UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: State Farm Fire and Casualty Company, Petitioner.	)	No. 16-3185

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America respectfully moves for leave to file a brief of *amicus curiae* in support of Petitioner in this case. Respondent has refused to consent to this motion.

Movant represents hundreds of thousands of U.S. businesses. Its members include businesses operating in every sector and region of the interstate markets for goods and services.

All of these businesses are deeply impacted by discovery issues raised by the rulings of the District Court and Special Master in this case. Among other issues, the Special Master and District Court endorsed a prohibitively expensive request for discovery as to each member of a putative class without undertaking the proportionality analysis that the newly amended Federal Rule of Civil Procedure 26 requires. Such a ruling sets a burdensome precedent, and undermines the balance that Rule 26 provides to control the rising costs of litigation on all parties, especially businesses and Movant's members.

Movant regularly files *amicus curiae* briefs in cases that raise issues of concern to their members. Movant respectfully submits that this is such a case and that the attached brief setting forth its views will be helpful to the Court in its consideration of these important issues.

Dated: July 29, 2016

Respectfully submitted,

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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

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONER AND IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America respectfully submits this Corporate Disclosure Statement and states as follows:

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The burdens and costs of discovery are of particular concern to the Chamber and its members. In this case, the Special Master and District Court endorsed a prohibitively expensive request for discovery as to each member of a class without accounting for the burdens of responding to the request. This matter has significant implications for the Chamber's members, for whom the costs of discovery frequently soar into millions of dollars, resulting in an inexorable hydraulic pressure to settle claims regardless of the underlying merits. The Chamber and its

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than *amicus curiae*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. A motion for leave to participate as *amicus curiae* has been filed with the Court.

members have a substantial interest in the enforcement of the proportionality analysis set forth in the newly revised Federal Rule of Civil Procedure 26(b)(1), and in the proper balancing of interests between plaintiffs and defendants. *See* U.S. Chamber Institute for Legal Reform, Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure, at 1-7 (Nov. 7, 2013) (addressing the proposed amendment to Rule 26).[2] The Chamber and its members thus have a strong interest in the proper resolution of this dispute.

SUMMARY OF ARGUMENT

With the amendments to Rule 26 of the Federal Rules of Civil Procedure in December 2015, the Federal Rules Committee recognized the severity of the costs and other burdens associated with the discovery process. John Roberts, *2015 Year-End Report on the Federal Judiciary*, at 6 (2015), *available at* https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (explaining that amended Rule 26(b)(1) "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."); *see also* Fed. R. Civ. P. 26 cmt. (2015 Amendment). The

[2] The Comment and Letters cited herein are available at https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002. The Transcripts cited herein are available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/transcripts.

amendments follow years of scholarship tracking rising discovery costs and the observation that the outcome of these cases is often based on these costs—as opposed to their merits. *See, e.g.*, Nicholas M. Pace and Laura Zakaras, RAND Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 17 (2012) (finding that median e-discovery cost is $1.8 million); Litigation Cost Survey of Major Companies 3-4 (2010), *available at* http://www.uscourts.gov/file/document/litigation-cost-survey-major-companies (between 2006-2008, high end discovery costs were reported to be between $2.3 million and $9.7 million)[3]; Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 925 (2012) ("In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.").

Pursuant to the amendments, parties and courts must consider whether a discovery request is proportional under the factors laid out in the Rule to determine

[3] By contrast, State Farm estimates that the cost of responding to the Interrogatories in the time set forth by the Special Master will cost at least $9.8 million. Petitioner's Br. 28; *see also In re Biomet M2a Magnum Hip Implant Prods. Liability Litig.*, No. 3:12-MD 2391, 2013 WL 1729682, at *2-3 (N.D. Ind. Apr. 18, 2013) (in case with hundreds of plaintiffs, a discovery request that would cost "a million, or millions of dollars" was not proportional to the needs of the case).

whether a request is within the permissible scope of discovery. Fed. R. Civ. P. 26 cmt. (2015 Amendment). Where a discovery request does not meet the proportionality standard, "the court must limit the frequency or extent of discovery . . . ." Fed. R. Civ. P. 26(b)(2)(C)(iii).

Yet, these amendments can only be effective if the judiciary (including appellate, district court, and magistrate judges, as well as special masters) takes an active role in curbing disproportionate discovery requests—particularly where those requests impose an outsized burden on only one party. Here, the District Court denied State Farm's objection to the Special Master's order compelling it to answer Plaintiff's Second Set of Interrogatories (the "Interrogatories")—a process which requires State Farm to spend millions of dollars to analyze and calculate the claims of 145,000 class members—undertaking a flawed proportionality analysis that failed to consider elements that Rule 26 requires and penalizing State Farm for its opposition to another disproportionate request. The District Court's analysis has negative implications beyond this ruling, both for the case as a whole and for other courts, as early case law on the revised Rule 26 emerges.

