No. _____

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

PETITION FOR WRIT OF MANDAMUS OF STATE FARM FIRE AND CASUALTY COMPANY

Daniel E. Wilke
WILKE & WILKE PC
2708 Olive Street
St. Louis, Missouri 63103
Tel. (314) 371-0800

Joseph A. Cancila, Jr.
Heidi Dalenberg
RILEY SAFER HOLMES & CANCILA LLP
Three First National Plaza
70 West Madison Street, Suite 2900
Chicago, Illinois 60602
Tel. (312) 471-8700

Counsel for Petitioner State Farm Fire and Casualty Company

July 25, 2016

CORPORATE DISCLOSURE STATEMENT

Petitioner State Farm Fire and Casualty Company ("State Farm") is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company. No publicly held corporation has any ownership interest in State Farm Mutual Automobile Insurance Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

Other Sources

RELIEF SOUGHT

Petitioner State Farm Fire and Casualty Company respectfully requests this Court to grant immediate review of two important legal questions of first impression for this Court: (1) whether extensive, individualized discovery on the merits regarding claims and defenses as to each of the approximately 144,900 members of a putative class is permissible under Federal Rule of Civil Procedure 23 and due process, and (2) how to interpret and apply the six-month-old, case-specific proportionality requirement of Rule 26(b) when it intersects with the class certification requirements of Rule 23. The second question is also a matter of first impression for the Courts of Appeals generally.

These novel questions arise from an *uncertified* class action that has devolved into a Draconian discovery process in which the district court and special master have committed serious and serial abuses of discretion. The uncertified class action concerns the calculation of actual cash value ("ACV") payments under Missouri homeowners insurance policies. State Farm has been ordered to answer detailed interrogatories as to the merits of the individual claims of approximately 144,900 absent putative class members. State Farm has also been ordered to separately state the individual facts supporting its affirmative defenses to each one of the 144,900 putative claims. To do so, State Farm cannot merely query a computer database, but must at a minimum perform a detailed file-by-file analysis of each absent putative class member's insurance claim. State Farm conservatively estimates that the cost for this staggering amount of individualized discovery is $9.8 million. That is nearly 10% of Plaintiff's inflated estimate of the amount in controversy for her asserted class case (which State Farm disputes). Appendix at 1936 (hereinafter "A__"). State Farm is attempting to answer

the interrogatories despite the immense burden they impose. To make matters worse, State Farm has been ordered to complete this Herculean task by September 8, 2016.

Individualized merits discovery on this scale is antithetical to the goals and rationales of class action litigation under Rule 23 and contravenes due process. The Supreme Court has emphasized that class actions can only go forward if common questions raised by the plaintiff's claims can be answered with common proof. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The sheer scale of individualized merits discovery ordered in this action reveals that no common issue predominates.

The need for courts to consider the provisions and goals of Rule 23 in determining the permissible scope of discovery in putative class actions is made manifest by newly amended Rule 26(b), which expressly requires discovery to be "proportional to the needs of the case." Class action litigation is premised on the principle that a class representative can prove putative class members' claims by presenting "common evidence" that supports her own claim and the class claims. *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013). If such common proofs are not available, then the plaintiff's claim must proceed as an individual action, not a class action. These class-action-specific procedures and concerns matter, because Rule 26(b) must be applied in a "case-specific" fashion to determine "the appropriate scope of discovery." Fed. R. Civ. P. 26, 2015 adv. comm. note. The requirements and protections of Rule 23 are part of "the needs of the case," Fed. R. Civ. P. 26(b)(1), and must factor into the proportionality analysis. Yet the district court here did not apply proportionality in the required "case-specific" manner. It did not consider Rule 23's requirement of common proof or the intersection of Rules 23 and 26(b). The district

court compounded its error when it disregarded the evidence of the substantial burden to State Farm. Thus, State Farm must now respond to extraordinarily burdensome individualized discovery that subverts the goals of Rules 23 and 26, and which confirms that this action can never be tried as a class.

This Court has recognized that, as here, "mandamus review may be appropriate to provide guidelines for the resolution of novel and important questions presented in [a] discovery order that are likely to recur." *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 123 (8th Cir. 1986), *vacated on other grounds*, 482 U.S. 522 (1987). Further, the district court's abuse of discretion is plain. If this Court does not grant immediate review, State Farm will be deprived of an effective remedy, suffer substantial business disruption, and be irreparably harmed by having to incur costs of $9.8 million.

State Farm therefore respectfully urges this Court to grant this petition for a writ of mandamus and (i) reverse the district court's May 9, 2016 order denying State Farm's Objection To and Motion To Vacate or Modify the Special Master's Discovery Order No. 4 (as Amended), and (ii) vacate Special Master's Order No. 8, dated May 26, 2016.[1]

ISSUES PRESENTED

1. Whether individualized discovery on the merits of the claims and defenses as to 144,900 homeowners insurance policy claims contravenes due process and

[1] This petition is based on the current record in this case. State Farm's objection and motion to vacate Order #8 were filed on June 2, 2016 (A4039), and fully briefed as of July 1, 2016 (A4451). The district court has not ruled on that objection and motion, despite the urgency of the issues. *See infra* at 9-10. On these facts, the district court's delay in ruling means that State Farm effectively "has no realistic remedy other than to seek a writ of mandamus." *In re U.S. Healthcare*, 159 F.3d 142, 147 (3d Cir. 1998) (issuing writ of mandamus as to magistrate judge's order).

frustrates the purposes of Federal Rule of Civil Procedure 23.

2. Whether individualized discovery on the merits of the claims and defenses as to 144,900 homeowners insurance policy claims violates the proportionality requirement of Federal Rule of Civil Procedure 26(b) in light of the burdens of that discovery and the requirements of Rule 23.

STATEMENT CONCERNING ORAL ARGUMENT

State Farm will move to stay relevant aspects of the proceedings below. If a stay is granted, State Farm submits that 20 minutes of oral argument per side will assist the Court in resolving the novel legal questions presented by this petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. THIS PUTATIVE CLASS ACTION CHALLENGES ACV CALCULATIONS

This action concerns State Farm's method for calculating ACV payments to Missouri homeowner insurance policyholders. ACV payments reflect the value of the damaged portion of the home at the time of the loss, factoring in the age and condition of the property (as opposed to the replacement value). When State Farm calculates the ACV payment for, *e.g.*, a damaged roof, it first estimates the cost to replace the roof, including the cost of the materials and labor to install it. A2795-96; A2981-82. State Farm then applies depreciation to the total estimated cost to account for the age and condition of the roof, including depreciation of materials and labor. *Id.* The estimated replacement cost minus the calculated depreciation (and deductible) is then generally paid as the ACV. *See id.*; A4214. After the repairs are completed, the policyholder may recover additional reasonable costs for the repair (up to the policy limits). A2981-82.

Plaintiff Amanda LaBrier is a State Farm policyholder whose roof was damaged

in a hail storm. A0027, ¶ 6. State Farm made Plaintiff an ACV payment that applied depreciation to estimated costs for her repairs, including materials and labor. A0028, ¶¶ 13-14; A2982. On March 30, 2015, Plaintiff filed this putative class action in Missouri state court on behalf of all similarly situated Missouri policyholders alleging that deducting such "labor depreciation" constituted a breach of contract. A0030, ¶ 26. Her putative class includes approximately 144,900 potential members. A4467. State Farm removed and then moved to dismiss the complaint. A0001; A0069; A0119. On November 30, 2015, the district court denied State Farm's motion. A0161.

II. CLASSWIDE MERITS DISCOVERY IS ORDERED BEFORE CLASS CERTIFICATION

On December 2, 2015, over State Farm's objection, A0147-52; A0154, the district court ordered simultaneous discovery on class certification and the merits of all putative class members' claims, A0182. Plaintiff was not required to move for class certification until after the close of discovery. *Id.*; A0188-89. On February 17, 2016, the district court appointed a special master to supervise discovery. A0200.

III. THE INTERROGATORIES

On March 14, 2016, Plaintiff served a Second Set of Interrogatories demanding that State Farm identify, for *each* of the 144,900 putative class members, the (i) amount of labor depreciation State Farm "withheld" from ACV payments; (ii) date of the "withholding"; (iii) amounts and dates of any subsequently "repaid" labor depreciation; and (iv) the particular facts supporting any affirmative defense State Farm wished to assert for each claim of the 144,900 potential members of the putative class. A4105.

Just two weeks after receiving the interrogatories, per accelerated deadlines

imposed by the special master, State Farm served its initial response. A1699-714. As permitted by Rule 33(d), State Farm referred Plaintiff to a random sample of approximately 400 claim files that State Farm was then preparing, as well as the extensive information already produced for the putative class. A1706; A1708; A1711-12. Beyond that, State Farm objected to the interrogatories as unduly burdensome and disproportionate, noting that this type of individualized discovery could never be proper even in a *certified* class action, as the need for such individualized proofs contravenes Rule 23's predominance and superiority requirements. A1700-12.

State Farm showed it could not answer the interrogatories simply by using a computer program to search electronic data. A0927-28; A0948-64; A1700-12.

[redacted] Since State Farm cannot produce answers to the

interrogatories using a computer program to automatically search and analyze data, people must perform a file-by-file review of the 144,900 claims at issue for the putative class. A4466-67.

IV. STATE FARM'S MOTIONS OVER THE INTERROGATORIES ARE DENIED AND IGNORED

Given the extraordinary burden imposed by answering the interrogatories, State Farm moved for a protective order before the special master. A0941. State Farm supported its motion with evidence, including corporate representatives' testimony about the detailed procedures that would be necessary to complete the review. A0948-57; A0960-62. State Farm also relied on expert evidence from a similar Arkansas lawsuit (previously produced at Plaintiff's demand) confirming both the individualized review required to answer the interrogatories, and the burden associated with that review. *Id.* That expert had reviewed a sample of claims, and it took him an average of roughly one hour per claim to complete the review. A0955-57.

