

**No. 15-0903**

---

**IN THE SUPREME COURT OF TEXAS**

---

**IN RE STATE FARM LLOYDS  
ORIGINAL PROCEEDINGS FROM THE  
206<sup>TH</sup> JUDICIAL DISTRICT OF HIDALGO COUNTY, TEXAS  
THE HONORABLE ROSE GUERRA REYNA PRESIDING  
CAUSE NO. C-3828013-D**

---

---

**AMENDED BRIEF OF AMICI CURIAE  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,  
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES  
&  
TEXAS ASSOCIATION OF BUSINESS  
IN SUPPORT OF  
STATE FARM LLOYDS' PETITION FOR WRIT OF MANDAMUS**

---

Patrick Oot  
State Bar No. 1024115 (D.C.)\*  
SHOOK, HARDY & BACON L.L.P.  
1155 F Street, N.W., Suite 200  
Washington, DC 20004-1305  
Phone: (202) 639-5645  
Facsimile: (202) 783-4211  
Email: [oot@shb.com](mailto:oot@shb.com)

Daniel Lim (Counsel of Record)  
State Bar No. 0795483  
SHOOK, HARDY & BACON L.L.P.  
JP Morgan Chase Tower  
600 Travis Street, Suite 1600  
Houston, TX 77002  
Phone: (713) 227-8008  
Email: [dlim@shb.com](mailto:dlim@shb.com)

**COUNSEL FOR *AMICI CURIAE***

\*Motion for admission Pro Hac Vice pending.

## IDENTITY OF PARTIES AND COUNSEL

***Relator (Defendant In  
Underlying Action)***

State Farm Lloyds

Brian M. Chandler  
RAMEY, CHANDLER, QUINN & ZITO, P.C.  
750 Bering Drive, Suite 600  
Houston, Texas 77057

Mollie C. Nichols  
REDGRAVE LLP  
601 Pennsylvania Avenue, NW  
Suite 900 - South Building  
Washington, D.C. 20004

***Respondent***

The Honorable Rose Guerra Reyna  
Hidalgo County Courthouse  
206th Judicial District Court  
100 N. Closner  
Edinburg, Texas 78539

***Real Parties In Interest  
(Plaintiffs In Underlying  
Action)***

Alejos Ramirez  
Ofelia Ramirez

J. Steve Mostyn, Esq.  
MOSTYN LAW  
3810 West Alabama Street  
Houston, Texas 77027

## IDENTITY AND INTEREST OF AMICI CURIAE

***Name of amici curiae***

Chamber of Commerce of the United States of America,

National Association of Mutual Insurance Companies &

Texas Association of Business

***Counsel for amici***

Patrick Oot  
Shook, Hardy & Bacon L.L.P.  
1155 F Street, N.W., Suite 200  
Washington, D.C. 20004-1305

Daniel Lim  
Shook, Hardy & Bacon L.L.P.  
600 Travis, Suite 3400  
Houston, Texas 77002-2926

***Source of fee paid***

Chamber of Commerce of the United States of America

## **TABLE OF CONTENTS**

|   | <b><u>Page</u></b> |
|---|--------------------|
| STATEMENT OF THE CASE.....  | vi                 |
| ISSUES PRESENTED.....   | vii                |
| INTRODUCTION .....  | 1                  |
| STATEMENT OF FACTS .....  | 5                  |
| SUMMARY OF ARGUMENT .....   | 7                  |
| ARGUMENT .....  | 10                 |
| I.    THE TRIAL COURT’S MISAPPLICATION OF RULE 196.4<br>REPRESENTS A PRIMA FACIE CASE OF UNDUE<br>BURDEN, UNNECESSARY RISK, AND UNREASONABLE<br>EXPENSE. .... | 10                 |
| A.    The Sheer Volume of Electronically Stored Information<br>Drives Exploding E-Discovery Costs .....   | 10                 |
| B.    The ESI Protocol is Unduly Burdensome, and Adds<br>Unnecessary Additional Costs That Increase Pressure to<br>Settle Even Frivolous Claims.....          | 13                 |
| II.    SIMILAR ATTEMPTS TO INCREASE THE COST,<br>BURDEN, AND RISK OF RESPONDING TO ESI<br>REQUESTS HAVE BEEN REJECTED BY TEXAS COURTS .....                   | 17                 |
| PRAYER.....   | 20                 |
| CERTIFICATE OF COUNSEL .....  | 21                 |
| CERTIFICATE OF COMPLIANCE (WORD COUNT) .....  | 22                 |
| CERTIFICATE OF SERVICE .....  | 22                 |

