No. 16-3185

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE: STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner.

Original Proceeding from the United States District Court
for the Western District of Missouri, Central Division

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OF STATE FARM FIRE AND CASUALTY COMPANY

RELATED TO CASE NO. 16-8013

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. Individualized Discovery Regarding the Claims of Nearly 144,900 Class Members Is Contrary to the Purposes of Rule 23 3

II. The Individual Discovery Ordered by the District Court Does Not Satisfy the Proportionality Requirement of Rule 26(b)(1) 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Duffy v. Barnhart Store Co.,
202 S.W.2d 520 (Mo. Ct. App. 1947) 4

In re Ford Motor Co.,
345 F.3d 1315 (11th Cir. 2003) 9

Johnson v. Nekoosa-Edwards Paper Co.,
558 F.2d 841 (8th Cir. 1977) 4

MKB Management Corp. v. Stenehjem,
795 F.3d 768 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016) 4

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 3, 5

Statutes and Rules

Fed. R. Civ. P. 23 ..... 1, 2, 3, 8, 10

Fed. R. Civ. P. 26 ..... 1, 6, 10

Fed. R. Civ. P. 26, 2015 adv. comm. note 6, 7

Fed. R. Civ. P. 26(b) 1, 2, 5

Fed. R. Civ. P. 26(b)(1) 5, 7

Fed. R. Civ. P. 28(j) 3, 4

Other Sources

Chief Justice John G. Roberts, *2015 Year-End Report on the Federal Judiciary*, *available at* https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf 6

The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation, 15 Sedona Conf. J. 171 (Fall 2014) 2

INTRODUCTION

Plaintiff's answer to State Farm's petition for a writ of mandamus avoids the issues raised by the petition and opts instead to give this Court a misleading narrative of the discovery proceedings below. Plaintiff provides no answer to the fundamental issue raised by the petition: whether extensive, individualized discovery regarding claims and defenses as to each of the approximately 144,900 class members is permissible under Rules 23 and 26 and under due process. Plaintiff confines her answer to conclusory and incorrect assertions that the orders requiring individual discovery as to every class member are entitled to deference, that the massive individual discovery ordered here is justified because it is supposedly "crucial" to Plaintiff's case, and that State Farm purportedly exaggerates the burden imposed by this discovery.

State Farm's petition raises important and novel legal issues concerning the application of the proportionality requirement of Rule 26(b) in the class action context. The individualized discovery ordered below is contrary to the goals of class action litigation. Those goals are attained by using the requisite class-wide evidence, not by forcing a defendant to answer interrogatories that require the individual evaluation of each class member's claim. There can be no legitimate need in a class action for individual discovery on the scale ordered here. The district court abused its discretion in imposing Draconian discovery orders and in making unfounded assumptions about "what computers do." *See* A3392.

Plaintiff's answer repeatedly echoes the district court's speculation regarding data retrieval that cannot be done, and much of its discussion is devoted to trying to discredit State Farm's attempts to comply with discovery. Plaintiff's recitation of the discovery

proceedings below is wholly inaccurate. Plaintiff cannot contest that a major part of the information sought by the interrogatories resides in computer records containing *imaged* paper documents, such as contractor invoices and estimates, and the narrative free-form notes of claims adjusters. This information can only be obtained by individuals examining the images and notes in the files. It cannot be obtained through computer programming. This manner of storing documents is consistent with State Farm's business needs and all applicable insurance statutes and regulations. It thus does not constitute any inadequacy in State Farm's record-keeping. The law instructs that a company "may maintain its corporate information in any manner it chooses" absent statutory or other preservation requirements. *See The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 Sedona Conf. J. 171, 193 (Fall 2014) (citing cases). State Farm evaluates and identifies damage to an insured's property and handles claims on an individual basis. Contrary to Plaintiff's and the district court's assertions (A3388), the fact that imaged information is not amenable to class-wide computerized data retrieval does not justify requiring State Farm to search through that information in whatever way it can and at whatever expense in money, time, and business disruption.