On April 6, 2016, the special master denied State Farm's motion for a protective order. A0203 ("Order #4"). The special master noted that the interrogatories sought full classwide merits discovery though no class was certified, but found that was permitted by the district court's scheduling order. A0204. He deemed the discovery "clearly relevant to the potential merits of the claim of the putative class." *Id.* Despite State Farm's evidence, the special master suggested that a "significant portion" of the information could be derived by data analysis performed by a computer. A0205. He held, however, that *even if* individualized review was required, State Farm failed to show "undue" burden or disproportionality given the size of the alleged class and Plaintiff's

estimated classwide damages. A0204-06.[2]

On April 13, 2016, State Farm filed an objection to and motion to vacate Order #4 (which was amended by Order #5, A0912). A0916; A0919. On May 9, 2016, the district court overruled State Farm's objection, A3395, holding that State Farm had failed to demonstrate undue burden and asserting that it was "incredible" that State Farm could not develop a computer program to answer the interrogatories, A3392-94.

While its objection to Order #4 was pending, State Farm served a supplemental response to the interrogatories. A4111. To do so, State Farm took a random sample of approximately 400 claim files from putative class members and had [redacted] claim representatives (pulled from their ordinary duties) review the files for the information requested by the interrogatories. A4112-14. [redacted]. A4113. State Farm also submitted results from a data review with respect to all putative class members performed by computer programming, which was developed to identify relationships in the data that the special master had suggested would provide answers for a "substantial portion" of the putative class. A4115-24; A4062-102.

On May 16, 2016, State Farm made a motion asking the special master to find that these supplemental responses constituted substantial compliance with Order #4. A4155. State Farm submitted declarations detailing its efforts to answer the interrogatories using the available data, summarizing State Farm's review and analysis of the claim file random sampling, and noting that further responsive data was not available without a file-by-file review—and even then, the policyholder might be the

[2] On April 8, 2016, Plaintiff chose to move for class certification ahead of schedule, largely on the basis of Order #4. *See* A0210; A0215. That motion remains pending.

only one with that responsive information. A4176-4201.

On May 26, 2016, the special master denied State Farm's motion. A4033 ("Order #8"). He criticized State Farm for relying on unreliable data (which he did not identify) and applying a "corrupted" mathematical test (which he did not identify), and concluded that State Farm had not provided *any* answers to *any* of the interrogatories. A4035; *see also* A4245-47.[3] He ordered State Farm to answer the interrogatories fully within 90 days notwithstanding "the time and expense that would be required." A4038. He also ordered State Farm to submit its plan for answering the interrogatories. *Id.*

On June 2, 2016, State Farm filed its objection to and motion to vacate Order #8 and requested expedited briefing. A4039; A4042; A4306. The district court did not rule on State Farm's motion for expedited briefing, allowing the default briefing schedule to run its course. A4566. Briefing on State Farm's objection ended on July 1, 2016, *see* A4451, but despite State Farm's request for an expedited ruling, to date the district court has not issued a ruling. Nonetheless, State Farm's looming completion deadline of September 8, 2016, remains in full effect, and State Farm is presently incurring discovery costs of approximately $100,000 each day and will continue doing so unless relief is granted. *See* A4470-4471. The district court's constructive denial (or "pocket veto") of State Farm's objection does not affect this Court's ability to grant mandamus review. State Farm exhausted its opportunity for district court review of Order #4, which imposed the discovery obligations at issue in this petition. State Farm sought review of Order #8 by the district court, but the court's delay means that State

[3] State Farm sought clarification regarding these and other unclear statements in Order #8, *see* A4240, but its request was denied, *see* A4246; A4320.

Farm effectively "has no realistic remedy other than to seek a writ of mandamus." *In re U.S. Healthcare*, 159 F.3d at 147.

V. THE INTERROGATORIES IMPOSE A MASSIVE AND UNDUE BURDEN ON STATE FARM

On June 10, 2016, State Farm submitted its plan to answer the interrogatories. A4336; A4464. State Farm's plan, supported by sworn declarations, described the steps required, and the estimated time and resources needed, for State Farm to conduct a file-by-file review of approximately 144,900 claim files in 90 days. A4464-72. State Farm explained it would need to take approximately 300 claims personnel away from their regular duties assisting State Farm policyholders to perform the file review, and detailed the tasks required to review each claim file:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

A4458; *see also* A4466-4469; A4494-4496; A4510. [redacted]

[redacted] A4470; A4500-01, ¶¶ 10-11. Assuming 300 claims professionals [redacted], State Farm estimated the total cost for the project at $9.8 million. A4470-71; A4515. Even then, policyholders' documentation (and possibly inspections of their homes) will be needed to confirm whether the insured was able to complete all repairs for the amount State Farm already has paid—that is, whether they suffered any injury.[4] A4194-95.

LEGAL STANDARD

"Extraordinary writs like mandamus are useful safety valves for promptly correcting serious errors...." *In re Lombardi*, 741 F.3d 888, 893 (8th Cir. 2014) (en banc) (quotation marks omitted). While mandamus review "is not ordinarily available to obtain immediate appellate review of an interlocutory discovery order ... mandamus review may be appropriate to provide guidelines for the resolution of novel and important questions presented in [a] discovery order that are likely to recur." *Societe Nationale*, 782 F.2d at 123.

Several factors inform the decision to review a discovery order on mandamus:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. ... (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

[4] On July 14, 2016, the special master denied State Farm's motion to shift the costs of answering the interrogatories, A4568, to which ruling State Farm has objected, A4574.

In re Bieter Co., 16 F.3d 929, 932 (8th Cir. 1994) (citation omitted). The petitioner need not establish each *Bieter* factor, *see id.*; *In re Medtronic, Inc.*, 184 F.3d 807, 810 (8th Cir. 1999),[5] although a "writ may only issue … when there is clear abuse of discretion." *Bieter*, 16 F.3d at 932 (quotation marks omitted); *see also In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001). A district court abuses its discretion if it "relies on erroneous legal conclusions … [or] fail[s] to consider relevant factors or to apply the proper legal standard." *Bieter*, 16 F.3d at 933 (quotation marks omitted).

REASONS WHY THE WRIT SHOULD ISSUE

I. THE DISTRICT COURT COMMITTED CLEAR ERROR BY FAILING TO CONSIDER OR APPLY THE PROPER LEGAL STANDARDS

A. Individualized Merits Discovery Concerning 144,900 Claims Is Contrary to Due Process and Frustrates the Purposes of Rule 23

"The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees" and must be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000); Fed. R. Civ. P. 1. The individualized merits discovery of 144,900 claims ordered below contravenes due process and frustrates the goals of Rule 23(b)(3), which include "achiev[ing] economies of time, effort and expense ... without sacrificing procedural fairness." Fed. R. Civ. P. 23, 1966 adv. comm. note. Rather than grapple with the constraints and goals of Rule 23 and the substantive and procedural rights that Rule is

[5] As this Court noted, "the fourth and fifth guidelines can seldom be consistent with each other … [and] review may well be appropriate if either the fourth or the fifth guidelines are satisfied." *Bieter*, 16 F.3d at 932 (quotation marks omitted).

designed to protect, the district court and special master brushed away those concerns, ordering State Farm to answer individualized interrogatories. This was clear error.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only … and [] certification is proper only if the trial court is satisfied, after a rigorous analysis," that the plaintiffs have satisfied all of requirements of Rule 23. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quotation marks omitted). Under Rule 23's commonality and predominance requirements, a plaintiff must show "questions of law or fact common to the class" and that those questions predominate over individual inquiries. Fed. R. Civ. P. 23(a)(2), (b)(3). As the Supreme Court further explained in *Wal-Mart*, "'[w]hat matters to class certification is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" 564 U.S. at 350 (citation and alteration omitted). Thus, the claims and defenses in a putative class action "must be of such a nature that [they are] capable of classwide *resolution*." *Id.* (emphasis added).[6]

The individualized, fact-intensive discovery as to the purported claims of approximately 144,900 putative class members ordered by the district court demonstrates that the claims and defenses in this action are incapable of classwide resolution. The interrogatories require State Farm to identify and provide details about each ACV payment for each insured. A4105-09. The interrogatories further require

[6] *See Marcus v. BMW of N. Am.*, 687 F.3d 583, 604 (3d Cir. 2012); *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 353 (6th Cir. 2011); *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115, 131 (N.D. Cal. 2014).

State Farm to separately state the *specific factual bases* for *every affirmative defense* State Farm will raise as to each of the purported class's *144,900 claims*. *Id.* The fact that such individualized responses are necessary (regardless of the burden) shows that Plaintiff cannot prove liability and damages on a classwide basis with classwide evidence. The individualized responses State Farm must produce also show that its defenses cannot be litigated classwide. The evidence sought by the interrogatories could only be ordered if the district court were presiding over trials of 144,900 individual suits where each plaintiff had the opportunity to introduce evidence as to his or her specific claim and State Farm had the opportunity to present contrary evidence. That is not a class action. This brand of discovery is not permitted by Rule 23.

The district court's failure to consider the provisions and purposes of Rule 23 as relevant to the propriety of Plaintiff's interrogatories (despite the fact that State Farm presented these points[7]) is clear error. *See Bieter*, 16 F.3d at 940. The district court acknowledged that the interrogatories require State Farm to manufacture "information that [Plaintiff] has sought for purposes of class certification *and the merits*." A3396 (emphasis added). The district court stated that "the discovery goes directly to central issues in the case and is needed to identify class members and damages." A3391. In fact, the interrogatories go far beyond what would be proper to identify class members even if a class had been certified. The very request for individualized merits discovery demonstrates that this action cannot go forward as a class action. It was an abuse of the district court's discretion to order such onerous discovery while denying the

[7] *See* A0924-25; A0931-35; A3381-82; A4045; A4057-59; A4459-60.

producing party the "procedural protections afforded by" the Rules. *In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991).

Ultimately, the district court justified the implications of this wide-ranging merits discovery by stating that the Eighth Circuit "has generally endorsed broad discovery prior to class certification." A3391. Yet the sole authority cited for this assertion was a footnote of *dicta* in a 1977 decision that predates almost every significant Supreme Court precedent interpreting Rule 23. *See Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 845 n.5 (8th Cir. 1977). The district court's "failure to apply the proper legal analysis" constitutes an abuse of discretion that can and should be reviewed on a petition seeking a writ of mandamus. *Bieter*, 16 F.3d at 940; *see also Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991).

