No. 16-3185 & 16-3562

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMANDA LABRIER,

Appellee-Respondent,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Appellant-Petitioner.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and LAWYERS FOR CIVIL JUSTICE
Amici on Behalf of Petitioner in No. 16-3185.

On Petitions for Permission to Appeal and Writ of Mandamus From Orders of the United States District Court for the Western District of Missouri, Central Division, in Civil Action No. 2:15-cv-04093-NKL

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

Kate Comerford Todd
Sheldon B. Gilbert
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Carter G. Phillips
Robert D. Keeling
Rebecca S. Levenson
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amicus Curiae

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 represents the interests 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.

Appellate Case: 16-3185 Page: 2 Date Filed: 12/09/2016 Entry ID: 4478066

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE PROPORTIONALITY ANALYSIS IS AN ESSENTIAL CONSIDERATION IN EVERY CASE 5

II. THE PROPORTIONALITY ANALYSIS REQUIRES AN ASSESSMENT OF THE BURDEN ON A PRODUCING PARTY 7

A. The Burden on a Responding Party Should Be Assessed in Terms of the Current Capabilities of its Databases or other Computer Systems 8

B. Requesting Access to an Entire Database is Not Proportional 13

C. The Burden Issues Raised Here are Widespread ....

III. DISTRICT COURTS HAVE AN OBLIGATION TO ENFORCE STRICTLY THE STANDARDS OF DISCOVERY TO PREVENT DISCOVERY ABUSE 18

A. The Special Master and District Court Should Have Taken Measures to Reduce the Burden of the Interrogatories........................19

B. The Court Unfairly Discounted Defendant's Objection to the Interrogatories Because of its Objections to Other Discovery Requests...22

CONCLUSION 24

Appellate Case: 16-3185 Page: 3 Date Filed: 12/09/2016 Entry ID: 4478066

TABLE OF AUTHORITIES

Page

Cases

Adair v. EQT Prod. Co.,
No. 10-37, 2015 WL 505650 (W.D. Va. Feb. 6, 2015) 6

Alaska Elec. Pension Fund v. Bank of Am. Corp.,
No. 14-7126, 2016 WL 6779901 (S.D.N.Y. Nov. 16, 2016) 6

Barrera v. Boughton,
No. 07-1436, 2010 WL 3926070 (D. Conn. Sept. 30, 2010) 20

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 23

In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.,
No. 12-2391, 2013 WL 1729682 (N.D. Ind. Apr. 18, 2013) 3

Brodsky v. Humana, Inc.,
No. 08-50188, 2009 WL 1956450 (N.D. Ill. July 8, 2009) 12

Coast to Coast Health Care Servs. v. Meyerhoffer,
No. 2:10-cv-00734, 2012 U.S. Dist. LEXIS 49903 (S.D. Ohio Apr. 10, 2012) 14

Ebert v. Gen. Mills, Inc.,
823 F.3d 472 (8th Cir. 2016) 22

Gen. Steel Domestic Sales, LLC v. Chumley,
No. 10-01398, 2011 WL 2415715 (D. Colo. June 15, 2011) 12

Grayson v. Gen. Elec. Co.,
No. 13-1799, 2016 WL 1275027 (D. Conn. Apr. 1, 2016) 10

Hankinson v. Class Action R.T.G. Furniture Corp.,
No. 15-81139, 2016 WL 1182768 (S.D. Fla. Mar. 28, 2016) 6

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008) 6

Jones v. Good,
No. 95-8026, 2002 WL 1007614 (S.D.N.Y. May 16, 2002) 10

N. Valley Commc'ns, LLC v. Qwest Commc'ns Corp.,
No. 09-1004, 2010 WL 3672233 (D.S.D. Sept. 10, 2010) 12

Sabouri v. Ohio Bureau of Emp't Servs.,
No. 97-715, 2000 WL 1620915 (S. D. Ohio Oct. 24, 2000) 14

Siriano v. Goodman Mfg. Co., L.P.,
No. 2:14-CV-1131, 2015 WL 8259548 (S.D. Ohio Dec. 9, 2015) 20

