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No. 15-0905

IN THE SUPREME COURT OF TEXAS

IN RE STATE FARM LLOYDS
ORIGINAL PROCEEDINGS FROM THE
206TH JUDICIAL DISTRICT OF HIDALGO COUNTY, TEXAS
THE HONORABLE ROSE GUERRA REYNA PRESIDING
CAUSE NO. 14-0169

AMENDED BRIEF ON THE MERITS OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & TEXAS ASSOCIATION OF BUSINESS IN SUPPORT OF STATE FARM LLOYDS' PETITION FOR WRIT OF MANDAMUS

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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 November 10, 2014. (APP_B0001-02.) On November 13, 2014, the court stayed the discovery order regarding electronic discovery and requested a response to the petition (APP_B0001-02.) In a per curiam opinion, the court denied the petition on October 28, 2015. (APP_C0001-02.) The only citation currently available is from West Law; *In re State Farm Lloyds*, No. 13-14-00651-CV, 2015 WL 6510647 (Tex. App.–Corpus Christi – Edinburg, Oct. 28, 2015, orig. action) (mem. op.) which adopted by reference the memorandum opinion from *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_D0015.)

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") and Texas Association of Business ("TAB") (collectively "*Amici*") respectfully submit this amended brief as *amici curiae* in support of Relator State Farm Lloyds.[1]

The burdens and costs of discovery are of particular concern to *Amici* and their members. Years of scholarship tracks rising discovery costs and the observation that the outcome of cases is often based on these costs—as opposed to their merits.[2] The data burdens and discovery costs that Relator articulated here

[1] 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.

[2] 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) *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf; Litigation Cost Survey of Major Companies 3-4 (2010) (between 2006-2008, high end discovery costs were reported to be between $2.3 million and $9.7 million), *available at* http://www.uscourts.gov/file/document/litigation-cost-survey-major-companies; 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."). Indeed, discovery costs are even rising for government agencies. See Patrick Oot, Comment from Electronic Discovery Institute, Comment on the U.S. Courts Proposed Rule: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 16 2014), *available at*

are not unique—indeed, in connection with the amendments to the federal e-discovery rules, which took effect on December 1, 2015, 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.[3] Indeed, a comment representing the views of over 300 companies called the Advisory Committee on Civil Rules' attention to the fact that:

> [L]itigation today is inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases. This stems from costly and inconsistent . . . discovery . . . In many cases, corporate parties over-preserve in order to avoid tactical threats of spoliation sanctions. In other cases, parties must

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http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_edi._patrick_ooot._2.15.14.pdf (last accessed Oct. 27, 2016).

[3] 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) ("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) ("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.").

simply settle claims or defenses based on the high costs [of discovery], rather than on the merits of the litigation.[4]

The Advisory Committee saw the importance of cases being decided on the merits of the litigation instead of being forced to settle because of the costs imposed by discovery. The amendments to FRCP 26 were intended to fulfill this larger goal in the area of civil discovery by placing "greater emphasis on the need to achieve proportionality." *Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205 (W.D. Va. 2016).[5] In Texas, that same function *should* be fulfilled by Texas Rules of Civil Procedure 196.4 and 194.2—when properly applied by the trial courts.

In this case, the trial court's order imposed a prohibitively expensive obligation on Relator to produce all possibly relevant documents in "native" or "near-native" format. Whether Texas discovery rules require a trial court to consider the proportion of benefits to the requesting party of a particular discovery request against the burdens such a request imposes on the responding party has significant implications for *Amici*'s members, for whom the costs of discovery

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[4] Robert Levy, 309 Companies in Support of the Proposed Amendments to the Federal Rules, Comment on the U.S. Courts Proposed Rule: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 14, 2014), *available at* https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-1269 (last accessed Oct. 27, 2016).

[5] In particular, the amendments to FRCP 26(b)(1) were a "response to the Federal Rules Advisory Committee's concern that the proportionality principles introduced in 1983 had never been adequately applied by courts." David G. Campbell, Memo Regarding Proposed Amendments to the Federal Rules of Civil Procedure, at 5 (June 14, 2014) , *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/rules_committee_memo_re_frcp_amendments.pdf (last accessed Oct. 27, 2016). The intent was to make "proportionality" unavoidable. *Id.*

frequently soar into millions of dollars, resulting in an inexorable hydraulic pressure to settle claims regardless of the underlying merits.

Texas Rules of Civil Procedure 196.4 and 194.2 have been designed and interpreted by this Court precisely to mitigate such discovery gamesmanship. But these rules, and the clear guidance from this Court as to the proper application of those rules, can only be effective if the judiciary (including appellate, district court, and magistrate judges) 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 rejected Relator's objection to the Real Parties' insistence on native (or near-native) production of documents because the court erroneously required Relator to prove that such production would be "infeasible"—a standard that is flatly incompatible with the Texas Rules of Civil Procedure and this Court's precedent. As a consequence, the court's ESI protocol requires Relator to spend immense resources to produce documents in a "native" format despite the fact that (1) Relator is prepared to produce the requested information in a "reasonably usable" format and (2) there is no real benefit to native production in this case. This Court should grant the Relator's Petition for Writ of Mandamus not only to rectify the trial court's abuse of discretion in this case, but also to reinforce for other trial courts that the Texas Rules of Civil Procedure prohibit such wasteful discovery.

