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Mr. Jonathan C. Rose,
Secretary of the
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Building, Room 7-240
One Columbus Circle NE
Washington, DC 20544

Re: Response by the General Electric Company to the Request to Bench, Bar and Public for Comments on Proposed Rules (August 2013)

To The Federal Rules Advisory Committee:

The General Electric Company (GE) hereby submits comments for the Committee's consideration on the proposed changes to the Federal Rules of Civil Procedure. We commend the Committee for its efforts to improve the discovery process, and in particular its efforts to rationalize the scope of discovery obligations and the proper reach of sanctions. We write primarily to comment on the proposed changes to Rules 26 and 37, which address what we perceive to be the most significant shortcomings of the current system.

Given both the volume of litigation in which GE is routinely involved, as well as GE's wide exposure to other countries' court systems and other dispute resolution processes, GE has a good perspective from which to evaluate these issues. GE operates in 160 countries around the globe and is regularly involved in litigation in many of them. At any given moment in time, the company is involved in many thousands of civil cases worldwide. In part due to the costs of civil discovery, GE's litigation costs in the United States, both in the aggregate and in individual cases, greatly exceed our costs in the rest of the world.

GE strongly supports the proposed amendments, but we recommend certain changes to ensure that the purposes of these amendments are not inadvertently undermined.

Begin at the Beginning: Rule 1

In evaluating the proposed changes to Rules 26 and 37, GE believes that Rule 1 serves as a useful cynosure. Rule 1 articulates the purposes of the federal civil litigation system as a whole, and for that reason, it is rightly afforded primacy of place in the Rules. The wisdom of the proposed changes to Rules 26 and 37 is apparent when considered in light of those purposes.

The purposes of the Federal Rules are expressed as ensuring the "just, speedy, and inexpensive" resolution of civil cases in the federal courts – three distinct values to be served by the Rules. No one value could or should be served single-mindedly at the expense of the others; they form a tightly interrelated whole. Justice comes first, in the Rules and in reality, and that is as it should be. But if justice could be served only by *Bleak House*-style litigation that dragged on for decades and at a cost

that eventually surpassed the value of the case, no one would consider that true justice. At best, it would be Pyrrhic justice; at worst, it would be injustice, both for the plaintiff and the defendant. For that reason, the efficiency of the system must be considered, both in time and cost.

Justice for these purposes can be succinctly defined as reaching accurate final judgments according to law. As it relates to the amendments currently under consideration, GE is not suggesting that the value of just outcomes should be balanced against the need for speedy and inexpensive adjudication. For better or worse, the current system – at least in the realm of discovery – is in such bad repair that no such tradeoff is necessary. Instead, based on what we regularly experience in the federal courts, GE believes that the proposed changes to Rules 26 and 37, with slight modifications, will actually serve all three Rule 1 values. Not only will these changes help reduce the costs and burdens of litigation, but in doing so, they will also improve the system's ability to render accurate verdicts according to law. After providing some additional factual background, we will explain why.

The Modern Realities of Preservation and Production at GE

The Preservation Challenge: The Company and Its Custodians

GE has approximately 307,000 employees, plus another 100,000 contractors who work closely with GE employees. Currently, there are over 422,000 GE workers who have either left the Company as retirees or are otherwise entitled to a GE pension. The average yearly turnover from, for example, retirements and transfers is about 35,000 employees each year. As for GE's geographic scope, it is virtually unparalleled: GE currently operates in over 3,400 locations in 160 countries around the world. And our business footprint and structure are ever-changing: on average, GE engages in approximately 60 acquisitions and divestitures each year across the company.

Given these numbers, it is not difficult to imagine the complexity with which GE must contend when dealing with its preservation obligations. To give just one example, consider email. GE's employees heavily rely upon email to conduct their daily business activities and communicate with others, both internally at GE and externally with customers and suppliers. GE has a Microsoft Outlook Exchange email system operated at the corporate level, with 450,000 mailboxes distributed across 141 servers in 8 global locations. On a monthly basis, there are approximately 550 million emails being sent and received through those servers, much of which is not stored on them.