Plaintiff's interrogatories regarding State Farm's payments to each of the nearly 144,900 class members and State Farm's individual defenses to each claim fail to meet the proportionality requirements of Rule 26(b), the purposes of Rule 23, and the mandates of due process. This Court should review and resolve the novel and important legal questions presented by the petition.

ARGUMENT

I. INDIVIDUALIZED DISCOVERY REGARDING THE CLAIMS OF NEARLY 144,900 CLASS MEMBERS IS CONTRARY TO THE PURPOSES OF RULE 23

The district court affirmed the special master's order requiring State Farm to (i) "identify the amount of labor depreciation withheld and the dates when it was withheld" for each class member and (ii) "state whether some or all of the depreciation was later paid by State Farm." A3391. Under this order, State Farm is required to categorize and analyze each payment made to each insured. *See* Pet. at 10. In affirming the special master's order, the district court failed to consider the purposes of Rule 23 and whether such individualized discovery is warranted in a class action, which by definition requires that the class members' claims and defenses "must be of such a nature that [they are] capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Instead of addressing these issues, Plaintiff repeats the mantra that the individual evidence sought by Plaintiff's interrogatories about each class member's claim is "central" and "critical" (*see* Answer at 1,3,6,10,11,19,26), and thus deference should be given to the district court's conclusion in that regard. In fact, the district court's acknowledgment that these individual issues go "'directly to the central issues in this case' and 'are at the very heart of this litigation'" (*id.* at 26 (quoting A3388-89)) reveal that this case cannot properly proceed on a class basis.[1]

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[1] The district court obscured the problems with predominance by holding that payment is an affirmative defense and that Plaintiff and the class members do not have the burden of establishing an underpayment on their claims. *See* Rule 28(j) Letter dated July 26, 2016, attachment at 13. In fact, where, as here, non-payment or underpayment is an element of a plaintiff's breach of contract claims, payment is not an affirmative defense. "[P]ayment is an affirmative defense as to which the party asserting payment has the burden of proof *except in the type of case where the fact of nonpayment is an essential*

Plaintiff cites no authority where discovery as to individual class members on the scale involved here has been approved, whether pre- or post-certification.[2] Plaintiff incorrectly contends that the issue is rendered moot by the district court's grant of class certification. Answer at 18. Plaintiff attempts to support this assertion by citing scattered references in State Farm's petition to the "putative" class or class members. *Id.* at 18 n.2. But State Farm's arguments do not depend on whether or not a class has been certified—the discovery ordered below demonstrates that *no class could properly be certified in the first place*. The district court's class certification order compounds, not cures, its original error.[3]

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element of the other party's cause of action." *Duffy v. Barnhart Store Co.*, 202 S.W.2d 520, 526 (Mo. Ct. App. 1947) (emphasis added). Moreover, the district court erred in reasoning that discovery as to individual affirmative defenses would not be a problem because (i) they are just affirmative defenses, can be litigated in mini-trials, and do not prevent class certification; (ii) State Farm would have to develop its affirmative defenses anyway; (iii) State Farm will be forced to be "judicious" in selecting its affirmative defenses; and (iv) the parties will likely "quickly tire" of mini-trials on affirmative defenses. *See* Pet. at 15-16 and A3393-94; Rule 28(j) Letter dated July 26, 2016, attachment at 28.

[2] The only case Plaintiff cites (Answer at 19) for the proposition that the individual discovery at issue is appropriate and permissible because it goes to the "central issue[s]" of Plaintiff's claims is *MKB Mgm't Corp. v. Stenehjem*, 795 F.3d 768, 773 n.4 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016). That case was not a class action and has nothing to do with the issues here. It merely affirmed a discovery order that limited the scope of discovery to the "'central issue[]'" in the case. *See id.*

[3] Plaintiff also points to State Farm's discussion of *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841 (8th Cir. 1977), which the district court cited as support for the extensive individual merits discovery it ordered. *See* Pet. at 15; A3391. Yet State Farm's analysis of that case did not concede that individualized discovery is proper post-certification. Likewise, State Farm's rebuttals of Plaintiff's claim that she was entitled to individualized discovery of damages were not confined to pre-certification, but apply equally post-certification. *See* Pet. at 14, 22.