ARGUMENT

The ESI Protocol in this case is improper because it violates Rule 196.4's limitation that a responding party is only required to produce data that is "available in the ordinary course of business" and in a form that is "reasonably usable." Further, the appropriate application of Rule 192.4's proportionality requirement and reversal of the trial court order serves the goal of limiting discovery gamesmanship by removing improper settlement pressure caused by the ESI Protocol with no bearing on case merit.

I. RULE 196.4 IMPOSES A STRICT LIMITATION THAT A RESPONDING PARTY "NEED ONLY" PRODUCE DATA "AVAILABLE IN THE ORDINARY COURSE OF BUSINESS" AND "IN REASONABLY USABLE FORM."

Texas Rule of Civil Procedure 196.4, which governs the discovery of electronic data, provides that a responding party must produce electronic data that is both "responsive to the request" and "reasonably available to the responding party in its ordinary course of business." In this Court's 1999 Comment to Rule 196.4—which this Court expressly stated is "intended to inform the construction and application" of the rules—this Court explained that the party responding to a discovery request "*need only*" produce data that is "available in the ordinary course of business" and to produce that data "in reasonably usable form." Tex. R. Civ. P. 196.4 (Comment 3 to 1999 change) (*emphasis* added). So long as the produced

data meets those two criteria, nothing more can be required of the responding party.

In the instant case, Real Parties insisted on production of all potentially relevant electronic data in the so-called "native" file format in which the data was initially *created*, regardless of the format in which that data was *stored* or *used*. Relator immediately objected, and submitted evidence that production of data in the format it was created (but not stored or used) would be unreasonably burdensome, given the difficulty and cost of converting stored data back into native format. Relator also produced evidence that the "native" format would have no real benefits over Relator's proposed searchable image-based format (a wide-spread industry standard for document retention). Yet rather than weigh whether Relator's proposal would produce electronic data that is "available in the ordinary course of [Relator's] business" and whether the production format would be "reasonably usable" for Real Parties, the trial court relied exclusively on Real Parties' expert, Craig Ball, who claimed that "native" production was "essential" for the Real Parties.[6] As Relator explains in detail in its brief, the trial court abused its discretion by relying on Ball's testimony rather than evaluating Relator's proposed production format under the standard articulated by this Court in the

[6] See, e.g., Brief on the Merits of Real Parties in Interest (filed Sept. 21, 2016) at 5.

1999 Comments. *Amici* do not intend to replicate those arguments, though *Amici* endorse them. Instead, *Amici* seek to underscore how the trial court's ESI Protocol is representative of a recurring, fundamental misunderstanding regarding how data is used "in the ordinary course of business," as well as the proper standard for determining whether a production format is "reasonable."

A. Electronic Data May Be Produced in the Form in Which it is *Stored* in the "Ordinary Course of Business," Rather Than the Form in Which It Is *Created*

Real Parties argue that data should nearly always be produced in "native" or "near-native" format because the format in which the data is created is the manner in which data is used in the "ordinary course of business." But this misleading claim is little more than a sleight-of-hand attempting to distract courts from looking at the *entire lifecycle* of electronically stored information ("ESI"). In reality, organizations frequently *create* ESI in one format but *store* and *use* it in a different format (often an image-based format), for countless business reasons.

As *Amici* noted in its prior brief in support of this mandamus petition, businesses handling private and confidential information on a large scale—such as financial, medical, and insurance institutions—have adopted records management systems for efficient document retention and protection of legally-mandated confidentiality requirements. Most frequently, those records-retention systems require the conversion of documents from the file format in which they were

initially created (the native format) into an alternative, more efficient preservation forma (such as an image-based format like the one Relators proposed for document production). Many large businesses have long invested in sophisticated records and information management technology with information retrieval and e-discovery programs that rely on storage of relevant files in imaged-based format. In addition to the cost efficiencies, image-based documents are difficult to alter, yet easy to label with unique designations.[7] In other words, the imaged-based format *is* the format in which the relevant records are used and kept "in the ordinary course of business." In addition to the routine conversion of native data into an image-based format for efficient storage, large organizations also routinely store core data and the associated, relevant[8] metadata in *separate* repositories.[9] As one commentator in the industry observed:

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[7] Production of ESI in "native" format, by contrast, lacks these features. See 8B Charles A. Wright, et al., Federal Practice & Procedure § 2219 (3d ed. 2014) ("[P]roducing information in native format presents challenges regarding making a record of what was produced (sometimes using a numbering system such as 'Bates numbering'), and may make the electronic material manipulable in ways that could raise issues of authenticity.").

[8] Of course, not *all* metadata, including *non-relevant* metadata is relevant and thereby discoverable. In *Aguilar*, the court determined that a request for system metadata for Word processing documents and PowerPoint documents was "at best, marginally relevant." *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 361-62 (S.D.N.Y. 2008). Further, the court noted it would allow the production of the requested additional metadata on the condition that the plaintiffs pay the cost of the second production. *Id.* at 362. The court suggested that because the plaintiffs would bear the cost of the production, "they may wish to reexamine whether they, in fact, need this metadata and, if so, to what extent." *Id.*

[9] See Julie Gable, Examining Metadata: Its Role in E-Discovery and the Future of Records Managers, Information Management, An ARMA International Publication (September – October 2009) *available at*

> The benefits of this architecture are that it can scale, easily handling the massive volumes of information typically found in large organizations – which can range from hundreds to thousands of terabytes scattered across mainframes, servers, and network drives. The metadata repository also offers a single point of management for the metadata record itself, thereby facilitating policy management, retrieval, and metadata for e-discovery.[10]

Such systems are common for companies across industries, from airlines and financial institutions to retail stores and shipping companies.