The Supreme Court has warned about the danger that class action discovery will be used as a coercive litigation tactic: "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). The Court has further disapproved of plaintiffs using the "*in terrorem*" threat of individualized discovery on a massive scale to achieve a "classwide" resolution of litigation that Rule 23 would not allow. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This action is a textbook example of the tactics and consequences the Supreme Court has warned against.

To take just one example, the district court highlighted the purported benefits of forcing State Farm to bear the cost of answering interrogatories on its affirmative defenses as to 144,900 claims: "placing the burden on State Farm to provide

information in support of its affirmative defenses ensures State Farm will be judicious in identifying those affirmative defenses that are sufficiently viable to justify the cost of discovery."[8] A3393-94. At this stage of the litigation, the relevant issue is the extent to which State Farm's affirmative defenses present individual issues and are thus not amenable to classwide resolution. Forcing State Farm to identify now which defenses it will assert for each putative class member is premature and unreasonably burdens its due process right to have "'an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation omitted). As *Wal-Mart* holds, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." 564 U.S. at 367. Further, imposing a "judiciousness" standard on a defendant's selection of its defenses is not a constitutionally acceptable method for a court to limit individual issues and facilitate a class trial. Nor, contrary to the district court's rationale, will the burden on State Farm be reduced by a "judicious" selection of its affirmative defenses. Rather, the Orders compel State Farm to analyze each of the 144,900 claims files, even though no class may ever be certified.

Rule 23 cannot, under the Rules Enabling Act, "abridge, enlarge or modify any substantive right" of State Farm. 28 U.S.C. § 2072(b). The discovery ordered by the district court violates these rules. It is practically and legally impossible for a jury to decide the individual merits of the claims of 144,900 putative class members. State Farm could never present its valid individual defenses to claims in a class action proceeding of this size, and under the circumstances, it cannot even gather the

[8] Almost simultaneously, the district court granted the special master the power to compel the parties to mediate before him. A3398; A3400.

information necessary to put on those defenses. Even as State Farm must answer individualized interrogatories as to 144,900 claims, it is being effectively deprived of the opportunity to take reciprocal discovery.[9] Further, defendants are not allowed, as a general matter, to inspect the premises of absent class members, or "propound discovery on each class member's individualized issues, [because] such discovery would frustrate the rationale behind Rule 23's representative approach to litigation and turn the class action into a massive joinder of individual cases." Newberg on Class Actions § 9:16 (5th ed. 2016). Thus, although State Farm needs discovery from absent class members to effectively present its defenses, it is unlikely that such discovery will be allowed. Despite all of this, the district court has ordered that only State Farm should provide detailed individualized discovery as to the approximately 144,900 putative class members. Such massive individualized discovery, which imposes unreasonable and arbitrary burdens on State Farm, and State Farm alone, is inconsistent with Rule 23 and contravenes State Farm's due process rights.

B. The Discovery Ordered By The District Court And Special Master Contravenes Rule 26(b)'s Proportionality Requirement

Rule 26(b), amended six months ago, and not analyzed by any Court of Appeals, requires discovery to be proportional to the needs of the case. The interrogatories violate this requirement. The district court's clearly erroneous application of Rule 26(b),

---

[9] The district court's scheduling order calls for all discovery to end by August 9, 2016, but State Farm's answers to the interrogatories will not be due until 30 days later. A0188; A4038. The special master recognized that State Farm's need for additional information from absent members of the putative class may trigger a duty to supplement the interrogatory responses. A4037. But given the district court's August 9 discovery cut-off, State Farm will likely *never* be able to collect this needed discovery.

and the novelty of this issue, warrant immediate appellate review.

1. *Rule 26(b)'s Proportionality Requirement Must Be Case-Specific*

Rule 26(b) was amended against a backdrop of widespread concern that "excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior. The number of these cases and the burdens they impose present serious problems." Comm. on Rules of Prac. and Proc. of the Judicial Conf. of the U.S., *Prelim. Draft of Proposed Amendments to the Fed. Rules of Banker. and Civil Procedure* 265 (Aug. 2013). The amended Rule seeks to solve these problems. It "mark[s] [a] significant change, for both lawyers and judges, in the future conduct of civil trials," and "crystalizes 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.

Amended Rule 26(b), effective December 1, 2015, now provides in relevant part:

> 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.

Fed. R. Civ. P. 26(b)(1) (emphasis added). Chief Justice Roberts emphasized that this amended Rule "states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but

eliminate unnecessary or wasteful discovery." *2015 Year-End Rpt.* at 7.

The proportionality requirement of Rule 26(b), by definition, does not exist in a vacuum—it must be read in conjunction with the law governing Plaintiff's claims and other federal rules. Rule 26(b)(1) requires the district court to evaluate the burden and utility of the requested discovery in light of the "issues" needed to be resolved. It is "[t]he court's responsibility, using all the information provided by the parties, [] to … reach[] a *case-specific* determination of the appropriate scope of discovery." Fed. R. Civ. P. 26, 2015 adv. comm. note (emphasis added). The relevance of evidence, and the means for gathering that evidence, depend on what the discovering party must prove at trial and how those proofs may be made. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016). Other federal rules are similarly part of the "case-specific determination" the court must make as part of the proportionality analysis.

The need for a "common-sense" and "case-specific" approach to proportionality becomes particularly acute in the context of class action practice. The court's "rigorous analysis" of the Rule 23 requirements frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351. But full-blown, individualized discovery of the merits of a large class action is far in excess of what is required to "conduct a limited preliminary inquiry" into the Rule 23 requirements. *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 783 (8th Cir. 2016) (quotation marks omitted). Pure merits discovery distracts and delays the rigorous Rule 23 inquiry that "must" be made "[a]t an early practicable time" after the action commences. Fed. R. Civ. P. 23(c)(1)(A). As here, the delays caused by unwarranted discovery in large class action can cost millions.

Applying the proportionality requirement to Rule 23 meshes with a broader trend in favor of staging discovery around class certification. Pre-certification discovery should generally be limited "to the requirements of Rule 23 and test[] whether the claims and defenses are susceptible to class-wide proof." Manual for Complex Litigation (Fourth) § 21.14. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013). Proportionality should therefore force the district court to first inquire "[w]hether the discovery sought can be staged and/or tiered to reduce the burden and then proceed further incrementally only as needed." Hon. Elizabeth D. Laporte et al., *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 Fed. Cts. L. Rev. 19, 50 (2015). It is a clear abuse of discretion for the district court to order burdensome discovery without addressing these underlying questions directly relevant to proportionality.[10]

2. *The District Court Failed To Consider What Proportionality Means In The Class Action Context*

The district court failed to address the interaction between Rules 23 and 26(b), and this "fail[ure] to consider relevant factors or to apply the proper legal standard"

[10] In *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010), the Second Circuit held that a district court abused its discretion when it applied a balancing test in deciding whether to disclose wiretap records without resolving the underlying question of whether the wiretaps were legal. *See id.* at 185-87. So too here, the district court could not validly apply the proportionality requirement while ignoring the requirements of Rule 23.

constitutes an abuse of discretion that should be reviewed immediately. *Bieter*, 16 F.3d at 933 (quotation marks omitted). The district court's errors affected every aspect of its analysis of the Rule 26(b) proportionality requirement.

The district court abused its discretion from the start by ordering burdensome discovery without considering what such discovery could be used for. Citing *dicta* from a 1977 opinion of this Court, the district court has allowed discovery as if this action would involve 144,900 individual trials. The district court emphasized the "centrality and importance of the information sought [by the interrogatories]. It is difficult to imagine any *fact discovery* more necessary to the prosecution and defense of *the case* …." A3396 (emphasis added). But "the case" is a putative *class action*. If individualized fact discovery of every putative class member is "necessary to the prosecution and defense of the case," then "the case" cannot proceed as a class action and classwide discovery on this scale is not necessary or proportional. The district court's decision to allow massive, individualized, and Draconian fact discovery contravenes the "common-sense concept of proportionality" and was clear error. *2015 Year-End Rpt.* at 6.

The district court's error was particularly egregious when it came to Interrogatory No. 4, which asks State Farm to "[s]eparately state, for each structural damage claim … , which of [its] affirmative defenses apply to such claim and the facts supporting [the] affirmative defense(s) for such claim." A4107. This interrogatory requires State Farm to comb the record of each one of 144,900 claims for its individual defenses. The class action device does not countenance individualized adjudication at this scale. Moreover, as noted above, the district court signaled that it considered the burden of responding to this interrogatory to be an advantage because it "ensures State Farm will be judicious

in identifying those affirmative defenses that are sufficiently viable to justify the cost of discovery." A3393-94. In other words, increased discovery costs will help trim the action by forcing State Farm to abandon meritorious, but expensive, defenses.

The district court also clearly erred in concluding that the interrogatories were justified because they were "needed to identify … damages." A3391. The Supreme Court instructs that a plaintiff's theory of damages in a class action must be consistent with her theory of liability, *see Comcast*, 133 S. Ct. at 1433, and both must be capable of classwide proof. *See id.*; *Wal-Mart*, 564 U.S. at 350. Accordingly, the relevant issue at the certification stage is whether proving damages on a classwide basis is possible, not the individual *amounts* of damages for all putative class members. *See Amgen*, 133 S. Ct. at 1194-95. Burdensome, individualized discovery into alleged damages on 144,900 claims far exceeds what is necessary to determine whether classwide proof of damages is possible. Further, the need for individualized discovery on this scale demonstrates that classwide proof is not available. It is an abuse of discretion to order burdensome discovery to help calculate damage when the underlying action has no chance of being certified as a class. *See Lombardi*, 741 F.3d at 895-96.

3. *The District Court Abused Its Discretion In Ordering State Farm To Engage In Grossly Disproportionate Discovery*

A correct analysis of the proportionality requirement, informed by Rule 23, should have led the district court to conclude that the requested discovery was not proportional to the needs of the case. Yet, in a clear abuse of discretion, the district court compounded its error by concluding that the burden of this discovery was acceptable. State Farm provided copious evidence in connection with the briefing on

Orders #4 and #8 that demonstrated: (1) that a computer program alone could not answer the interrogatories, and (2) the file-by-file analysis required to answer the interrogatories would take hundreds of trained personnel and an estimated $9.8 million to complete.

