No. 15-0905

IN THE
SUPREME COURT OF TEXAS

IN RE STATE FARM LLOYDS,

RELATOR

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE*

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STATEMENT OF INTEREST

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system, to secure the just, speedy, and inexpensive determination of civil cases. Because of the disproportionate role discovery plays in driving court costs, LCJ respectfully submits this brief as *amicus curiae* on behalf of its members, who grapple every day with the consequences of an increasingly expensive court system. Since 1987, LCJ has advocated reform of procedural rules to: (1) promote balance and fairness in the civil justice system; (2) reduce the burdens associated with litigation; and (3) advance predictability and efficiency in litigation. No counsel for a party authored this brief in whole or in part. LCJ, the *amicus curiae*, paid Thompson & Knight, LLP a stipend for its work preparing this brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

This case (and its companion case, also titled *In re State Farm Lloyds* and numbered 15-0903) provides the Court with an opportunity to clarify once and for all that the burden of electronic discovery must not be disproportionate to its potential benefit. LCJ requests that the Court grant mandamus relief to Relator State Farm Lloyds ("State Farm") in Cause No. 15-0905 and remind Texas courts that the scope of electronic discovery is limited by reason and proportionality.

SUMMARY OF ARGUMENTS

Respondent's ruling below undermines the proportionality standard in the Texas Rules by essentially requiring State Farm to produce Electronically Stored Information ("ESI") exclusively in the format the Real Parties in Interest ("Real Parties") requested, unless State Farm shows this is "infeasible." As State Farm has shown in its briefing, Respondent abused her discretion when she adopted the Real Parties' discovery plan, and this Court should grant mandamus relief to correct that error. This is not the type of error the Court can safely ignore. The Real Parties' view of the Texas Rules is not only legally incorrect, but is dangerous from a policy standpoint, and this Court should not allow this view to spread. The danger is revealed

by the very different worlds the parties' interpretations of the rules create.

In State Farm's world, requesting parties may request ESI in the format they desire, but responding parties may object to unreasonable requests, and then produce the ESI in another reasonably usable form. Disputes are resolved by weighing the benefits of discovery against the burdens of production in the form requested. Requesting parties have a strong incentive to avoid successful objections by calibrating their requests to be proportional to the burdens they would impose. In the Real Parties' world, by contrast, the responding party *must* produce ESI in the format demanded by the requesting party unless the requesting party can show that such a demand is "infeasible." Rather than weigh the benefits and burdens of discovery, the court's job is simply to referee whether the responding party *could* comply. The requesting party has no incentive to consider how difficult it might be for the responding party to comply with a request.

In State Farm's world, the expense of ESI discovery is manageable, because requesting parties have an incentive to request ESI in formats readily available to responding parties, and responding parties have an incentive to adopt internal policies making production of documents quick and efficient. In the Real Parties' world, requesting parties have no incentive

to consider the retention and production practices of the producing party. Instead, the requester has a perverse incentive to demand ESI in formats that are especially difficult for a responding party to produce.

In State Farm's world, Texas and federal discovery practice are closely aligned, discouraging forum shopping. In the Real Parties' world, ESI discovery in Texas diverges sharply from federal practice, encouraging nuisance litigation in Texas.

Correcting the trial court's erroneous approach to these burdens may be the difference between ESI discovery in Texas being a helpful tool to acquire relevant information and a cudgel to coerce settlements regardless of the merits. The Court should grant State Farm mandamus relief.

ARGUMENTS

State Farm has already persuasively presented the legal case for mandamus relief in its briefing to the Court. It simply is not the rule in Texas that a party responding to discovery requests may object to production of ESI in a requested format only if it can show such production would be "infeasible." As *amicus curiae*, LCJ seeks to draw the Court's attention to several important policy implications of the decision in this case, which demonstrate some of the dangers presented by the trial court's approach.

1. Denial of mandamus will create perverse incentives, driving up costs.

It would be easy, given the facts before the Court and the depth of the legal arguments made by the parties in their briefing, to forget that this case has ramifications beyond the specific questions of whether production in "native" format is burdensome, or whether searchable PDFs are "reasonably usable." These legal questions are certainly important. But at the heart of this matter is what weight Rule 196.4 gives to the requesting party's stated desire for production in a particular format, whatever that format is.