Nor are such information architecture choices limited to the private sector. Indeed, most State and Federal government agencies rely on non-native formats to respond to Freedom of Information Requests using FOIAXpress software.[11] Even the Texas Court System uses non-native PDF format for filings; and Texas and other governments agencies (both federal and state) use a non-native, image-based format (specifically, a "TIF" format) when processing Freedom of Information requests. What's more, not only do government entities themselves rely on non-native document storage, they also encourage private entities to adopt non-native document storage architecture. For example, the U.S. Department of Health and

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http://content.arma.org/IMM/SeptOct2009/IMM0909examiningmetadataitsroleine-discovery.aspx.

[10] *Id.*

[11] FOIAXpress lists the following federal entities as clients: Federal Trade Commission, Securities and Exchange Commission, Department of Energy, Department of Agriculture, United States Postal Service, Treasury, Department of Defense, and others. See http://ains.com/foiaxpresscom (last accessed on Oct. 23, 2016).

Human Services supports a nationwide effort for consolidation of medical information, through a Health Information Exchange ("HIE"), which allows health care providers and patients the ability to access and share medical information electronically and securely.[12] The infrastructure for maintaining information through the HIE does not preserve ESI in native format.[13] Rather, HIE uses an "XDM" format which maintains electronic documents and pertinent metadata separately.[14]

Real Parties would have courts force companies, at the whim of requesting parties, to reinvent its standard processes and *retroactively* convert documents that they store in non-native formats "in the ordinary course of business" into the less-efficient (and former) native versions. There is simply no need for courts to compel production in a format other than the non-native format in which it is already stored, because such non-native formats are "reasonably usable."

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[12] See U.S. Department of Health and Human Services, What is health information exchange? *available at* http://www.hrsa.gov/healthit/toolbox/RuralHealthITtoolbox/Collaboration/whatishie.html (last accessed on Dec. 2, 2015); Health Information Exchange (HIE), What is HIE? (May 12, 2014) *available at* https://www.healthit.gov/providers-professionals/health-information-exchange/what-hie.

[13] See National Rural Health Resource Center, Direct Guide, at 2-5 *available at* https://www.healthit.gov/providers-professionals/health-information-exchange/what-hie.

[14] See EHR Doctors, XDM: Sending Clinical Documents and Meta-Data Over Email, *available at* http://www.ehrdoctors.com/xdm-sending-clinical-documents-and-meta-data-over-email/ (last accessed on Dec. 2, 2015).

B. Under Rule 196.4, Electronic Data "Need Only" Be Produced in a Format That Is "Reasonably Usable" To The Requesting Party

The only objection allowed by the ESI Protocol as to production in native format is whether it is "infeasible to produce an item of responsive ESI in native form . . . [or] near-native form . . . ." As noted by Relators, neither Rule 196.4 nor Texas case precedent permits this standard. The appropriate standard as articulated by this Court is whether the format of an ESI request is available with reasonable efforts. *In re Weekley Homes, L.P.,* 295 S.W.3d 309, 315 (Tex. 2009).

The trial court should have held that that responding parties "need only" produce electronic data in a "reasonably usable" format rather than whatever format the plaintiff has requested. Had it done so, it would have certainly agreed that a searchable, image-based format with extracted searchable text is certainly "reasonably usable"; indeed, many courts have already agreed.[15] Once imported into any commonly used litigation support document review software such as Concordance, Relativity, Summation, Recommind or EDR, a receiving party can search, sort, and print documents with the same functionality as the producing party. Because image-based files are a commonly used format supported by

[15] Mr. Ball has recognized that "[a]s long as the information lends itself to a printed format and is electronically searchable, image formats work reasonably well . . . ." Craig Ball, Function Follows Form, Law Technology News, June 2006, *available at* http://www.craigball.com/BIYC.pdf.

standard litigation support software, production of ESI in this format makes it easy and efficient for parties to share and run searches across documents.[16] Even the Texas Court System's e-filing application often uses image-based formats as the preferred form of document production in litigation because they ensure that everyone who uses and sees a document in litigation will see the document the same way.[17]

II. CORRECT APPLICATION OF RULE 192.4'S PROPORTIONALITY REQUIREMENT LIMITS THE DISCOVERY GAMESMANSHIP DESIGNED TO INCREASE SETTLEMENT PRESSURE REGARDLESS OF A CASE'S MERIT

The Texas Supreme Court should issue mandamus to prevent abuse of the discovery rules by the Real Parties in Interest. The ESI Protocol requirements for native format of *all* ESI and corresponding metadata constitute an overt attempt to increase exponentially the value of what otherwise would be much smaller financial claims. The proportionality requirement in Rule 192.4 must be upheld and enforced in order to deter wasteful and irrelevant discovery gamesmanship.

