Nos. 16-3185 & 16-3562

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMANDA LABRIER,

Appellee-Respondent,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Appellant-Petitioner.

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Lawyers for Civil Justice states that it has no parent corporation and has issued no stock.

/s/ *Susan E. Burnett*
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December 8, 2016

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INTEREST OF *AMICUS CURIAE* AND ALL PARTIES' CONSENT

Lawyers for Civil Justice (LCJ) is a national coalition of corporations, defense bar organizations, and law firms that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules to: (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ has a unique perspective on the rules amendments, having been directly involved in the entire process, including participating in the 2010 Duke Conference, submitting empirical evidence in support of changes to the discovery rules and other materials such as White Papers, and participating in all the hearings and Rules Advisory Committee meetings related to the adoption of the 2015 rules amendments. Examples of its contributions are listed in footnotes 2 and 3 of this brief.

No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or other person or entity—other than LCJ or its counsel—contributed money that was intended to fund preparing or submitting the brief.

All parties consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Despite their decades-long recognition that proportionality should play a central role in discovery, the drafters of the Federal Rules of Civil Procedure have struggled mostly in vain to transform it from an ivory-tower aspiration to a routinely employed element in "effective and defensible discovery plan[s] that . . . advance the goals" of securing "the just, speedy, and inexpensive determination of every action and proceeding." Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality* ("Shaffer"), 16 Sedona Conf. J. 55, 61; Fed. R. Civ. P. 1.

Given this long struggle, the amendments to the federal rules that took effect on December 1, 2015 ("the 2015 Amendments") represent more than another incremental "tweak" to the rules. They are, in the words of Chief Justice Roberts, "a major stride toward a better federal court system," and a call to arms for courts and litigants to "step up to the challenge of making real change." Hon. John Roberts, *2015 Year-End Report on the Federal Judiciary* (*Year-End Report*) at 9, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx. In particular, the elevation of proportionality to a criterion equal to relevance under Rule 26(b)(1) is meant to ***require*** litigants and courts to take this concept to heart in fashioning, and settling disputes over, discovery.

These first years after the 2015 Amendments are a critical period. The initial response by federal courts to the challenge of making "real change" is vitally

important to achieving the goals embodied in those amendments. Effecting this change in the digital age will not get any easier, either. Commentators have estimated that by 2020 there will be "as many digital bits as there are stars in the universe." EMC^2 Digital Universe with Research & Analysis by IDC, *The Digital Universe of Opportunities: Rich Data & the Increasing Value of the Internet of Things*, Exec. Summary (Apr. 2014), http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm.

The district court's orders failed to incorporate proportionality as a core, guiding principle, as they must. The court ordered State Farm to provide class member-by-class member merits discovery without considering the nature of and limits on class actions as they impact proportionality. It effectively conditioned State Farm's ability to assert affirmative defenses on its willingness to absorb the entire burden of this individualized discovery. And it failed to engage both sides in a realistic, fair, and evidence-based assessment of that burden. Among other things, the district court deemed "incredible" State Farm's inability to quickly and inexpensively produce detailed, claim-specific information for 149,000 class members, despite contrary evidence, and characterized its legitimate objections as

"obstructionist" and warranting the penalty of disproportional discovery. (*See* A3841, 3844.)[1]

This Court—the first appellate court to consider proportionality under amended Rule 26—has a unique opportunity to correct these missteps and provide future courts with a framework for implementing real reform in federal discovery practice. Allowing orders to stand that do not apply faithfully the 2015 Amendments will gut their effectiveness in short order. The Court should enforce the policies of judicial economy and fairness that lie at the heart of amended Rule 26.

ARGUMENT

I. The 2015 Amendments to Rule 26 Were Meant to Achieve Meaningful Reform—Reform that Will Fail without Judicial Implementation of this New Approach to Discovery.

Shortly after the 2015 Amendments became effective, Chief Justice Roberts highlighted their significance to the bench and bar: "Many rules amendments are modest and technical, even persnickety, but the 2015 Amendments to the Federal Rules of Civil Procedure are different." *Year-End Report*, at 5. The important changes begin with Rule 1. It now provides that the rules "should be construed, administered, ***and employed by the parties and courts*** to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1

[1] References to "A__" refer to the Joint Appendix.