Walker v. H & M Henner & Mauritz, L.P.,
No. 16-3818, 2016 WL 4742334 (S.D.N.Y. Sept. 12, 2016) 20

Rules

Fed. R. Civ. P. 1 18

Fed. R. Civ. P. 26 advisory committee note to 2015 amendment 18

Fed. R. Civ. P. 26(b)(1) 4, 5, 8

Fed. R. Civ. P. 26(b)(2) advisory committee note to 2006 amendment 19

Fed. R. Civ. P. 26(b)(2) 4

Fed. R. Civ. P. 26 cmt. (2015 Amendment) 3, 4

Scholarly Authorities

John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547 (2010) 9

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 (2012) 3

Conrad Jacoby et al., *Databases Lie! Successfully Managing Structured Data, the Oft-Overlooked ESI*, 19 Rich. J.L. & Tech. 9 (2013) 9

Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561 (2001) 23

Appellate Case: 16-3185 Page: 5 Date Filed: 12/09/2016 Entry ID: 4478066

Other Authorities

Litigation Cost Survey of Major Companies (2010), http://www.uscourts.gov/file/ 3

In re: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Feb. 7, 2014)....15, 17

In re: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules (Nov. 7, 2013)....15, 17

The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation, 15 The Sedona Conf. J. 171 (Fall 2014) 9, 10, 11, 14

Letter from Bradford A. Berenson, V.P. Sr. Counsel, General Electric Co., to the Secretary of the Committee on Rules of Practice and Procedure (Feb. 7, 2014)....16

Letter from David M. Howard, V.P. & Dep. Gen. Counsel, Microsoft Corp., to Committee on Rules of Practice and Procedure (Feb. 18, 2014) 15

Letter from Doug Lampe, Office of General Counsel, Ford Motor Co. to Advisory Committee on Civil Rules (Nov. 22, 2013)....16

Nicholas M. Pace & Laura Zakaras, Rand Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012), http://www.uscourts.gov/file/document/litigation-cost-survey-major-companies 3

John Roberts, *2015 Year-End Report on the Federal Judiciary*, (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year- endreport.pdf....2

Appellate Case: 16-3185 Page: 6 Date Filed: 12/09/2016 Entry ID: 4478066

U.S. Chamber Inst. for Legal Reform, Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure (Nov. 7, 2013) 2

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 repeatedly endorsed a prohibitively expensive request for discovery as to each member of a putative class without accounting for or attempting to lessen the burdens of responding to the request. In so doing, it allowed Plaintiff to maintain the contradictory position of seeking intensive, individualized discovery for a case in which she argued that common issues predominate.

[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. The parties have consented to the filing of this brief.

Appellate Case: 16-3185 Page: 8 Date Filed: 12/09/2016 Entry ID: 4478066

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 pressure to settle claims regardless of the underlying merits. The Chamber and its 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, and in judicial management of abusive discovery requests. *See* U.S. Chamber Inst. 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). 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), 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

Appellate Case: 16-3185 Page: 9 Date Filed: 12/09/2016 Entry ID: 4478066

proportionality."); *see also* Fed. R. Civ. P. 26 cmt. (2015 Amendment). The 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 the cases' merits. *See, e.g.*, Nicholas M. Pace & 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), 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)[2]; 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.").

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[2] By contrast, Defendant estimates that the cost of responding to the Interrogatories in the time set forth by the Special Master will cost at least $10 million. (Brief of Appellant-Petitioner State Farm Fire and Casualty Company at 16 ("Br.")); *see also In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, No. 12-2391, 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).

