21.)

In deciding issues of electronic discovery, courts frequently refer to the Sedona Principles and commentaries as "the leading authorities on electronic document retrieval and production." *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 424 (D.N.J. 2009); *accord Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, No. 1:09-CV-2012, 2010 WL 4973317, at *13 (M.D. Pa. Dec. 1, 2010). Significantly, Principle 12 of the Sedona Principles provides that one of the fundamental purposes of producing electronic files is to "enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case." The Sedona Conference, *The Sedona Principles (Second Edition): Best Practices Recommendations and Principles for Addressing Electronic Document Production* ("*The Sedona Principles*") Principal 12, at 60 (2d ed. 2007), *available at* https://thesedonaconference.org/download-pub/81. Numerous courts have endorsed this guiding principle. *See, e.g., Aguilar v. Immigration & Customs*

Enforcement Div. of U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 356 (S.D.N.Y. 2008); *Navajo Nation v. United States*, 106 Fed. Cl. 753, 754-56 (Fed. Ct. Claims 2012); *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 109 & n.115 (S.D.N.Y. 2012); *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 651-52 (D. Kan. 2005).

For example, in *Aguilar*, the trial court relied on the Sedona Principles for the proposition that TIFF or PDF with an accompanying load file "satisfies the goals of Principle 12 because the production is in usable form, *e.g.*, electronically searchable and paired with essential metadata." 255 F.R.D. at 356-57 (internal quotation marks omitted). Thus, the *Aguilar* Court quoted the Sedona Principles' conclusion that "even if native files are requested, it is sufficient to produce memoranda, emails and electronic records in PDF or TIFF format accompanied by a load file containing searchable text and selected metadata." *Id.* at 356; *see also Navajo Nation*, 106 Fed. Cl. at 756 (entering ESI protocol that focuses on converting most documents to "TIFF" image format, with a limited exception for native files in exceptional circumstances including Excel spreadsheet files). Similarly, the approach of the federal court for the Eastern District of Texas in patent cases is that the TIFF format is presumptively appropriate, and native format is required only based on a reasonable and specific request to do so for particular documents. Eastern District of Texas, *Model Order Regarding E-Discovery in*

Patent Cases ¶ 5.A, 5.D, *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22218; *see also* Seventh Circuit's Model Discovery Plan for Electronically Stored Information ¶ I.C.2(a)(1)(c), *available at* http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order; District of Delaware, Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI") at 5-6, *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf.

In short, extensive authority supports the principles embodied in Texas Rule of Civil Procedure 196.4: There is and should be no "default standard" for a specific production format, such as "native format." The district court's order directly violates this mandate and represents an abuse of discretion. The district court's edict that ESI be produced in "native" format demonstrates disregard for the overwhelming, persuasive precedent that favors reasonably usable forms of production. Further, the district court did not consider the issues in the case and the purpose for which the discovery is being sought. Most importantly, the court's order disregards the clear evidence that State Farm has offered to produce ESI in a reasonably usable format, as discussed in Section I.C.1 below.

B. The District Court's Order Is An Abuse of Discretion Because It Imposes Unwarranted Burdens on State Farm that Are Disproportionate to the Litigation

The district court's order also violates the proportionality requirements of Texas Rule of Civil Procedure 192.4. The record reflects that State Farm objected to the ESI Protocol proposed by Plaintiffs to the extent that it required "native file" productions as a default standard form of production. (App., Tab C; *see also* App., Tab D at 16:59:08 2 - 16:59:43 8, stating that it is not typical to set a default standard for the form of production of ESI in native format.) In addition, State Farm objected to the singular format for database productions required by the ESI Protocol. (*Id.*) State Farm proposed a reasonably usable production that reflects how State Farm has met production obligations in other cases (without dispute) as well as State Farm's willingness to accommodate, where reasonably feasible, Plaintiffs' request for productions in certain formats. By definition, and as established by the evidence, State Farm proposed the forms of production that were the most convenient, least burdensome, and least expensive for the producing party in light of the requests and agreed-upon accommodations. *See* Tex. R. Civ. P. 192.4. Notwithstanding State Farm's objections, the district court adopted the protocol proposed by Plaintiffs, without modification or any findings regarding why State Farm's proffered forms of production, specifically identified by data source and category, were unacceptable given the nature of this litigation (a simple