By GE's calculations, when it comes time to preserve data for legal holds, GE is faced with a potential universe of upwards of approximately 4,770 terabytes of email alone, in hundreds of thousands of devices across the company and across the world. To emphasize – this is email alone. Of course no case will involve even a small fraction of the total GE workforce, the total volume of electronic data in the company, or the total number of devices or locations. But each time litigation is reasonably anticipated, GE's lawyers have to define some scope for our preservation efforts, in terms of both subject matter and potential custodians. They then have to ensure that the scope is properly covered in legal hold notices, that those notices are properly communicated and maintained, and that periodic reminders are sent. Enterprise-wide, it is a herculean task. Most of the time we cannot anticipate the precise claims or defenses in whatever litigation might ultimately be filed, much less the way in which the legal and factual theories will develop and change over time. And every preservation decision made at the outset could be scrutinized years later with the benefit of hindsight in an adversarial setting, where the opposing side has powerful opportunities and incentives created by the discovery and sanctions provisions in the current Rules to allege spoliation and create satellite litigation largely divorced from the merits and designed to gain tactical and settlement advantage.

GE takes its preservation obligations seriously and works hard and in good faith to fulfill them. And GE recognizes that preservation efforts will usually be more complicated at GE than at many other companies, given the company's size and worldwide footprint. But what GE, or any other civil litigant, should not have to accept is a discovery system that turns civil litigation into a high-stakes game of "gotcha," where parties seek settlement leverage by engaging in massive, expensive fishing expeditions, and then build on and magnify that leverage by piling reputational risk, threatening sanctions if some small part of the ocean of documents in which they are fishing has not been preserved, even in good faith. That, unfortunately, is the system that has evolved under the current version of the Federal Rules, at least as interpreted by some courts.

As a practical matter, this system has led GE to engage in what by any reasonable measure is tremendous over-preservation. There are a number of factors that, taken together, lead to wasteful and expensive maintenance of enormous quantities of data for extended periods of time, the vast majority of which almost certainly will never be important to any litigation. These include the lack of clarity regarding when the preservation obligation is triggered, uncertainty regarding the scope of that obligation, the sheer volume and variety of data and potential storage media that must be considered, and uncertainty regarding when the preservation obligation ends.

The Costs and Burdens of Review and Production

For those cases that actually end up in litigation where discovery occurs, the costs and burdens become far worse. As costly as it may be to store and preserve massive amounts of data, it is even more expensive to collect, process, and review it, a task that typically requires a trained professional to examine each document that might be producible. And the purely financial cost understates the true cost, since it does not count the time lost by scores of employees who must stop doing productive work that benefits the company and its customers in order to aid in these discovery tasks.

GE of course accepts that some expense, and some amount of employee time, should and must be allocated to the task of discovery in civil litigation. But the problem is that the overbroad scope of discovery typically allowed under the current version of Rule 26 drives the costs higher than they reasonably should be, and wastes the time of far too many employees who are of no real significance to the claims or defenses at issue in the litigation.

The best way to test this assertion is to compare what we do in internal investigations to what we do when we produce documents in civil cases—in other words, compare what we do when we need an answer to an important legal question for our own purposes and what we do when the machinery of civil discovery is directed toward the same end. Although the evidence is only anecdotal and based upon my own experience and observations, it is striking: the first is far more efficient and less costly than the second. In internal investigations, we are typically able to gather the documents necessary to satisfy ourselves we know the truth of a matter efficiently and quickly, usually from a relatively small number of total custodians in a matter of weeks or at most several months. I would estimate that, in the typical internal investigation of a serious matter, we find it necessary to collect documents from approximately 20 custodians. The volumes are usually manageable, being susceptible to thorough review and analysis within six to eight weeks by a small number of internal lawyers or auditors. That is because, when we are investigating for our own compliance purposes, our incentives are to get the right answer as efficiently as possible, without waste and needless expense. We therefore target our search and review at the central actors in the drama, and at the most meaningful documents, *i.e.*, those that will actually help to answer the questions before us. We expand our search as necessary to answer those questions, but they remain our focus. We fish using lures and bait; we do not boil the ocean.