## **TABLE OF AUTHORITIES**

|   | <b>Page(s)</b> |
|---|----------------|
| <b>CASES</b>  |                |
| <i>CP Solutions PTE, Ltd. v. Gen. Elec. Co.</i> ,<br>No. 3:04-CV-2150, 2006 WL 1272615, at *4 (D. Conn. Feb. 6, 2006) ..... | 16             |
| <i>Dizdar v. State Farm Lloyds</i> ,<br>No. 7:14-CV-523 (S.D. Tex. Jan 7, 2015).....  | 3              |
| <i>In re Alford Chevrolet-Geo</i> ,<br>997 S.W.2d 173, 181 (Tex. 1999) .....  | 18             |
| <i>In re Harris</i> ,<br>315 S.W.3d 685, 703 (Houston [1 <sup>st</sup> Dist.] 2010, orig. proceeding).....                  | 18             |
| <i>In re Priceline.com Sec. Lit.</i> ,<br>233 F.R.D. 88, 91 (D. Conn, 2005) .....   | 17             |
| <i>In re Stern</i> ,<br>321 S.W.3d 828, 842 (Tex. App. -- Houston [1 <sup>st</sup> Dist.] 2010, orig.<br>proceeding) .....  | 18             |
| <i>In re Weekly Homes</i> ,<br>295 S.W.3d 309, 311 (Tex. 2009) .....  | 17             |
| <i>Williams v. Sprint / United Mgmt. Co.</i> , No. 03-2200, 2006 WL 3691604 at*6<br>(D. Kan. Dec. 12, 2006).....            | 16             |
| <b>STATUTES</b>   |                |
| Belgian Law of December 8, 1992 on Privacy Protection in relation to the<br>Processing of Personal Data .....               | 13             |
| TEXAS BUS. & COMMERCE CODE §48.102(b).....  | 13             |
| Data Protection Act 1998 (c. 29) .....  | 13             |
| German Federal Data Protection Act.....   | 13             |
| Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 <i>et seq.</i> .....   | 13             |

|  |    |
|--|----|
| Health Insurance Portability and Accountability Act .....  | 13 |
| Personal Information Protection and Electronic Documents Act (PIPEDA),<br>S.C. 2000, c. 5 .....  | 13 |
| The Federal Law on Protection of Personal Data held by Private Parties<br>(published July 5, 2010).....  | 13 |
| The Personal Information Protection Act (Law No. 57 of 2003) .....   | 13 |
| <b>RULES</b>   |    |
| FED. R. CIV. P. 1 .....  | 2  |
| TEX. R. APP. P. 9.9.....   | 13 |
| TEX. R. APP. P. 11 .....   | 1  |
| TEX. R. CIV. P. 1 .....  | 2  |
| TEX. R. CIV. P. 171 .....  | 18 |
| TEX. R. CIV. P. 192.4(a) .....   | 19 |
| TEX. R. CIV. P. 192.4(b) .....   | 19 |
| TEX. R. CIV. P. 193.....   | 18 |
| TEX. R. CIV. P. 196.4.....   | 7  |
| <b>OTHER AUTHORITIES</b>   |    |
| 21 C.F.R. 20.63 .....  | 13 |
| 45 C.F.R. Part 160.....  | 13 |
| 45 C.F.4. 164, Subparts A and E.....   | 13 |
| Directive 95/46/EC of the European Parliament and of the Council of 24<br>October 1995 on the Protection of Individuals with Regard to the<br>Processing of Personal Data and on the Free Movement of Such Data,<br>1995 O.J. (L281/31)..... | 13 |

|   |    |
|---|----|
| Gartner Press Release, Gartner Says Worldwide IT Spending on Pace to Reach \$3.8 Trillion in 2014, (Jan. 6. 2014), <i>available at</i> <a href="http://www.gartner.com/newsroom/id/2643919">http://www.gartner.com/newsroom/id/2643919</a> .....  | 10 |
| John Bace, Cost of E-Discovery Threatens to Skew Justice System, Gartner Report No. G00148170, April 20 2007, <i>available at</i> <a href="https://www.gartner.com/doc/503935?ref=SiteSearch&amp;stkw=justice%20breyer&amp;fml=search">https://www.gartner.com/doc/503935?ref=SiteSearch&amp;stkw=justice%20breyer&amp;fml=search</a> .....   | 2  |
| National Insurance Crime Bureau, NICB Reports Hail Damage Claims in the United States, 2010-2012 (Jul. 17, 2013), <i>available at</i> <a href="https://nicb.org/newsroom/news-releases/hail-damage-claims-in-the-us">https://nicb.org/newsroom/news-releases/hail-damage-claims-in-the-us</a> .....   | 13 |
| Nicholas M. Pace, Laura Zakaras, Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery, Rand Institute for Civil Justice (2012) at 20, <i>available at</i> <a href="http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf">http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf</a> .....   | 11 |
| Sara Radicati and Justin Levenstein, Email Statistics Report, 2013-2017, Executive Summary, The Radicati Group, Inc. (April 2013), <i>available at</i> <a href="http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf">http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf</a> .....                                  | 11 |
| Special Counsel, Case Study: Large Online University, Managing Documents, Redactions, and Personally Identifiable Information (PII), <i>available at</i> <a href="http://www.specialcounsel.com/resources-legal/case-studies/document-review-redaction-attorney-team/">http://www.specialcounsel.com/resources-legal/case-studies/document-review-redaction-attorney-team/</a> (last accessed Dec. 4, 2015) .....                       | 15 |
| The Electronic Discovery Institute, Proceedings of the 2013 EDI Leadership Summit: At the Crossroads of Bad Faith & Negligence: How Sekisui Shows We Need New Rule 37(e) (2013) at 3 – 4, <i>available at</i> <a href="http://www.ediscoveryinstitute.org/publications/">http://www.ediscoveryinstitute.org/publications/</a> .....   | 11 |
| 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, dated Nov. 7, 2013, at 1 (citing studies), <i>available at</i> <a href="http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf">http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf</a> ..... | 2  |