Plaintiff contends that "appropriate pre-certification discovery has *broadened* in recent years due to the increased focus on the merits when considering certification, as mandated by" *Wal-Mart* and its progeny. *Id.* at 19. Nothing in *Wal-Mart* supports the proposition that pre- or post-certification discovery has been broadened to allow extensive individual discovery of every single class member's claim. The analysis of the merits authorized under *Wal-Mart* goes to whether the class claims *and* defenses to those claims can be resolved on a class-wide basis through class-wide evidence. *See Wal-Mart*, 564 U.S. at 349-50. That is far different from the effect of the district court's order.

The answer to the problems presented by the management of this case is not to force State Farm to provide individual discovery as to 144,900 class members or to be "judicious" in presenting its affirmative defenses to individual class members' claims. The district court's orders compelling this individual discovery should be reversed.

II. THE INDIVIDUAL DISCOVERY ORDERED BY THE DISTRICT COURT DOES NOT SATISFY THE PROPORTIONALITY REQUIREMENT OF RULE 26(b)(1)

In opposing State Farm's petition, Plaintiff wrongly contends that the proportionality requirement is nothing new and that there is no important or novel issue for the Court to resolve regarding that requirement. Answer at 26-27. Yet Plaintiff points to no case law grappling with the application of the proportionality requirement to discovery as to the individual claims of class members, particularly where, as here, there is a vast class.

Plaintiff's assertion that the 2015 amendment to Rule 26(b) "had little impact on long-standing discovery requirements" (*id.*) is contradicted by the Chief Justice of the Supreme Court, who hailed the amendments as "mark[ing] significant change, for both

lawyers and judges, in the future conduct of civil trials" and "crystaliz[ing] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." Chief Justice John G. Roberts, *2015 Year-End Report on the Federal Judiciary* 5-6.[4] While the requirement of proportionality was introduced as a limitation on the scope of discovery under Rule 26 in 1983, it is plain from the 2015 advisory committee note that the courts were not "using these limitations as originally intended," and that the "problem of over-discovery" was not solved by the various amendments to the provision. Fed. R. Civ. P. 26, 2015 adv. comm. note.

The 2015 "amendment restores the proportionality factors to their original place in defining the scope of discovery." *Id.* The advisory committee recognized that "[w]hat seemed an [information] explosion in 1993 has been exacerbated by the advent of e-discovery." *Id.* The 2015 amendment, as the advisory committee expressly recognizes, not only gives new emphasis to the proportionality limitations, but must also be applied in circumstances that have changed dramatically since the requirement was originally enacted. The discovery issues raised here relate specifically to the application of the proportionality requirement in e-discovery and illustrate the pitfalls of ill-founded assumptions that all information sought in discovery from a corporate defendant will be available at the push of a button on a computer. As the advisory committee recognizes, "[c]omputer-based methods of searching such information continue to develop," *id.* – meaning that, even as of 2015, there are still certain things

[4] *Available at* https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (last visited Aug. 26, 2016).

that computers cannot do. This is one of them.[5] The district court simply refused to accept the unrebutted fact that computer-based methods for data retrieval could not be used to answer the interrogatories.[6] *See* A3392-94.

The advisory committee also repeated the caution first raised in 1983 that "'[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.'" Fed. R. Civ. P. 26, 2015 adv. comm. note. Thus, "[t]he court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1)." *Id.* The oppressive discovery ordered here fails to abide this precept.

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[5] The unrefuted evidence shows that the data that must be analyzed to answer the interrogatories [redacted] *See* A4494-96; A4499-500; A4510; A4196-97; Pet. at 10. There is no evidence, expert or otherwise, suggesting – let alone demonstrating – that State Farm, Xactware, or anyone else could devise programming capable of doing that.

[6] Plaintiff repeatedly asserts that State Farm is able to retrieve labor depreciation information when it chooses to do so. *See* Answer at 21, 23. In fact, however, to the full extent State Farm *could* retrieve data, it did so, yet Plaintiff rejected that information as "non-responsive" to the interrogatories. *See* A2524-26; A4430-31, 4442; A4453.