By contrast, in civil litigation, boiling the ocean is the norm. That is because our adversaries' incentives are often the opposite: particularly when there are asymmetric burdens of document production, they have an interest in seeking the broadest possible discovery. There are at least three reasons for this. First, by driving up our costs, they exert pressure on us to settle to stop the financial bleeding and business distraction. Second, by casting the broadest net possible, they increase their chances of being able to make an allegation of spoliation or discovery misconduct, which increases the pain and cost of the litigation to us in yet another way. Finally, because discovery is essentially a free good to them, carrying no marginal cost, they want as much of it as possible on the off chance they will stumble across a needle of marginally useful evidence in the haystack. Without any meaningful restraint from the Rules or the courts, the result is predictable. Vast quantities of documents are collected from a large number of custodians, reviewed and produced at great expense, and never used in the litigation—not in a deposition and certainly not at trial.

Although the aggregate volume and diversity of GE's litigation makes getting data from which to calculate company-wide averages difficult, several examples from actual cases should help give the Committee a sense of the scale of the burden and expense of current civil discovery practices in the federal courts. When GE last presented testimony to the Committee at the Dallas Mini-Conference in 2011, GE provided the Committee with three case studies drawn from our actual experience to illustrate some of the problems under the current Rules. We have now updated all three of those examples to account for the developments of the past three years. These updates illustrate the points we are making and should also help the Committee evaluate the extent to which developments in technology or otherwise over the past several years have lessened the problems. The bottom line is they have not.

Example 1. In the first example, where litigation had not yet even been filed, we reported in 2011 that GE had incurred fees of $5.4 million to collect and preserve 3.8 million documents, totaling 16 million pages for 96 different custodians. Today, the situation is worse. It remains true that no case has yet been filed, and it is quite possible that no case ever will be. Yet the obligation to preserve has remained open-ended, because there is no court to intervene and the opposing party has no interest in negotiating the scope or size of the preservation hold.

The cost to preserve and collect data, as reported in 2011, was substantial. The initial outlay of $5.4 million now has grown by approximately $100,000 per year for ongoing maintenance, culminating in a total pre-litigation discovery spend to date approaching $6 million. Most companies would consider a final judgment of that amount to be a bad result. Yet our existing discovery system has compelled the company to spend this amount before we have been sued by anyone and before we have produced a single document to the adverse party. The total number of custodians on hold has increased from 96 to 103, and these employees continue to generate data during their daily work life. Working under the constraints of a litigation hold, GE estimates approximately 500,000 new documents (paper and ESI) are generated every six to twelve months that might be subject to preservation. Given this environment, GE regularly harvests data from the custodians as part of a detailed preservation plan to minimize the impact on business operations, and stores that data.

This digital landfill just continues to grow, without any sense of whether an end – or even a narrowing of the scope – will ever be reached. And despite this effort and expense, we could still be vulnerable to spoliation claims if an adversary decides years from now, with the benefit of hindsight, that the universe of custodians should have been 104 or 105 instead of 103.

Example 2. GE reported on a second matter in 2011, where the cost to preserve and collect data was $5 million for fewer than 250 custodians. Notably, the $5 million cost cited in 2011 excluded

review, which as the RAND study and others have shown is by far the most costly part of discovery (73 cents per dollar, per RAND).[1]

As of 2013, this same matter remains active. GE has had a legal hold in place for seven years and counting. Based on changes in the litigation during the past several years, GE ultimately felt obliged to preserve the paper and ESI of a total of 815 custodians located in the US and EU. This demonstrates how difficult it can be to gauge accurately at the outset what documents and custodians will ultimately come within the scope of the claims that are eventually litigated.

Out of the total number of custodians put on hold, slightly more than 50% – 415 – had their documents collected in anticipation of possible discovery requests, and only 10% - 85 – had their documents produced to the other side. As the case has progressed, the all-in cost of discovery has grown tremendously. When one adds the costs of continued preservation and data hosting, collection from 415 custodians, and review and production of the documents belonging to 85, the total cost to date for the discovery process in this matter exceeds $22 million.

