No. 16-3185

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE: STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner.

AMANDA LABRIER,

Respondent.

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

RESPONDENT AMANDA LABRIER'S ANSWER TO STATE FARM FIRE AND CASUALTY COMPANY'S PETITION FOR WRIT OF MANDAMUS

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RELIEF REQUESTED

State Farm Fire and Casualty Company's ("State Farm") Petition for a Writ of Mandamus should be denied. Mandamus is an extraordinary remedy. "Only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion" will justify its application. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004). Further, a petitioner must show that entitlement to the writ is "clear and indisputable." *Id*. at 380-81.

This Petition concerns orders of the district court that require State Farm to answer interrogatories seeking central evidence in State Farm's exclusive possession. The orders were entered only after State Farm opposed discovery of the information by other means. The district court carefully considered and applied the proportionality standards of Rule 26(b)(1), after first having a special master analyze an extensive factual record. Because the district court acted within its discretion, the Petition should be denied.

ISSUES PRESENTED BY THE PETITION

Respondent Amanda LaBrier ("LaBrier") does not agree with the Statement of Issues in the Petition for a Writ of Mandamus. The issues presented by the Petition are properly stated as:

1. Whether a writ of mandamus is proper to prevent the discovery of damages evidence in the sole possession of the defendant, in a certified class action, on

the alleged grounds that the discovery is disproportionate to the needs of the case and imposes an undue burden on the defendant, after both the district court and a court-appointed special master considered defendant's contentions as to both proportionality and burden under an extensive factual record and concluded otherwise.

2. Whether this Court should consider declarations of defendant's employees that were rejected by the district court as untimely and that were found to contain information available to the defendant when the district court first considered and ruled upon the matter.

RESPONDENT'S STATEMENT OF FACTS

In response to State Farm's Statement of Facts, LaBrier admits only the facts set forth in Section II of State Farm's "Factual and Procedural" Background. As to the other sections, some sentences accurately reflect the facts and procedure of the case and others do not. For the sake of clarity, LaBrier states that the following facts are necessary to understand the issues presented in State Farm's Petition:

LaBrier is a State Farm policyholder whose home was damaged in a hailstorm. Dkt. 1-1 at ¶¶ 6-7 (A0027). Her policy requires State Farm to pay the actual cash value ("ACV") of her loss. *Id.* at ¶¶ 13-14 (A0028). State Farm withheld $1,061.02 from LaBrier's ACV payment as labor depreciation. Dkts. 133 at 1-2; 138-14 at 7

(A0219-20, 1925). LaBrier represents a certified class of similarly-situated Missouri policyholders. Dkt. 238 at 7.

State Farm moved to dismiss LaBrier's case, asking the district court to interpret its policy to permit withholding labor depreciation from ACV payments. Dkts. 21; 22 (A0069-143). The district court denied State Farm's motion. Dkt. 67 (A0161-180). The district court held that State Farm's ambiguous policy language should be construed in favor of the insured. *Id.* at 9, 14 (A0169, 0174). The district court later granted LaBrier's motion for class certification. Dkt. 238.

While the district court interpreted the policy in favor of the certified class, State Farm now seeks to prevent LaBrier from receiving discovery upon the "central issues" in the case. Dkt. 176 at 7 (A3391). State Farm was ordered to provide interrogatory answers identifying the amounts of labor depreciation it withheld from class members, the dates of such withholding and any amounts of labor depreciation it subsequently repaid. *See id.* at 4-5 (A3388-89). State Farm was also ordered to identify facts supporting its affirmative defenses. *Id.*

State Farm neither disputes that the interrogatories are relevant to the case,

Before discussing whether State Farm was properly ordered to answer the interrogatories, one must understand the procedural context. State Farm's Petition fails to discuss its "obstructionist" and "intransigent" approach to discovery. Dkt. 176 at 11 (A3395).