[redacted]

Second, since computers alone cannot answer the interrogatories, State Farm has been forced to reassign nearly 300 claims personnel to complete the file-by-file review by the looming deadline of September 8, 2016. A4470. [redacted]. Even with nearly 300 trained professionals assigned to this task, State Farm will be hard-pressed to complete the review in line with the district court's highly expedited schedule.

The district court failed to seriously consider the overwhelming evidence of the

burden imposed by answering the interrogatories. Instead, the district court relied on its own set of facts about the capabilities of computerized review:

> While the Court understands the actual payment data is in [State Farm's database], *it finds incredible* the suggestion that there is no cost-effective way to match up information in one database with the information in another. Even if this data sorting would need to be done for each claim, *data sorting is what computers do* in much higher levels in very short amounts of time.

A3392 (emphasis added). The district court had no support for its factual assumptions about "what computers do," nor did it engage in a meaningful analysis of the logistical challenges identified by State Farm. Computers may do many things, but they do not solve every large-scale data analysis project with a few keystrokes. The district court abused its discretion when it invoked its intuition about computers rather than the facts in the record. *See BankAmerica Corp.*, 270 F.3d at 643.

The disproportionality of the discovery orders becomes even more apparent when measured against the minimal reciprocal discovery State Farm can expect. Plaintiff is only required to provide discovery based on the information she possesses as to her claim, and class action defendants generally cannot take discovery of putative class members. *See, e.g., In re Nat'l Hockey League Players' Concussion Injury Litig.*, 2015 WL 1191272, at *4 (D. Minn. 2015) (collecting cases). Yet the special master and district court have allowed Plaintiff to obtain from State Farm individualized discovery on the claims and defenses as to some 144,900 putative class members, while State Farm is subject to the restrictions against mandatory classwide discovery before certification. This unbalanced calculus is grossly disproportionate and a clear abuse of discretion.

The district court further erred in its application of other relevant factors of the

Rule 26(b) proportionality analysis. Most basically, the district court failed to consider the substantial burden the interrogatories imposed. The district court erred in its one-sentence discussion of the parties' relative resources. It reasoned that this factor weighed in favor of compelling State Farm to answer because Plaintiff "is an individual, while State Farm is a corporation with a national presence, with sophisticated access to data." A3396. But the relevant resources of Plaintiff are those of her counsel—class representatives generally do not pay their lawyers or bear the costs of discovery. The court's reasoning also runs counter to the advisory committee's instruction: "consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, *nor justify unlimited discovery requests addressed to a wealthy party*." Fed. R. Civ. P. 26, 2015 adv. comm. note (emphasis added).

The district court erred again in evaluating the proportionality of the interrogatories by comparison to Plaintiff's other burdensome discovery requests. Plaintiff did not challenge State Farm's timely objection to her earlier requests for document discovery of some 144,900 claim files. *See* A0158; A2670. And Plaintiff waived any objection after the special master denied her demand for disclosure of the "data dictionary" for State Farm's proprietary claims system and chose not to pursue available depositions. A1693. Plaintiff's tactical choices do not justify making State Farm spend $9.8 million to answer the interrogatories. This is especially true since courts have recognized that in "class-action discovery, sampling," not file-by-file discovery "advances the goal of proportionality." *Feske v. MHC Thousand Trails Ltd. P'ship*, 2012 WL 1123587, at *2 (N.D. Cal. 2012); *see also Bouaphakeo*, 136 S. Ct. at 1047. Thus, the answers State Farm has already provided to the interrogatories (which the

special master rejected in Order #8) should be deemed sufficient. In whatever guise, Plaintiff is improperly seeking individualized discovery into 144,900 claims files, not common proof that could advance her putative class action.

Finally, the district court and special master suggested that whatever burden State Farm might incur answering the interrogatories, it is justified by purported deficiencies in State Farm's recordkeeping. A0206; A3392; A3395. As the special master put it, "to the extent defendant does not possess readily-accessible computerized records sufficient to answer the Interrogatories, it is necessarily because defendant has failed to keep such records with respect to certain categories of information." A0206. This statement is wrong. State Farm keeps copious records to meet its business needs and regulatory obligations (which do not include labor depreciation data). State Farm's only supposed "fault" is in not keeping its records in a form desired by plaintiff's counsel.

The district court failed to properly apply, or even consider, the proportionality requirement of Rule 26(b) in light of the requirements of Rule 23. The district court's error will force State Farm to spend $9.8 million to construct answers to interrogatories, which, by their very nature, confirm that this action can never proceed on a class basis. This Court should immediately review the district court's clear abuse of discretion.

II. THE DISTRICT COURT'S DISCOVERY ORDERS RAISE IMPORTANT ISSUES OF FIRST IMPRESSION THAT ARE CERTAIN TO RECUR

Mandamus review of the clear errors below is further warranted due to the importance and novelty of the issues, which will repeatedly confront district courts in this Circuit. Rule 26(b)'s proportionality requirement became effective in December 2015. No Court of Appeals has discussed it. "[M]andamus properly lies to review []

issues of first impression," *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987) (collecting cases); *In re Wickline*, 796 F.2d 1055, 1056 (8th Cir. 1986), including novel discovery issues, *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 955 n.7 (8th Cir. 1979), and the proper interpretation of the Federal Rules, *Schlagenhauf v. Holder*, 379 U.S. 104, 110-12 (1964). A recent Rule amendment makes mandamus review even more appropriate. *Tushner v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 829 F.2d 853, 855-56 (9th Cir. 1987) (Kennedy, J.).

This petition raises doubly novel and complex issues of law because it concerns the proper interpretation of the new proportionality requirement in conjunction with the requirements for class certification under Rule 23. Similar considerations prompted this Court to grant mandamus review in *Societe Nationale*, which was "the first time this court ha[d] been called upon to consider the novel and important questions concerning the interplay between the Federal Rules of Civil Procedure, the Hague Convention, and the French Blocking Statute." 782 F.2d at 123. Though the Supreme Court disagreed on the merits, *see* 482 U.S. 522 (1987), it did not question the need for mandamus review.

The questions presented by this petition are certain to recur. In every class action that proceeds to discovery, district courts will be asked to evaluate the proportionality requirement in light of Rule 23. "Resolving the issues in this [petition will thus] … aid in the administration of justice by helping district courts avoid erroneous discovery orders in the future." *Rajaratnam*, 622 F.3d at 171 (quotation marks omitted). Further, a mandamus petition is likely the only way issues such as these will reach this Court. Many Courts of Appeals have ruled that a Rule 23(f) appeal does not permit review of discovery orders (this Court has not ruled on the issue). *See* Newberg on Class Actions

§ 7:52 & n.6 (5th ed.). Without that opportunity for interlocutory review, a defendant can only raise these discovery issues after a final adverse judgment. Yet class actions "rarely proceed to trial," all but eliminating that narrow path for review. *Id.* § 11:1.

The issues raised by this petition have importance that goes beyond the confines of this case. "The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question" worthy of review by this Court. *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., circuit justice, granting stay). Chief Justice Roberts notes that Rule 26(b)'s proportionality requirement is a "big deal." *2015 Year-End Rpt.* at 5. Immediate review by this Court is warranted.

III. STATE FARM HAS NO OTHER ADEQUATE MEANS TO ATTAIN RELIEF, AND WILL BE IRREPARABLY HARMED WITHOUT IMMEDIATE REVIEW

State Farm has no adequate avenue for relief apart from immediate review by this Court. Absent that review, State Farm will suffer irreparable harm by being compelled to answer individualized interrogatories concerning the merits and defenses as to approximately 144,900 insurance claims, at an estimated cost of $9.8 million.

Apart from a writ of mandamus, State Farm has no adequate means of obtaining appellate review of these discovery rulings. An appeal after a trial and verdict would only be possible if State Farm loses the trial, which would only happen after spending years and millions more dollars litigating this action. State Farm would have a higher burden then, as this Court "will grant a new trial based on allegedly erroneous discovery rulings only if the alleged errors amount to a gross abuse of discretion and result in fundamental unfairness." *Porchia v. Design Equip. Co., a Div. of Griffith Labs.*, 113 F.3d 877, 882 (8th Cir. 1997). A Rule 23(f) appeal is unlikely to provide review of discovery

orders, as explained above in Point II. Thus, absent immediate review, State Farm's only real option is to answer the interrogatories. Refusing compliance would expose State Farm to a contempt finding and sanctions. *See, e.g.*, *United States v. Coppa*, 267 F.3d 132, 138-39 (2d Cir. 2001). Mandamus "review [] may be specifically justified on the ground that the alternative of disobedience and contempt is not a suitable or adequate remedy." 16 Wright & Miller, Fed. Prac. & Proc. § 3935.3 (3d ed. 2010).

The harm that will befall State Farm if this Court denies immediate review is real and irreparable. Most obviously, State Farm will be forced to spend what it conservatively estimates to be $9.8 million to respond to the interrogatories. A4470-71. State Farm has already been forced to reassign nearly 300 existing employees from their usual responsibilities to shoulder the enormous burden of responding. If they are needed to respond to, for example, a summer hurricane, State Farm will be forced to choose between complying with the district court's deadline and helping policyholders. *Id.* Courts have considered mandamus review appropriate to avoid the disruption caused by orders directing parties to collect electronic discovery on a massive scale. *See John B. v. Goetz*, 531 F.3d 448, 458 (6th Cir. 2008).

The requirement that State Farm state the facts supporting its defenses to each of 144,900 claims in the short time allowed may wrongfully cause State Farm to inadvertently waive valid defenses. *See* A4107. "[T]he assertion of legal rights and claims" is a central part of the practice of law. *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 239 (Mo. Ct. App. 2000). But solely due to the massive volume of claims and the short time allotted, State Farm must use non-lawyers perform this work. Even if those non-lawyers make judgment errors on just 1% of the claims, that will still mean that

State Farm will lose valid defenses to almost 1,500 claims.