Example 3. In the third example we presented in 2011, GE had incurred discovery costs of nearly $6 million to produce more than 700,000 documents, representing an estimated 15 million pages of paper and ESI. To date, the cost to the company to complete discovery in that matter has exceeded $11 million and counting, including hosting fees, technical vendor fees, substantive document review, privilege logging, and law firm fees. Apart from the mounting cost, the remarkable thing about this example is the relationship between those costs and the actual value of the case. GE estimates the fair settlement value of the case at less than $4 million, $7 million less than GE has already spent on discovery alone. Yet we face inflexible plaintiffs making what we consider to be exorbitant and unjustified settlement demands well above $11 million. Because the court refuses to shift any of the costs of discovery to plaintiffs, the company has been forced to spend far more on just the document production component of discovery than we believe the entire case is worth. And the plaintiffs are never forced to think critically about the discovery costs in relation to the value of the case; indeed, because they are spending someone else's money, they may well be pleased to the extent they perceive the disparity. In this situation, we would be better off economically if we could pay an unjust

[1] Pace, Nicholas M. and Laura Zakaras. Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery. Santa Monica, CA: RAND Corporation, 2012, at xvi. http://www.rand.org/pubs/monographs/MG1208. Also available in print form.

nuisance value settlement more than double the fair value of the case, a dramatic illustration of the way in which cost can distort or destroy just outcomes.

Some have suggested that advances in technology and litigation management techniques are decreasing the costs of discovery, such that the Committee should not be overly concerned. It is certainly true that technology is getting better, as are our tools and methods of managing the discovery process. But in our experience, even when one can find ways to reduce the unit cost of discovery, that does not always translate into a reduction in the aggregate cost.

Looking more broadly across our portfolio of litigation, we have not noticed a meaningful reduction in the aggregate dollars we are spending on discovery. And the volume of data within the company continues to grow. As anyone who has purchased a computer in the past several years knows, the memory size of computer hard drives continues to expand. At GE, the amount of storage on the hard drives of employee laptops has increased by a magnitude of between 2 and 4 times in the past 3 years alone. To accommodate increasing file sizes and overall data volumes, GE has also been obliged to increase the mailbox size restrictions for the hundreds of thousands of employee email accounts in the company. The size restriction on an employee's ability to receive email has recently increased by more than 4 times and the size restriction on an employee's ability to send email has increased by 10 times. As storage and volume increases exponentially, so do the associated costs and challenges of discovery.

More importantly, even if aggregate costs were declining, they would still be high, both in absolute terms and compared to the costs of other systems of adjudication, which we will address more fully below. And they would still be wasteful: the millions of dollars spent to preserve documents in anticipation of litigation in Example 1 would otherwise be spent creating technology, products, and jobs, or else they would be returned to the owners of the company for them to spend, save, or invest as they wish. It is easy to be dismissive even of large dollar figures associated with discovery, especially for a company the size of GE, but these costs have real consequences.

Comparison With Other Countries' Litigation Systems

A significant percentage of GE's litigation is pending in the court systems of other countries, including roughly 40% of GE's significant cases. GE thus has extensive experience with the court systems of other countries. These countries are not limited to those of Western Europe, or the developed world more generally. GE currently has significant cases in the court systems of South America, in Asia, in the Middle East, in Africa – almost everywhere on the globe.

Although GE has not attempted to make a detailed, data-driven comparative analysis of the cost or burdens of litigation across various countries, GE's experience largely mirrors the conclusions of some of the recent reports and studies conducted by academic institutions and others suggesting that the cost of the U.S. system far outstrips that of systems of equivalent quality elsewhere.[2] GE considers the quality of justice very high in the U.S. federal courts, and has great confidence in the transparency, fairness, and integrity of U.S. judicial proceedings. Yet in GE's experience, the quality of justice is equivalently high in many other court systems, despite the fact that the costs and burdens of litigating cases here are proportionally much higher.

[2] Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies, App. 1 at 15 fig. 9 (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survev%20of%20Major%20Companies.pdf; D.L. McKnight and P.J. Hinton, International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States, NERA (June 2013)

There are undoubtedly many reasons why U.S. litigation costs so dramatically exceed non-U.S. litigation costs, even in advanced industrial democracies with excellent court systems. But one key factor, in GE's experience, is our civil discovery system. No other country has anything remotely like it. Other countries are as interested as we are in providing good quality justice in their courts, but none considers it necessary to require essentially boundless, indiscriminate gathering up and production of every conceivable kind of document and data. In the U.S., discovery costs typically account for 50% or more of the total costs in a case,[3] whereas in many other countries, that figure is much lower. And of course the denominator is much higher in the U.S., as the overall cost of a case here is much higher than in most other countries.