Plaintiff (and the district court) err in concluding that the interrogatories are proportional to the needs of the case because they seek information "central" to Plaintiff's case. That is nothing more than a claim that if individual merits evidence as to every class member is "central" to her case, then she is entitled to it, no matter the burden and expense. Answer at 1,3,10,11,19,26. This contention is contrary to the purposes of Rule 23 and runs roughshod over the concerns addressed by Rule 26(b)(1).

Plaintiff's suggestion that State Farm does not really need to review individualized records to answer her interrogatories also is baseless. Plaintiff does not address, much less refute, State Farm's detailed showing in its petition that much of the information needed to answer Plaintiff's interrogatories is contained in computer claims files of *imaged* paper documents and free-form notes. *See* Pet. at 6-7. These files cannot be searched reliably by computer programming, and it takes anywhere from 30 minutes to two hours on average to interpret the file contents. *See id.*; A4500-01; A4513.[7] These materials must be analyzed to determine (i) the nature of each payment made on a class member's insurance claim; (ii) whether labor depreciation was applied; (iii) whether any previously applied depreciation was effectively "repaid"; (iv) whether State Farm paid the insured the full actual cost of his or her repairs; and (v) whether any of State Farm's affirmative defenses apply to the insured's claim.

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[7] Plaintiff points to a single time entry (likely a typographical error) by one reviewer for one file he reviewed that supposedly shows State Farm generally has inflated the time needed to derive responsive information. *See* Answer at 12, 23. Yet the documentation for that reviewer's work does not show any such improper time inflation. Further, State Farm now has reviewed *thousands* of files and has confirmed that the 30-minute to two-hour time range it estimated for file review as stated in its Plan was, if anything, *understated*. *See* State Farm's Motion for Stay, Ex. D at ¶ 3.

The district court may have deemed it "'incredible'" (A3392) – or, as Plaintiff puts it, against "'common sense'" (Answer at 22 (citation omitted)) – that State Farm cannot simply press a button and provide all the answers to Plaintiff's interrogatories. But that is not a basis for granting the requested discovery regardless of the burden and expense. Nor does the fact that State Farm objected to providing Plaintiff with remote access to its computer system justify disregarding the burden imposed by Plaintiff's interrogatories. Plaintiff made no formal discovery request for such access, and she never made the showing necessary before such extraordinary access properly may be ordered. *See, e.g.*, *In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003).

Equally baseless is Plaintiff's complaint that State Farm wrongfully "refused" to produce a list of "data fields pertaining to its structural claims data" or the "data fields" from Xactware, which provides State Farm with estimating software. Answer at 27. Plaintiff claims that a State Farm software engineer testified that "almost any data field in the databases could be readily retrieved from the databases and imported into an Excel spreadsheet on a class-wide basis" and that neither he nor an Xactware employee "described a burdensome process in retrieving class-wide data for State Farm related to labor depreciation." *Id.* at 7. But Plaintiff engages in misdirection. [redacted]

[redacted]

[8] [redacted]

State Farm timely objected to Plaintiff's "data field" demands on the grounds that it did not possess a list of Xactware's data fields, that its own data fields listing was proprietary, and – most importantly – that running queries against the data it maintains will not generate the labor depreciation amounts Plaintiff demands. *See* A2662, A2670-73. State Farm's objection was supported by affidavits from State Farm employees and was sustained by the special master. *See* A2772-79, A2781-84; A1693; A0203. Plaintiff did not challenge that ruling, and thus waived any objection to it. Thus, Plaintiff cannot show that State Farm could have run responsive reports for her had it wished to do so, or that *she* could have run such reports using data from State Farm and Xactware.

Finally, Plaintiff and the district court suggest that State Farm was obligated to furnish some other way to provide the information sought by Plaintiff, and having failed to do so, State Farm should bear whatever burden is imposed to answer the interrogatories. Answer at 27; A3395. This is not the law of proportionality. No less burdensome method exists. State Farm should not be penalized for that fact. In ordering the discovery, the district court plainly abused its discretion. The orders fail to comply with Rules 26 and 23 and due process. The orders warrant immediate relief.

CONCLUSION

This Court should grant State Farm's petition and issue a writ of mandamus.

[redacted]

Dated: August 26, 2016

Respectfully submitted,

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