|   |    |
|---|----|
| United States District Court of Appeals, District of Columbia Circuit,<br>Guidance on Redacting Personal Data Identifiers, <i>available at</i><br><a href="https://www.cadc.uscourts.gov/internet/home.nsf/Content/Guidance%20on%20Redacting%20Personal%20Data%20Identifiers%20in%20Electronically%20Filed%20Documents/\$FILE/ECF%20Redaction%20Guide.pdf">https://www.cadc.uscourts.gov/internet/home.nsf/Content/Guidance%20on%20Redacting%20Personal%20Data%20Identifiers%20in%20Electronically%20Filed%20Documents/\$FILE/ECF%20Redaction%20Guide.pdf</a> ..... | 15 |
| William H. J. Hubbard, Preservation Costs Survey Final Report (Feb. 18,<br>2014) at 3, <i>available at</i><br><a href="http://www.ediscoverylaw.com/files/2014/02/Hubbard-Preservation_Costs_Survey_Final_Report.pdf">http://www.ediscoverylaw.com/files/2014/02/Hubbard-Preservation_Costs_Survey_Final_Report.pdf</a> .....   | 13 |



## STATEMENT OF THE CASE

***Nature of the Underlying Proceeding:***

Breach of contract and violations of the Texas Deceptive Trade Practices Act and Chapters 541 and 542 of the Texas Insurance Code, breach of the duty of good faith and fair dealing, fraud, and conspiracy to commit fraud.

***Respondent:***

The Honorable Rose Guerra Reyna, Presiding Judge, 206th Judicial District Court, Hidalgo County, Texas.

***Action from Which Relief is Sought:***

Trial Court's Order September 30, 2014 Granting Plaintiffs' Amended Motion for Entry of Production Protocol.

***Court of Appeals and Panel:***

Court of Appeals for the Thirteenth District of Corpus Christi – Edinburg; Chief Justice Rogelio Valdez and Justices Dori Contreras Garza and Nora L. Longoria.

***Court of Appeals' Disposition:***

State Farm Lloyds filed its Petition for Writ of Mandamus in the court of appeals on October 22, 2014. The next day, the court stayed the discovery order regarding electronic discovery and requested a response to the petition (APP\_E0001-02.) In a per curiam opinion, the court denied the petition on October 28, 2015. The only citation currently available is from West Law: *In re State Farm Lloyds*, No. 13-14-00616-CV, 2015 WL 6520998 (Tex. App.—Corpus Christi – Edinburg Oct. 28, 2015, orig. action) (mem. op.). (APP\_F0001.)

## **ISSUES PRESENTED**

1. Did the trial court abuse its discretion by imposing an ESI protocol that misinterprets Texas Rule of Civil Procedure 196.4 because its order mandates specific forms of production absent a novel showing of “infeasibility,” eliminates all other available objections under the civil rules, and disregards evidence that the producing party proffered other reasonably usable formats?

2. Did the trial court abuse its discretion by disregarding proportionality considerations under Texas Rule of Civil Procedure 192.4 where a party has proffered reasonably usable formats that are a less intrusive and less burdensome means of meeting the party’s discovery obligations?

## **INTRODUCTION**

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Chamber of Commerce of the United States of America (“Chamber”), National Association of Mutual Insurance Companies (“NAMIC”) and Texas Association of Business (“TAB”) respectfully submit this brief as *amici curiae* in support of Petitioner State Farm Lloyds.<sup>1</sup>

The Chamber is the world’s largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. NAMIC is the largest and most diverse national property and casualty insurers trade association in the United States, with more than 1300 member companies. Texas Association of Business is a trade association of over 4,000 business members and has a more than 85-year history of representing Texas businesses, large and small. An important function of the Chamber, NAMIC and TAB is to represent the interests of its members by

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. TEX. R. APP. P. 11.

filing *amici curiae* briefs in cases involving issues of national concern to American business.