The U.S. is an enormous market with many built-in advantages, and companies and investors need to be here. But the disproportionate cost of U.S. litigation is a competitive disadvantage for global companies based in the United States. It also means that where participants in the global litigation market have the choice to opt out of the U.S. system, they often do. In GE's Oil & Gas business, for example, our preferred contracts typically provide for arbitration in Geneva or Paris, rather than litigation in the U.S. federal courts. A 2008 survey of 180 corporate counsel in Europe conducted by the Lovells law firm (now Hogan Lovells) found that, despite the admirable features of our court system, it was the system about which those counsel had the greatest concern, far outstripping the two runners-up, Russia and China.[4] The discovery regime, with all its attendant costs and burdens, is only one reason, of course – civil juries, punitive damages, and elected judges are others – but it is a major one.

To see why, consider GE's own tale of two cities. GE recently litigated two roughly comparable cases in its Oil & Gas business to judgment, one in federal court in Houston and one in Paris. GE won both cases, but the costs of victory were very different.

In the first case, GE was sued for $55 million in federal court in Houston, based on a claim that certain GE products used in a Floating Production, Storage and Offloading ship did not perform adequately. The case ended with a defense verdict after a month-long trial. Shortly after the verdict, GE and the plaintiff reached a resolution that avoided appeals. GE hired an efficient local litigation boutique for this case but still spent over $7 million in legal fees to achieve this result.

In the second case, a French company sued GE in a French court, claiming more than $130 million in damages due to a joint development project in four Commonwealth of Independent States (CIS) countries that turned out not to be as profitable as hoped. The litigation was complex, and documents and witnesses were spread across Italy, France, Germany and the United Kingdom, as well as the CIS region. The case was heard by the Paris Commercial Court, which rejected almost all of the French company's claims. The judgment was affirmed on appeal at the intermediate level and ultimately by the court of final appeal in France, the *Cour de Cassation.* GE paid a top-flight international law firm total fees of approximately €492,000 (about $671, 500) through final appeal.

The absence of U.S.-style discovery in French litigation accounts for a large part of this dramatic difference in cost. More than half of the total fees GE paid to its outside counsel in the Houston case were spent on discovery, including the litigation of a late-filed spoliation claim against GE that the court ultimately rejected, but only after allowing additional depositions for witnesses and experts. In

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[3] John H. Beisner, Discovering A Better Way: The Need For Effective Civil Litigation Reform, 60 Duke L.J. 547, 549 & n.5 (2010).

[4] Lovells, LLP. "The Shrinking World" Research Report: How European In-house Counsel Are Managing Multinational Disputes (Spring, 2008).

fact, litigating that spoliation claim cost nearly the same amount in outside counsel fees as the entire case in France, including appeals to France's highest court.

Distortion and Dysfunction: The Perverse Effects of the Current System

As the above examples reflect, our experience under the current discovery rules has been one of waste and needless burden and cost. The result has been anything but "speedy and inexpensive." But is at least the first goal of the Rules being served? Is the system just? The great irony is that, in many ways, the same features of the Rules that produce the waste, burden, and cost also produce opportunities for substantive injustice. Herein lies the opportunity before the Committee: changes to the Rules that reduce some of the costs and burdens should also reduce some of the incentives that distort litigation behavior and, in the worst-case scenarios, litigation outcomes.

As the prior discussion makes clear, the waste comes from over-preservation, over-production, and tangential litigation over meritless spoliation claims. Consider again the matter in federal court that is the subject of Example 2 above. Of course the ultimate point of all the effort and expense described in that example was to produce evidence to put before the trier of fact. By definition, this is the evidence the parties considered necessary to arrive at an accurate verdict. When one considers the case from that perspective, the picture of waste becomes even more dramatic. GE produced approximately 340,000 unique documents (in pages, more than 6 million) to plaintiffs in that case. At trial, a total of 194 documents were marked as exhibits by both sides. Thus, less than 0.1% of the documents produced (and a far, far smaller percentage of the documents preserved or collected) were actually used at trial.