(emphasis added). The highlighted addition consists of "a mere eight words, but those are words that judges and practitioners must take to heart." *Year-End Report*, at 6.

A key aspect of the 2015 Amendments are the revisions to Rule 26(b)(1) governing the scope of discovery. The amendments "crystalize[ ] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." *Id.* In reforming Rule 26, the Rules Committee sought to address decades of mounting costs and burden, and to promote a fairer and more efficient discovery process.

A. Ever-Increasing Discovery Costs Undermine the Utility and Integrity of Our Civil Justice System.

The 2015 Amendments are "a big deal," *id.* at 5, because they address a big problem. For years, stakeholders in the American civil justice system have observed spiraling discovery costs with growing alarm. A 2009 survey found that 70% of chief legal officers and general counsel believe that litigants overuse discovery. Inst. for the Advancement of the Am. Legal Syst., *Civil Litig. Survey of Chief Legal Officers & Gen. Counsel Belonging to the Assoc. of Corp. Counsel* at 27 (2010) ("IAALS Survey"), http://iaals.du.edu/images/wygwam/documents /publications/Civil_Litigation_Survey2010.pdf. According to another survey, the average number of exhibit pages used at trial in major cases totaled a mere 0.1% of the total pages produced. Lawyers for Civil Justice, et al., *Litig. Cost Survey of*

Major Companies at 16 (2010) ("Cost Survey"), www.uscourts.gov/file/document/litigation-cost-survey-major-companies.

These concerns are shared by the plaintiffs and defendants' sides alike. The American College of Trial Lawyers "widely agreed that today's civil litigation system takes too long and costs too much," a view echoed in American Bar Association (ABA) Litigation Section and National Employment Lawyers Association (NELA) surveys. Hon. David G. Campbell, *New Rules, New Opportunities* ("Campbell"), 99 Judicature 19, 20–21 (2015).

Chiefly, overbroad and wasteful discovery drives these costs. A "significant majority" in the NELA survey indicated that "discovery is abused in almost every case," and a report summarizing all three surveys notes that between 61% and 76% of respondents "agreed that judges do not enforce existing proportionality limitations." *Id.* at 21. A number of studies confirm these sentiments, suggesting "that disproportionate discovery occurs in a significant percentage of federal court cases." *Id.* at 20.

The advent of vast digital storage capacity and e-discovery has intensified disproportionate discovery. As early as 1993, the Advisory Committee observed that the "information explosion of recent decades" threatened to turn discovery requests into a potential "instrument for delay or oppression." Fed. R. Civ. P. 26(b)(1) advisory comm. notes (2015). This was only the beginning. By 2007, the

Sedona Conference warned that unless the burden of e-discovery is "proportional to the amount in controversy and the nature of the case," the "transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation." *The Sedona Principles, Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production* 17, cmt. 2.b. (2d ed. 2007).

Soaring discovery costs threaten the integrity of our legal system. Over 80% of chief legal officers at major companies believe outcomes are driven more by costs than the merits. IAALS Survey, at 20. Surveys of large companies conducted prior to the conference revealed that the "costs of discovery[] threaten to exceed the amount at issue in all but the largest cases." Cost Survey, at 2. Justice Breyer, for one, described how spending millions of dollars on electronic discovery will ultimately "drive out of the litigation system a lot of people who ought to be there." Patrick Oot, Comment from Electronic Discovery Inst., Comment on the U.S. Courts Proposed Rule: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, *available at* https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-1680 (Feb. 15, 2014).

When costs become the paramount concern, the merits take a backseat. Litigants abuse discovery precisely because they are motivated to "achieve an

outcome divorced from the ultimate merits of the case." Shaffer, at 55–56. In short, proportionality in discovery is essential to meaningful civil justice.

B. Amended Rule 26, the Culmination of Years of Work, Requires Courts to Implement a New Discovery Framework.

The 2015 Amendments are a "big deal" for another reason. They are the fruit of "five years of intense study, debate, and drafting" by representatives of "all facets of the legal community, including judges, lawyers, law professors, and the public at large." *Year-End Report*, at 4. They also reflect a broad consensus that earlier efforts to constrain discovery overuse and abuse had failed. *See* 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, 417 (2015) ("Jablonski/Dahl") (Rules Committee survey participants believed "that proportionality was still lacking in too many cases") (citing June 2014 Rules Committee Report at B-8).