Appellate Case: 16-3185 Page: 10 Date Filed: 12/09/2016 Entry ID: 4478066

Pursuant to these important amendments, parties and courts must consider whether a discovery request is proportional under the factors laid out in the Rule to determine whether a request is within the permissible scope of discovery. Fed. R. Civ. P. 26 cmt. (2015 Amendment). Indeed, amended Rule 26(b)(1) specifically requires that all discovery must be "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). 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, the 2015 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 improperly denied Defendant's objection to the Special Master's order compelling Defendant to answer Plaintiff's Second Set of Interrogatories (the "Interrogatories"). The Interrogatories imposed millions of dollars of cost on Defendant to analyze and calculate the claims of nearly 145,000 putative class members. The Special Master and District Court's orders allowed Plaintiff to have it both ways: the order imposes exorbitant, *individualized* discovery on damages and Defendant's affirmative defenses for each of the members of the putative class, while paradoxically granting class certification by agreeing with Plaintiff that, as

required by Rule 23, the case could be tried using common (rather than individualized) proof.

In denying Defendant's objection, the District Court undertook a flawed proportionality analysis that failed to consider elements that Rule 26 requires and penalized Defendant for its opposition to another disproportionate request. The District Court then denied Defendant's later attempts to substantiate its showing of undue burden. The District Court's rulings in both opinions have significant negative implications, both for the case as a whole and for other courts, as early case law on the revised Rule 26 emerges that may be influenced by the decision in this case.

ARGUMENT

I. THE PROPORTIONALITY ANALYSIS IS AN ESSENTIAL CONSIDERATION IN EVERY CASE

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.*

Appellate Case: 16-3185 Page: 12 Date Filed: 12/09/2016 Entry ID: 4478066

Put simply, nothing in Rule 23 vitiates the independent obligations imposed by Rule 26. The requisite proportionality analysis applies with equal force to class actions, and rightly so, given the increased risk of excessive discovery costs to class action defendants and the resulting inexorable pressure to settle claims regardless of the underlying merits. If anything, the "extraordinary leverage" a class certification provides to plaintiffs should *heighten* a court's sensitivity to the proportionality requirement. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) (Rule 23's "bite should dictate the process that precedes [certification].") (quoting *Oscar Private Equity Invs. v. Allegiance Tel., Inc.*, 487 F.3d 261, 268 (5th Cir. 2007). Accordingly, the proportionality analysis is a critical tool for courts to rein in disproportionate or unduly burdensome discovery requests to parties in such cases. *See, e.g.*, *Alaska. Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-7126, 2016 WL 6779901, at *4 (S.D.N.Y. Nov. 16, 2016) (denying motion to compel in putative class action on "relevance, proportionality, and overbreadth grounds" and finding that "production of all of the requested documents would be unduly burdensome"); *Hankinson v. Class Action R.T.G. Furniture Corp.*, No. 15-81139, 2016 WL 1182768, at *1 (S.D. Fla. Mar. 28, 2016) (finding several of plaintiffs' discovery requests in putative class action were "not proportional to the needs of the case"); *Adair v. EQT Prod. Co.*, No. 10-37, 2015 WL 505650, at *6 (W.D. Va. Feb. 6, 2015) (granting motion for protective order in

class action where "burden and expense of any further discovery outweighs its likely benefits").

As discussed below, the Special Master and District Court made conclusory statements dismissing Defendant's substantiated proportionality concerns. Because the Interrogatories sought specific and individualized merits and damages information pertaining to the nearly 145,000 putative class action plaintiffs, the Special Master and District Court should have given greater consideration to the irreversible and considerable burden Defendant faced in responding—a burden which, as Defendant argues, was unnecessary and unjustifiable at this stage of the litigation. (Br. 43-50.)

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

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 Defendant's position. Specifically, the Special Master and District Court failed to weigh all of the factors properly in light of the evidence presented as well as the legal and procedural context of the discovery at issue. 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, Defendant overstated the burden that the Interrogatories would pose because Defendant could likely automate a process to answer the Interrogatories, and even if it could not, any failure of Defendant to retain the data in a specific format was its own fault. A3839-43; A0617. 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.