We recently saw the same pattern in an intellectual property dispute that culminated in a $170 million judgment for GE in federal court in Dallas. For that case (and directly related litigation against the same party), GE collected and preserved 2.4 terabytes of data or roughly 180,000,000 pages. To provide a tangible comparison, that is about 72,000 banker's boxes of documents. We produced only 7% of that in discovery. The total volume of exhibits eventually admitted in evidence fit into two binders, a total of 165 documents.

As these examples suggest, over-preservation and over-production are both very costly. These costs are a function of how the Rules currently work. Rule 26, as currently interpreted by many courts, requires production that is far broader than could ever be necessary to fully and properly present the claims and defenses in a case, which is amply borne out by the huge discrepancy between documents produced and documents actually used at trial. Entitling a litigant to demand and obtain not only the evidence relevant to the claims and defenses in the case but also to anything that might "lead to the discovery of admissible evidence" generates significant additional cost and burden. And when one combines the breadth of Rule 26 with the threat of sanctions under the current version of Rule 37, that leads many litigants, including GE, to over-preserve out of fear of otherwise triggering sideshow litigation over claimed spoliation – litigation that can be damaging both substantively, in its effects on a case, and reputationally, to the company and its lawyers.

Rule 37 drives over-preservation in several distinct ways. To begin with, the trigger for preservation obligations is reasonable anticipation of litigation, but the moment one finds oneself asking the question, even a good faith "no" answer creates risk under the current sanctions regime. Thus, with no objective criteria to use in assessing whether litigation is reasonably anticipated, companies often face strong pressure to assume that situations of conflict or controversy could ripen into litigation. Moreover, even when litigation is anticipated, one cannot easily anticipate its precise contours or issues. Issues that did not seem salient at the outset often become so as theories of recovery and defense morph in a long and complex case. And the party with the duty of preservation knows that

under the current regime, without clear protection for good faith efforts, sanctions are an ever-present threat. Any party seeking sanctions has every incentive to attribute the worst motivations to the party with the duty of preservation, and will naturally claim that whatever is missing is especially important to their case – a claim that is impossible to meaningfully contradict in many cases because, of course, the evidence in question is gone.

After a case has been filed, the problem often becomes worse. That is because in many cases the burdens of document production are seriously asymmetrical. It thus is tactically advantageous for the party with less burden to drive up the other side's costs by demanding the broadest possible scope of discovery consistent with the Rules. The breadth of current Rule 26 can make that tactic quite a powerful one.

This is where the current rules drive not just inefficiencies but injustice in particular cases. The breadth of discovery and lack of clarity and safe harbors in the sanctions rules allow litigants to engage in gamesmanship, setting and springing discovery traps, and playing various forms of "gotcha" based on spoliation claims, all designed to secure tactical or strategic advantage. The incentives to do so are strong: this kind of litigation behavior drives up costs for the other side, exposes them to reputational harm and embarrassment, creates divisions between lawyer and client, and can result in adverse inferences or other jury instructions that substantively further the alleger's case. Worse still, the weaker the case is on the merits, the stronger the incentives are to shift the focus to discovery and spoliation issues. The asymmetrical nature of discovery burdens, amplified by the scope of current Rule 26 and the uncertainties posed by current Rule 37, all too often turn litigation into a form of guerrilla warfare, where one side uses discovery to exact a toll on the other side rather than to find the truth.

The ultimate injustice in such situations manifests itself in two forms. The first is nuisance value settlements. In today's world of electronic discovery, the nuisance value of a case can be quite high, with fees and discovery costs running to many millions of dollars, as the above examples reflect. By definition, a nuisance value settlement represents a substantive injustice, at least most of the time. Money is being paid to a claimant not because anyone has adjudicated the claim and found it valid (or settled a claim for which the party was fairly at risk of being found liable), but because the defendants have concluded it is cheaper to pay the claim than to litigate it. And where the cost of litigation exceeds the value of the dispute – a circumstance increasingly common in the era of ESI – then it becomes economically rational, at least within the context of the particular case, to settle rather than litigate, regardless of the merits. Make no mistake: plaintiff's lawyers are keenly aware of this dynamic, and many exploit it for everything it's worth. It can be worth a lot. Settlements like this happen every day.