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[16] Federal courts agree that an image-based ESI production, which preserves *relevant* metadata and renders the electronic files searchable, is a "reasonably usable" form for purposes of FRCP 34. See, e.g., *Davenport v. Charter Communications, LLC*, 2015 WL 128372 at *3 (E.D. Mo. Mar. 20, 2015); *U.S. ex rel. Carter v. Bridgeport Educ., Inc.*, 305 F.R.D. 225, 244-45, 316 Ed. Law Rep.896, 90 Fed. R. Serv. 3d 1836 (S.D. Cal. 2015); *National Jewish Health v. WebMD Health Services Group, Inc.*, 305 F.R.D. 247, 253-54 (D. Colo. 2014); *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 356-58 (S.D.N.Y. 2008).

[17] The eFileTXCourts system uploads files in .pdf format. eFileTXCourts.gov User Guide --- Release 3.13 (Mar. 2016) at 33, *available at*

A. Unnecessary Discovery Requests for All Native Data and Metadata Appear Designed to Multiply the Settlement Value of Claims

In his 2015 year-end report, Chief Justice John G. Roberts, Jr. urged attorneys to improve efficiency and reduce the cost of litigation.[18] After reviewing the extensive efforts in the most recent amendments to the discovery rules in the Federal Rules of Civil Procedure, Chief Justice Roberts wrote:

> As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship…. The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.[19]

Discovery demands designed to inflate the cost of litigation are precisely the type of "antagonistic tactics" and "wasteful procedural maneuvers" decried by the Chief Justice. Indeed, the "brinksmanship" of demanding all possibly relevant ESI in a native (or near-native) format forces the resolution of cases based on the discovery costs rather than on the basis of "just results." Requiring defendants like Relator to produce files in a different format for the sake of providing metadata that *might* lead to discoverable information is an impermissible fishing expedition.

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http://content.tylerhost.net/docs/eFileTexas/help/eFile.TXCourts.gov_User%20Guide.pdf.

[18] "2015 Year-End Report on the Federal Judiciary" *available at* http://www.scotusblog.com/wp-content/uploads/2015/12/CJ-year-end-report-12-31-15.pdf (last accessed Oct. 12, 2016).

Discovery requests such as the ESI Protocol appear designed to multiply the settlement value of insurance claims of approximately $5,000 by four times to $20,000 based solely on production format with no relation to the merits of the underlying claim.

This case appears emblematic of discovery gamesmanship. The Real Parties make only a minimal showing of relevance for certain metadata fields, and virtually no showing of relevance or proportionality for *all* metadata fields that would be included in a native-format production. Other insurance claim cases by Real Parties' attorney, Steve Mostyn, have garnered significant attention precisely because the settlements seem to some to be exorbitant compared to the actual home damage. Commenting on Mostyn's $135 million settlement with the Texas Windstorm Insurance Agency, a state representative noted "[m]any of the cases I've seen have been way inflated --- when you're paying 92 percent of the limit on a house that looks like it's in a real estate for sale photo."[20] *Forbes* recently reported on allegations that a representative of Mostyn's law firm boasted to a Texas school district superintendent that Mostyn's firm is "number one" in the

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[19] *Id.* at 11.

[20] Chris Hooks, Mostyn Announces $135 Million TWIA Settlement, The Texas Tribune. May 28, 2013, *available at* https://www.texastribune.org/2013/05/28/steve-mostyn-announces-135-million-twia-settlement/.

country for insurance claims recovering "probably billions."[21] The article also reported that in May of this year, an attorney with Mostyn's law firm was ordered to appear for a hearing before a federal judge in McAllen to show cause why he should not be sanctioned for bringing factually unsupported hail lawsuits against insurers.[22] Other media sources report that plaintiff attorneys "learned from [Hurricane] Ike how to swoop into neighborhoods following a bad storm and convince homeowners they'd been under-paid for wind or hail damage."[23] Given the firm's notoriety, it is perhaps unsurprising that last year, Mostyn participated in a CLE panel, with CLE "ethics" credit reportedly available, entitled "How to Get Dough Out of Insurance Companies: Tactics and Tricks of the Trade," which reportedly was designed to discuss "critical tactics and strategies for getting insurance companies to pay on a variety of claims."[24]

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[21] Recording: Texas Dem Chair, Mostyn Law 'Brought' Notion of Lawsuit To School District, Forbes, Oct. 4, 2016, *available at* http://www.forbes.com/sites/legalnewsline/2016/10/04/recording-texas-dem-chair-mostyn-law-brought-notion-of-lawsuit-to-school-district/#113f226572b9 (last accessed Oct. 17, 2016).

[22] *Id.*

[23] Dave Fehling, In Texas, Insurance Companies Say They're Victims of Storm-Chasing Lawyers, Texas Standard (Oct. 10, 2016) *available at* http://www.texasstandard.org/stories/in-texas-insurance-companies-say-theyre-victims-of-storm-chasing-lawyers/ (last accessed Oct. 17, 2016) (referencing Houston Public Media report).

[24] University of Texas Law School, 20th Annual Insurance Law Institute, Nov. 12, 2015 Luncheon Presentation, *available at* https://utcle.org/conferences/IN15 and https://utcle.org/conferences/IN15/brochure.