The effort "to instill a more proportionate approach to discovery" began with the 1983 amendments to Rule 26. The 1983 rule directed courts "to limit the frequency or extent of use of discovery if it determined that 'the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.'" Fed. R. Civ. P. 26(b)(1) advisory comm. notes (2015) (quoting 1983 note); *see also* Shaffer, at 62. In the "ensuing 32 years,"

however, "proportionality did not figure prominently in the reported case law or the public debate," and, in Judge Shaffer's experience, an invitation to incorporate the principle in proposed scheduling orders was "typically . . . met with stony silence or intransigence from both sides." Shaffer, at 58, 66.

In the 2000 amendments, the Rules Committee added a sentence to Rule 26(b)(1) "calling attention to the limitations" on the scope of discovery added in 1983, after being "told repeatedly that courts have not implemented these limitations with the vigor that was contemplated." Rule 26(b)(1) advisory comm. notes (2000). This "nudge" also was largely greeted with indifference. *See*, *e.g.*, Campbell, at 21 ("Despite the longstanding existence of these proportionality provisions in the rules, the Duke conference concluded that judges do not apply them."). The stubborn truth is that although "the need for a proportionality approach had become even more urgent" throughout the past several decades, Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26* ("Laporte/Redgrave"), 9 Fed. Cts. L. Rev. 19, 31 (2015), "proportionality did not figure prominently in the reported case law or the public debate," Shaffer, at 58.

It was against this backdrop that the Rules Committee turned "its attention again to the concept of proportionality in 2010." Laporte/Redgrave, at 23. In May 2010, it convened the Duke Conference, which "brought together federal and state

judges, law professors, and plaintiff and defense lawyers, drawn from business, government, and public interest organizations" and "generated 40 papers and 25 data compilations[.]" *Year-End Report*, at 4. The Rules Committee then hosted two "mini-conferences" before releasing its initial proposals in August 2013, followed by three public hearings during which 120 witnesses testified, and over 2,300 written comments were submitted. *Year-End Report*, at 4; Jablonski/ Dahl, at 412.

LCJ participated actively. It submitted 14 comments between 2010 and 2014 addressing proportionality and discovery reform, as well as a White Paper and statements to congressional committees.[2] It also commissioned a litigation cost survey of major companies.[3]

After robust debate, "further scrutiny from the [Rules] Committee, the Judicial Conference and the Supreme Court," *Year-End Report*, at 5, and some substantial revisions, the proposed amendments were submitted to and approved by

[2] *E.g.*, Lawyers for Civil Justice (LCJ), Supp. Public Comment to Advisory Comm. on Civil Rules, *An Imperative to Act: The Public Comments Demonstrate the Need to Reform the Discovery Rules to Achieve a Meaningful Reduction in the Costs & Burden of Discovery* (Feb. 3, 2014); LCJ, Comment to Comm. on Rules of Practice & Procedure, *In Support of Proposed Rule 37(e) & the Duke Package of Amends.* (May 22, 2014); LCJ, et al., White Paper, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure* (May 2, 2010) (submitted to Duke Conf.).

[3] Litigation Cost Survey of Major Companies (2010), http://www.uscourts.gov /file/document/litigation-cost-survey-major-companies.

Congress. They took effect on December 1, 2015, and "mark significant change" in a number of respects. *Id.*

New Rule 26(b)(1) no longer permits discovery of inadmissible evidence simply because it "appears reasonably calculated to lead to the discovery of admissible evidence." Though never intended "swallow any other limitation on the scope of discovery," that phase had been misread by some to mean that "any inquiry 'reasonably calculated to lead' to something helpful is fair game in discovery." Rule 26(b)(1) advisory committee's note (2000); Campbell, at 22.

Most critically for the case at hand, amended Rule 26(b)(1) explicitly invokes proportionality as a "first principle" and sets it on an equal footing with relevance in defining the scope of discovery. Parties may obtain discovery if it is both relevant to a claim or defense ***and*** "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1); *see In re Bard IVC Filters Prod. Liab. Litig.*, No. MDL 15-02641-PHX_DGC, 2016 WL 4943393, at *2 (D. Ariz. Sept. 16, 2016) (Campbell, J.) ("Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case.").