A significant concern for the *amici* and its members is the breadth and impact of overbroad and burdensome discovery in litigation. Discovery costs continue to grow at an alarming rate, frustrating the goals of a “just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1; *see also* TEX. R. CIV. P. 1. Discovery costs comprise 50 to 90 percent of total litigation costs in a given case, and as well as the highest “liability costs” (which includes discovery expenses) of its peer countries at 2.6 times the average level of the Eurozone economies.<sup>2</sup> These high discovery costs hinder a defendant’s ability to meaningfully defend its rights and interests in the courts by inappropriately increasing plaintiff attorneys’ settlement leverage.<sup>3</sup>

It appears that in many instances, plaintiff attorneys abuse discovery rules to leverage settlement via unnecessary, unduly burdensome and unreasonable

---

<sup>2</sup> *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, dated Nov. 7, 2013, at 1 (citing studies), *available at* [http://www.instituteforlegalreform.com/uploads/sites/1/FRCP\\_Submission\\_Nov.7.2013.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf). United States liability costs are four times higher than those of Belgium, The Netherlands and Portugal. *Id.*

<sup>3</sup> In a Georgetown Law panel moderated by Arthur Miller on the cost of electronic discovery, Justice Steven Breyer commented, “if it really costs millions to do that, then you’re going to drive out of the litigation system a lot of people who ought to be there. They’ll go to arbitration . . . They will go somewhere where they will write their own discovery rules, and I think that is unfortunate in many ways.” *See* John Bace, Cost of E-Discovery Threatens to Skew Justice System, Gartner Report No. G00148170, April 20 2007, *available at* <https://www.gartner.com/doc/503935?ref=SiteSearch&stkw=justice%20breyer&fnl=search>.

discovery demands that escalate the cost of litigating cases well beyond the true value of the case. In this case, the Defendant estimates that the total cost of repairs for the plaintiffs to be \$6,258.36; yet the electronically stored information (“ESI”) protocol at issue will require efforts that State Farm demonstrated would be burdensome and no doubt would create internal and external costs associated with those efforts in magnitudes above the actual damages at issue. As noted by State Farm, the same plaintiffs’ attorneys are deploying this tactic in a line of pending insurance cases in Texas.<sup>4</sup>

*Amici* respectfully request that this Court grant review to clarify the proper application of Texas discovery rules. The District Court’s ESI Protocol creates haphazard and disparate requirements for large data holders in Texas contrary to the Texas Rules of Civil Procedure, the precedent of this Court and other authorities, while undermining the fundamental due process rights of American businesses.<sup>5</sup> The order – and others like it – dramatically weaken the legal rules governing discovery and improperly increase the financial and legal exposure of *amici*’s members and companies doing business in Texas. Moreover, continued

---

<sup>4</sup> See *Dizdar v. State Farm Lloyds*, No. 7:14-CV-523 (S.D. Tex. Jan 7, 2015) (granting State Farm’s request for protective order allowing producing of ESI in searchable static image claims files rather than the format requested by the plaintiffs) (APP\_K001-28). Similar orders have been entered in other MDL proceedings. (APP\_C0098).

<sup>5</sup> The underlying action was transferred to a single multidistrict litigation (“MDL”) pretrial court in the 206<sup>th</sup> District Court of Hidalgo County handling pretrial proceedings for similar cases. Because the MDL pretrial court entered a case management order with a similar ESI protocol, the trial court’s ruling affects 118 open and active cases in the MDL as well.

misinterpretations and abuses of the Texas discovery rules threaten the integrity of the Texas judicial system. Accordingly, *amici* request reversal of the 206<sup>th</sup> Judicial District Court order granting the Entry of Production Protocol in the case below. *Amici* appreciate the opportunity to present its submissions to the honorable Court, and look forward to further argument and briefing on these important issues.

## **STATEMENT OF FACTS**

As relevant to this *amici* brief, on September 30, 2014, the District Court ordered the entry of a “Production Protocol” mandating, among other requirements, the following:

- Production of ESI “in its native form; that is, in the form in which the information was customarily created, used, and stored by the native application employed by the producing party in the ordinary course of business.” (APP\_B0008-09 at ¶ 2).
- “If it is infeasible to produce an item of responsive ESI in its native form, it may be produced in an agreed-upon near-native form; that is, in a form in which the item can be imported into the native application without a material loss of content, structure or functionality as compared to the native form.” *Id.* at ¶ 3. The order allows for the production of static image formats “only for” items that are natively static images, such as photographs and scans of hard-copy documents.
- “information . . . requiring redaction shall (as feasible) be redacted natively, produced in .PDF format and redacted using the Adobe Acrobat redaction feature . . . .” *Id.*

State Farm filed Petitions for Writs of Mandamus in the Thirteenth Court of appeals for both the underlying and MDL discovery orders. Both Petitions have

been denied. State Farm filed Petitions for Writs of Mandamus to the Texas Supreme Court for both actions on November 23, 2015.