B. Rule 192.4's Proportionality Requirement Is a Necessary Bulwark against Wasteful and Irrelevant Discovery Gamesmanship

A proper application of the proportionality requirement is a necessary bulwark against the continued use of wasteful and irrelevant discovery to leverage higher settlements that have little or nothing to do with the case merits.

As Relators cogently argue, it is indisputably Texas law that a determination of the reasonableness of a discovery request "necessarily requires some sense of proportion." *In re Allstate County Mut. Ins. Co.*, 227 S.W.3d 667, 670 (Tex. 2007); Tex. R. Civ. P. 192.4(b); see also Relator's Brief on the Merits (filed July 1, 2016) at 38-45. The scope of discovery must be limited where the "burden or expense of the proposed discovery outweighs its likely benefit." Tex. R. Civ. P. 192.4(b)

Relator has submitted extensive evidence that it would incur significant burdens under the ESI Protocol. *Amici's* previously filed brief in support of Relator's Petition for Writ of Mandamus (filed Dec. 15, 2015) also argued that the additional costs of the requested production formats are excessive and unduly burdensome. But this case is not an isolated example of excessively burdensome discovery orders. *Amici* and their members have experience complying with similarly expansive discovery orders, and can speak to the real burdens such orders impose. Collecting native files from disparate data sources is far more burdensome

than collecting the same relevant information from these files from existing document management systems. Requiring the retrieval of duplicate information from native sources such as laptops, desktops, mobile devices, file shares, *etc.* after the vast majority of relevant information has *already* been captured in centralized systems creates a "last-mile" scenario that would involve a substantial re-deployment of redundant wasted resources.[25]

Further, as discussed in *Amici's* prior briefing, instituting a manual process for redaction of electronic files is prohibitively expensive and carries risks of inadvertent alteration of the files in the process. Imposing a requirement to redact documents either natively or in the ESI's Protocol's manual manner 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.

In the face of overwhelming evidence that native production is extremely burdensome, Real Parties fall back on the assertion that Relator would have been "better-served" if it had made the "more economical" choice to retain and produce

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[25] The "last mile" refers to the portion of a communications network chain that physically reaches the end-user. The last mile nodes are the most numerous and, consequently, the most expensive part of the system. They are also the most difficult to physically access.

all data in native format in the first instance (Merits Resp. at 41). But Real Parties' argument is essentially a demand that companies construct their IT systems to serve the needs of some unknown future litigation, rather than the needs of their business. This makes no business sense whatsoever; moreover, it has been roundly rejected by the well-respected nonprofit Sedona Conference, which recognizes that "[v]irtually 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."[26] Companies spend millions of dollars to set up and maintain IT systems, and they design those systems to *maximize business functionality*.[27] The burden imposed by a discovery request must be measured based on the burdens to an existing IT that has been designed to serve its business interests, not based on the burden the discovery request might impose on a hypothetical IT system that exists only in a plaintiff's briefing.

In contrast to the extensive evidence that native document production imposes significant burdens, the benefits of native production for requesting parties

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[26] The Sedona Conference, The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation, The Sedona Conference Journal Vol. 15 (Fall 2014) at 193, *available at* https://thesedonaconference.org/download-pub/4008

[27] Conrad Jacoby et al., Databases Lie! Successfully Managing Structured Data, the Oft Overlooked ESI, 19 Rich. J.L. & Tech. 9, 24 (2013).

are minimal at best; completely illusory or manufactured at worst. Relator's brief establishes this in detail. Relator's Brief on the Merits (filed July 1, 2016) at 38-45. In addition, the expert for the Real Parties, Mr. Craig Ball, has himself provided support for the proposition that native or near-native production imposes unreasonable burdens and expenses outweighing any likely benefit. According to Mr. Ball, "[t]he native applications required to view the data in its native format may be prohibitively expensive or difficult to operate without extensive training (*e.g.*, Oracle Corp. or SAP America Inc. databases)."[28] Mr. Ball also recognized that "[b]ecause the native file format for enterprise e-mail is bound up with information beyond the scope of discovery, it's the rare case where e-mail should be produced in its native format."[29]

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[28] Ball, Function Follows Form*, supra* note 15. Mr. Ball's recognition of the difficulties and "prohibitively expensive" costs of native production are curiously in tension with his decade-long advocacy in support of more burdensome discovery formats. In discussions leading up to the passage of the 2006 amendments to the Federal Rules of Civil Procedure, Plaintiffs' expert requested the opportunity to testify to the Rules Committee as to Federal Rule of Civil Procedure 34(b) addressing the specification of the forms of production. Letter from Craig Ball to Peter McCabe dated Jan 28, 2005, attached as **Exhibit 1**. Ironically, Mr. Ball agreed at the time that "the producing party is entitled to object to any or all requested forms of production." *Id.*; see also Craig D. Ball, The Case for Native Production, Thompson-Reuters Practical Law Journal, Oct / Nov. 2015, *available at* http://www.craigball.com/LIT_OctNov2014_EDiscoveryBulletin.pdf.

[29] Craig Ball, Re-Burn of the Native, Law Technology News, Sept. 2007, *available at* http://www.craigball.com/BIYC.pdf. Ball's statements about the burden and limited utility of native production are in tension with his opinions in this case.