I. State Farm Rejects All Efforts To Streamline Discovery.

As a means of streamlining discovery, in October 2015, LaBrier requested that State Farm provide her a list of the available data fields in its internal claims database, including payment data. Dkts. 156-1 at 2-3, 176 at 2 (A2545-46, 3386). LaBrier also asked for a list of the available data fields used by State Farm's vendor, Xactware Solutions, Inc. ("Xactware"). *See id*. Xactware's software, Xactimate, is used to prepare and generate estimates for State Farm's policyholders. Dkt. 133-3 (A0723). LaBrier asserted that the lists of data fields would "assist the parties in more efficiently determining which structural damage claims fall within the putative class." Dkt. 156-1 at 2 (A2545). [redacted]

LaBrier then deposed two persons who are familiar with the State Farm and Xactware databases [redacted]

[redacted]

LaBrier then served State Farm with a request for production of documents after the Jangda and Stoddart depositions. Dkt. 156-1 at 1-7 (A2552-58). LaBrier asked State Farm to produce some of the ESI identified by Jangda at his deposition, [redacted] State Farm refused to produce the requested information and moved for a protective order. Dkt. 156-4 at 1-22 (A2662-83). State Farm argued that the requests were unduly burdensome, sought highly confidential information and infringed trade secrets. *See id.* at 13-14, 17 (A2674-75, 2678).

As an alternative to the production of data field lists, LaBrier requested that State Farm provide remote access to State Farm's internal claims database. State Farm also rejected this proposal. *See id.* at 21 (A2682).

In a further attempt to respond to obtain the critical discovery while continuing to respond to State Farm's concerns, LaBrier served State Farm with the interrogatories at issue to assist with "identify[ing] class members and damages." Dkt. 176 at 7 (A3391). Like the previous requests, State Farm refused to answer the interrogatories. State Farm argued that the interrogatories were unduly burdensome and disproportionate to the needs of the case. *See generally* Dkts. 138-1; 138-11 (A1699-714, A0941-66).

II. The Special Master Applies Rule 26 To The Extensive Record Before Him And Orders State Farm To Answer The Interrogatories.

The parties first litigated the propriety of the interrogatories before the special master. The special master held multiple in-person and telephone hearings, and reviewed extensive written arguments, numerous depositions and other written evidence submitted by the parties. *See generally* Dkt. 176 at 3 (A3387). The evidence included documents showing that State Farm retroactively reimbursed certain Missouri policyholders for previously withheld labor depreciation while LaBrier's lawsuit was pending. *See generally* Dkts. 88; 171 at 7 (A3380) (indicating Renita Jackson's deposition testimony concerning program was presented to the special master).

While the parties submitted an extensive record to the special master, State Farm did not submit *any* evidence from its employees or Xactware's employees that described or estimated the cost and time required to answer the interrogatories. Dkts.

138-1 at 10-11; 176 at 10 (A0950, 3394). Instead, State Farm relied on its experts from another case as evidence of its purported burden in answering the interrogatories. *Id.* The experts were not State Farm employees, did not work in the insurance industry, did not have general technology expertise and did not have experience working with the State Farm or Xactware databases. *See* Dkt. 176 at 10 (A3394).

In contrast, LaBrier presented [redacted]

In addition, the special master was provided [redacted]

The special master also considered evidence showing how computer data could be used to efficiently provide the information necessary for many of the claims at issue. For example, [redacted]

[redacted]

The special master also considered evidence demonstrating that State Farm could readily determine the amounts of withheld labor depreciation. The record showed that State Farm repaid certain Missouri policyholders for withheld labor depreciation shortly after the district court denied State Farm's motion to dismiss. *See* Dkt. 88. This process involved State Farm representatives' review of claims in which labor depreciation was withheld from estimates prepared on or after November 30, 2015, the date of the district court's order. *Id.* State Farm sent labor depreciation payments to those policyholders. *Id.*

According to Renita Jackson, another long-time State Farm adjuster, it was

[redacted]

[redacted]

State Farm adjuster Gray similarly testified that determining the amount of withheld labor depreciation [redacted] Gray, like Jackson, testified that [redacted]

In addition to evidence regarding the calculation of labor depreciation, the special master considered the procedural posture of the case. Despite State Farm's request, the district court did not bifurcate class and merits discovery. Dkts. 26; 81 (A0144-60, 0187-99). The special master was aware that the district court had already interpreted State Farm's policy in LaBrier's favor. *See* Dkt. 67 (A0161-80).