The drafters' intent is plain: "to make proportionality unavoidable." Campbell, at 21. The hope is that courts and litigants will no longer treat proportionality as a neglected stepchild, but "as a guiding principle not just for discovery, but for the process as a whole." Am. Coll. of Trial Lawyers, *Reforming Our Civil Justice System: A Report on Progress & Promise* at 3 (Apr. 2015), http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf; *see also* Laporte/Redgrave, at 20 (noting that proportionality is "critically important to securing the just, speedy, and inexpensive resolution of civil disputes, consistent with" Rule 1).

But real change is rarely easy. The 2015 Amendments will avoid the fate of earlier reform efforts "only if lawyers and judges resist the tendency to employ a 'business as usual' mindset." Shaffer, at 74. In crucial respects, the district court's orders reflect that resistant mindset.

II. The District Court Failed to Treat Proportionality as a Primary, Guiding Principle, a Deficiency Exacerbated by its Subsequent Certification of a Class.

Discovery orders Nos. 4 and 8 (the Discovery Orders) by Special Master Shurin and the district court directed State Farm to provide merits discovery specific to each of 149,000 class members, including information that will identify which of them arguably suffered no injury and thus lack standing. They further

required State Farm to identify case-by-case its affirmative defenses and the facts to support them. (*See* A0614–20, A3834–46, A4490–95, A5889–5900.)

The Discovery Orders—requiring individualized review and legal analysis of tens of thousands of claims—raise a proportionality red flag on their face. Yet relying exclusively on pre-2015 cases, the district court framed the issues under the rubric of "liberal" and "broad" discovery—concepts that are no longer properly part of the Rule 26 analysis. (A3839–40.) It went on to discount State Farm's showing of burden, pointing not to contrary evidence, but its supposition about "what computers do in much higher levels in very short amounts of time." (A3841.)

These analytic missteps are emblematic of the court's overall failure to make proportionality a cornerstone of its analysis as required by amended Rule 26. Equally troubling is the court's failure to consider the nature of and limits on class actions under Rule 23. Most notably, class treatment must be able to generate common answers to common questions by common evidence. And in damages classes like this, common issues must predominate over individual ones. Courts cannot judge "the importance of the discovery in resolving the issues" for purposes of proportionality without considering these requirements. The district court did not properly consider them. To the contrary, it used disproportional and one-sided discovery to surmount the requirements of commonality and predominance.

These orders together contravened Rule 26 and Rule 23.

A. The Case Specifics—Including, Here, the Class Action Plaintiff's Burden to Muster *Common Proof*—Must Inform the Proportionality Analysis.

Declaring that the wide-scale, class member-by-class member discovery it ordered impacts issues "at the very heart of this litigation," the district court found it "difficult to imagine any fact discovery more necessary to the prosecution and defense of the case[.]" (A3845.) The premise that such individualized information was both necessary and proper shaped the court's subsequent consideration of proportionality, as well as the propriety of class certification. That premise was flawed.

Class actions do not depend on class member-by-class member proof of liability and injury. They are not a mechanism by which a court groups tens-of-thousands of claims for separate prosecution and defense. Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). "In order to justify a departure from that rule, 'a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* at 349 (citation omitted).

Given their exceptional nature—and their well-recognized "in terrorem" potential to coerce settlement of weak or meritless cases—Federal Rule of Civil

Procedure 23 confines the use of class actions within carefully drawn parameters. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299–1300 (7th Cir. 1995) (explaining that class actions force defendants to settle due to fears of exorbitant judgments on meritless claims).

Most critically here, a class representative seeking monetary damages on a class-wide basis must demonstrate both commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) (among other criteria). The former means that class claims "depend upon" a common contention sufficiently important "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. The latter means that common issues "predominate over any questions affecting only individual members." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). At "the core" of these requirements is "whether the defendant's liability to all plaintiffs may be established with common evidence." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010).

In sum, a class representative is just that—a litigant who ***represents*** unnamed class members. *See* Fed. R. Civ. P. 23(a)(4). To achieve certification, she must show that the evidence necessary to resolve her claim will in large measure resolve theirs. *See Comcast*, 133 S. Ct. at 1432. After certification, she must use

this common proof on their behalf to generate common answers to the common questions that must underlie all class members' claims. *Dukes*, 564 U.S. at 350.