CONCLUSION

Mandamus is an appropriate remedy where, as here, a court clearly steps well outside the bounds of settled law. Texas Rules of Civil Procedure 196.4 and 194.2, as written and as interpreted by this Court, simply cannot support the ESI Protocol at issue in this case. This Court should grant the mandamus petition on order to actively curb the discovery gamesmanship at play in this case, and that imposes great harm on *Amici*'s members in other cases throughout Texas. Granting this mandamus petition will send a clear message to litigants and to lower courts that the Texas discovery rules should not be abused to create hydraulic pressure to settle claims regardless of the underlying merits.

PRAYER

Amici join State Farm in its request for 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: November 14, 2016.

Respectfully submitted,

/s/ Patrick Oot

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Counsel for Amici Curiae

CERTIFICATE OF COUNSEL

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

Dated: November 14, 2016.

/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 Brief on the Merits contains 5,099 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1)

Dated: November 14, 2016.

/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 14th day of November, 2016.

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EXHIBIT 1

RECEIVED 1/12/05

04-CV-112
Request to Testify
2/11 DC

"Craig Ball" <craig@ball.net>
01/12/2005 12:15 AM

To <Rules_Support@ao.uscourts.gov>
cc
Subject Request to Testify

To The Rules Committee:

I respectfully request the opportunity to testify in person concerning the proposed changes to the Federal Rules of Civil Procedure during the scheduled Civil Rules hearing in Washington, D.C. on February 12, 2005. Apart from questions, I believe my testimony will not require more than approximately 15 minutes. Please confirm if I will be afforded this opportunity. Thank you.

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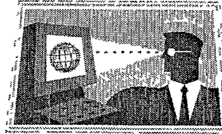

Craig Ball
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Certified Computer Forensic Examiner

RECEIVED 2/10/05

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04-CV-112
Testimony
2/11 DC

Tuesday, January 18, 2005

Re: Comments Respecting Proposed Amendments to Civil Rules 26(b); 34(b); 37(f) and 45(d)(1)(B)

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, D.C. 20544

Dear Mr. McCabe and Members of the Committee:

My name is Craig Ball, from Houston, Texas. I'm a former plaintiffs' trial lawyer and also an author, teacher, sometime student and certified computer forensic examiner. After two decades in court sparring with automakers, medical device manufacturers and polluters in mass document cases, my work has changed such that electronic discovery is now the sole focus of everything I do. I frequently serve as a court-appointed Special Master or Neutral Expert in matters of computer forensics and electronic discovery, and I've had the good fortune to counsel everyone from Fortune 500 corporations and prominent law firms to solo practitioners and Mom-and-Pop businesses about such matters. Perhaps as much as anyone, I've knocked around nearly every corner of the e-discovery neighborhood, and not a week goes by without the pleasure and privilege of my instructing a roomful of lawyers or judges about electronic discovery, helping them reach that "ah-ha" moment. The physicist Niels Bohr said that an expert is a man who has made all the mistakes that can be made in a very narrow field. By that definition certainly, I come to you as an expert in e-discovery.

Though asked, I am not here on behalf of the trial lawyers, nor for any corporate client that would benefit from limiting the scope or shifting the costs of e-discovery. I'm here on my own nickel, on my own time, to echo the ideal that evidence must remain freely available in discovery and that the cost of finding the truth must not serve as a disincentive to seeking the truth. I seek as well to fairly balance the concerns of those who contend with equal vigor that we must guard against e-discovery becoming an instrument of abuse, extortion or oppression.

I applaud the careful deliberation and hard work of your committee that's brought us to these hearings. Though I respect the thoughtful and forward-looking efforts of the drafters of the proposed rules, I still must caution, "If it ain't broke, don't fix it."

Sometimes the hardest thing to do is nothing, but that is precisely the proper course for now with respect to the proposed amendment to Rules 26(b) and 37(f).

The proposed amendment to Rule 26(b) will make it more difficult and expensive for parties seeking discovery to get to the evidence. Further, the delay engendered by the necessity of motions, expert testimony and hearings insures an increased potential that evidence will be overwritten or corrupted by the passage of time. The justification for this sacrifice is that the explosion of information in electronic form has made discovery too expensive and risky for producing parties to bear. But, before parties seeking discovery lose important rights, it's worthwhile to look back and ask, "How did this happen and are those claiming to be victims of e-discovery the architects of their own demise?"

How Did We Get Here?
Like the Captain of the H.M.S. Pinafore, "when I was a lad I served a term as office boy to an attorney's firm." Then, and subsequently in my years as a young lawyer, the process of responding to a request for production was straightforward. If the request concerned correspondence in the Doe Matter, one visited a room reserved to file storage, located the cabinet, shelf or drawer for Doe, and then found, reviewed, redacted and produced the Doe Correspondence File. Rarely was it necessary to look elsewhere because the producing party could say with reasonable certainty, "This is the Doe file." That certainty grew out of adherence to records management throughout the business process. Documents with unique headings were placed in labeled or numbered files and, in turn, stored in labeled folders, red ropes, drawers and cabinets within controlled environments. Managing paper in this way was costly and so created an incentive to discard what wasn't needed.