After considering the extensive record before him, the special master entered "Order No. 4" on April 6, 2016, which required State Farm to answer the interrogatories. Dkt. 117 (A0203-09).

Order No. 4 analyzes all of the factors set forth in the current version of Rule 26(b). *Id.* at 2-4 (A0204-06). The special master noted that State Farm was relieved

it of having to provide proprietary data field lists. *Id.* at 4 (A0206). The special master also noted that State Farm did not dispute that LaBrier was permitted to conduct discovery on the potential merits prior to class certification. *Id.* at 2 (A0204).

III. The District Court Affirms The Special Master's Order After Applying The Proportionality Considerations Of Rule 26(b) To The Record And Concludes That State Farm's Discovery Positions Are "Obstructionist" And "Intransigent."

State Farm appealed Order No. 4 to the district court. Dkts. 135; 138 (A0916-2519). In considering the appeal, the district court considered the extensive record presented to the special master. *See id; see also* Dkt. 156 (A2520-777). Like the special master, the district court applied the proportionality and burden requirements of Rule 26(b) to the record. Dkt. 176 at 6-13 (A3390-97). The district court affirmed Order No. 4 on May 9, 2016. *See id. passim.* The district court held that the interrogatories seek information "routinely provided in class action cases," go "directly to central issues" in the case and assist with identifying "class members and damages." *Id.* at 7 (A3391).

The district court rejected State Farm's argument that answering the interrogatories is complex and overly burdensome. Rather, the court found "incredible" State Farm's argument that it could not efficiently answer the interrogatories because its payment and estimate data are contained in different databases. *Id.* at 8 (A3392). The court noted that computing could address this task.

See id. ("[D]ata sorting is what computers do in much higher levels in very short amounts of time.")

The district court further noted that much of the burden was created by State Farm's refusal to provide LaBrier access to the information she requested. *Id.* at 11-12 (A3395-96). State Farm "offered no effective way" for LaBrier to otherwise access the data she requested months earlier. *Id.* at 11 (A3395). The court refused to reward State Farm's "obstructionist" and "intransigent" approach to discovery, which it believed created much of the purported burden. *Id.* In other words, State Farm could not "keep its own system secret and then refuse to gather the information itself." *Id.*

The district court also rejected State Farm's proportionality arguments. First, the district court held that the interrogatories "are at the very heart of this litigation" and go to the "central issues in the case." *Id.* at 7, 12 (A3391, 3396). Second, the court recognized that State Farm, not LaBrier, has access to the information requested through the State Farm and Xactware databases and that State Farm refused to provide this information through other means. *Id.* at 12 (A3396). Third, in considering the parties' resources, the district court recognized that LaBrier is an individual seeking to obtain information from a "corporation with a national presence, with sophisticated access to data." *Id.*

Last, the district court rejected State Farm's burden arguments. Essentially, the court found the testimonies of Jangda and Stoddart more credible than that of State Farm's experts who did not work in the insurance industry, did not have general technology expertise and did not have experience working with the State Farm or Xactimate databases. *See id.* at 10 (A3394). Rather, the court concluded that [redacted]

IV. State Farm Ignores The Special Master's Order And Fails To Answer The Interrogatories.

State Farm provided its initial answers to the interrogatories on May 6, 2016. [redacted] The answers were non-responsive, [redacted]

While not requested in the interrogatories, State Farm's "answers" provided statements regarding [redacted]

State Farm proceeded to file a motion for substantial compliance before the special master asking that it not be "required to provide further or other" response to the interrogatories. Dkt. 210-25 at 15 (A4169). The parties then held a half-day, in-person hearing before the special master. Dkt. 210-28 at 2-39 (A4268-305).