ARGUMENT

I. THE PROPORTIONALITY ANALYSIS REQUIRES AN ASSESSMENT OF THE BURDEN ON A PRODUCING PARTY

Federal Rule of Civil Procedure 26(b)(1) provides that the scope of discovery is limited to requests that are "proportional to the needs of the case." The

proportionality of a request is determined by 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." *Id.*

The orders from the Special Master and District Court wrongly analyzed proportionality, paying only lip service to the factors and refusing to weigh the countervailing considerations that favored State Farm's position. Specifically, the Special Master and District Court failed to weigh properly whether the benefit of responding to the Interrogatories outweighed the burden to State Farm. The broad implications of these rulings affect companies in every industry.

A. The Burden on a Responding Party Should Be Assessed in Terms of the Current Capabilities of its Databases or other Computer Systems

The District Court endorsed the Special Master's finding that, contrary to the evidence, State Farm overstated the burden that the Interrogatories would pose because State Farm could likely automate a process to answer the Interrogatories, and even if it could not, any failure of State Farm to retain the data in a specific way was its own fault. Appx. 3390-94; Appx. 206. The court stated that

> 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.

Appx. 3392. But the proportionality analysis does not instruct judges to assess what the burden of a discovery *should be*; instead, it asks what the burden *is*. Fed. R. Civ. P. 26(b)(1). Here, State Farm presented proof that it cannot automate the requested calculation for each of the approximately 145,000 class members. Yet, the District Court adopted the Special Master's finding that State Farm should be penalized—regardless of the burden—for its failure to maintain its data in a way that would make these calculations less burdensome. Appx. 206. This reasoning upends the proportionality analysis in Rule 26. As the Sedona Conference noted in 2014:

> Requesting parties have challenged [] claims of undue burden, arguing that a responding party may not rely upon idiosyncrasies and limitations in its systems to establish burden; parties may not "hide" behind a unique and burdensome data management system which they created. However, absent evidence that a party has purposefully designed its data systems to thwart discovery, such challenges are not supported by Rule 26[]. . . .

The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation, 15 The Sedona Conference Journal 171, 193 (Fall 2014) ("*Sedona Conf.*"); *see also* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 583 (2010) ("[C]ourts have historically ignored proportionality concerns, instead blaming companies for choosing to employ computer systems that make retrieving records more difficult or expensive.").

Companies spend millions of dollars to set up and maintain databases and other computerized systems, which require compromises in order to maximize functionality. *See Sedona Conf.* at 193 ("Virtually all databases include some design compromises after balancing competing business and legal needs. . . . Such design decisions are appropriate, as long as they are not made to frustrate legitimate discovery."); *see also id.* at 179 ("Database systems tend to be highly unique and customized to support a specific task or system owner."); Conrad Jacoby et al., *Databases Lie! Successfully Managing Structured Data, the Oft-Overlooked ESI*, 19 Rich. J.L. & Tech. 9, 24 (2013) ("Structured data systems have a variety of capabilities and technical capacity. Many of the older legacy systems can be very limited in how one can manipulate and export data."). Companies construct their databases and other computer systems to serve the needs of their business – not the needs of some unknown future litigation. "[T]he fact that a database is in active use does not automatically mean that the data is easy and inexpensive to produce in litigation." *Sedona Conf.* at 208. Because of these sensible compromises, these complex systems cannot be fashioned readily to accommodate every discovery request. *See, e.g.*, *Jones v. Good*, No. 95-8026, 2002 WL 1007614, at *10 (S.D.N.Y. May 16, 2002) (denying motion to compel discovery request because, *inter alia*, "the databases in question are not simply collections of lists or numbers that can be easily extracted and correlated with other

numbers; rather, each of the requested databases has been constructed to support the interactions of hundreds of concurrent users rather than to support the analytical activities of a few"). Accordingly, the District Court's assumption that State Farm can "bear the cost of doing any additional programming to pull out the information required by the interrogatories" reflects a flawed understanding of how a company's systems are typically designed. Appx. 3392.