The record also shows that State Farm's discovery obligations will not end on the deadline date. Plaintiff's counsel has already filed a motion to compel with the special master concerning State Farm's responses, and has previously stated that they intend to "audit" State Farm's responses. A4317; A4482. The test for any such audit remains unclear, as the special master refused to clarify what he meant in ruling that State Farm's prior answers were "corrupted" by the supposed use of an unidentified "mathematical test" and supposed failure to use an unspecified "category of computerized information." A4245-47; A4320. State Farm has no other option but to press on and spend at least $9.8 million at the risk that its work may later be criticized for reasons the arbiter refuses to disclose.

This Court has stepped in to review out-of-control discovery proceedings that presented "classic case[s] of abuse of the discovery process." *See E.E.O.C. v. Carter Carburetor*, 577 F.2d 43, 49 (8th Cir. 1978). The prejudice to State Farm from being compelled to answer the interrogatories similarly warrants intervention by this Court.

CONCLUSION

For these reasons, this Court should issue the requested writ of mandamus.

Dated: July 25, 2016

Respectfully submitted,

/s/ Heidi Dalenberg

Joseph A. Cancila, Jr.
Heidi Dalenberg
RILEY SAFER HOLMES & CANCILA LLP
70 West Madison Street, Suite 2900
Chicago, Illinois 60602
Tel. (312) 471-8700

Daniel E. Wilke
WILKE & WILKE PC
2708 Olive Street
St. Louis, Missouri 63103
Tel. (314) 371-0800

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 25, 2016, Petitioner, State Farm Fire and Casualty Company caused the foregoing PETITION FOR WRIT OF MANDAMUS and the APPENDIX referenced therein to be served on the following counsel of record for Plaintiff Amanda LaBrier by sending the same via electronic mail and FedEx, overnight delivery, addressed as follows:

David T. Butsch
Christopher E. Roberts
Butsch Roberts & Associates LLC
231 South Bemiston Ave., Suite 260
Clayton, MO 63105
Tel. (314) 863-5700
dbutsch@butschroberts.com
croberts@butschroberts.com

and

Joe D. Jacobson #33715
Jacobson Press & Fields P.C.
168 North Meramec Avenue, Suite 150 Clayton, MO 63105
Tel. (314) 899-9789
Jacobson@archcitylawyers.com

and

T. Joseph Snodgrass
Larson King LLP
30 East Seventh Street, Suite 2800 St. Paul, MN 55101
Tel. (651) 312-6500
jsnodgrass@larsonking.com

/s/ Heidi Dalenberg
Heidi Dalenberg

No. _____

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

APPENDIX EXCERPTS

(from Table of Contents of Appendix)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

AMANDA LABRIER,	)	
	)	
	)	
Plaintiff	)	
	)	
v.	)	**Case No. 15-04093-NKL**
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
	)	
	)	
Defendant.	)	

SPECIAL MASTER ORDER NO. 4

On March 21, 2016, this Special Master issued a preliminary ruling with respect to defendants' motion for protective order as to Plaintiff's Fourth Request for Production, to the effect that, in lieu of being required to produce the materials called for in that request for production, defendant should be required to answer Plaintiff's Second Set of Interrogatories to Defendant, with modifications as reflected in the attachment to that preliminary ruling. That preliminary ruling nevertheless noted that defendant had not yet had an opportunity to provide its written response to those interrogatories (although a significant amount of time had been spent discussing them during telephone conferences). That preliminary ruling therefore invited each of the parties to provide this Special Master with any written materials that they might want to submit on the subject of those interrogatories by March 28, 2016. The written materials submitted by the parties on this subject included, on behalf of defendant, both a set of written objections and a motion seeking a ruling that it should not be required to answer those

interrogatories. These written materials were discussed and argued, during a conference call with this Special Master on April 1, 2016.

This Special Master has concluded that the Plaintiff's Second Set of Interrogatories to Defendant (hereinafter, the "Interrogatories") seek information that is within the scope of discoverable matters, under the current version of Rule 26(b), Fed.R.Civ.P. This is because they (a) seek information relevant to the case, and (b) are proportional to the needs of the case, considering the importance of the issues at stake, the amount in controversy, the parties' relative access to the requested information, the parties' resources, the importance of the requested information to the resolution of the issues in the case, and whether the burden or expense of the proposed discovery outweighs its likely benefit. As discussed below, the primary issue being raised by defendant concerns this latter consideration--whether the burden or expense of the proposed discovery outweighs its likely benefit.

In reaching this conclusion, this Special Master is mindful that the authorized scope of discovery in this action comprehends issues concerning both the merits and the certifiability of this case as a class action. It would therefore appear to be self-evident that plaintiff is entitled to conduct discovery on the potential merits of the claim of the putative class, as a whole, even though a decision on class certification has not yet occurred (and defendant does not contend otherwise).

The Interrogatories seek information that is clearly relevant to the potential merits of the claim of the putative class. According to defendant, it has already identified the universe of Missouri claims for which the requested information might exist. Defendant has indicated that there are in excess of 150,000 of these claims. Defendant's primary objection to the Interrogatories is that providing the requested information would require it to engage in extensive analysis of its claim-file records (as opposed to simply obtaining the answers by way of electronic queries to its computerized claims systems). However, defendant's own briefing

confirms that the computerized information available to it for each of the 150,000-plus claims as to which the Interrogatories could potentially seek information, includes the following:

(a) the incremental amounts paid on the claim;

(b) the total amounts paid on the claim;

(c) the amount of the relevant deductible;

(d) the amount of the relevant policy limits, under Coverage A;

(e) the amount of the calculated "Actual Cash Value"; and

(f) the amount of labor depreciation deducted, in the course of calculating such "Actual Cash Value."

It appears to this Special Master that the withheld depreciation amounts called for in the Interrogatories could be determined from defendant's computerized records, at least with respect to a certain sub-set of the 150,000-plus universe of claims described above. That sub-set consists of claims for which (a) the total claims payments made were equal to the calculated "Actual Cash Value" amount (less the relevant deductible), and (b) these total payments were still less than the total maximum amount that might be payable (in light of the relevant policy limits), if the claim was resolved on the basis of actual repair or replacement cost. Consequently, it would appear that individualized claim-file review would not be required in order to obtain the information sought by the Interrogatories, at least with respect to a significant portion of those claims for which the Interrogatories are actually seeking the withheld depreciation information called for therein.

However, even if this conclusion is incorrect, this Special Master has reached the conclusion that defendant should be required to answer the Interrogatories, for the other reasons stated herein.

Among these reasons is the recognition that this Special Master is ordering defendant to answer the Interrogatories, in lieu of producing those documents called for by Plaintiff's Fourth Request for Production. As a consequence, defendant will be relieved of what it has described as substantial burden.

Another of these reasons is that, if and to the extent defendant does not possess readily-accessible computerized records sufficient to answer the Interrogatories, it is necessarily because defendant has failed to keep such records with respect to certain categories of information. Moreover, these are categories of information that defendant considered pertinent to the calculation of amounts owed to Coverage A claimants--even though the pertinence of such categories of information was not spelled out in the policies it provided to its insureds, and even though those terms that actually were included in such policy forms were ambiguous, as previously determined by the District Court in this action. At the very least, defendant's failure to keep such records should not constitute a justification to withhold relevant discovery from plaintiff.

This Special Master has also concluded that defendant's objections to the Interrogatories (both those that assert non-discoverability under Rule 26(b) and those that raise other issues) and its motion for protective order in that regard should be overruled. However, this Special Master has concluded that the modification to "Criterion (d)" (contained in Interrogatory No. 1 of the Interrogatories) that was set forth in the attachment to this Special Master's preliminary ruling of March 21, 2016, consisting of the insertion of certain parenthetical language, should be considered withdrawn. For the sake of clarity, the current version of the Interrogatories (following such withdrawal) is set forth on the following pages. Defendant is therefore ordered to provide answers to the version of the Interrogatories set forth on the following pages, on or before May 6th, 2016.

This Special Master would nevertheless encourage plaintiff and defendant to discuss between themselves any possible ways that defendant can provide information that will satisfy plaintiff's need for discovery, while minimizing defendant's burden and/or expense.

SO ORDERED, on this 6th day of April, 2016.

/s/Leland M. Shurin
Leland M. Shurin, Special Master

DEFINITIONS

1. The phrase "structural claim" shall mean a claim by an insured for loss or damage to a dwelling, building, home, dwelling extension or any attached or unattached structure such as a detached garage, equipment shed, fence, barn or guest cottage. The phrase does not include a claim (or portion of a claim) for personal property or contents.

2. The words "you," "your," "yours," "Defendant" or any pronoun or noun referring to the Defendant, shall mean Defendant State Farm Fire and Casualty Co. and such Defendant's affiliated entities, parent entities, subsidiary entities, predecessors-in-interest, successors-in-interest, attorneys, agents, officers, board members, employees, investigators, representatives or any other individual acting on its behalf.

INTERROGATORIES

INTERROGATORY NO. 1: Separately for each structural damage claim upon which you made one or more actual cash value ("ACV") payments to Missouri policyholders, and for which some amount of depreciation of labor was withheld from at least one of those ACV payments, please state the total, principal amount of labor depreciation that was actually withheld by you for each claim, subject to the applicable deductibles and policy limits.

The criteria for this interrogatory are as follows:

a. The temporal scope of this interrogatory includes claims for which the first ACV payment was between March 30, 2005 and the present; and

b. Excluded from this interrogatory is any structural damage claim that is or was subject to appraisal; and

c. Excluded from this interrogatory is any structural damage claim that is or was the subject of an individual lawsuit; and

d. By the terms of this interrogatory, excluded from this interrogatory is any claim for which State Farm paid its full limits of available coverage, without regard to the withholding of labor depreciation; and

e. By the terms of this interrogatory, included in this interrogatory is any claim for which the withholding of labor depreciation caused the value of the claim to drop below the applicable deductible.

INTERROGATORY NO. 2: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, state the date that labor depreciation was first withheld. If multiple labor depreciation withholdings took place for a particular claim, state both the date(s) and amount(s) of the withheld labor depreciation.

INTERROGATORY NO. 3: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, whether you contend you subsequently paid a portion or all of the withheld labor depreciation for such claim, and, if so, set forth the date and amount of the withheld labor depreciation that was later paid. If you contend that payment of withheld labor depreciation took place on multiple dates for a particular claim, state both the date(s) and amount(s) of payment(s) of the withheld labor depreciation.