The second form of injustice comes when a party that is under assault for claimed spoliation decides to fight and ends up being sanctioned, despite the absence of bad faith or willful discovery misconduct. Satellite sanctions litigation often is completely divorced from the merits of the case, and the sanction itself can have the effect of pushing towards an incorrect verdict. The classic example is the innocent, good faith loss of data that results in an adverse inference or evidentiary presumption, or even in lesser jury instructions that have the effect of informing the jury of the data loss and the party's responsibility for it. Such inferences, presumptions, or instructions might or might not tend toward an accurate verdict: when evidence has been lost not due to any intentional, bad faith destruction but rather to honest mistake or accident, or to good faith misjudgments as to scope, custodians, and the like, as often as not, the inference or presumption will be substantively unfair and tend toward an unjust verdict. After all, if evidence has been lost innocently, there is no reason to suppose that it would have favored the party seeking sanctions rather than the party

resisting them. In such situations, it serves neither logic nor justice to provide one side with a favorable jury instruction.

The Proposed Amendments: A Modest Corrective

The proposed changes to Rules 26 and 37 should help ameliorate some of the uglier aspects of this dysfunction. Because the problem has its roots in the interaction between the scope of what is discoverable (and thus must be preserved and produced), and the rules regarding sanctions for failure to comply with these obligations, any solution should address both factors.

Rule 26(b)(1) – The Scope of Discovery

GE supports the proposed change to Rule 26(b)(1). Limiting discovery to evidence relevant to the claims or defenses in a case, and requiring that it be proportionate to the needs of the case, is a matter of common sense. In evaluating issues relating to the scope of discovery, it is important to bear in mind, as illustrated above, that the vast majority of evidence preserved is not produced, much of what is produced surely never gets reviewed, and most of what is reviewed is never actually used in trial or motion practice. Even among big cases, it is the rare case indeed that will have more than several hundred exhibits, as the examples discussed above show. By definition, those are the only documents important enough to be presented to the trier of fact, and the only ones the parties themselves deem necessary to arriving at a just verdict. In GE's experience, both parties usually know about most or all of these key documents very early in the case. They can be, and usually are, identified quickly.

In light of this well-known truth among litigators, the exceptionally broad scope of discovery embodied in the current Rule 26 is simply unnecessary. And being unnecessary, it is counterproductive to all the purposes of the Federal Rules for the reasons described above. Many other judicial and dispute resolution systems produce just outcomes without creating anything like the preservation and production obligations of the current Federal Rules.

International arbitration is one such example. Many parties to significant business transactions (including sophisticated litigants like GE Oil & Gas) now choose arbitration in civil law countries as their preferred method for resolving disputes in a variety of circumstances, whether they are plaintiffs or defendants. There are many reasons for this, but no party to a billion-dollar commercial contract would choose arbitration if it felt that its chances of obtaining a just resolution according to the facts and the law were meaningfully lower than in court. And the choice of arbitration is of course made behind the veil of ignorance, not knowing what sort of dispute might arise, which party would be plaintiff or defendant, and which party would have greater need for discovery. This says quite a lot about how sophisticated litigants feel about Rule 26's current scope, regardless of whether they are seeking to press or defend against claims.

The American criminal justice system provides another useful point of comparison. Under Federal Rule of Criminal Procedure 16, a criminal defendant is not entitled to obtain every piece of evidence that might lead to something admissible. Instead, in criminal cases, where the interests at stake typically involve individual liberty, the defendant generally gets documents that are material to the preparation of his defense or that tend to exculpate him. And prosecutors and grand juries don't subpoena every scrap of electronic evidence that might conceivably be relevant to a case; far more typically, the criminal investigative process, like GE's internal investigative process described above, is more focused on the documents and evidence that are truly likely to matter. There are of course many reasons why analogies between the civil and criminal justice systems are imperfect; the point is simply that a narrower scope of discovery has long been accepted in the United States as fair and

just in a context where accurate verdicts matter as much as or more than they do in our civil justice system.

And of course, as noted above, many other countries in the world afford good quality, accurate adjudications without the costs and burdens of U.S.-style discovery.