It follows that a class is not certifiable if central, outcome-determinative issues—for example, the existence of a legally cognizable injury conferring standing—require class member-specific inquiries and evidence. By the same token, a court may not properly use disproportionate discovery to generate evidence to answer class member-by-class member inquiries that a representative action by its very nature must avoid. The district court's rulings on discovery and class certification violate these principles.

First, Rule 26(b)(1) expressly instructs courts to evaluate proportionality in light of the "importance of the discovery in resolving the issues." Here, that means the court must consider this element in light of the plaintiff's burden to prove "the defendant's liability to all plaintiffs . . . ***with common evidence***." *Avritt*, 615 F.3d at 1029 (emphasis added).

The Discovery Orders fail to acknowledge this core precept. They do not explain why case-specific evidence about 149,000 class members supposedly is necessary given the plaintiff's burden to muster common proof. Nor do they analyze how class member-specific information gleaned from this discovery will facilitate a trial of the plaintiff's claim on a representative basis. The failure to tie

the requested discovery to the key issues in a case fatally undermines the district court's assessment of proportionality under Rule 26(b)(1).

Second, while the district court found it "difficult to imagine any fact discovery more necessary" than individual information about tens of thousands of absent class members (A3845), that conclusion itself demonstrates why this class does not satisfy Rule 23.

Most glaringly, certifying a Rule 23(b)(3) class while simultaneously acknowledging the necessity of individualized evidence fueling individualized inquiries is fundamentally incompatible with the requirement of predominance. Predominance is an exacting standard and procedural safeguard on the "'adventuresome innovation'" of Rule 23(a)(3) to limit class certification in situations where it "is not as clearly called for." *Comcast*, 133 S. Ct. at 1432 (citation omitted). It is the plaintiff's burden to "affirmatively demonstrate" compliance with this and the other Rule 23 requirements. *Dukes*, 564 U.S. at 350. Rather than hold the plaintiff to her burden, however, the district court effectively circumvented the requirement by authorizing individualized adjudication using evidence generated solely at State Farm's expense.

The district court's failure to properly apply Rule 23 and amended Rule 26(b)(1) are two sides of the same coin. A class action in which individualized proof is "necessary to the prosecution and defense of the case"—as the district

court here explicitly found—cannot be one in which common issues predominate. And an order mandating that the defendant generate this evidence at its sole expense by answering burdensome, class member-by-class member discovery is not proportional.

B. Making Costly, Individualized, and One-Sided Discovery the Price of Asserting Defenses is Disproportional and Raises Due Process Concerns.

In *Dukes*, the Supreme Court held that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 564 U.S. at 367. To do so would violate the Rules Enabling Act, which forbids interpreting Rule 23 or other procedural rules so as to "abridge, enlarge or modify any substantive right." *Id.* (quoting 28 U.S.C. § 2072(b)). Curtailing a defendant's opportunity to present its defenses adequately may also violate its due process rights. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996) (district court orders restricting the defendant from adequately investigating class-action plaintiffs violated due process).

For these reasons, courts consider the existence of affirmative defenses highly relevant to issues of predominance, commonality, and other considerations in judging the propriety of class certification. *See, e.g., Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132, 134 (2d Cir. 2013) (stating that the defendant's affirmative defenses "will necessarily inform and perhaps moot our analysis of

many class certification issues"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438 (4th Cir. 2003) (when affirmative defense depends on "facts peculiar to each plaintiff's case, class certification is erroneous").

Rather than grapple with the impact of State Farm's affirmative defenses on the propriety of class certification, the district court skirted the issue through onerous and one-sided discovery. It did not require the plaintiff to prove a class could properly be certified in light of individualized issues implicated by likely affirmative defenses. Instead, it directed State Farm to identify its individual affirmative defenses, and state the facts supporting each defense on a class member-by-class member basis, for every one of the 149,000 claims. (A3840, A3842–43.)

The district court was fully cognizant of the potential impact this considerable burden and cost would have on State Farm's willingness to vigorously defend itself, as is its right. *See Dukes*, 564 U.S. at 367. In fact, the court found that impact salutary: "[P]lacing the burden on State Farm to provide information in support of its affirmative defenses ensures State Farm will be judicious in identifying those affirmative defenses that are sufficiently viable to justify the cost of discovery." (A3842–43.) It is not clear how the court envisioned State Farm would calculate which defenses cost too much to assert. What is clear is the court's intent to use the considerable cost and burden of class member-by-class

member factual and legal analysis of defenses to discourage State Farm from fully availing itself of those defenses.