INTERROGATORY NO. 4: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, which of your affirmative defenses apply to such claim and the facts supporting your affirmative defense(s) for such claim.

1513864

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

AMANDA LABRIER,	)	
	)	
	)	
Plaintiff	)	
	)	
v.	)	**Case No. 15-04093-NKL**
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
	)	
	)	
Defendant.	)	

SPECIAL MASTER ORDER NO. 5

On April 6, 2016, this Special Master issued Special Master Order No. 4, requiring defendant to answer Plaintiff's Second Set of Interrogatories to Defendant, with modifications as reflected in that ruling. During the conference call on April 8, 2016, defendant argued that a further modification to those interrogatories should be made, in that, without such further modification, the interrogatories would call for information relative to a type of claim that is not eligible for inclusion in the class for which plaintiff is seeking class certification. Specifically, defendant argued that the interrogatories should be modified, by removing "criterion (e)" (which is set forth as part of Interrogatory No. 1, but is cross-referenced in each of the other interrogatories). As indicated to the parties, during that conference call, this Special Master agrees with defendant's argument.

Accordingly, this Special Master has concluded that "criterion (e)" (contained in Interrogatory No. 1 of the Interrogatories) should be considered removed from the interrogatories

to which Special Master Order No. 4 relates. For the sake of clarity, the current version of the Interrogatories (following such removal) is set forth on the following pages. Defendant is therefore ordered to provide answers to the version of the interrogatories set forth on the following pages, on or before May 6th, 2016.

SO ORDERED, on this 11th day of April, 2016.

/s/Leland M. Shurin
Leland M. Shurin, Special Master

DEFINITIONS

1. The phrase "structural claim" shall mean a claim by an insured for loss or damage to a dwelling, building, home, dwelling extension or any attached or unattached structure such as a detached garage, equipment shed, fence, barn or guest cottage. The phrase does not include a claim (or portion of a claim) for personal property or contents.

2. The words "you," "your," "yours," "Defendant" or any pronoun or noun referring to the Defendant, shall mean Defendant State Farm Fire and Casualty Co. and such Defendant's affiliated entities, parent entities, subsidiary entities, predecessors-in-interest, successors-in-interest, attorneys, agents, officers, board members, employees, investigators, representatives or any other individual acting on its behalf.

INTERROGATORIES

INTERROGATORY NO. 1: Separately for each structural damage claim upon which you made one or more actual cash value ("ACV") payments to Missouri policyholders, and for which some amount of depreciation of labor was withheld from at least one of those ACV payments, please state the total, principal amount of labor depreciation that was actually withheld by you for each claim, subject to the applicable deductibles and policy limits.

The criteria for this interrogatory are as follows:

a. The temporal scope of this interrogatory includes claims for which the first ACV payment was between March 30, 2005 and the present; and

b. Excluded from this interrogatory is any structural damage claim that is or was subject to appraisal; and

c. Excluded from this interrogatory is any structural damage claim that is or was the subject of an individual lawsuit; and

d. By the terms of this interrogatory, excluded from this interrogatory is any claim for which State Farm paid its full limits of available coverage, without regard to the withholding of labor depreciation.

INTERROGATORY NO. 2: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, state the date that labor depreciation was first withheld. If multiple labor depreciation withholdings took place for a particular claim, state both the date(s) and amount(s) of the withheld labor depreciation.

INTERROGATORY NO. 3: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, whether you contend you subsequently paid a portion or all of the withheld labor depreciation for such claim, and, if so, set forth the date and amount of the withheld labor depreciation that was later paid. If you contend that payment of withheld labor depreciation took place on multiple dates for a particular claim, state both the date(s) and amount(s) of payment(s) of the withheld labor depreciation.

INTERROGATORY NO. 4: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, which of your affirmative defenses apply to such claim and the facts supporting your affirmative defense(s) for such claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

AMANDA M. LABRIER, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	No. 2:15-cv-04093-NKL
vs.	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
Defendant.	)	

ORDER

On April 6, 2016, Special Master Leland Shurin[1] ordered Defendant State Farm Fire and Casualty Company to answer Plaintiff Amanda LaBrier's second set of interrogatories by 5/6/2016. [Docs. 117 and 125.] On April 14, 2016, State Farm objected to the Special Master's order, arguing the interrogatories are unduly burdensome and the order penalizes State Farm for its record keeping. State Farm asks the Court to vacate or suspend the order. [Doc. 135.]

For the reasons discussed below, the Court concludes the Special Master did not abuse his discretion in entering the order. State Farm's motion is therefore denied.

I. Background

In May 2015, State Farm removed this case from state court, filing the supporting declaration of its employee Juan Guevara, in which he explained he used State Farm's and Xactware Solutions, Inc.'s data to generate calculations of class size and alleged damages.

Since July 2015, LaBrier has been serving State Farm with discovery concerning State

[1] Mr. Shurin was agreed to by the parties and appointed in February 2016.

Farm's data related to putative class members and damages.[2] In October 2015, as a means to streamline discovery, LaBrier proposed that State Farm provide a list of data fields that were available in State Farm's and Xactware's databases, including a list of fields for State Farm's internal claims payment data. State Farm would not do so. LaBrier then deposed Naresh Jangda, a State Farm software engineer who writes computer code to retrieve data from State Farm's internal claim system and who has done so to retrieve class-wide data in other labor depreciation class actions. Jangda testified that State Farm maintained a list of data fields and that he could put almost any such data field into an Excel spreadsheet. LaBrier also deposed Jamie Stoddart, an Xactware developer who writes code to retrieve data from Xactware databases. Similar to Jangda, Stoddart testified he has done so to retrieve class-wide data on behalf of State Farm in other labor depreciation class actions, that Xactware maintained a list of data fields, and that he could put almost any such data field into an Excel spreadsheet.

In March 2016, LaBrier told the Special Master that she sought a list of all data fields for both systems, and wanted to obtain remote access to State Farm's electronic claims system. State Farm objected, arguing that the identity of data fields and operation of its complex proprietary electronic claim system were highly confidential and constituted trade secrets, and doing so would not yield the information LaBrier sought. The Special Master preliminarily ruled that in lieu of providing data fields or remote access, State Farm should answer interrogatories asking for labor depreciation withheld and the dates relevant to calculation of prejudgment interest, and State Farm's affirmative defenses.

---

[2] LaBrier served her first requests for production in July 2015; first set of interrogatories in October 2015; second requests for production, a notice of deposition of State Farm's employee, and a subpoena duces tecum on Xactware Solutions, Inc.'s employee in December 2015; a notice of deposition on Xactware's employee in January 2016; five notices of deposition in February and March 2016; and a second set of interrogatories in March 2016.

In total, the Special master held six in-person and telephone hearings from 3/4/2016 to 4/1/2016 before issuing Order No. 4, and reviewed extensive written argument, and numerous depositions and other evidence submitted by the parties. The Special Master concluded the interrogatories sought information that is within the scope of Rule 26, in that they sought information relevant to the case, and were proportional to the needs of the case, considering the factors expressly provided under Rule 26(b). He noted that State Farm's primary issue concerned whether the burden or expense of the proposed discovery outweighs its likely benefit. He observed that the authorized scope of discovery in this case concerns both merits and certifiability, so LaBrier was entitled to conduct discovery on both. He concluded that State Farm had identified a universe of 150,000 Missouri claims at issue, and State Farm's

> own briefing confirms that the computerized information available to it for each of the…claims as to which the Interrogatories could potentially seek information[] includes the following:
>
> (a) The incremental amounts paid on the claim;
> (b) The total amounts paid on the claim;
> (c) The amount of the relevant deductible;
> (d) The amount of the relevant policy limits, under Coverage A;
> (e) The amount of the calculated "Actual Cash Value"; and
> (f) The amount of labor depreciation deducted, in the course of calculating "Actual Cash Value."

[Doc. 117, pp. 2-3.] Furthermore, the Special Master concluded, it appeared that the amounts of withheld depreciation called for in the interrogatories could be determined from State Farm's computerized records with respect to at least a subset of the 150,000 claims: "(a) the total claims payments made were equal to the calculated "Actual Cash Value" amount (less the relevant deductible), and (b) these total payments were still less than the total maximum amount that might be payable (in light of the relevant policy limits), if the claim was resolved on the basis of actual repair or replacement cost." [*Id.*, p. 3.] "Consequently," the Special

Master concluded, "it would appear that individualized claim-file review would not be required in order to" answer the interrogatories, "at least with respect to a significant portion of" the claims. [*Id.*]

The Special Master concluded that even if the above rationale was incorrect, State Farm should be required to answer the interrogatories for additional reasons. State Farm was being ordered to answer interrogatories in lieu of producing documents, which State Farm had described as a substantial burden. To the extent State Farm's computerized data was not readily accessible, it is because of State Farm's purported inability to access the data, notwithstanding that State Farm itself uses the same categories of information pertinent to the calculation of amounts owed its insureds. "At the very least, [State Farm's] failure to keep such records should not constitute justification to withhold relevant discovery from [LaBrier]." [*Id.* at p. 4.]

The Special Master set out the approved interrogatories in the Order. State Farm was ordered to answer the following interrogatories by May 6, 2016:

> **INTERROGATORY NO. 1:** Separately for each structural damage claim upon which you made one or more actual cash value ("ACV") payments to Missouri policyholders, and for which some amount of depreciation of labor was withheld from at least one of those ACV payments, please state the total, principal amount of labor depreciation that was actually withheld by you for each claim, subject to the applicable deductibles and policy limits. The criteria for this interrogatory are as follows:
>
> a. The temporal scope of this interrogatory includes claims for which the first ACV payment was between March 30, 2005 and the present and
> b. Excluded from this interrogatory is any structural damage claim that is or was subject to appraisal and
> c. Excluded from this interrogatory is any structural damage claim that is or was the subject of an individual lawsuit and
> d. By the terms of this interrogatory, excluded from this interrogatory is any claim for which State Farm paid its full limits of available coverage, without regard to the withholding of labor depreciation.

INTERROGATORY NO. 2: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, state the date that labor depreciation was first withheld. If multiple labor depreciation withholdings took place for a particular claim, state both the date(s) and amount(s) of the withheld labor depreciation.