Further, because State Farm demonstrated that it could not answer the Interrogatories electronically (*see, e.g.*, Petitioner's Br. 22-23), the District Court's reasoning that State Farm could undertake "additional programming," regardless of the burden, to derive the answers places a greater burden on State Farm than Rule 26 requires, upending the balance that the proportionality standard advances. Beyond retaining information for anticipated litigation, the Court's reasoning requires a corporation to anticipate what it may one day be compelled to produce, and then to fashion its complex systems to automate any calculation that could arise in litigation. If it does not, the corporation faces the potentially exorbitant cost of changing its programs during litigation, no matter its proportion to the merits or value of the case. Such reasoning would eliminate the backstop of undue burden or cost from the proper application of Rule 26. *See, e.g.* Fed. R. Civ. P. 26(b)(2)(B).

The Court should have recognized that "a requesting party finds a producing party and its IT systems *as they are* and not *as they wish them to be*." *Sedona Conf.*

at 193 (emphasis added). Had it taken seriously State Farm's showing of the burden it faces to respond to the Interrogatories—a manual calculation process that cannot be automated, hundreds of employees pulled from their assigned duties, and millions of dollars to answer this one discovery request—the Court's proportionality analysis would have been different. The Court's failure to do so was error.

B. The Data Management Burdens Raised Here are Widespread

As discussed above, the 2015 amendments were enacted to protect responding parties from discovery requests that pose an undue burden. The data burdens that State Farm articulated here are not unique—for example, in connection with the 2015 amendments, the Federal Rules Committee heard evidence from myriad companies explaining that, despite technological advances, manipulation of databases and data systems does not come at the push of a button. *See, e.g.*, Testimony of David Werner, Shell Oil Co., In re: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 192 (Feb. 7, 2014) ("Feb. 7 Tr.") ("Technology is not the answer to the problem that technology has created. . . . "[T]here are no keyword search tools that you will routinely search across distinct unlinked servers. . . ."); Letter from David M. Howard, V.P. & Dep. Gen. Counsel, Microsoft Corp., to Committee on Rules of Practice and Procedure at 10 (Feb. 18,

2014) ("[T]he technologies that contribute to the proliferation of data and data types will always outpace the technological tools designed to preserve, process and produce that data."); Testimony of Robert L. Levy, Exxon Mobil Corp., In re: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 162:1-8 (Nov. 7, 2013) ("Nov. 7, 2013 Tr.") ("These systems are designed to make our people do their jobs more effectively, more efficiently, to give them more information, and yet when we have to deal with all of these issues and hamstring the technology, it slows down the process. We end up sometimes making significant changes in our technology and other times not approaching technology solutions because of [litigation] concerns.").

The struggle to determine what will be of relevance in future cases compounds this problem, leaving companies in the position of balancing the needs of their businesses against the uncertainty of future court orders.

> [A]lthough defendants may attempt to predict what materials will be sought in future litigation, lawsuits . . . involve unforeseen issues and disagreements . . . . [I]dentifying, collecting, and processing documents to comply with discovery requirements often occurs many years after the events at issue in the case, and surveying old information systems utilizing outdated, prior technology can be an enormous burden.

Letter from Doug Lampe, Office of General Counsel, Ford Motor Co. to Advisory Committee on Civil Rules, at 5 (Nov. 22, 2013). *See also* Letter from Bradford A.

Berenson, V.P. Sr. Counsel, General Electric Co., to the Secretary of the Committee on Rules of Practice and Procedure, at 2 (Feb. 7, 2014) (in the related context of preservation, "[m]ost of the time we cannot anticipate the precise claims or defenses in whatever litigation might ultimately be filed, much less the way in which the legal and factual theories will develop and change over time. And every preservation decision made at the outset could be scrutinized years later with the benefit of hindsight in an adversarial setting").

These concerns are not hypothetical. Companies consistently have proven the magnitude of the expense and other burdens involved in preserving data and responding to discovery requests, particularly where the data is not easily extractable. Microsoft Letter at 5 (noting high cost of "database management, and in particular the management of data that from time to time must be extracted from legacy systems that are not currently used for business purposes"); *see also, e.g.*, Testimony of Malini Moorthy, Pfizer, Nov. 7, 2013 Tr. at 262:22-263:0 ("In connection with the [one court's] preservation order, we estimate that Wyeth and Pfizer spent nearly $40 million to buy and store [100 petabytes of data] . . . . 50 petabytes is roughly equivalent to the entire written literary works of all mankind in all languages since the beginning of recorded time, and we preserved twice that much."); *see also* Testimony of Michael Harrington, Eli Lilly & Co., Feb. 7, 2014

Tr. at 123:1-3 ("In the last three years we spent over $50 million to review and produce documents for litigation in the United States.").

