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Committee on Rules of Practice and Procedure
Administrative Offices of United States Courts
Thurgood Marshall Building
One Columbus Circle, Room 7-240
Washington, DC 20544

Dear Judge Campbell and Committee Members:

In its current form, Rule 26(b) unnecessarily complicates a party's preservation duty: (1) it permits discovery of any information that appears "reasonably calculated to lead to discovery of admissible evidence;" and (2) it provides for discovery extending to "the subject matter of the action." This results in an extremely wide breadth of discovery, and therefore preservation obligations. There tend to be many repositories of information, containing thousands (or hundreds of thousands) of records, where it is impossible to summarily rule out that the repository **may** contain information the other side could argue is "reasonably calculated to lead to discovery of admissible evidence" or arguably relevant to "the subject matter of the action"— even if the information is (i) of little or no usefulness in adjudicating disputed issues; (ii) mostly duplicative; and/or (iii) cumulative.

Parties are therefore faced with equally unfavorable options: either preserve vast quantities of documents that have no utility in resolving the dispute, and will never be used by either side, or risk accusations and sanctions for potentially failing to preserve "discoverable" information. Unwilling to take such a risk, most companies over-preserve, costing them, and our economy, untold millions of dollars in preservation and discovery costs. Sadly, this also causes companies to resolve disputes not on the merits, but instead due to the sheer expense of runaway preservation and discovery costs.

The Advisory Committee's proposed language would help to clarify parties' preservation obligations, and thereby alleviate these burdens, to the extent that it would eliminate both the present Rule's "reasonably calculated" language and the potential extension of discovery to "any matter relevant to the subject matter involved…." Although the proposed language would retain the provision that information need not be admissible in evidence in order to be discoverable, it would focus discovery on information relevant to the claims or defenses at issue.

Further, the new proposed language would support companies in their preservation efforts by better incorporating the concept of proportionality. This change accomplishes an important reaffirmation of the Rules' purpose "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Practical Proportionality Considerations

Civil litigation today is dominated by discovery, and much of that discovery is of little if any value, raising costs but not advancing just outcomes. The proposed Rules are designed to restore some balance and accelerate case resolution, by focusing on claims and defenses, considering proportionality, and reducing some of the presumptive limits on discovery. For example, the amendments would effectuate a reduction in the number of interrogatories permitted from twenty-five to fifteen interrogatories. In addition, the Rules Committee has suggested a reduction in the number of depositions presumptively allowed per side from ten to five depositions and a reduction in the duration of depositions, from seven hours to six. The proposed reduction in interrogatories and depositions will motivate parties to focus their interrogatories and depositions on the most important areas of inquiry. Where appropriate, the number of depositions or deposition hours would be expanded, but starting with lower limits requires parties to give additional consideration to what they really need and how to get it

most efficiently, before incurring tens of thousands of dollars (or even hundreds of thousands of dollars) in discovery costs on potentially unnecessary or inefficient discovery.

Information Governance

Records issues, and particularly electronic records issues, have become increasingly prominent in recent case law and business practices. Companies faced with the fear of having to retain any information that appears "reasonably calculated to lead to discovery of admissible evidence" often retain everything permanently, rather than risk imposition of costly sanctions. This generates enormous storage and search burdens that negatively impact the global competitiveness of U.S. businesses, and increases costs for all businesses subject to U.S. discovery. In addition, many companies feel compelled to pay large settlements rather than defending cases that have little or no merit. Electronic discovery costs have gotten so high that companies are better off settling cases than winning them, and this motivates the filing of more meritless litigation by parties able to take advantage of this dynamic.

The proposed amendments to the sanctions Rules will also be quite beneficial. First, the current Rule 37(e) addresses only electronic information. The new proposed language would address all discoverable information, regardless of format. Second, the proposed Rule language would reduce current uncertainty by providing a more uniform standard for the imposition of sanctions, as well as allowing courts to order curative measures without the stigma of calling them "sanctions." There will always be a subjective element in deciding how far preservation and production efforts must extend. Allowing "curative measures" to replace "sanctions," where appropriate, reduces the risk of the worst outcomes where a party has not engaged in intentional misconduct and has not substantially prejudiced an opposing party. While still motivating the highest standards of behavior (even curative measures can

be extremely expensive), this standard brings necessary balance and does not needlessly tarnish the reputation of companies and counsel who are not seeking to hide or destroy relevant evidence.

In summary, the proposed Rule amendments make incremental but important changes to the Rules in a way that it will help focus discovery, reduce costs, restore some balance in asymmetrical discovery cases, and ultimately foster more just case outcomes.

Respectfully submitted,

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