contract dispute) and the amount in controversy (the original insurance claim for damages was approximately $6,000). Neither were there any findings that Plaintiffs demonstrated a need for an all-native production when State Farm has demonstrated that native formats are not readily available. In adopting Plaintiffs' protocol, the district court has required State Farm to go far beyond what the letter and spirit of Texas Rule of Civil Procedure 196.4 require. That was a clear abuse of discretion.

State Farm's expert, Mr. Opsitnick, testified with respect to the various burdens imposed by Plaintiffs' proposed protocol that was adopted by the district court. Forcing State Farm to adoptive "native" and "near native" production formats "no matter what" simply creates practical and substantial burdens and problems that cannot be ignored. As explained by Opsitnick, "[r]equiring State Farm to produce the 'native' form of files would require State Farm to engineer a new process that includes determining upstream sources of the data, validating the upstream source, determining whether native files of the information still exists, and developing an extraction method for the native versions." (App., Tab C-2 at ¶ 41.)[7] This takes time, resources, and money.[8] It also creates inefficiencies for the court, as it needlessly slows the resolution of this case.

[7] Mr. Opsitnick was referring to another State Farm repository, but the principle applies with equal force to State Farm's archive of materials from prior document productions.

[8] The "native file" production format outlined in Plaintiffs' ESI Protocol also impacts the

Principle 12 of The Sedona Principles also notes that a "native" file production that includes a substantial volume and variety of file types could become very expensive and burdensome for the requesting party. *The Sedona Principles* at 62. In addition, experts uniformly recognize that a native file production imposes unique, new burdens on the parties because it would require separate workflows for the review of privileged or otherwise protected information that may exist. (App., Tab C-2 at ¶ 36.) Further, since certain metadata could contain or reveal privileged, secret, or other sensitive information, an organization may determine that it must review such metadata before producing it, which can substantially impact the speed of production.

Moreover, State Farm objected to the undue burden and expense of producing all documents in color. (App., Tab C-2 at ¶ 50.) State Farm's collection and maintenance of documents as black and white images is not surprising, as many documents may have color – such as State Farm's iconic red logo – that has no independent value. (*Id.*; *see also* Tab D at 17:12:09 13 - 17:12:22 16.) Expending extra efforts and costs to capture color regardless of need has no

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practical handling of documents. Native file productions mandate "work-arounds" to address the fact that Bates stamps and Confidentiality legends cannot be applied using existing standard processes for TIFF and PDF files (*e.g.*, everything from a convention for changing file names, resulting in the need to deliver the original file name in a load file, to establishing a protocol to ensure that each time a native file is printed the appropriate Bates numbers and Confidentiality legends will appear on the hard copy). (App., Tab C-2 at ¶¶ 30-36.) For further discussion, *see* section I.C, *infra*.

countervailing value, and the absence of color does not affect the "reasonable utility" of the documents for discovery and evidentiary purposes. (App., Tab D at 17:11:11 20 - 17:11:49 6.)

In addition, State Farm will be required to expend additional time, resources, and money if it is required to create new procedures to produce relevant information from its databases, rather than produce the standard formats used in the ordinary course of business. For example, State Farm's standard production format for the ECS is a searchable PDF. (App., Tab C-2 at ¶ 43.) As discussed in detail in Section I.C.4 *infra*, in order for State Farm to produce the ECS claim handling information in a different format, State Farm would have to undertake the burden of creating and validating an entirely new business process.