A3841. But the proportionality analysis does not instruct a judge to assess the burden of a discovery request compared to what he or she believes the burden *should be*; instead, it asks what burden will be imposed based on what a party *can do*. Fed. R. Civ. P. 26(b)(1). Here, Defendant 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 Defendant should be compelled to answer the Interrogatories—regardless of the burden. A0617. 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"

Appellate Case: 16-3185 Page: 15 Date Filed: 12/09/2016 Entry ID: 4478066

> 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 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 information 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

Appellate Case: 16-3185 Page: 16 Date Filed: 12/09/2016 Entry ID: 4478066

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"); *see also Grayson v. Gen. Elec. Co.*, No. 13-1799, 2016 WL 1275027, at *2 (D. Conn. Apr. 1, 2016) ("Plaintiffs next seek a more extensive and more usable Factory Service Database. . . . It appears that, now, Plaintiffs want additional information and/or information in a different format. It is quite clear that Rule 34 cannot be used to compel a party to produce a document that does not exist."). Accordingly, the District Court's assumption that Defendant can " do[] 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 and what the Federal Rules of Procedure require of a litigant. A3841.

Further, because Defendant demonstrated that it could not answer the Interrogatories electronically through data queries (*see, e.g.*, Br. 54-55), the District Court's reasoning that Defendant could undertake "additional programming," regardless of the burden, to derive the answers places a greater burden on Defendant 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 the lack of proportionality between those costs and the merits or value of the case. Such reasoning would eliminate the backstop of undue burden.

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 (emphases added). Had it taken seriously Defendant'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.

In light of these realities, courts have recognized that technology cannot always cure or mitigate a burdensome discovery request. In cases with requests posing far less burden than the Interrogatories here, courts have restricted discovery requests where—in spite of technology—information is simply too burdensome to produce. For example, in one case:

> Plaintiff has adequately demonstrated, with affidavits, that it is unable to use software to separate . . . sales calls from all other recorded calls. Assuming that each recorded call in Plaintiff's database is just one minute long, listening to 463,000 calls would require 7,716 hours. Thus, working 40 hours per week, a person would need 193 weeks—nearly four years—to listen to every recorded call. Accordingly the Court finds that Plaintiff has adequately demonstrated that listening to its entire database of recorded calls would be unduly burdensome. Moreover, . . . the Court finds that such cost is prohibitive. Even assuming that an individual could be hired at minimum wage . . . a simple calculation shows that the cost of this project in wages alone would be more than $56,000.

Gen. Steel Domestic Sales, LLC v. Chumley, No. 10-01398, 2011 WL 2415715, at *2 (D. Colo. June 15, 2011) (citations omitted); *N. Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, No. 09-1004, 2010 WL 3672233, at *5 (D.S.D. Sept. 10, 2010) (denying motion to compel revenue information which may have been relevant to damages, but which defendant had not recorded and represented would take thousands of hours to reconstruct); *Brodsky v. Humana, Inc.*, No. 08-50188,

Appellate Case: 16-3185 Page: 19 Date Filed: 12/09/2016 Entry ID: 4478066

2009 WL 1956450, at *2 (N.D. Ill. July 8, 2009) ("Based on the volume of electronic and paper data that would have to be inspected to comply with this request, production would take about two years and would cost about $80,000. This burden outweighs the likely benefit and the court denied Plaintiff's motion to compel these documents . . . .") (citation omitted).

Defendant's demonstrated burden is far greater. Defendant presented sworn testimony from a systems analyst, business analyst, a claims section manager, who supervised the review of a sample of files to obtain supplemental responsive information, and an expert report. (Br. 53-54.) Defendant has emphasized repeatedly that it that it cannot search for the answers to the Interrogatories automatically; it would take a year for 72 individuals working 40 hours a week to compile the information necessary to respond to the Interrogatories; and the cost, which exceeds $10 million—making up 11-17% of Plaintiffs' claimed amount in controversy—is unreasonable. (Br. 61.) Each of these factors on their own far exceeds burdens that other courts have found excessive. Together, they are unbearable.

B. Requesting Access to an Entire Database is Not Proportional

The Special Master and District Court also stated that Defendant should be penalized for its failure to grant Plaintiff access to its entire computer system. *See, e.g.*, A3844. Setting aside Defendant's assertion that accessing its data would not

Appellate Case: 16-3185 Page: 20 Date Filed: 12/09/2016 Entry ID: 4478066

give Plaintiff the requested information, forcing Defendant to open its data systems to Plaintiff is far from proportional.