In the rush to automate, businesses largely abandoned sound records management in favor of commingling everything willy-nilly on massive networks, strewing the rest across countless back up tapes, local hard drives and portable digital devices. We keep many more digital documents than needed because it feels inexpensive to do so. Instead, what we've done is defer, Enron-like, a big part of the true cost of computerization. Some of these chickens have come home to roost, only to be re-deployed as harbingers of, "The sky is falling!"

But is it *Really* Broke?
Despite the hue and cry of those who embraced automation while recklessly abandoning sound records management, the facts show the sky isn't falling. Where are the uncorrected abuses of discretion? Who are the district judges so bereft of judgment that only these new rules can rein them in? Where are the appellate decisions correcting such abuses or reconciling gaping inconsistencies between districts or circuits? Looking at the cases where district judges have imposed sanctions, would anyone claim these were instances of innocent and diligent action met by penalty? No, the sanctions in the cases follow egregious, flagrant, venal abuses of litigants' rights and contempt for the courts' authority. In Texas, it's said, "Even a dog knows the difference between being kicked and being tripped over." We should trust a district judge to be no less discerning.

The proposed amendments to rules 26(b)(2) and 37(f) are premature and will likely prove unnecessary, unavailing and expensive. Let's not swap a perceived problem for a real one. Changes in the rules should grow from reason, not anxiety, and be grounded on empirical, not anecdotal, evidence. The existing rules framework can and will successfully adapt to meet the challenge, and I see that adaption taking place right now in genuine and productive ways. The bench, bar and litigants we serve continue to accrue expertise and experience in digital discovery. Sound e-records management systems are emerging. Storage technologies are racing forward. There is progress aplenty, but if we dilute incentives and erect roadblocks to benefit a few, we reveal our distrust of the common law and of the bench. Both have well-earned our trust.

A techno-savvy bench and bar isn't a pipe dream. I majored in English, but with study late in life, became fluent in computer forensics and e-discovery. A level of expertise and interest much less than mine is sufficient to grasp the challenges and fashion workable solutions. And I'm not alone. Many lawyers you've heard from already "get it." Many more lawyers and judges are starting to wrap their arms around e-discovery issues and fashion real-world solutions and strategies. The Zubulake case is an example, but just one of many on its heels, if and only if we allow the law and technology to evolve unhampered by special interests and stop gap rulemaking.

Rule 26(b)(2) Reasonable Accessibility Criteria
If an eyewitness didn't speak English, we wouldn't regard their testimony as inaccessible. Likewise, if probative documents are in Japanese or German, they wouldn't be dismissed as "inaccessible" and beyond the bounds of proper discovery absent good cause shown. Electronic evidence is just relevant, probative information recorded in an unfamiliar language. What we are finding is that more and more evidence in our cases comes to us in an unfamiliar tongue. In Texas, it's common to encounter witnesses speaking only Spanish or Vietnamese. Do we dismiss that evidence as inaccessible, or do we embrace the truth by working through skilled translators and better educating ourselves?

Data that some commentators assume to be inaccessible (i.e., deleted files or back up tapes) may actually be easier to access, review and produce than accessible active data (e.g., relational databases, voice mail and instant messaging traffic). Considering the dynamic and fragile nature of electronically stored information, the interposition of a new procedural hurdle and attendant delay creates greater problems than it solves. That delay is particularly troubling because the proposed rules don't expressly impose an obligation to preserve items identified as inaccessible pending the court's consideration. The delay then serves as an opportunity to migrate evidence from inaccessible to gone.

If the proposed amendment to Rule 26(b)(2) is not abandoned, the better approach would be an express requirement to preserve all data claimed to be inaccessible pending the court's determination whether good cause exists for production.

Rule 26(b)(5)(B) Non-Waiver of Privilege Amendment
Other commentators have expressed concerns about the feasibility of securing return of inadvertently produced privileged data, recognizing that after the information is used in

deposition, or shared with experts or other counsel, the toothpaste just won't go back in the tube. I share those concerns but harbor another, being that the terms "return, sequester or destroy" are problematic when applied to data stored on magnetic media. Once digital data has been stored or even viewed on a computer system, it is no small undertaking to eradicate it from the local hard drive, necessitating specialized software or expertise. You cannot "return" the bits on the magnetic media and, even when deleted, the privileged information remains on the media indefinitely, commingled with all other deleted data within the unallocated clusters of the volume. What might a party claiming unintended disclosure be entitled to demand in the way of eradication by the innocent recipient? Is deletion sufficient, notwithstanding the growing awareness that ***delete*** doesn't mean ***gone***? Must the media be wiped or physically destroyed? Must a computer forensic expert be brought in to locate and overwrite the data?

Perhaps it would be sufficient to simply change the wording to state that "a party must take reasonable steps to return, destroy, delete or sequester the specified information and any reasonably accessible copies."

Rule 34(b) Specifying Form of Production Provision
I heartily endorse the effort to provide for discussion of e-discovery issues in meet-and-confer sessions and the proposed amendment to Rule 34(b) authorizing a party to specify the form for production of electronically stored information.