The evidence reflects that *any* burdens imposed by such a change in processes and re-collection were not countered by Plaintiffs. Plaintiffs provided no evidence that the requested form of production was needed, but rather merely claim it is wanted.[9] The clear weight of the evidence reflects that State Farm's standard production formats are reasonable, provide the information relevant to

[9] Indeed, when implementing the 1999 Rules changes, the Supreme Court added the necessity of a discovery control plan in each case setting limits on the discovery allowed to "focus courts and parties on both the need for discovery and its costs in each case." (App., Tab H.) Clearly there must be a nexus between the amount of money spent on discovery and the actual need for that discovery.

this straightforward breach of contract dispute, are more convenient, and are less expensive.

In many ways, the violation of proportionality principles in the district court's order arose because the Respondent improperly treated Plaintiffs as the best situated party to determine the appropriate form of production. Principle 6 of The Sedona Principles clearly states that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for . . . producing their own electronically stored information." *The Sedona Principles*, Principle 6, at 38. Principle 6 has stood for years and remains an appropriate reflection of a fundamental presumption underlying state and federal discovery procedures: a responding party has the right and responsibility to produce relevant information within the boundaries of reasonableness and should be accorded deference in meeting its responsibilities. *See, e.g.*, *Ford Motor Co.*, 257 F.R.D. at 427 ("The Sedona Principles wisely state that it is, in fact, the producing party who is [in] the best position to determine the method by which they will collect documents."). The position adopted by the district court turns the system on its head and imposes the wishes of the requesting party on the responding party, in spite of not showing any need or reasonableness. Such disregard of long-standing proportionality principles has been routinely rejected by the Texas Supreme Court. *Cf. In re Weekley Homes*, 295 S.W.3d at 322-23.

C. The District Court's Order Is an Abuse of Discretion Because It Refuses to Allow Production in Reasonably Usable Formats That Were Proffered

Here, uncontradicted evidence in the record established that State Farm offered reasonably usable forms of production reflecting information as it is stored or reasonably available in the ordinary course. State Farm's proposed production formats fall squarely within the types of productions typically accepted in courts across the country and should have been accepted in light of prevailing Texas law. As explained in detail in this section, State Farm undertook the effort to specifically identify reasonably usable production formats that it maintains in the ordinary course of business and to provide an appropriate response pursuant to Rule 196.4.

1. Production of collected and archived materials in searchable image formats is reasonably usable and compliant with Tex. R. Civ. P. 196.4

State Farm's proposed ESI Protocol specifically notes that it will be producing documents from its "archive materials" in TIFF format with accompanying OCR text to provide search functionality. (App., Tab C-1 at ¶ 10.) This is an appropriate, reasonably usable format.

To avoid the Sisyphean task of endlessly identifying, collecting, and producing the same documents for multiple litigations, State Farm created a business process over many years for routinely retrieving copies of commonly

sought documents from a wide variety of business departments and then storing these documents centrally so they are readily available in a single location when needed. (App., Tab C-2 at ¶ 17k.) By storing these documents in a central repository, State Farm significantly reduced its litigation costs and provided an efficient means to access and produce documents in litigation, ensuring its ability to meet discovery obligations in court jurisdictions across the country with timely and accurate discovery responses. *Cf.* Manual For Complex Litigation (Fourth) § 11.444 (2014) ("Central document depositories can promote efficient and economical management of voluminous documents in multiparty litigation.").