The design of each company's system is unique, reflecting the best efforts of the company to balance competing obligations, and no company can strike a perfect balance. By ignoring this reality, the District Court's order does severe violence to the mandate of Rule 26 that the actual burden of the request on the producing party is a necessary factor in determining whether a request falls within the permissible scope of discovery.

II. REQUESTING ACCESS TO AN ENTIRE DATABASE IS NOT PROPORTIONAL

The Special Master and District Court also stated that State Farm should be penalized for its failure to grant Plaintiff access to its entire computer system. *See, e.g.*, Appx. 3395. Setting aside State Farm's assertion that accessing its data would not give Plaintiff the requested information, forcing State Farm to open its data systems to Plaintiff is far from proportional.

A company's proprietary computer system is filled with confidential data about its business practices and its customers. Allowing unfettered access to these computer systems is not proportional, particularly where, as here, those systems possess deeply personal information about State Farm's customers, most of whom are not in the class. "Absent a specific showing of need, a requesting party is

entitled only to database fields that contain relevant information, . . . and not to the entire database in which the information resides . . . .” *Sedona Conf.* at 199.

Not surprisingly, courts have recognized that requests to view an entire database or computer system are problematic. “The fact that a client stores documents in a database does not mean that the opposing party has the right to obtain access to all the documents in the database when much of the information in the database is irrelevant to the issues in the lawsuit and not responsive . . . .” *Coast to Coast Health Care Servs. v. Meyerhoffer*, No. 2:10-cv-00734, 2012 U.S. Dist. LEXIS 49903, at *3 (S.D. Ohio Apr. 10, 2012) (internal citation omitted); *see also Sabouri v. Ohio Bureau of Emp’t Servs.*, No. 97-715, 2000 WL 1620915, at *5 (S. D. Ohio Oct. 24, 2000) (ruling that while a plaintiff alleging discrimination was “entitled to view [computer] files that relate to him or to the claims or defenses asserted in [the] action, he has no right to rummage through the computer files of the defendants”). Plaintiff’s request to access State Farm’s databases directly was disproportionate to the needs of the case and burdensome to State Farm.

III. THE DISTRICT COURT UNFAIRLY DISCOUNTED STATE FARM’S OBJECTION TO THE INTERROGATORIES BECAUSE OF ITS OBJECTIONS TO OTHER DISCOVERY REQUESTS

The District Court also erred by determining that because State Farm had objected to Plaintiff’s request to access State Farm’s databases, it was obligated to respond to the Interrogatories instead of assessing individually the proportionality

of the Interrogatories themselves. *See* Appx. 3395 ("To the extent State Farm has been burdened by answering interrogatories rather than providing direct access by LaBrier to the information she seeks, State Farm's intransigent approach has created most of that burden."). The District Court penalized State Farm for this objection even though the Special Master excused State Farm from responding to Plaintiff's requests for data fields and database access, and despite the fact that Plaintiff did not challenge the Special Master's order. Appx. 4036.

Such a ruling creates a perverse incentive for parties—by failing to assess on an individual level the proportionality of challenged discovery requests, and instead granting a disproportionate and burdensome request on the basis that other burdensome requests had been rebuffed by the other party—a court invites a requesting party to throw everything at the wall to see what sticks. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001) ("[T]he fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request."). Choosing one disproportionate request among many does not accomplish the goals that the amendments to Rule 26 seek to achieve, since the expense of one unduly burdensome request can motivate a party to settle a case of questionable merit instead of trying it. *See, e.g.*, *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

Here, State Farm is faced with the unrecoverable expenses of millions of dollars to answer one discovery request because it refused to accede to another disproportionate and unreasonable request. The District Court should have assessed each request individually, not against other requests with which State Farm legitimately refused to accept. By failing to take this approach, the District Court further undermined the protection that the proportionality standard was meant to provide and has effectively written the new amendments out of Rule 26.

CONCLUSION

For these reasons, State Farm's Petition for a Writ of Mandamus should be granted.

Respectfully submitted,

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July 29, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Federal Rule of Appellate Procedure 29(d) because it is 15 pages long, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

3. This brief complies with Local Rule 28A(h)(2) because it has been scanned for viruses and is virus-free.

/s/ Carter G. Phillips
Carter G. Phillips

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2016, I caused the foregoing Motion for Leave to Participate as *Amicus Curaie* and Brief of *Amicus Curiae* Chamber of Commerce of the United States of America to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit through the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Carter G. Phillips
Carter G. Phillips