A company's proprietary computer system typically 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 Defendant'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 Defendant's databases directly was disproportionate to the needs of the case and burdensome to Defendant.

C. The Burden Issues 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 Defendant 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) ("Microsoft Letter") ("[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

Appellate Case: 16-3185 Page: 22 Date Filed: 12/09/2016 Entry ID: 4478066

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 2015 Amendments were intended to free parties from impossible and unproductive discovery demands, including the struggle companies face in determining what will be of relevance in future litigation, leaving them 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, General Electric Company, V.P. Sr. Counsel, General Electric Co., to

Appellate Case: 16-3185 Page: 23 Date Filed: 12/09/2016 Entry ID: 4478066

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").

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.").

Appellate Case: 16-3185 Page: 24 Date Filed: 12/09/2016 Entry ID: 4478066

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.

III. DISTRICT COURTS HAVE AN OBLIGATION TO ENFORCE STRICTLY THE STANDARDS OF DISCOVERY TO PREVENT DISCOVERY ABUSE

Rule 26 encourages courts to manage discovery actively to ensure that discovery is not used to force settlement as a result of costs instead of on the merits. The Advisory Committee Notes to the 2015 Amendments to Federal Rule of Civil Procedure 26 re-affirm that "[t]he court *must* apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent." (emphasis added). "Even if the information sought is relevant, courts have the authority to forbid or to alter discovery that is unduly burdensome." *Grayson v. Gen. Elec. Co.*, No. 13-1799, 2016 WL 1275027, at *1 (D. Conn. Apr. 1, 2016) (quoting *During v. City Univ. of N.Y.*, No. 05-6992, 2006 WL 2192843, at *4 (S.D.N.Y. Aug. 1, 2006)); *see also* Fed. R. Civ. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy,

Appellate Case: 16-3185 Page: 25 Date Filed: 12/09/2016 Entry ID: 4478066

and inexpensive determination of every action and proceeding."). The Special Master and District Court ignored valuable opportunities to manage the burden the Interrogatories placed on Defendant. In doing so, the Special Master and District Court abandoned Rule 26's requirement that discovery be used fairly—not as a weapon for settlement.

A. The Special Master and District Court Should Have Taken Measures to Reduce the Burden of the Interrogatories

Rule 26 encourages courts to consider the specific burdens imposed by the discovery requests propounded by each party. "[T]he parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery." Fed. R. Civ. P. 26(b)(2) advisory committee note to 2006 amendment.

As the comments to the Rules suggest, to the extent the Special Master or District Judge had questions about the capabilities of Defendant's systems, the information it had, and the effort required to produce that information, they should have considered the sample Defendant provided to determine a more prudent path forward. That the Special Master and District Court thought the answers to the Interrogatories were relevant is not enough. "[T]he amended Rule is intended to 'encourage judges to be more aggressive in identifying and discouraging discovery

overuse' by emphasizing the need to analyze proportionality before ordering production of undeniably relevant information. *Walker v. H & M Henner & Mauritz, L.P.*, No. 16-3818, 2016 WL 4742334, at *2 (S.D.N.Y. Sept. 12, 2016). For example, in *Siriano v. Goodman Manufacturing. Co.*, No. 2:14-CV-1131, 2015 WL 8259548, at *6–7 (S.D. Ohio Dec. 9, 2015), the court found that, in a putative class action,

> In the instant case, the discovery sought by Plaintiffs is directly related to their claims. . . . It is highly unlikely that Plaintiffs could discover similar information from another source or in another manner. . . . Documents . . . would be easily accessible to Defendants but almost completely inaccessible to Plaintiffs. Additionally, it is much more efficient for Plaintiffs to seek information related to Defendants' dealings with their distributors from Defendants themselves . . . rather than assemble it piecemeal from the distributors themselves. Furthermore, Defendants' corporate resources vastly exceed Plaintiffs' . . . [and] the amount in controversy in this matter is potentially very large.