Here, certain documents responsive to discovery were pre-collected, are stored in this archive, and are readily available in TIFF format (with OCR searchable text). (App., Tab D at 17:03:06 24 - 17:03:47 11.) State Farm does not have existing, validated processes for the collection and production of these items in the "native" format from other sources required under the district court's order, much less a re-collection as now mandated by the district court. (*Id*.) Nevertheless, the ESI Protocol ordered by the court precludes State Farm from producing documents from this data source because they are not stored in the form in which they were "created." Indeed, the different forms for storage and creation demonstrate that the district court order – that ESI "shall be produced in its native form; that is in the form in which the information was customarily created, used,

and stored" (App., Tab E (emphasis added)) – is internally inconsistent. Moreover, it is also inconsistent with the form in which ESI is "stored" and routinely produced (and accepted) in cases across the country.[10]

State Farm's well-accepted form of production conforms to the dictates of Texas Rules of Civil Procedure 1, 192.3, 192.4, 196.1, and 196.4, and the district court's order is accordingly an abuse of discretion. The format requested – especially when the format is not how the information is stored in the ordinary course of business – should not control production format when a data source exists from which the requested information can be easily retrieved in a reasonably usable format. This conclusion, which the district court ignored, is the axiomatic result of applying the combined principles articulated by Texas Rule of Civil Procedure 192.4 (proportionality), Rule 196.4 (reasonably usable format), and the overarching Rule 1 ("just, fair, equitable, and impartial adjudication of the rights of litigants . . . attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable . . . .").

There is no reason that State Farm should have to undertake an archeological exercise to identify documents easily retrievable from the repository of archive materials. Under the circumstances, "[t]here is no reason or need to require

[10] State Farm provided an alternative definition of "native" in its ESI Protocol to avoid just this result. State Farm's definition acknowledges the business reality that documents may be created in one format, stored in another, and used in a third. (App., Tab C-1, ¶ 2.)

recollection, especially where State Farm is agreeing to provide accompanying OCR text." (App., Tab C-2 at ¶ 17m.) Even the expert witness for Plaintiffs stated that this was not the intended outcome of the ESI Protocol when he commented about State Farm's "ECS": "[W]e don't expect them to go say, oh, there's a PDF, now we have to send out a – a – a bunch of digital bloodhounds to find the counterpart for this. We don't expect them to trace the data from one source to another." (App., Tab D at 18:23:56 9 - 18:24:12 13.) Yet contrary to Plaintiffs' expert's own expectation, that is exactly what the court's order would mandate. In addition, State Farm's reliance on developed and tested mechanisms to identify, retrieve, and produce information in litigation should not be lightly disregarded. Stated otherwise, "requiring State Farm to develop or devise (as well as test) new methods of collecting and handling all requested information in 'native' or 'near native' file types is burdensome and does not make sense." (App., Tab C-2 at ¶ 17k.)

Despite all this, the district court's order compels the perplexing and unduly burdensome result of re-collection and reproduction without regard for the reasonable availability of the relevant information already collected by State Farm. This is a clear abuse of discretion.

2. Production of black and white images of text documents, with appropriate caveats for instances of need, is reasonably usable and compliant with Tex. R. Civ. P. 196.4

The district court was presented with a reasonable and routine alternative to a mandated "native" color requirement for all documents. Rather than collecting and producing all documents in color, it is more common, and less costly, to include a provision in an ESI protocol that allows parties to make limited requests, based upon a showing of need, for color versions of documents produced in black and white. (*Id.* at ¶ 51.) This is exactly what State Farm proposed – and again reflects a reasonably usable production format with proportional process to address any needed exceptions. Notwithstanding this reality, the district court mandates that all documents be produced in color, which would require a change in process for State Farm to re-collect and reproduce historic materials for no practical purpose.

The district court's wholesale requirement of color productions is a clear abuse of discretion.

3. Tex. R. Civ. P. 196.4 does not allow a district court to mandate the use of specific software functionality to redact documents

It is customary for a producing party to choose the redaction tool it will use from among the tools commercially available for performing redactions on a large number of documents. (App., Tab C-2 at ¶ 17h; Tab D at 17:11:11 20 - 17:13:52

23.) State Farm's expert presented uncontradicted testimony that there are multiple ways to accomplish redactions, including the process chosen by State Farm.