## **SUMMARY OF ARGUMENT**

The District Court ignored and misinterpreted key components of the process for the production of electronically stored information (ESI) outlined in Texas Rule of Civil Procedure 196.4. State Farm Lloyds (“State Farm”) objected to the trial court’s ESI protocol and provided evidence that the production format requirements could not be followed through reasonable efforts. *See* (APP\_A0033-39; APP\_C0060-00). The District Court’s order misinterprets Rule 196.4 by requiring a producing party to show that production would be “infeasible” rather than “unreasonable.” Moreover, under the order, even if a defendant could show that the required discovery is “infeasible,” the only alternative production format allowed by the ESI protocol is an equally unreasonable “agreed-upon near-native form.” (APP\_B0008-09 at ¶¶ 2-3). Additionally, the ESI protocol fails to allow for any cost-allocation mechanism as required by Rule 196.4 for “extraordinary steps” that State Farm must take to produce the ESI in the ordered format. *See* TEX. R. CIV. P. 196.4. The redaction requirements of the ESI protocol suffer the same extraordinary burdens and introduce requirements beyond the scope of the Texas Rules of Civil Procedure.

*Amici* present the following considerations in support of State Farm’s Petition For Writ of Mandamus. First, the trial court’s discovery order presents a *prima facie* case of the imposition of undue burden, unnecessary risk, and

unreasonable expense in violation of Rule 196.4. Native file production and “near-native” production as defined by the ESI protocol exacerbates the costs and risks of production for large data holders, particularly businesses and government agencies, further blocking a litigant’s access to justice. Also, the redaction process and software mandate dictated by the ESI protocol presents obvious and unduly burdensome requirements on producing parties. Many businesses, particularly large data holders, have instituted processes for document management in formats other than “native” and do not use Adobe or .PDF formats for redaction.

Requiring companies to retool their processes in order to meet the requirements for the ESI protocol imposes massive and unreasonable costs -- costs that cannot be imposed under Rule 196.4 without a showing of need for the particular production protocol. Many businesses similar to State Farm have invested in processes and technology that rely on non-native formats to better manage the integrity of data systems. Eviscerating these substantial investments by requiring a particular production format and redaction methodology for each case at the requesting party’s whim kills incentives for innovation by American businesses to seek better and cost-effective measures to maintain and process relevant ESI.

Second, the ESI protocol creates undue burden and hardship for large data holders to meet legally mandated data protection requirements regarding private

health information, personally identifiable information, and confidential business information. For example, producing parties are required by law to redact health care information – even if ordered to produce such information by a court. Compared to redaction within commercially available document review software, production of redacted documents in native format is overly burdensome, given the paucity of reliable redaction tools for native files, and the substantial increase in time required for Adobe Acrobat .PDF redaction.

Finally, this Court and other Texas appellate courts have struck down similar efforts by plaintiffs’ lawyers to use outlandish and unnecessary discovery requirements that drastically increase the cost and burden to responding parties. Where the discovery costs overwhelm the potential value of the underlying litigation, it is no surprise that defendants are frequently forced to settle even meritless claims, at unreasonable amounts, in order to avoid those discovery-related costs, and businesses and consumers will suffer adverse economic consequences as a result of the increased cost of litigation caused by overbroad and unnecessary discovery orders.

For these reasons, the Court should grant the Petition for Writ of Mandamus to ensure that Texas courts do not become a forum for exploitation of its discovery rules that impose a disparate economic impact on American industries doing business in Texas.

## **ARGUMENT**

### **I. THE TRIAL COURT’S MISAPPLICATION OF RULE 196.4 REPRESENTS A PRIMA FACIE CASE OF UNDUE BURDEN, UNNECESSARY RISK, AND UNREASONABLE EXPENSE.**

The prospect of a blanket requirement for “native” or “near-native” production of ESI poses substantial and obvious burdens on corporate parties, particularly large data holders.

#### **A. The Sheer Volume of Electronically Stored Information Drives Exploding E-Discovery Costs**

Current enterprise Document Management Systems (DMS) do not operate like smart phones – there is no magical “get evidence” button a company can push in response to a discovery request. Managing ESI requires substantial labor from attorneys, their support staff, and records and information management specialists in part because of the sheer volume of data that must be sifted through, and in part because of the proliferation of emerging technologies producing potentially responsive documents in innumerable file formats. Indeed, the magnitude of e-discovery costs is illustrated through an estimated 2014 global information technology spend of \$3.8 trillion.<sup>6</sup> The Radicati Group, a market research firm focused on the computer industry, reported that in 2013 the average business user sent and received 100 e-mail messages per day, and projects that number to grow

---

<sup>6</sup> Gartner Press Release, Gartner Says Worldwide IT Spending on Pace to Reach \$3.8 Trillion in 2014, (Jan. 6. 2014), available at <http://www.gartner.com/newsroom/id/2643919>.

to 132 daily e-mails by 2017.<sup>7</sup> Similarly, Jon Palmer, Associate General Counsel at Microsoft, estimated that the average user at a large corporation typically holds approximately 30 gigabytes of data, which equates to over 1.3 million pages of documents for each employee.<sup>8</sup> If 2,500 pages fit in a ‘banker’s box,’ 30 gigabytes of documents for that single user would fill 525 such boxes.