Attorneys and litigants are keenly aware of the ever-increasing role of ESI in litigation. ESI production often requires expenditures of time and effort disproportionate to the evidentiary value of the material actually produced. *See* Martha J. Dawson, Bree Kelly, *The Next Generation: Upgrading Proportionality for A New Paradigm*, 82 DEF. COUNS. J. 434, 438 (2015); John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing A Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411 (2015). As a result, many businesses have adopted internal procedures for retention of documents and for production of ESI in reasonably usable formats. *See*

Alexander Nourse Gross, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?*, 2015 COLUM. BUS. L. REV. 705 (2015) (describing the effect of discovery rules on the conduct of businesses even before litigation begins). In an age where the amount of potentially discoverable information is increasing at an exponential rate, such procedures are more than merely advisable—they are crucial to restraining the costs of ESI discovery on businesses, both before and during litigation.

It is therefore fortunate that the Texas Rules of Civil Procedure contain two proportionality rules applicable to ESI. Rule 192.4 provides that courts should keep in mind the amount in controversy in deciding *all* discovery questions, and should limit *every* form of discovery where the material sought can be produced in a more convenient or less burdensome way, or where the burden or expense of discovery outweighs the benefit to the requesting party. TEX. R. CIV. P. 192.4. And Rule 196.4 provides that while a requesting party must request ESI in a particular form, the responding party must produce only what is reasonably available to the party in the ordinary course of its business, and may object if it cannot through reasonable efforts produce in the form requested. TEX. R. CIV. P. 196.4. The trial court violated both

of these rules when it ignored testimony regarding State Farm's internal practices (and other important factors, like the amount in controversy in the dispute, and whether less intrusive alternative means of discovery were available) and imposed plaintiffs' demand for native documents subject to an entirely novel "infeasibility" standard.

This is an injustice to State Farm. But it is also a decision that, if allowed to stand, could radically undermine the proportionality rule as it applies to ESI in Texas. By deciding that State Farm's internal practices were irrelevant, and by imposing a procedure whereby the requesting party is entitled to ESI in the format it requests unless production in that format is "infeasible," the trial court altered Rule 196.4 beyond recognition. Under Real Parties' interpretation of the Rules, businesses would no longer have any incentive to develop efficient procedures for the storage and production of ESI, since they cannot know before litigation begins what format they will be commanded to produce information in. While the Real Parties here requested native documents (a category that is, itself, ambiguous), the interpretation of Rule 196.4 the Real Parties propose would enable the requesting party to demand documents in whatever other format they desire,

so long as the responding party could not show that such production would be "infeasible."

The Real Parties' rule (as adopted by the trial court) would therefore force businesses to either retain the same possibly discoverable materials in numerous formats, incurring potentially enormous additional storage costs, or retain all materials in a single format and then rapidly convert potentially enormous amounts of information into the requesting party's chosen format when litigation arises (which may even require the business to acquire additional software or technology). Either option imposes a significant additional burden, especially on frequent litigants. More likely, businesses would simply maintain whatever current retention practices they have and make no effort to develop more efficient techniques. Why invest in such efficiencies when an artful production request can entirely circumvent them, and a court can completely ignore them?

The Real Parties' rule would also allow a requesting party to impose arbitrary costs on the producing party. A requesting party could demand (and expect to receive) different formats for each type of ESI it requests. The cost and complexity this imposes on a responding party would vary directly with the number of parties demanding discovery in a given case. In a single

case, one requesting party might request Word files for all word processed documents, PDFs of all emails, and TIFF files of all images, while another demands native word processed documents, TIFFs of all e-mails, and JPEGs of all images. Unless production in these formats is "infeasible," the responding party would be compelled to bear the costs to meet these inconsistent demands, even if reasonably usable (and more efficient) alternatives are available.