The district court ignored this evidence and ordered the use of a specific software program, Adobe Acrobat, at Plaintiffs' insistence because of Plaintiffs' stated desire to have a particular utility available in that program regarding the process by which documents are made searchable. In doing so, the court ignored the fact that Adobe Acrobat is not among the commercially available tools normally used to perform redactions in the litigation context. (App., Tab C-2 at ¶¶ 48-49.) Indeed, "using Adobe Acrobat is not feasible on an enterprise level, as the tool is only appropriate for a document-by-document approach." (*Id.* at ¶ 49.) Practically, this would thus place a substantial and unreasonable burden on State Farm. Moreover, forcing State Farm to use Adobe Acrobat would require the development and validation of new processes and workflows to perform redactions (*id.*), an undertaking that is plainly disproportionate and altogether unwarranted when it can use an industry standard redaction tool without incurring any additional costs.

In short, the district court's novel mandate of a specific software tool is unnecessary, disregards evidence regarding the reasonably usable form of redaction proposed, and reflects a clear abuse of discretion.

4. Tex. R. Civ. P. 196.4 does not authorize a district court to mandate that a party create a new production format when the producing party has proffered a reasonably usable production

Paragraph five of the district court's ESI Protocol addressing database productions states:

> Absent a showing of need, a party shall produce responsive information reports contained in databases through the use of standard reports; that is, reports that can be generated in the ordinary course of business and without specialized programming efforts beyond those necessary to generate standard reports. All such reports shall be produced in a delimited electronic format preserving field and record structures and names. The parties will meet and confer regarding programmatic database productions as necessary.

(App., Tab E at Ex. A ¶ 5.) State Farm has identified at least six databases (not including email) that may contain responsive information in this matter. (App., Tab C-1, ¶ 9; *see also* App., Tab C-2 at ¶ 45.) For each, State Farm offered "to produce the information . . . in a form or report that is reasonably usable." (*Id.*) No evidence was presented contradicting this evidence; Plaintiffs simply demanded a different form of production.

Under Texas law, the requesting party may not demand that the responding party use electronic data to create a list that does not currently exist. *See In re Family Dollar Stores of Tex., LLC,* No. 09-11-00432-CV, 2011 WL 5299578, at *2 (Tex. App.—Beaumont Nov. 3, 2011, no pet.) (citing Tex. R. Civ. P. 196.1; *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989)).

Ordering a party to produce a delimited electronic file instead of the Excel file or searchable PDF generated by the standard report is akin to impermissibly ordering the creation of a new electronic list. Moreover, ordering a party to produce a "standard report" and subsequently defining the file format for the report in such a way ("delimited electronic file") that prevents the party from producing the "standard report" in its "standard file format," as does paragraph 5 of the ESI Protocol, creates a Hobson's choice for State Farm: produce standard reports as it offered to in the reasonably usable, fully searchable standard file formats for those reports (searchable PDF and Excel) in violation of the district court's order, or incur the costs and expense to completely alter existing processes to create an alternative report format that does not currently exist. Reliance on standard reports is reasonable because the effort and cost that is often required in order to create custom reports for any one database can be significant. *See Sedona Database Principles* Comment 2.B, "The reporting functionality of the database," at 31.

Importantly, the district court was presented with (and disregarded) specific examples illustrating why production in delimited electronic file format under ESI Protocol paragraph five is impractical and unreasonable. For example, State Farm's standard production format for the ECS is a searchable PDF. (App., Tab C-2, at ¶ 43.) State Farm's claims adjusters perform claims handling in the ECS. (App., Tab D, at 15:17:32 16 - 15:18:46 13.) In the ordinary course of business,

State Farm accesses the claim file information in the ECS by entering a claim number into the web interface and reviewing the information in that platform. (App., Tab D, at 15:34:20 5 - 15:34:49 14.) State Farm has a published business procedure that allows it to produce "claim file" information from the ECS system for use in litigation. (App., Tab C-2, at Ex. C ¶ 11.) Given the complexity of this database and the fact that no alternative reporting is in place[11] that generates the type of information that Plaintiffs seek in their discovery requests, State Farm would have to create a business process, and validate that process, in order to retrieve information in any manner other than the standard litigation production format it currently uses. (App., Tab C-2, at ¶ 41.) Not only does Texas law provide that it is unnecessary to create new processes in order to list information, but it is unreasonable given that the searchable PDF that State Farm ordinarily produces is reasonably usable.