After considering the record and arguments, the special master denied State Farm's motion for substantial compliance in "Order No. 8." Dkt. 190 (A4033-38). He held that State Farm's motion was a "rehash" and "another attempt to demonstrate" that it should not be ordered to answer the interrogatories because doing so requires a "time-consuming" and expensive review of the claims. *Id.* at 1-3 (A4033-4035). The special master further concluded that State Farm did not produce *any* direct answers to the interrogatories and did not properly verify the interrogatories. *Id.* at 4-5 (A4036-37).

The special master ordered State Farm to submit a plan describing the process it would implement to answer the interrogatories. *Id.* at 6 (A4038). The plan was ordered to "provide some needed predictability regarding the timing" of State Farm answering the interrogatories. *Id.* Although it was not asked to do so, State Farm included [redacted]

V. State Farm Improperly Attempts To Expand The Evidentiary Record Concerning Its Alleged Burden *Post Hoc*.

Apparently not pleased with the evidence it initially presented, State Farm began efforts to improperly back-fill evidentiary support for its burden objections in the court record. On June 14, 2016, State Farm, without a request from the special master or the district court, [redacted] State Farm made this submission after: (1) the parties fully briefed and submitted to the special master evidence concerning the propriety of the interrogatories; (2) the parties participated in oral argument before the special master concerning the propriety of the interrogatories; (3) the special master entered Order No. 4; (4) the parties fully briefed State Farm's appeal of Order No. 4; (5) the district court affirmed Order No. 4; (6) the parties fully briefed and argued State Farm's motion for substantial compliance; (7) the special master entered Order No. 8; and (8) State Farm filed its appeal of Order No. 8. *See id.*

The district court rejected State Farm's untimely filing and held that "nothing suggests State Farm could not have produced" the materials earlier. *See* Dkt. 266 at 10. The district court further held that "State Farm had a fair opportunity" to make its cost argument earlier. *Id.*

VI. The District Court Rejects State Farm's Creative Attempt To Seek Reconsideration Of Its Failed Burden And Proportionality Arguments.

The district court affirmed Order No. 8 on August 9, 2016 for two primary reasons. Dkt. 266. First, the district court held that State Farm's latest appeal was an improper attempt to have the district court reconsider its order compelling State Farm to answer the interrogatories. *Id.* at 10-11. Second, the district court held that the special master's entry of Order No. 8 was not an abuse of discretion. *Id.* at 9.

The district court first held that reconsideration of its May 9, 2016 order was not appropriate. While State Farm's motion underlying Order No. 8 is titled a "motion for substantial compliance," the district court recognized that State Farm really sought reconsideration of its previous order affirming Order No. 4. The district court rejected State Farm's arguments, in part, because they did not meet the governing judicial standards for reconsideration. Dkt. 266 at 10. The district court held:

> State Farm also argues at length that the discovery is burdensome and not proportional. The Court has previously addressed and rejected the same argument in connection with State Farm's motion to vacate Special Master Order No. 4. Again, *this argument is a request to reconsider the Court's prior ruling*. A request to reconsider an interlocutory order requires the movant to demonstrate it "did not have a fair opportunity to argue the matter previously" and that "granting [the requested relief] is necessary to correct a significant error." A motion for reconsideration "is not a vehicle for simple reargument on the merits. *State Farm cannot meet this standard*.

Id. (citations omitted and emphasis added).

In rejecting State Farm's burden arguments a second time, the district court recognized that State Farm purposefully undertook a cumbersome and inefficient approach to answering the interrogatories, stating:

> Further, and as discussed above, most recently, State Farm has approached discovery in a way that appears to have been inefficient, both by including irrelevant data in a data query, and excluding information that appears relevant, then tasking the adjusters to manually enter data from existing databases to a new one and go back through the results, showing the results were difficult to work with. [footnote: Plaintiff points to an example in which an adjuster spent 240 minutes working on a claim involving a single ACV payment].

Id. at 11.