Because the preferences of requesting parties cannot be predicted in advance, under the Real Parties' rule, litigants would not be able to reasonably estimate the cost of ESI discovery before receiving the request even within a single case. This is compounded by the fact that each case is different, with a different venue, different facts, and a different requesting party (or parties) with different discovery preferences. The cost of ESI would be unpredictable within a case and wildly inconsistent from one case to the next. And, if a requesting party knows that it will nearly always get the format it wants, it has a perverse incentive to demand production in

whichever format would be most expensive for the other side, since this will increase the pressure on the responding party to settle.[1]

Rule 196.4 must not be read to flatly impose the format requested by the requesting party on the producing party, subject only to some artificial test of feasibility. If the trial court's ruling is allowed to stand, other courts may adopt the Real Parties' interpretation of Rule 196.4, and the result will be the conversion of a rule intended to make ESI discovery reasonable and proportional into a rule that generates a web of perverse incentives that will only make electronic discovery slower and more expensive, and encourage settlements based on litigation cost rather than the merits.

2. Denial of mandamus will cause Texas rules to diverge from the federal rules, creating confusion and encouraging forum shopping.

This Court looks to the Federal Rules of Civil Procedure when interpreting Texas discovery rules, and has held that—especially with respect to ESI—the two sets of rules closely correspond. *See In re Weekley*

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[1] Discovery costs certainly influence how litigants (or at least their attorneys) view the desirability of settlement. *See* Am. Bar Ass'n Section of Litig., Member Survey on Civil Practice: Full Report 9 (2009), *available at* https://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf (last visited Oct. 12, 2016) (noting based on ABA member survey that 94% of plaintiffs' lawyers, 98% of defense lawyers and 99% of mixed practice lawyers view discovery costs as influencing settlement).

Homes, L.P., 295 S.W.3d 309, 316-19 (Tex. 2009). State Farm has shown that the trial court's decision is contrary to federal court decisions applying the federal rules to almost identical facts. *See*, *e.g.*, Relator's Brief on the Merits at 35-36 (citing and discussing *Dizdar v. State Farm Lloyds*, 7:14-CV-506, 2016 WL 2610108 (S.D. Tex. May 6, 2016), a case decided under the federal rules on almost identical facts, and involving some of the same parties and counsel). To deny mandamus would effectively create two different proportionality standards for ESI: a stronger one for federal courts, and a weaker one for Texas state courts.

The most recent amendments to the Federal Rules of Civil Procedure, which became effective December 1, 2015, place even stronger emphasis on the requirement of proportionality in discovery than did the prior rules. *See* FED. R. CIV. P. 26(b)(1). Under the amended Rule 26, material is simply not discoverable if it is not proportional "to the needs of the case," considering, among other things, "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* Proportionality is now a threshold question under the federal rules, governing the very discoverability of evidence. It is not an afterthought to be considered by the court only when a responding party objects to a request.

Failure to address the error below—or worse, endorsement of that error—would open an unbridgeable chasm between Texas and federal ESI discovery practice. Texas litigants and courts could no longer be able to look to federal cases to interpret ESI discovery questions (as this Court did in *Weekley Homes*), creating additional confusion and provoking more forum shopping, satellite litigation, and appeals. *See* Glenn S. Koppel, *Toward A New Federalism in State Civil Justice: Developing A Uniform Code of State Civil Procedure Through A Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1189-93 (2005). This is not an alarmist parade of horribles—in fact, procedural differences among forums empirically do affect where plaintiffs choose to bring their actions. Asbestos litigation, for instance, is now almost exclusively brought in just a few states that have procedural rules conducive to large verdicts. *Id.* at 1991-93. A weakened proportionality standard for ESI in Texas will attract precisely the type of litigants Texas does not want: those who fight for nuisance settlements rather than vindication of meritorious claims.

Texas state courts should not have to shoulder the burden of being the forum of choice for parties seeking large nuisance settlements in complex

cases involving large amounts of ESI. The trial court's decision, if not corrected, risks that outcome. This Court should act.

CONCLUSION

Therefore, LCJ respectfully requests that the Court grant State Farm its requested mandamus relief, and correct the error below.

Respectfully submitted,

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