In light of the above, the district court clearly abused its discretion by requiring State Farm to create special reports in a new format to produce information from databases – especially when a less burdensome, readily available, and reasonably usable alternative was presented to the court.

[11] "[S]ince many databases are intended to be used as information repositories, the system may have been designed solely with the ability for a user to add new data records or update existing records, with no functionality included for the export of records in bulk." *Sedona Database Principles*, Comment 2.B, "the capability for exporting data," at 31. The ECS falls into this category of databases.

II. THE DISTRICT COURT'S ORDER REQUIRING "DISCOVERY ABOUT DISCOVERY" IS PROCEDURALLY AND SUBSTANTIVELY DEFICIENT

Mandamus is the appropriate remedy here, where in addition to approving the ESI Protocol, the district court's order also grants Plaintiffs' Motion to Compel testimony regarding collateral discovery on discovery addressing the following vastly overbroad and clearly premature subject matter:

- methods used by State Farm for searching of electronically-stored information;
- State Farm's computer files, programs, databases, for electrically-stored [sic] information for document production purposes for the past three (3) years;
- the criteria and methodology State Farm uses in conducting the search s [sic] electronically-stored information;
- billing records, invoices, and time sheets associated with State Farm's search for electronically-stored information; and
- State Farm's retention policies [sic] electronically stored information, including knowledge of the length of time electronically-stored information is retained, the types of electronically-stored information that is retained, and the database or system that stores retained electronically-stored information.

(App., Tab. B.)

There is no evidence to establish that the information sought by Plaintiffs is "reasonably calculated to lead to the discovery of admissible evidence." Tex. R. Civ. P. 192.3(c). Instead, they have produced a list of topics that are astonishing in their over-breadth, asking, for example, to make inquiries regarding State Farm's

entire computer system[12] and how all searches for ESI are conducted. By way of illustration:

- There is no reasonable basis for allowing inquiries across State Farm's entire computer system or about all ESI searches[13] conducted on that system, when only an infinitesimally small percentage of that system contains ESI that is "reasonably calculated to lead to the discovery of admissible evidence." Tex. R. Civ. P. 192.3(a).

- Providing testimony on how State Farm searched ESI for past document productions that addressed different issues and different information systems bears no relationship whatsoever to what State Farm's existing capabilities are with respect to searching information systems that contain ESI relevant to this matter. Thus, this subject of inquiry is similarly overbroad on its face.

- The efforts Plaintiffs have made to obtain information regarding "billing records, invoices, and time sheets associated with State Farm's search for electronically-stored information" plainly will not result in the production of information that will help the parties address the merits of this case. These records have nothing whatsoever to do with a weather-related event and property damage. To the extent this inquiry may address issues related to cost shifting, it is premature.

- Finally, Plaintiffs' request that a witness or a deponent be produced to discuss all of State Farm's ESI retention policies without limitation is simply not reasonable on its face. State Farm has already disclosed that its computer system includes over 20,000 servers; asking for information regarding all ESI retention policies on all information systems is nothing but harassment. This is yet another request that is facially overbroad.[14]

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[12] At a prior hearing on this matter, when it was still a part of the *In re Wellington* MDL, State Farm counsel Brian Chandler advised the Court and the parties that State Farm's computer system is comprised of an estimated 20,000 servers. (App., Tab O at 17:19:27 23 - 17:19: 34 25 February 4, 2014 Hearing Transcript.)