Second, the district court held that the special master did not abuse his discretion. *Id*. at 9. With respect to the first and second interrogatories, the district court held that the data produced by State Farm in making payment relied on a faulty premise that incorporated "actual-cost-of-repair" data, *i.e.*, data that was not requested in the first two interrogatories. *Id.* at 7-8. The district court also noted that the data was faulty as State Farm relied on the last estimate uploaded to its system, yet asked its employees to review the *first* estimate in their review of approximately 400 claims. *Id.* With respect to the third and fourth interrogatories, State Farm did not provide any answers. *Id.* at 8-9.

VII. State Farm Offers No Pragmatic Solutions To Providing LaBrier The Information She Seeks.

State Farm was ordered by the special master on April 6, 2016 to answer the interrogatories. More than three months later, the district court invited State Farm to suggest a pragmatic solution to providing LaBrier with the requested information. Ex. G at 16:17-18.[1] State Farm did not offer *any* solution and flatly rejected the district court's suggestion to have a court-appointed computer expert to access its database. *See id.* at 16:24-19:2.

LEGAL STANDARD

The party seeking a writ of mandamus must establish that the "right to issuance of the writ is clear and indisputable." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). Courts are "extremely reluctant to grant a writ of mandamus." *In re Ford Motor Co.*, 751 F.2d 274, 275 (8th Cir. 1984).

"Mandamus is not ordinarily available to obtain immediate review of discovery orders." *In re Shalala*, 996 F.2d 962, 964 (8th Cir. 1993). Mandamus is only appropriate when discovery orders concern attorney-client privilege, trade secrets or executive privilege. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir. 1977); *In re Remington Arms Co.*, 952 F.2d. 1029 (8th Cir. 1991); *Cheney*, 542 U.S. 367 (2004). This discovery orders here concern burden and

[1] "Ex." refers to the exhibits State Farm filed with the Court separate from its Appendix.

proportionality. State Farm has not cited *any* case in which a court issued a writ of mandamus concerning such discovery issues.

Mandamus is not ordinarily available to correct discovery orders because the "district court has very wide discretion in handling discovery," and its discovery rulings will not be overturned unless "its rulings are seen to be a gross abuse of discretion." *Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342, 344 (8th Cir. 1979); *see also Haukereid v. Nat'l R.R. Passenger Corp.*, 816 F.3d 527, 533-34 (8th Cir. 2016).

State Farm fails to establish that its right to a writ of mandamus is clear and absolute. It cannot establish that the district court's discovery rulings constitute a gross abuse of discretion. Therefore, a writ of mandamus should not issue.

REASONS WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE

I. The District Court Properly Applied The Requirements Of Rule 26 To The Extensive Record Before It.

Most of State Farm's arguments about the propriety of the interrogatories are rendered moot by the district court's certification of the class.[2] There is little doubt

[2] Examples include: the district court does not have authority to endorse broad discovery before class certification (Pet. at 15); individualized discovery on a massive scale seeks to achieve class-wide resolution in an otherwise uncertifiable case (*id.*); forcing State Farm to identify its affirmative defenses for *putative* class members is premature (*id.* at 16); pre-certification discovery should be limited (*id.* at 20); the interrogatories are unduly burdensome in light of Rules 23 and 26 because the case is a *putative* class action (*id.* at 21); and the district court abused its

that a defendant's burden and manual review arguments will not allow it to escape liability when certification is appropriate. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539-40 (6th Cir. 2012); *see also Byrd v. Aaron's, Inc.*, 784 F.3d 154, 171 (3d Cir. 2015) ("[T]he size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification. To hold otherwise would seriously undermine the purpose of Rule 23(b)(3) . . . .")

For example, State Farm argues that the district court improperly determined that the Eighth Circuit permits broad discovery before class certification. (Pet. at 15). State Farm ignores, however, that a district court has discretion to limit the scope of discovery to what the court believes are the "central issues" in the case. *MKB Mgm't Corp. v. Stenehjem*, 795 F.3d 768, 773 n. 4 (8th Cir. 2015). This is precisely the task undertaken by the district court. Dkt. 176 at 2 ("[T]he discovery goes directly to central issues in the case.")