In an effort to maintain and manage the growing volumes of ESI in a cost-effective manner, large data holders have adopted DMS that store ESI in non-native formats, allowing for a single technology, rather than multiple technologies, to search for responsive files. Examples include the Federal Judiciary’s Case Management / Electronic Case File systems (CM/ECF), which requests the submission of documents in non-native form rather than native format. Texas’ mandatory e-filing system (eFileTexas) for all civil matters utilizes the same non-native based filing format for all documents, rather than native.

The volume of data that must be sifted through during litigation is one of the major drivers for high e-discovery costs. One noted study found the total cost of ESI production to be in the range of \$12,000 to \$30,000 per gigabyte of data.<sup>9</sup>

---

<sup>7</sup> Sara Radicati and Justin Levenstein, Email Statistics Report, 2013-2017, Executive Summary, The Radicati Group, Inc. (April 2013), *available at* <http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf>.

<sup>8</sup> See The Electronic Discovery Institute, Proceedings of the 2013 EDI Leadership Summit: At the Crossroads of Bad Faith & Negligence: How Sekisui Shows We Need New Rule 37(e) (2013) at 3 – 4, *available at* <http://www.ediscoveryinstitute.org/publications/>

<sup>9</sup> Nicholas M. Pace, Laura Zakaras, Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery, Rand Institute for Civil Justice (2012) at 20,

Accordingly, ESI production for our hypothetical employee's 525 banker's boxes of data would cost between \$360,000 and \$900,000. Multiply those estimates by the number of employees in a company, and it is no surprise, then, that a study by a Chicago Law School professor notes that the cost of *preserving* ESI remains as high as \$40 million *per year* for large data holders.<sup>10</sup> As an example of how a company might manage data preservation, imagine a large data holder that maintains a DMS designed to manage ESI specifically for all its claims by converting files into static image-based files.<sup>11</sup> If a dispute as to a claim arises, the data holder can use this DMS to search for potentially relevant ESI. Now, the plaintiffs in this case and many others, are radically increasing the already expensive costs associated with ESI by demanding unnecessary and exorbitantly expensive methods to redact and produce these mountains of data.

---

available at

[http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf).

<sup>10</sup> William H. J. Hubbard, Preservation Costs Survey Final Report, (Feb. 18, 2014) at 3, available at

[http://www.ediscoverylaw.com/files/2014/02/Hubbard-Preservation Costs Survey Final Report.pdf](http://www.ediscoverylaw.com/files/2014/02/Hubbard-Preservation%20Costs%20Survey%20Final%20Report.pdf).

<sup>11</sup> For an insurance company, such claims could number in the hundreds of thousands. For example, the alleged hail damage in this case occurred in 2012. That year, 150,000 insurance claims were filed in Texas for hail damages, and over 861,000 claims nationwide. News Release, National Insurance Crime Bureau, NICB Reports Hail Damage Claims in the United States, 2010-2012 (Jul. 17, 2013), available at <https://nicb.org/newsroom/news-releases/hail-damage-claims-in-the-us>. Moreover, the systems insurance companies maintain to addresses claims for hail damages also maintain information for millions of other types of claims.

**B. The ESI Protocol is Unduly Burdensome, and Adds Unnecessary Additional Costs That Increase Pressure to Settle Even Frivolous Claims**

Requiring large data holders who have already invested in expensive systems to accommodate *ad hoc* and disparate requests for every requesting party creates *prima facie* undue burdens, unnecessary additional costs and inherent risks.

1. “Native” or “near-native” document production, as in the ESI Protocol in this case, requires a data holder to duplicate efforts to collect and produce the information and imposes undue burdens on companies that have invested significantly in DMS to preserve and produce the same information. If producing parties were required to re-collect duplicate “native” data sources for each disputed claim, thousands of employee hours would be wasted and producing parties would need to deploy redundant systems to complete essentially the same task as existing systems.

2. Similarly, redaction requirements like that in the ESI Protocol are unduly burdensome because they are redundant to existing processes large data holders typically have in place to redact and protect private information.<sup>12</sup> As a result of

---

<sup>12</sup> In the context of litigation, the data holders are required by myriad domestic and international laws and regulations to redact such information. *See, e.g.* The Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* (financial information); The Health Insurance Portability and Accountability Act and the regulations thereunder, 45 C.F.R. Part 160 and Subparts A and E of Part 164 (medical information); 21 C.F.R. 20.63 (private medical information); Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281/31) (European Union personal information); Data Protection Act 1998 (c. 29) (United Kingdom personal information); the German Federal Data Protection Act (Germany personal information); the Belgian Law of December 8, 1992 on Privacy Protection in relation to

federal and state requirements or business needs, large data holders frequently utilize specialized document review platforms that have innovative features to redact and protect confidential information in image format quickly and efficiently.

As with the processes that Texas businesses have developed to address the preservation of ESI for litigation, many industries handling private and confidential information on a large scale such as financial, medical, and insurance institutions have also developed records management systems to protect and maintain legally mandated protection and confidentiality for such information. These systems rarely accomplish redaction through alteration of the native documents. Rather, redaction of such information is accomplished through other image-based processes and technology.