[13] Moreover, as discussed below, an inquiry into State Farm's search criteria and methodology seeks attorney-client and work product privileged information.

[14] While State Farm objects to providing any testimony or a deponent to discuss any of

Mandamus is "an appropriate remedy if a party is forced to disclose "patently irrelevant information." *MCI Telecommc'ns Corp. v. Crowley*, 899 S.W.2d 399, 403 (Tex. App.—Forth Worth 1995, no writ.) (citing *Walker*, 827 S.W.2d at 843). Information is "'patently' or 'clearly' irrelevant when . . . reasonable minds would not differ that it has no tendency to prove or disprove any issue involved in the subject matter of the suit and the information's irrelevancy is apparent from the face of the record." *Id.* at 403-04. By any definition, the requested discovery on discovery seeks "patently irrelevant information" with "no tendency to prove or disprove any issue involved in the" case. *Id.*[15]

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these topics, it is important to note that even if these were appropriate subjects of inquiry, Plaintiffs make no effort whatsoever to "'reasonably tailor[]'" them. *In re CSX Corp.*, 124 S.W.3d at 152 (citation omitted). "A central consideration in determining over-breadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." *Id*. at 153. The Texas Supreme Court requires discovery requests to be reasonably tailored because "[d]iscovery is a tool to make the trial process more focused, not a weapon to make it more expensive." *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 668 (Tex. 2007). None of the five topics that Plaintiffs identified is appropriately limited in time or scope to target only those data sources that contain relevant data. These requests are so overbroad on their face as to obviate the need for State Farm to present evidence under Tex. R. Civ. P. 193.4(a) to support its objections to producing a witness or deponent to testify on these topics. "Where a request is overly broad as a matter of law, the presentation of evidence is unnecessary to decide the matter." *In re Brookshire Grocery Co.*, 2006 WL 2036569, at *2 (Tex. App.—Tyler July 21, 2006, no pet.); *see also In re CSX Corp.*, 124 S.W.3d at 153; *In re Union Pac. Res. Co.*, 22 S.W.3d 338, 341 (Tex. 1999).

[15] "As for the requested 'discovery about discovery' . . . such sweeping requests for methodologies, databases, billing records and retention policies runs afoul of best practices guidance (as well as limits imposed by state and Federal Rules of Civil Procedure) that focuses discovery on the merits. . . . Moreover, it is my experience that requiring corporate testimony on such topics wastes substantial resources of the parties and the court while delaying the start of discovery and the ultimate resolution of cases." (App., Tab C-2 at ¶ 18.)

Moreover, much of the information sought implicates privilege concerns, as it constitutes attorney work product. Texas Rule of Civil Procedure 192.3 permits discovery only regarding "any matter that is not privileged and is relevant to the subject matter of the pending action." Tex. R. Civ. P. 192.3(a). Texas courts applying Rule 192.3 have appropriately recognized that the "scope of discovery is also limited by the legitimate interests of the opposing party to avoid overly broad requests, harassment, *or disclosure of privileged information*." *In re Nolle*, 265 S.W.3d 487, 491 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (emphasis added); *see also In re Baptist Hosps. of Se. Tex.*, 172 S.W.3d 136, 140 (Tex. App.—Beaumont 2005, no pet.) ("Compelling an attorney of record involved in the litigation of the case to testify concerning the suit's subject matter generally implicates work product concerns").

In *In re Exxon Corp.*, 208 S.W.3d 70 (Tex. App.—Beaumont 2006, no pet.), the court granted a mandamus petition, holding the trial court had abused its discretion in granting discovery requests related to "efforts taken to search for documents requested in requests for production that have been previously responded to by the [defendants]." *Id.* at 71. The court recognized that the impermissible request "necessarily and almost exclusively concerns the 'mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives' and consists of the 'attorney's representative's mental

impressions, opinions, conclusions, or legal theories' subject to protection as work product and core work product." *Id.* at 75 (citing Tex. R. Civ. P. 192.5(a)(1) and (b)(1)). Yet here, the court's order permits inquiry into exactly the subject matter that was deemed impermissible in *In re Exxon Corp.* (*See supra*.)