State Farm also fails to consider 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 Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and its progeny. "These new appellate decisions have led to an increased focus on the discovery required for certification. Given these factors, *more*

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discretion in ordering State Farm to answer discovery to help calculate damages before certification (*id.* at 22).

discovery, and more discovery not limited solely to the certification standards, now occurs before a certification motion is made." William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 7:15 (5th ed., updated June 2016) (emphasis added). Further, "[g]iven discovery's discretionary nature, the sculpting of certification-related discovery is generally left to the district court, reviewed only for an abuse of discretion, and rarely reversed." *Id*. at § 7:17.

Even at the pre-certification stage, the district court and special master appropriately concluded that State Farm should answer the interrogatories after applying each of the Rule 26(b) factors to the extensive record. Yet, without citing a single case in direct support of its argument, State Farm contends that the district court failed to consider or apply the proper legal standards in ordering it to answer the interrogatories. Pet. at 12-26.

The relevant portion of Rule 26(b) states:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1). The district court and special master did not merely pay "lip service" to the proportionality considerations (Chamber of Commerce Amicus

Brief at 5). Instead, they thoroughly analyzed and applied the proportionality requirements of Rule 26 to the extensive record.

A. The District Court Properly Concluded That The Benefit Of State Farm Answering The Interrogatories Outweighs The Purported Burden Or Expense.

LaBrier presented an extensive record to the district court that formed its basis for concluding that the benefit of answering the interrogatories outweighed State Farm's purported burden. LaBrier presented testimony of persons familiar with the

[redacted]

LaBrier presented evidence that State Farm quickly and efficiently used computers to [redacted]

Conversely, State Farm primarily relied on its experts in a separate case to argue that answering the interrogatories imposes an undue burden and expense on

State Farm. Dkt. 176 at 10 (A3394). These experts were not qualified: they were not State Farm employees, did not work in the insurance industry, did not have general technology expertise and did not have experience working with the State Farm or Xactware databases. *Id.*

In light of this record, the district court appropriately concluded that the benefit of State Farm answering the interrogatories outweighed any alleged burden. The district court also noted that computers could be used to assist State Farm in answering the interrogatories in a more cost-effective manner. Dkt. 176 at 8-9 (A3392-93).

While computers have been used to send a man to the moon and to instantly connect us with family members across the globe, State Farm believes it was improper for the district court to find "incredible" that "there is no cost-effective" way to connect payment and estimate data contained in two separate databases, State Farm is wrong. *Id.* A court is "not required to abandon common sense." *See generally U.S. v. Singer*, 660 F.2d 1295, 1308 (8th Cir. 1981). It simply defies common sense to believe that information from two databases, all of which can be readily imported into spreadsheets, cannot be connected to provide at least a portion of the interrogatory answers. Dkt. 176 at 8 (A3392) ("data sorting is what computers do in much higher volumes in very short amounts of time").

As shown in the record, State Farm used computers to prepare a spreadsheet of data for approximately [redacted] The district court's order appropriately recognizes that State Farm does not need to "expand the frontiers of computing" (Pet. at 23) to connect its readily available data from two databases. The district court simply asks State Farm to walk the grounds of computing developed decades ago.

However, instead of using a cost-effective means to provide many of the interrogatories answers, State Farm decided [redacted] Basic computing could have provided this data in seconds.

State Farm also takes issue with having to provide the bases for its affirmative defenses, yet admits that the majority of its burden pertains [redacted]

More importantly, State Farm will need to retrieve this information anyway to advance any applicable affirmative defenses.

The district court appropriately recognized that State Farm's purported burden of answering the interrogatories was a product of its own design. State Farm refused to provide LaBrier access to the information she requested through several other means. Dkt. 176 at 11 (A3395). Instead, the district court held that State Farm's "intransigent approach" to discovery created much of its purported "burden." *Id.*

B. The District Court Correctly Concluded That The Remaining Rule 26 Proportionality Considerations Justify State Farm Answering The Interrogatories.

The district court also properly weighed consideration of the "parties' respective access," "the parties' respective resources" and "the importance of the discovery in resolving the issues" in ordering State Farm to answer the interrogatories. Dkt. 176 at 11-12 (A3395-96).