The desire to ensure the broadest possible discovery of evidence bearing on a dispute is understandable, but long experience with the current rules now suggests that we have gone too far. The slight narrowing of the scope of discovery in the proposed amendment to Rule 26 is a worthwhile corrective.[5]

Rule 37(e) – Sanctions

GE also supports the proposed changes to Rule 37(e), including both a nationally uniform set of standards and a restriction of punitive sanctions to instances of intentional, bad faith destruction of evidence. Indeed, these are, if anything, even more important to reducing some of the gamesmanship and injustice that flows from the current design of the Rules. However, further modifications will better ensure that the amendments serve their intended purpose.

First, the term "willful" should either be defined or else the rule should require that the loss of evidence be "willful *and* in bad faith" before punitive sanctions may be awarded. Either way, the critical point is that if a party conducts itself in good faith and nonetheless loses some evidence that might conceivably be relevant to the case, no punitive sanctions are in order. The Sedona Conference's suggested language – "acting with specific intent to deprive the opposing party of material evidence relevant to the claims or defenses" – accurately captures the critical concept. Sanctions such as evidentiary presumptions might be fair if a court finds that a party acted with an intent to deprive the other party of the evidence lost but not if the loss was inadvertent. In a world where compliance is so complex and difficult, where data can be lost through mere failure to know about or stop automatic data deletion protocols in effect in any one of a variegated group of electronic storage programs and media, and where compliance depends upon so many judgments that are so easily second-guessed after the fact with the benefit of hindsight and full knowledge of how the case progressed, allowing sanctions on a lesser showing simply creates an unfair windfall for the opposing party. The desire to achieve such windfalls leads to unproductive and unjust litigation behavior, especially by parties with weak cases on the merits.

Second, we believe that the amendment would be better off without the exception in subsection (B)(ii), which allows sanctions without any showing of bad faith if a loss of data irreparably deprives a party of any meaningful opportunity present a claim or defend against the claims in the litigation. This exception provides a potential avenue for swallowing much of the principal rule. It is also difficult to understand the logic of requiring bad faith where there has been "substantial prejudice" to a party but not where the prejudice rises to a higher level, even assuming there were analytical integrity to the distinction. Either way, evidence has been lost and a party's chance to make out a claim or defense has been significantly harmed, but if the loss did not occur through ill-intentioned conduct, there is both no reason to suppose the lost evidence would support the party seeking the sanction and no reason to direct moral condemnation and punishment at the other party. In these circumstances, the fair and just approach would be to treat the loss of evidence the same way one would treat evidence lost through an act of God: the evidence is simply unavailable, and the case

[5] We further support the proposal made by other commenters to modify Rule 26(c) to make clear that district courts have the authority to issue protective orders limiting excessive or unduly burdensome preservation demands.

moves forward without it, for better or worse, and with whatever result then occurs under the applicable law and burdens of proof. But if the Committee considers it important to retain the exception in some form, it should provide clear guidance about when and how it is to be used, and it should narrow its scope expressly – for example, to tangible things rather than ESI.

Third, GE has concerns regarding the authorization of "curative measures" in subsection (e)(1)(A) for the failure to preserve discoverable information. As with our concern regarding the proposed subsection (B)(ii) exception, we are concerned that this could become an avenue for preserving the existing sanctions regime under another name, and could undermine the core purpose of requiring bad faith before sanctions may be awarded. Whether denominated "sanctions" or "curative measures," an evidentiary presumption or other jury instruction regarding data loss will still have the same effect on the litigation, and if unwarranted, its effects will be equally unfair. Moreover, the absence of any prejudice requirement in subsection (e)(1)(A) means that the curative measures referenced there could provide a means to evade the substantial prejudice requirement in subsection (e)(1)(B), thus creating, in effect, a no-fault, no-prejudice loophole to almost the entirety of the most meaningful change to Rule 37(e). This would represent a step backwards from the current state of the law in many jurisdictions. In our view, the reference to "curative measures" is unexceptionable if it refers to measures other than those presently associated with sanctions, but the current draft of the Note suggests that may not be the case. If the reference to curative measures is to be retained, its scope should be narrowed and defined so that it excludes the types of relief customarily associated with punitive sanctions. Otherwise, the same requirements of bad faith and substantial prejudice that apply to sanctions should also apply to this identical but differently denominated relief.

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In conclusion, GE thanks the Committee for the opportunity to submit its views and commends the effort to find ways to fine-tune the current rules governing civil discovery to produce a more just, rational, and efficient system.

Respectfully submitted,

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