Despite these findings, however, the court was mindful of the estimated 4,000 hours of time that the discovery could take to produce. *Id.* Recognizing its obligation under Rule 1, the court determined that it was responsible for holding a conference to ensure that the discovery was proportional. *Id.* In other cases, courts take samples of burdensome discovery to obtain a better sense of how to impose sensible limitations on discovery and to understand better the information within the responding party's possession. *See, e.g.*, *Barrera v. Boughton*, No. 07-1436, 2010 WL 3926070, at *3 (D. Conn. Sept. 30, 2010) ("The concept of sampling to

test both the cost and the yield is now part of the mainstream approach to electronic discovery." (quoting *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 418 (S.D.N.Y. 2009))).

Defendant represented that it produced the information it could have generated electronically through data queries. (Br. 7-13.) In response to the Special Master's and District Court's rejection of its challenge to the Interrogatories, Defendant supplemented its response to the Interrogatories by providing information from 398 randomly chosen claim files belonging to members of the putative class. (Br. 9.) Detailing the efforts it undertook to provide these additional answers, and identifying the holes in the information it had, Defendant again sought to mitigate the effect of the Special Master's order. (Br. 9-10.) Moreover, Defendant presented evidence to the Special Master and the District Court showing that it did not possess the capabilities that both presumed it had. (Br. 61.)

Instead of taking an active management role to mitigate the costs of a burdensome discovery order to which Defendant insisted it could not fully respond, both the Special Master and the District Court abandoned their responsibilities under Rule 26. Both should have considered this information closely, and used the tools at hand to study the $10 million cost of one single discovery request that sought detailed, individualized information about damages

Appellate Case: 16-3185 Page: 28 Date Filed: 12/09/2016 Entry ID: 4478066

and Defendant's affirmative defenses as to each putative class member. This failure was particularly troubling in light of Plaintiff's burden under Rule 23 to show that this action is "susceptible to generalized, class-wide proof." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479 (8th Cir. 2016) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)). Instead, both the Special Master and District Court accepted, without reservation or further investigation, Plaintiff's position that there must have been a more efficient way for Defendant to respond to the Interrogatories. *See, e.g.*, A0616; A3839-43; A5898-99. In the face of the overwhelming and unrecoverable costs that Defendant alleged it would incur by answering the Interrogatories, the Special Master and District Court should have relied on more than unsupported assumptions about Defendant's capabilities and the actual cost before requiring Defendant's wholesale compliance. Their failure to do so was manifest error.

B. The Court Unfairly Discounted Defendant's Objection to the Interrogatories Because of its Objections to Other Discovery Requests

The District Court erred by determining that because Defendant had objected to Plaintiff's request to access Defendant's databases, it was obligated to respond to the Interrogatories instead of assessing individually the proportionality of the Interrogatories themselves. *See* A3844 ("To the extent Defendant has been burdened by answering interrogatories rather than providing direct access by LaBrier to the information she seeks, Defendant's intransigent approach has

Appellate Case: 16-3185 Page: 29 Date Filed: 12/09/2016 Entry ID: 4478066

created most of that burden."). The District Court penalized Defendant for this objection even though the Special Master excused Defendant 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. A4493.

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.").

Appellate Case: 16-3185 Page: 30 Date Filed: 12/09/2016 Entry ID: 4478066

Here, Defendant is faced with the unrecoverable expenses of millions of dollars to answer one discovery request because it failed to accede to another disproportionate and unreasonable request. The District Court should have assessed each request individually, not against other requests to which Defendant legitimately objected. 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 the foregoing reasons, Defendant's Petition for a Writ of Mandamus should be granted, and the Court should reverse or vacate the District Court's orders relating to the Interrogatories.

Respectfully submitted,

/s/ Carter G. Phillips
Carter G. Phillips

Kate Comerford Todd
Sheldon B. Gilbert
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Carter G. Phillips
Robert D. Keeling
Rebecca S. Levenson
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

December 8, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Federal Rule of Appellate Procedure 29(d) because it is 5,598 words, 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 8th day of December, 2016, I caused the foregoing Motion for Leave to Participate as *Amicus Curiae* 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