INTERROGATORY NO. 3: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, whether you contend you subsequently paid a portion or all of the withheld labor depreciation for such claim, and, if so, set forth the date and amount of the withheld labor depreciation that was later paid. If you contend that payment of withheld labor depreciation took place on multiple dates for a particular claim, state both the date(s) and amount(s) of payment(s) of the withheld labor depreciation.

INTERROGATORY NO. 4: Separately state, for each structural damage claim within the scope of Interrogatory No. 1 (including its criteria) and for which you withheld labor depreciation of any amount from a Missouri policyholder, which of your affirmative defenses apply to such claim and the facts supporting your affirmative defense(s) for such claim.

[Doc. 125, pp. 3-4.]

II. Discussion

Focusing on the burden of compliance, State Farm argues that the discovery is not proportional to the needs of the case.

A. Standard for review of the Special Master's order

Because the Order appointing the Special Master in this case was silent as to the standard of review, his discovery orders are reviewed by this Court for abuse of discretion. *See* Fed. R. Civ. P. 3(f)(5) (a "court may set aside a master's ruling on a procedural matter only for an abuse of discretion" unless the order of appointment "establishes a different standard"); and, *see, e.g., In re. Hardieplank Fiber Cement Siding Litig.*, 2014 WL 5654318, at *1 (D. Minn. Jan. 28, 2014) (special master's discovery orders are procedural and subject to review for abuse of discretion).

State Farm argues the standard is *de novo*, but the cases it cites are unpersuasive. They involve review of orders concerning disputes referred to special masters for report and recommendation. *E.g., Koninklijke Philips Electronics N.V. v. Zoll Lifecor Corp.*, 2014 WL 4660539 (W.D. Pa. Sept. 17, 2014) (motion to compel referred to special master for report and recommendation, which court adopted in part). Here, the Special Master is authorized to make discovery orders. State Farm also suggests that LaBrier's cited authority, *Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.*, 2007 WL 878566, *1 (N.D. Cal. Mar. 20, 2007), establishes a more rigorous review standard when discovery disputes are not "standard" ones. The court in *Advanced* simply observed that the dispute before it was a standard discovery dispute, and not functionally similar to a dispositive order, and proceeded to apply the abuse of discretion standard in reviewing the special master's discovery order. The Special Master's order here is not the functional equivalent of a dispositive order.

Accordingly, the abuse of discretion standard will be applied here.

B. Does the burden or expense of the proposed discovery outweigh its likely benefit?

The federal rules contemplate liberal discovery. Rule 26(b)(1) authorizes parties to

> 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.

Under the rules, district courts possess considerable discretion in determining the need for, and form of, discovery. *See Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 898–99 (8th Cir. 1978). District courts are similarly granted considerable discretion in

determining the necessity for and scope of discovery on issues related to class certification. *See Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1495 (5th Cir.1993); *Kamm v. California City Dev. Co.*, 509 F.2d 205, 209 (9th Cir. 1975). The Eighth Circuit Court of Appeals has generally endorsed broad discovery prior to class certification. *See Johnson v. Nekoosa–Edwards Paper Co.*, 558 F.2d 841, 845 n. 5 (8th Cir. 1977) ("[W]e note that broad discovery should usually be permitted prior to class certification."). Because the rules "allow for broad discovery, the burden is typically on the party resisting discovery to explain why discovery should be limited." *Cincinnati Ins. Co. v. Fine Home Managers,* 2010 WL 2990118, *1 (E.D. Mo. July 27, 2010) (*citing Rubin v. Islamic Republic of Iran,* 349 F.Supp.2d 1108, 1111 (N.D.Ill.2004)). The bare assertion that requested discovery is unduly burdensome is "ordinarily insufficient to bar production." *Id.* (*citing St. Paid Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511–12 (N.D. Iowa 2000)). In *Cincinnati*, for example, the court was "not persuaded" that the amount of time or money required to comply with discovery represented an undue burden, where the objecting party failed to provide an estimate of hours or monetary cost of compliance. *Id.* at *2.

In this case, Special Master Shurin effectively ordered State Farm to identify the amount of labor depreciation withheld and the dates when it was withheld. For each claim, State Farm was to state whether some or all of the depreciation was later paid by State Farm. Excluded from the calculations were any claims for which State Farm paid its full limit of coverage. Finally, State Farm was to identify which affirmative defenses it was asserting as to each claim where labor was depreciated. State Farm does not dispute that the discovery sought is relevant. Indeed, the discovery goes directly to central issues in the case and is needed to identify class members and damages, discovery that is routinely provided in class action cases.

State Farm argues, however, that it cannot answer the interrogatories without complex inquiries in multiple databases. For example, it claims it cannot search for "actual cash value" payments using data inquiries because its payment data is in a "picture format" which can only be accessed through "ECS." In addition, it claims calculating labor depreciation for any particular claim based on Xactware estimates would require downloading estimates "one at a time and recalculating each estimate manually." Yet Guevara explained that he used Xactware software at the beginning of the lawsuit to identify the number of putative class members, which necessarily required identification of who had depreciated labor deducted from their ACV calculation. He also used the data to estimate the amount of damages being alleged. While the Court understands the actual payment data is in the ECS system, it finds incredible the suggestion that there is no cost-effective way to match up information in one database with the information in another. Even if this data sorting would need to be done for each claim, data sorting is what computers do in much higher levels in very short amounts of time. Therefore, even if the matching must be done claim by claim, the time and cost involved does not justify preventing LaBrier's access to critical information.[3]

The Court recognizes this might require computer programming that State Farm does not have or does not normally use for this purpose. Nonetheless, State Farm has refused access to its computer system. Therefore, neither the Court nor LaBrier can determine whether such a calculation can be made with existing software. In light of State Farm's interest in keeping its computer system secret, it should bear the cost of doing any additional programming to pull out the information required by the interrogatories, which is information clearly within the control of

[3] Even if Guevara testified that Xactware estimates had to be downloaded one at a time, and individually calculated, such testimony does not address how Guevara was able to provide information in support of State Farm's removal of the case to federal court within 30 days of its filing, nor what information is available in State Farm's own claims payment system.

State Farm.

While it may be more difficult to determine when a later payment effectively reimburses a previously withheld labor depreciation, State Farm has not identified with any specificity why the databases it has access to would not show subsequent payments being made to an insured for replacement cost. While theoretically such subsequent payments could be for something else, the Court agrees with the Special Master that this will be the exception and not the rule. Indeed, Guevara could identify putative class members by claim and could calculate estimated damages within 30 days for each putative class member. State Farm has not identified with specificity and coherence why it cannot now, after many months of discovery, use a similar method to provide highly relevant discovery contemplated by the Federal Rules of Civil Procedure.

Further, retroactive reimbursement of labor depreciation is arguably an affirmative defense that State Farm would need to gather information on anyway, which is further reason for State Farm being required to incur this expense. *Asberry v. Cate*, No. 11-2462, 2014 WL 1286191, at *3 (E.D. Cal. Mar. 31, 2014) ("Moreover, if the responding party would necessarily have to gather the requested information to prepare its own case, objections that it is too difficult to obtain the information for the requesting party are no honored."); *Flour Mills of Am., Inc. v. Pace*, 75 F.R.D. 676, 680-81 (E.D. Okla. 1977) ("An interrogatory will not be held objectionable as calling for research ... if the interrogated party would gather the information in preparation of its own case."); *Am. Oil Co. v. Penn. Petrol. Prods. Co.*, 23 F.R.D. 680, 683 (D.R.I. 1959) ("Since the information sought here will undoubtedly be assembled by the defendant prior to trial in preparation for its defenses, it cannot be said that these interrogatories are objectionable as being burdensome.").

Indeed, this is true as to all State Farm's affirmative defenses and placing the burden on

State Farm to provide information in support of its affirmative defenses ensures State Farm will be judicious in identifying those affirmative defenses that are sufficiently viable to justify the cost of discovery. For example, State Farm suggests it might need to do an in-person viewing of the property in question, before it can answer the interrogatories. The Court thinks such discovery is highly implausible, so shifting the cost to State Farm is not unfair. As for the bulk of the information requested, however, State Farm did not provide evidence from its own or Xactware employees knowledgeable about the databases, describing and estimating the hours and costs of obtaining class-wide data reports needed to respond to the interrogatories, and detailing the manner in which they would be required to analyze the data.

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, who have general technology expertise, or who have expertise in working with State Farm or Xactware databases. In contrast, the testimony of State Farm employee Jangda and Xactware employee Stoddart, to which LaBrier points, demonstrated their familiarity with the systems, and experience in retrieving the data on behalf of State Farm in other labor depreciation class actions. Neither Jangda nor Stoddart described a burdensome process, let alone an unduly burdensome one. As previously mentioned, State Farm's own employee, Guevara, was able to quickly access at least part of the data when State Farm wished to use it.

Again, State Farm was ordered to answer interrogatories, rather than produce documents or permit LaBrier to search for the information, after State Farm argued that producing data fields and providing proprietary system access would divulge highly confidential, trade secret information. Answering interrogatories has ameliorated State Farm's concern about keeping its

system confidential. A litigant cannot keep its own system secret and then refuse to gather the information itself.

Moreover, it is plain from the procedural development of this case and the course of proceedings before the Special Master, that State Farm was focused on providing discovery in the manner it saw fit, whether phased, sampled, or delayed, which the Court has never permitted in the year since State Farm removed this case from state court. *See Admiral Theatre,* 585 F.2d at 898–99 (district courts possess considerable discretion in determining the need for, and form of, discovery); *Buycks-Roberson v. Citibank Fed. Sav. Bank,* 162 F.R.D. 338, 343 (N.D. Ill. 1995) (declining to limit class discovery to a sample selected by the defendant, noting that "[t]he Federal rules and this Court do not countenance self-selecting discovery by either party"). During the course of discovery, the Special Master offered several options but State Farm resisted all except its choice of its sampling of 400 cases without any access to all data from which those 400 cases were selected. Even now, State Farm has offered no effective way for LaBrier to access the data that should have been shared in discovery long ago. Such an obstructionist approach cannot be rewarded. To the extent State Farm has been burdened by answering interrogatories rather than permitting direct access by LaBrier to the information she seeks, State Farm's intransigent approach has created much of that burden.