The ESI Protocol in this case needlessly directs redaction through a specific software that requires a complex multi-step process to redact a document, despite multiple alternative commercially available document review platforms that are faster, easier, and in this case, already adopted by the Defendant. The District of Columbia federal courts have outlined a redaction process using the same software

---

the Processing of Personal Data (Belgium personal information); Personal Information Protection and Electronic Documents Act (PIPEDA), S.C. 2000, c. 5 (Canada personal information); The Federal Law on Protection of Personal Data held by Private Parties (published July 5, 2010) (Mexico personal information); and The Personal Information Protection Act (Law No. 57 of 2003) (Japan personal information). State laws and rules also require protection of such information. *See, e.g.*, TEXAS BUS. & COMMERCE CODE §48.102(b) (requiring businesses to destroy customer records containing sensitive personal information); TEX. R. APP. P. 9.9 (privacy protections for documents filed in civil cases).



dictated by the ESI Protocol for CM/ ECF filing of individual documents.<sup>13</sup> This process requires a minimum of *eight* separate steps for *each* document. Further, the process for redacting “natively” as required by the ESI Protocol requires even greater time and effort.<sup>14</sup>

To better conceptualize the undue burden imposed by redaction orders like those in the ESI Protocol, imagine that 20,000 documents required the redaction of sensitive health care information,<sup>15</sup> and the ESI Protocol’s redaction process took two additional minutes to complete per document (a modest estimate, to be sure). Such redaction of already-redacted documents would impose an additional 667 hours of extra labor. Even at a cost of \$60 per hour for an attorney to redact the documents, the order would impose an additional \$40,000 needed to complete the redaction process in a *single case* using the method dictated by the ESI Protocol. These high expenses for redaction using manual methods or software not designed for large-scale litigation review and redaction are among the reasons why large data holders have invested in alternative, more cost-effective methods and

---

<sup>13</sup> See United States District Court of Appeals, District of Columbia Circuit, Guidance on Redacting Personal Data Identifiers, *available at* [https://www.cadc.uscourts.gov/internet/home.nsf/Content/Guidance%20on%20Redacting%20Personal%20Data%20Identifiers%20in%20Electronically%20Filed%20Documents/\\$FILE/ECF%20Redaction%20Guide.pdf](https://www.cadc.uscourts.gov/internet/home.nsf/Content/Guidance%20on%20Redacting%20Personal%20Data%20Identifiers%20in%20Electronically%20Filed%20Documents/$FILE/ECF%20Redaction%20Guide.pdf).

<sup>14</sup> See *id.*

<sup>15</sup> One case study noted that almost 26 percent of documents (70,000 out of 270,000) in a particular case needed redaction. See Special Counsel, Case Study: Large Online University, Managing Documents, Redactions, and Personally Identifiable Information (PII), *available at*

technologies for review and redaction. Redaction orders like those in the ESI Protocol are about as efficient as using tweezers rather than a magnet to find the proverbial needle in the haystack.

Also, not all native formats are subject to redaction through use of the process and software dictated by the ESI Protocol, which cautions against discovery orders that impose technologies other than those already adopted by defendants to preserve, redact, and produce the same information. For example, courts have observed that file types such as integrated .pst files cannot be redacted in native format. *See, e.g., Williams v. Sprint / United Mgmt. Co.*, No. 03-2200, 2006 WL 3691604 at\*6 (D. Kan. Dec. 12, 2006) (noting it is “technologically impossible to redact the actual text of e-mails while maintaining them in native format” and denying request for native-production format); *CP Solutions PTE, Ltd. v. Gen. Elec. Co.*, No. 3:04-CV-2150, 2006 WL 1272615, at \*4 (D. Conn. Feb. 6, 2006) (observing it is impossible to separate individual documents, or portions of documents, from an integrated .pst mailbox).

3. Finally, the underlying protocol introduces unnecessary risks. Redacting “natively” inherently changes information in an electronic file. Consequently, reviewers changing native files to remove privileged or confidential information for purposes of redaction run a greater risk of changing substantive information in

an electronic file. One court deemed the production of electronic documents in image format as “the most secure format” for production. *In re Priceline.com Sec. Lit.*, 233 F.R.D. 88, 91 (D. Conn, 2005). The court found that numbered image files were the best way to guard against alteration of documents, as well as any accusations of alteration. *Id.*

Imposing a requirement to redact documents either natively or using software not already adopted by the Defendant imposes inherent risks in alteration of native files, imposes substantial costs in a single average case, and in some cases simply is impossible. Litigants doing business in Texas should be given the opportunity to negotiate reasonable parameters and processes to provide relevant data in the context of existing DMS designed to aid in the protection of confidential and proprietary personal and business information.