I suggest one small-but-important clarification to Proposed Rule 34(b), being to substitute "form(s)" for "form." As written, the rule requires the requesting party to choose a single format for production of all manner of electronically stored information when it makes better sense to allow the requesting party to specify the format best suited for each particular type of electronic information. For example, it's often useless to request that spreadsheets be produced in TIFF or PDF formats, where such paper-like formats may be ideally suited to electronic mail or word processed documents. Compelling the requesting party to select a single production format for all data is as counter-productive as requiring the producing party to convert everything to paper. I urge the Committee to expressly afford requesting parties the flexibility to select the most appropriate production format for each class of data sought. Such a change need never be oppressive as the producing party is entitled to object to any or all requested forms of production. To this end, the language "The party need only produce such information in one form" should also be omitted from the proposed amendment to Rule 26(b)(ii). Similar language should be removed from the proposed amendment to Rule 45(d)(1)(B) relating to subpoenae.

Rule 37(f) Safe Harbor from Sanctions Amendment
Rule 37(f) merely codifies the principle of "the dog ate my homework." Though likely to be infrequently applied, the proposed rule isn't altogether benign. At worst, some fear it will come into play as a means to cloak deliberate spoliation. At best, it's one less reason to act diligently and decisively to promptly preserve relevant evidence. A judge is capable of distinguishing inadvertence from misbehavior. Just as we don't need a rule compelling a judge to grant sanctions, we need none stripping a judge of the power to do so when warranted.

If the proposed amendment is not abandoned, it should be changed to reference both "discoverable" information *and* "information sought in discovery." As written, the proposed amendment creates a safe harbor for anyone who knew or should have known the information was discoverable. Instead, the fact that the information was expressly sought in discovery should alone be sufficient to trigger reasonable steps to preserve same pending action by the Court.

Should Back-Up Tapes Be Out-of-Bounds?
Businesses have entrusted the power and opportunity to destroy data to virtually every person in the organization, including those with strong motives to make data disappear. Back up tapes are often the only means to preserve information that lies beyond the ambit of those with the greatest incentive to destroy evidence. If we reach back as far as Col. Oliver North's deletion of e-mail subject to subpoena in the Iran-Contra affair, it was the government's back up system that served as the means to recover the evidence demonstrating obstruction of justice.

While it can be indeed be difficult and expensive to restore back up tapes, it should be noted that everything on those back up tapes came from active data, and the necessity of difficult, costly restoration stems only from the destruction of the active data by its custodian. If all discoverable information resides within active data, back up tapes are merely cumulative and there is no obligation to preserve truly identical copies of information. However, if the information has been deleted, the back up tapes may then be the sole source of the deleted data. If the producing party preserves neither the active data nor the duplicate back up data, how has it met its preservation obligation? Put another way, perhaps no litigant should demand the contents of back up tapes at the outset, but neither should the contents of back up tapes be overwritten before the producing party has ascertained that the information is available in the active data. Those who delete evidence without checking if it remains otherwise available should not be heard to complain about the cost of its restoration.

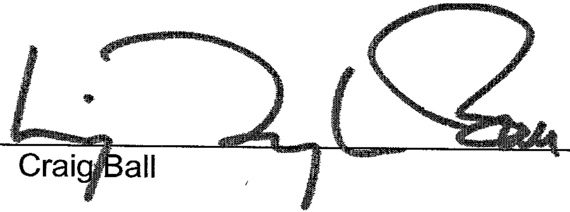
Another issue that militates against treating back up systems as inaccessible is the fact that much discoverable data no longer exists in a paper-philic format. By that I mean, key evidence like databases and even spreadsheets bear little resemblance to what we think of as "documents." These are very dynamic data compilations and how they are constituted at a point in time may be of signal importance, yet they may only be captured on a back up tape. Tomorrow's database will be different and the following day's much different still. Because a snapshot of the database in a relevant form may exist *only* on back up tapes, rotation of those tapes obliterates the only source for relevant evidence. Often a database will not be produced outright in discovery for reason stemming from third-party licensing issues to trade secret concerns to simple logistics. Instead, the database may need to be queried in the form it existed at some relevant time in the past. This isn't possible unless there is a way to reconstitute the database for the relevant time, hence the importance of the back up.

It should be noted that although one witness who previously testified posited the dynamic character of a database as grounds for its inaccessibility--the implication being that databases can't be frozen in time—in fact, a database can be and is captured at intervals. Further, the complex and sophisticated databases mentioned typically

maintain logs which journal changes made to the source data, so it may indeed be possible to extrapolate the contents of a database at a prior point in time using these journaling entries.

This, Too, Shall Pass
I hope the committee will favorably consider these suggestions, most particularly the proposed modification of the amendment to Rule 34(b) respecting form of production. Lawyers have successfully buried their heads in the sand about electronic discovery for far longer than seems possible considering the ability to discover electronic data compilations has been part of our law for decades. Though the current costs of e-discovery eclipse even the pricey old ways of paper discovery, this is a temporary disparity. In spite of the gargantuan data volumes, e-discovery can and will deliver economies and efficiencies like those we take for granted when exploring the 8 billion web pages indexed by Google or the 80 billion bytes on our computer's hard drive. The solutions will entail a mix of new technologies and proven methodologies. Companies will compel employees to "file" their e-mails before they can be sent. System back ups won't require complex and costly restoration. Deleted data will actually be erased from the media. *Electronic discovery will disappear.* It will just be "discovery," and we will soon forget we made any distinction at all.

Thank you for the opportunity to contribute to the rulemaking process.

By: 
Craig Ball