The Special Master did not abuse his discretion in concluding that the likely benefit of the discovery outweighs the burden or expense of compliance on State Farm.

C. Is the discovery proportional?

State Farm also generally argues that the burden of the discovery is not proportional to the needs of the case.

In considering proportionality, the Special Master cited the factors under Rule 26(b):

"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."

The issues at stake are at the very heart of this litigation. 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. In terms of resources, LaBrier is an individual, while State Farm is a corporation with a national presence, with sophisticated access to data. As discussed in the preceding section, the burden or expense of the discovery outweighs its likely benefit, particularly in light of State Farm's refusal to permit an outsider to access its computer system or even provide complete lists of its data fields.

The Special Master acted well within the bounds of discretion, particularly in view of the centrality and importance of the information sought. It is difficult to imagine any fact discovery more necessary to the prosecution and defense of the case than that covered by the Order No. 4, as amended.

State Farm argues that the burden is disproportionate because of the individualized review it claims is necessary, and that the individualized review shows class certification cannot be granted in any event. As discussed above, State Farm failed to demonstrate the burden of producing the information is an undue one. Furthermore, State Farm cannot withhold for months the very information that LaBrier has sought for purposes of class certification and the merits, then claim LaBrier cannot meet her burden of proof and that State Farm therefore should not have to produce the missing data.

The Special Master did not abuse his discretion in concluding the burden of discovery is

proportional to the needs of the case.

III. Conclusion

State Farm's motion to vacate or suspend the Special Master's Discovery Order No. 4, as amended [Doc. 135], is denied.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: May 9, 2016
Jefferson City, Missouri

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

AMANDA M. LABRIER, individually, and on behalf of all other similarly situated,	)	
Plaintiff	)	
vs.	)	**No. 2:15CV04093-NKL**
STATE FARM FIRE AND CASUALTY COMPANY,	)	
Defendant.	)	

SPECIAL MASTER'S ORDER NO. 8

The subject of this ruling is defendant's motion requesting this Special Master to determine that defendant has "substantially complied" with plaintiff's Second Set of Interrogatories to Defendant, by way of its supplemental responses to those interrogatories (filed concurrently with that motion). On May 16, 2016, an in-person hearing was held on this motion. At the conclusion of that hearing, this Special Master indicated that he would deny that motion--and, in essence, confirm his previous ruling (in Special Master Order No. 4 and Special Master Order No. 5) that defendant is required to answer these interrogatories. The purpose of the present order is to confirm that ruling, and to provide an explanation of its basis.

The motion for finding of substantial compliance is in the opinion of this Special Master in many ways a rehash of defendant's previous objections to the Second Set of Interrogatories both set out in defendant's objections filed with this Special Master and in the briefs and exhibits filed in the District Court in support of its motion to modify or vacate Special Master Order No. 4. Basically, defendant is arguing that it cannot answer the interrogatories because the answers

to them are not reflected in the electronic data available to it, but must be located through a review of each putative class member's claim file. Although these claim files are stored in computerized form, defendant maintains that the interrogatory answers in many cases cannot be determined without actually looking at the notes and correspondence, images of which are within the computerized claim file. Defendant claims that this review will take so much time, and result in so much expense, that it need not do more than it has already done in order to comply with its obligation to answer these interrogatories. Defendant claims that its supplemental response, which cross-referenced certain spreadsheets containing columnar data relative to 398 of the approximately 150,000 putative class of claims substantially complied with its requirement to fully answer the interrogatories.

There are four interrogatories set forth in plaintiff's Second Set of Interrogatories to Defendant. Defendant's argument chiefly (if not exclusively) relates to the first and second of these interrogatories.

The crux of the argument being made by defendant, in connection with this motion, is as follows. To begin with, it selected 398 claims to subject to a particularized review. It then applied a mathematical test to the computerized information available to defendant relative to these claims. This was a mathematical test which defendant suggested should have been expected to reliably identify those claims which involved a payment that was calculated by deducting depreciation (including a labor-depreciation component of such depreciation). It then sought to demonstrate that this test did not, in fact, reliably identify such claims. It sought to do so, by examining particular claims that had been identified by way of this test (that is, by way of a "yes" answer to a particular mathematical question), and then showing that the specific facts relative to these claims (as reflected in information that could only be obtained by reviewing

non-computerized information in the pertinent claim file) did not fit the anticipated paradigm of a claim payment that had been calculated by deducting labor depreciation. This anticipated paradigm is where the amount that was paid by defendant (whether in one or more payments) is equal to the amount of a repair estimate, less a deduction for depreciation (including a labor component), less the applicable deductible.

This argument does not demonstrate that defendant "substantially complied" with the first two interrogatories.

To begin with, in applying this test, defendant did not employ a category of computerized information that could be reliably counted on to reflect an original repair estimate (from which depreciation could be expected to have been deducted, in arriving at the amount of an "actual cash value" payment). Instead, defendant employed a category of information that it specifically acknowledged would have included (or reflected) the actual cost of repairs (if such repairs had actually been made). Any such actual repair-costs information would necessarily have corrupted the application of this test, because the actual cost of repairs is not relevant to the calculation of payments on an "actual cash value" basis. Instead, that information is only relevant to the alternative measure of loss under defendant's policies—that is, payment on the basis of the actual cost of repair or replacement.

Moreover, this argument is merely another attempt to demonstrate the defendant should not be required to answer Interrogatory No. 1 and Interrogatory No. 2, on the ground that it does not possess *computerized* information that would allow it to do so, without a time-consuming review of non-computerized information contained in individual claim files. Conversely, such an argument is not directed at demonstrating that particular information that defendant has provided, by way of a verified answer to these interrogatories, constitutes a "substantial

compliance" with the obligation to answer that interrogatory, in that it constitutes substantially all of the information known by or available to defendant, regarding the question posed by that interrogatory. Nor has defendant even directly responded to Interrogatory No. 1 or Interrogatory No. 2 (whether in verified form, or otherwise), to the extent it could have done so, based on the information regarding the 398 claims that was revealed by its in-depth review of those claims. In fact, State Farm has not provided *any* direct answers, in response to Interrogatory No. 1 or Interrogatory No. 2, with respect to *any* claims (much less verified answers).

Defendant also suggests that, in Order No. 4, this Special Master ordered defendant to answer these interrogatories in lieu of other discovery (by which plaintiff requested defendant's disclosure of all of its data fields), for the reason defendant had elected to do so. Defendant then argues that it did not elect such an option. This Special Master, in Order No. 4, never indicated that defendant had made such an election. Instead it was this Special Master's decision that, by answering the Second Set of Interrogatories, the discovery of the data fields would be unnecessary and that discovery would move substantially faster and more efficiently than by producing the proprietary data field/dictionary and then further discovery of specific data field information. In its May 9, 2016 order denying defendant's motion to vacate or modify Order No. 4, the District Court stated that the discovery requested in the Second Set of Interrogatories "goes directly to central issues in the case and is needed to identify class members and damages, discovery that is routinely provided in class action cases," and further that "it is difficult to imagine any fact discovery more necessary to the prosecution and defense of the case than that covered by the Order No. 4, as amended." In the opinion of this Special Master, defendant's motion for a finding of substantial compliance does not even begin to provide the answers to the interrogatories, as required by the Federal Rules of Civil Procedure.

As an aside, the verifications to the supplemental response to plaintiff's Second Set of Interrogatories provided by Mr. Donald Vinciguerra and Mr. Allen King do not comply with the Federal Rules of Civil Procedure. Those verifications instead state that the information is not "based entirely on that affiant's personal knowledge," and that such information is only being provided to the "best of affiant's knowledge, information and belief." A proper corporate verification should not contain such qualifying language, but should verify, on behalf of the corporation, that the answers given are accurate, based on the information that is available to the corporation. Federal Rule of Civil Procedure 33(a)

> expressly permits a representative of a corporate party to verify the corporation's answers without personal knowledge of every response by "furnish[ing] such information as is available *to the party*." [Citations omitted.] Of course, the representative must have a basis for signing the responses and for thereby stating on behalf of the corporation that the responses are accurate. [Citation omitted.] The representative may accomplish this through whatever internal process the corporation has chosen, including discussions with counsel.

Shepherd v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1482 (D.C. Cir. 1995)(emphasis in original).

With regard to Interrogatory No. 3 and Interrogatory No. 4, it is clear that those interrogatories seek information relative to the facts upon which defendant expects to rely, as support for its affirmative defenses. Defendant continues to argue that it does not currently possess knowledge relative to at least a significant portion of such facts. However, these interrogatories only call upon defendant to provide such responsive facts as are known to defendant (or are reasonably available to it). Conversely, information that would be responsive, but is not known to defendant nor reasonably available to it need not be provided—although a duty to supplement may arise, when and if such information becomes known to defendant or reasonably available to it.

In order to provide some needed predictability regarding the timing of defendant's answers to the present interrogatories, defendant is ordered to provide a detailed written plan of how it intends to proceed, to this Special Master and plaintiff's counsel, by 5:00 p.m., Central Time, on June 10, 2016. This Special Master is not unaware of the time and expense that would be required to answer the interrogatories. That does not change the necessity for defendant to do so. Defendant is to submit a plan that describes the process it will be implementing, in order to fully answer the interrogatories. All four of the interrogatories must be fully answered within 90 days of the filing of that plan. In addition, defendant must serve, every two weeks throughout this 90-day period, sworn partial answers reflecting the responsive information that defendant has been able to assemble as of the end of each such two-week period.

I will not order the defendant to use the exact format for answering of interrogatories that the plaintiff has requested; however, Interrogatory No. 1 clearly calls for the amount of labor depreciation that was withheld, in calculating one or more payments on particular claims, along with claim number identifier used by the defendant for such claim. This does seem to be very basic information that does not require defendant to provide numerous columns of data. This rather simple format should also be used to provide the answers to Interrogatory No. 2 and Interrogatory No. 3.

SO ORDERED.

Dated this 26th day of May, 2016.

Respectfully submitted,

/s/Leland M. Shurin
Leland M. Shurin, Special Master