## **II. SIMILAR ATTEMPTS TO INCREASE THE COST, BURDEN, AND RISK OF RESPONDING TO ESI REQUESTS HAVE BEEN REJECTED BY TEXAS COURTS**

Texas Courts have rejected similar efforts for overbroad and unnecessary discovery requests. For example, this Court granted mandamus relief where a trial court ordered a party to turn over computer hard drives to forensic experts for imaging, copying, and searching for deleted emails. *In re Weekly Homes*, 295 S.W.3d 309, 311 (Tex. 2009). Delineating the requirements of Rule 196.4, this

---

[attorney-team/](#), (last accessed Dec. 4, 2015).

Court concluded that the requesting party was unable to show that the benefit of the forensic examination outweighed the burden that the “invasive method of discovery imposed.” *Id.* at 320.

In another Texas case, an appellate court granted mandamus relief striking the appointment of a special master to review the computer hard drive of an out-of-state resident. *In re Harris*, 315 S.W.3d 685, 703 (Houston [1<sup>st</sup> Dist.] 2010, orig. proceeding). The cost of the special master would have been taxed as “costs of suit” to the parties. TEX. R. CIV. P. 171. The Court determined that the case was not of a “highly technical nature” justifying the appointment of the special master and that examination of the hard drives would be unduly burdensome. *Id.* at 701-06.

In another case granting mandamus relief from an order requiring hard drives from an out-of-state resident, the appellate court observed that Rule 193 allows parties to object to discovery as overbroad and refuse to comply with it entirely. *In re Stern*, 321 S.W.3d 828, 842 (Tex. App. -- Houston [1<sup>st</sup> Dist.] 2010, orig. proceeding). This Court has held that discovery requests must not only be reasonably tailored to include only matters relevant to the case, but such requests may not be used as a fishing expedition or to impose unreasonable expenses on an opposing party. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999).

The ESI Protocol requiring the production in specific formats and using specific redaction methods and software not already utilized by most large data holders for such purposes imposes unreasonable burdens and expenses outweighing any likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *See* TEX. R. CIV. P. 192.4(b). Moreover, the requested format should be limited as unreasonably cumulative or duplicative, and obtainable from other sources that are more convenient, less burdensome, and less expensive. TEX. R. CIV. P. 192.4(a).

## **PRAYER**

*Amici* join State Farm in its request for oral argument and request this Court to issue immediate temporary relief by staying ESI discovery in this matter until its decision as to State Farm's petition.

*Amici* further pray that this Court issue immediate relief by vacating Respondent's ESI protocol filed on September 30, 2014.

*Amici* further pray that this Court grant State Farm's petition for mandamus and direct the Honorable Rose G. Reyna to withdraw the order regarding the ESI protocol and enter an order providing that "State Farm may produce responsive, relevant electronically stored information in a reasonably usable format. Static images made searchable for documents containing text constitute a reasonably usable format."

Finally, *amici* pray that the Court grant such other and further relief to which it may be justly entitled.

Dated: December 15, 2015.

Respectfully submitted,

/s/ Daniel Lim

---

Daniel Lim  
SBN 0795483  
SHOOK, HARDY & BACON L.L.P.  
JP Morgan Chase Tower  
600 Travis Street, Suite 3400  
Houston, TX 77002  
Telephone: (713) 227-8008  
Facsimile: (713) 227-9508  
Email: [dlim@shb.com](mailto:dlim@shb.com)

Patrick Oot  
SBN 1024115  
SHOOK, HARDY & BACON L.L.P.  
1155 F Street, N.W., Suite 200  
Washington, D.C. 20004  
Telephone: (202) 783-8400  
Facsimile: (202) 783-4211  
Email: [oot@shb.com](mailto:oot@shb.com)

*Counsel for Amici Curiae*

**CERTIFICATE OF COUNSEL**

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

Dated: December 15, 2015.

/s/ Daniel Lim

---

### **CERTIFICATE OF COMPLIANCE (WORD COUNT)**

Pursuant to Texas Rule of Appellant Procedure, Rule 9.4(i)(1) and (3), I certify that this Amended Petition for Writ of Mandamus contains 4,228 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1)

Dated: December 15, 2015.

/s/ Daniel Lim

---

### **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been forwarded to all counsel of record, and interested parties, via hand delivery, USPS, CMRRR, electronic service, and/or facsimile on this 15th day of December, 2015.

The Honorable Rose Guerra Reyna  
Hidalgo County Courthouse  
206<sup>th</sup> Judicial District Court  
100 N. Closner  
Edinburg, Texas 78539  
*Respondent*

J. Steve Mostyn  
The Mostyn Law Firm  
3810 West Alabama  
Houston, Texas 77027  
Telephone: (713) 714-0000  
Facsimile: (713) 714-1111  
*Counsel for Real Parties in Interest*

Brian M. Chandler  
Ramey, Chandler, Quinn & Zito, P.C.  
750 Bering Drive, Suite 600  
Houston, Texas 77057  
and  
Mollie C. Nichols  
Redgrave LLP  
601 Pennsylvania Avenue, NW, Suite  
900 – South Building  
Washington, D.C. 20004  
*Relator (Defendant in Underlying  
Action)*

/s/ Daniel Lim

---