An order, such as the one at issue here, compelling discovery into patently irrelevant subject matter that intrudes upon attorney work product, whether through witness testimony or a Rule 199.2(b)(1) deposition, violates the Texas Rules of Civil Procedure and is remediable by a writ of mandamus.

PRAYER

State Farm prays that this Court issue immediate temporary relief by staying ESI discovery in this matter until this Court issues its decision regarding this petition.

State Farm further prays that this Court issue immediate relief by vacating the district court's Amended Order Granting Plaintiffs' Amended Motion for Entry of Production Protocol and Motion to Compel Testimony Regarding Technical Information filed on September 30, 2014.

State Farm further prays that this Court grant the petition for mandamus and direct the Honorable Rose G. Reyna to withdraw the order regarding the ESI Protocol and provide that State Farm may produce information as it has identified as reasonably available, both in terms of source and format. In the alternative,

State Farm prays that this Court amend the ESI Protocol by adding the following language as a preamble to the protocol: "Notwithstanding any other provisions of this ESI Protocol, the responding party may produce responsive, relevant electronically stored information in a reasonably usable format. Static images (made searchable for documents containing text) constitute a reasonably usable format. The responding party should comply with the other provisions of this ESI Protocol to the extent practicable and reasonable."

State Farm also prays that the Court direct the Honorable Rose G. Reyna to withdraw the order compelling witness testimony.

Finally, State Farm prays that the Court grant such other and further relief to which it may be justly entitled.

Dated: October 22, 2014

Respectfully submitted,

By: /s/ Brian M. Chandler
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CERTIFICATION

STATE OF TEXAS §
COUNTY OF HIDALGO §

BEFORE ME, the undersigned authority, on this date personally appeared **Brian M. Chandler**, who, being duly sworn, deposed as follows:

"My name is Brian M. Chandler. I have personal knowledge of the facts stated herein, and they are true and correct. I am the attorney for Relators. All the documents and exhibits submitted herewith in the Appendix are true and correct copies of documents filed by the Parties in Interest in the underlying cause (Tabs A-C); transcripts from hearings in the underlying cause (Tab D) or the related MDL (Tab O); the at-issue Order filed in the underlying cause (Tab E); pertinent sections of the Texas Constitution (Tab F), Texas Government Code (Tab G), Texas Rules of Civil Procedure (Tabs H-K, Tab N), or the Federal Rules of Civil Procedure (Tab L); and related United States congressional documents (Tab M).

I have read the above and foregoing Petition for Writ of Mandamus and the factual statements contained therein are supported by competent evidence included in the Appendix or record."

Brian M. Chandler

SWORN TO AND SUBSCRIBED BEFORE ME by the above-named Affiant this 22nd day of March, 2014.

REBECCA GARCIA
My Commission Expires
March 25, 2017

NOTARY PUBLIC – STATE OF TEXAS
MY COMMISSION EXPIRES: 3/25/17

CERTIFICATE OF COMPLIANCE (WORD COUNT)

Pursuant to Texas Rules of Appellate Procedure, Rule 9.4(i)(1) and (3), I certify that this Petition for Writ of Mandamus contains 10,575 words, not including the cover page, identity of parties and counsel, table of contents, index of authorities, statement of issues presented, statement of jurisdiction, signature, certificate of service, certification, appendix, signature blocks, or this Certificate of Compliance page.

DATED: October 22, 2014

/s/ *Brian M. Chandler*
Brian M. Chandler

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to all counsel of record via hand delivery, USPS, CMRRR, electronic service, and/or facsimile on this the 22nd day of October, 2014.

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/s/ *Brian M. Chandler*
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