The district court correctly determined that the "parties' respective access" weighs in LaBrier's favor. "LaBrier does not have access to the information she seeks, other than through the discovery, as it is in State Farm's own database and the database of its vendor, Xactware." *Id.* at 12 (A3396). The district court further noted that LaBrier's access to the information was made impossible because "State Farm has offered no effective way for LaBrier to access the data that should have been shared in discovery long ago." *Id.* at 11 (A3395).

State Farm does not dispute the district court's correct analysis of the parties' relative access to the requested information, as it fails to address this factor. Curiously, while State Farm spends pages discussing the purported ramifications of the Rule 26(b) amendments, the only substantive change to the rule is that it specifies "one additional factor to be considered in determining proportionality: *the parties' access to relevant information*." *Schultz v. Sentinel Ins. Co., Ltd.*, No. 4:15-CV-04160, 2016 WL 3149686, at *6 (D.S.D. June 3, 2016) (emphasis added). State Farm's silence is telling as LaBrier has no alternative means of accessing this information.

The district court also correctly concluded in light of the record that the "parties' respective resources" weighs in LaBrier's favor. LaBrier "is an individual while State Farm is a corporation with a national presence, with sophisticated access to data." Dkt. 176 at 12 (A3396). State Farm's arguments that the district court grossly abused its discretion in analyzing this factor are also unavailing. First, State Farm imaginatively argues that the district court failed to rewrite the explicit language of Rule 26 that states "parties' resources" to state the "resources of counsel." Pet. at 25. It is nonsensical to claim the district court grossly abused its discretion by failing to rewrite the plain language of Rule 26.

State Farm incorrectly asserts that the advisory committee notes' statement that "consideration of the parties resources [does not] justify unlimited discovery

requests to a wealthy party" establishes a gross abuse of discretion. Pet. at 25. The interrogatories are *not* "unlimited discovery requests." Here, the interrogatories are limited to class members, consist of four questions and seek critical information "central" to the case.

Again, State Farm does not dispute that the district court committed a gross abuse of discretion in concluding that "the importance of the discovery in resolving the issues" weighs in LaBrier's favor. The interrogatories seek basic information concerning labor depreciation withheld from the class members, *i.e.*, the amount of withheld labor depreciation, the dates of such withholding, any amount of labor depreciation repaid and facts supporting State Farm's affirmative defenses. The district court reached the logical conclusion that the answers sought go "directly to the central issues in this case" and "are at the very heart of this litigation." Dkt. 176 at 5-6 (A3388-89). The district court did not abuse its discretion, and State Farm does not argue otherwise.

C. The District Court's Orders Are Consistent With The Recent Amendments To Rule 26.

State Farm's suggestion that the recent amendments to Rule 26(b) should have changed the district court's analysis is misplaced. The recent amendment to Rule 26(b) had little impact on long-standing discovery requirements. *See Schultz*, 2016 WL 3149686, at *5-6. Rather, the amendment simply "restore[d] [the proportionality requirement]" that was "in effect for the last 33 years" to "part (b)(1)

of the rule, where it first appeared." *Id.* at *5 n.1. The advisory committee notes to the 2015 amendment state that the amendment simply "restores the proportionality factors to their original place in defining the scope of discovery." FED. R. CIV. P. 26, Advisory Committee Notes to the 2015 amendment.

More importantly, the district court's rulings are entirely consistent with another advisory committee note, which states:

> The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. **Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery** as reliable means of searching electronically stored information become available.

Id. (emphasis added). The district court heeded this suggestion for two reasons.

First, the district court and LaBrier considered alternative options for State Farm to answer the interrogatories - all of which were rejected by State Farm. To this end, LaBrier asked State Farm to produce a list of data fields pertaining to its structural claims data. After first denying their existence, State Farm ultimately refused to produce these lists. LaBrier also requested remote access to State Farm's internal claims database. State Farm refused. The district court sought pragmatic solutions. State Farm offered no solutions. *See* Dkt. 176 at 11 (A3395).

Second, the record established that State Farm could use computer-based methods [redacted]

[redacted]

Thus, the district court appropriately found "incredible" State Farm's suggestion that computing could not be used to connect payment and estimate data from two databases. Dkt. 176 at 8 (A3392).

II. State Farm's Untimely "Evidence" That It Will Cost $9.8 Million To Answer The Interrogatories Should Not Be Considered By The Court.

State Farm's burden argument is based on an entirely false premise – that the district court failed to consider "copious evidence" that it "would take an estimated $9.8 million" to answer the interrogatories. Pet. at 22-23. The district court did not fail to consider "evidence" of this purported cost. State Farm failed to timely submit *any* evidence from its own employees concerning the purported cost of answering the interrogatories. As State Farm did not timely submit this evidence for consideration, this Court should not consider the materials. *African Am. Voting Rights Legal Def. Fund v. Villa*, 54 F.3d 1345, 1350 (8th Cir. 1995) (refusing to consider untimely filed materials on appeal and holding district court did not abuse discretion in refusing such untimely filed materials).

A. State Farm Failed To Submit Any Declarations From Its Employees Concerning The Purported Cost Of Answering The Interrogatories Until After The District Court Ruled.

The heart of State Farm's argument is that the purported cost of answering the interrogatories, based on its employees' declarations, establishes that the interrogatories are unduly burdensome and disproportionate to the needs of the case. State Farm failed to submit *any* employee declaration concerning its purported cost of answering the interrogatories until June 14, 2016 – more than one month after the district court affirmed Order No. 4 and after State Farm appealed Order No. 8. Dkt. 203-5 at 22-55 (A4358-91).

The district court recognized State Farm's failure to submit employee declarations concerning its burden arguments when it affirmed Orders No. 4 and 8. The district court stated the following with respect to Order No. 4:

> State Farm's reliance on an extrapolation of hours and costs based on materials filed in another case does not convince the Court that the Special Master abused his discretion. Those materials were not prepared by State Farm employees, or persons who work in the insurance industry or who have expertise working with State Farm or Xactware databases.

Dkt. 176 at 10 (A3394). With respect to Order No. 8, the district court stated:

> Much of the material to which State Farm points duplicates material on which it previously relied in objecting to Plaintiff's Second Set of Interrogatories and seeking to vacate Special Master Order No. 8. To the extent State Farm supplies new material, nothing suggests State Farm could not have produced it earlier. State Farm had a fair opportunity to make this argument earlier.

Dkt. 266 at 10. The court rejected the newly minted declarations as untimely. *Id.*

This Court should not consider State Farm's untimely submissions. The district court's decision to consider State Farm's submission as untimely is reviewed for an abuse of discretion. *Villa*, 54 F.3d at 1350. The district court did not abuse its discretion. Rather, State Farm provides no explanation as to why it failed to submit such declarations as part of the extensive record previously submitted to the special master related to Order No. 4.

CONCLUSION

For these reasons the Court should deny State Farm's Petition for a Writ of Mandamus.[3]

[3] LaBrier notes that State Farm submitted all of the relevant orders concerning its Petition in its Appendix or Rule 28(j) submissions. Those orders include Order No. 4 (Dkt. 117), the district court's order affirming Order No. 4 (Dkt. 176), Order No. 8 (Dkt. 190), the district court's order affirming Order No. 8 (Dkt. 266) and the district court's order granting class certification (Dkt. 238).

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on the 18th day of August 2016, a copy of the foregoing document was filed and served through the Court's electronic filing system to all counsel of record and an unredacted copy of said filing was submitted to the following counsel for State Farm Fire and Casualty Company via electronic mail: Heidi Dalenberg and Joseph A. Cancila, Riley Safer Holmes & Cancila LLP, Three First National Plaza 70 West Madison Street, Suite 2900, Chicago, Illinois 60602 (hdalenberg@rshc-law.com and jcancila@rshc-law.com) and Daniel E. Wilke, Wilke & Wilke P.C., 2708 Olive Street, St. Louis, Missouri 63103 (dwilke@wilkewilke.net).

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