Restricting a defendant's ability to assert valid affirmative defenses to facilitate class treatment runs afoul of *Dukes*, the Rules Enabling Act, and due process. 564 U.S. at 367; *In re Am. Med. Sys., Inc.*, 75 F.3d at 1086. It turns the concept of proportionality on its head by condoning—even applauding—the cost-based pressure to settle regardless of the merits that the 2015 Amendments are meant to redress. And it is the antithesis of using the federal procedural rules to secure "the just, speedy, and inexpensive resolution of civil disputes, consistent with the edict of Federal Rule of Civil Procedure 1." Laporte/Redgrave, at 20.

C. Courts Must Engage Both Sides in a Realistic and Evidence-Based Assessment of Proportionality—Not Presume the Resisting Party is Misrepresenting its Technological Capabilities and Trying to Obstruct Legitimate Discovery.

The rapid expansion of data-storage capacity to previously unimaginable levels poses threats to the fair and efficient resolution of discovery disputes in more ways than one. As already discussed, it threatens to turn the notions of "broad" and "liberal" discovery—notions entrenched in pre-2015 federal jurisprudence and the hearts of many judges—into potential weapons for abuse.

These advances may also engender the mistaken belief that technology now makes all information readily accessible. Courts may misperceive that large companies can—or should be able to—retrieve, sort, and produce large quantities

of information "at the push of a button." *See* The Sedona Conference, *The Sedona Conference® Database Principles* ("Sedona Database Principles") at 15 & n.20 (2011), https://thesedona conference.org/download-pub/426 (citing pre-2015 cases finding that even unusually high costs of production due to the responding party's business record storage policies should ordinarily be imposed solely on that party).

The district court did just that here:

> [The court] finds incredible the suggestion that there is no cost-effective way to match up information in one database with the information in another. Even if this data sorting would need to be done for each claim, data sorting is what computers do in much higher levels in very short amounts of time.

(A3841.)

This hypothesis—that State Farm was or should be able to easily deliver voluminous claim-specific information in the form demanded by the plaintiff—injected error into the district court's analysis of burden, and hence of proportionality. Further, the court's treatment of this issue highlights its failure to engage both State Farm and the plaintiff in a dialogue to accomplish their collective responsibility to ensure the fair resolution of discovery disputes.

First, the district court's skepticism, which was grounded on assumptions about "what computers do," kept it from determining "burden and expense . . . in a realistic way." Fed. R. Civ. P. 26(b)(1) advisory comm. notes (2015). A realistic determination of the accessibility of database information should be based on

"empirical data," rather than "deduction and inference" about "what should be there." *See* Sedona Database Principles, at 27. The district court surmised, without citing evidence, that what the plaintiff wanted was just something State Farm should be able to easily provide.

Consequently, the court apparently concluded that State Farm must be misrepresenting its technical capabilities and thus the extent of the burden. For instance, the district court dismissed as "highly implausible" State Farm's objection that in-person viewing of some class members' properties might be necessary. (A3843.) This putative implausibility justified "shifting the cost to State Farm[.]" (*Id.*). Because this reasoning is based on deduction and inference rather than evidence, however, it is inconsistent with the Rule 26 directive to assess burden realistically.

Second, and as illustrated by the preceding example, the district court relied on its assumptions to use disproportional discovery as a penalty. The plaintiff did not argue, nor did the district court find, that State Farm's organization and storage of its claims information violated any law or was deliberately structured to thwart discovery in future litigation. Nevertheless, the court determined that if State Farm's database systems were incapable of providing the sought-after information cost effectively, then the entire burden of retrieving that information should fall on State Farm as a penalty. (*E.g.*, A3837 ("To the extent State Farm's computerized

data was not readily accessible, it is because of State Farm's purported inability to access the data, notwithstanding that State Farm itself uses the same categories of information pertinent to the calculation of amounts owed to its insureds."); *id.* (adopting special master's finding that "[a]t the very least [State Farm's] failure to keep such records should not constitute justification to withhold relevant discovery from [LaBrier].").

Punishing a party for setting up its database systems to suit business needs simply because those systems do not permit the extraction of information sought in litigation violates the commonsense principle that "a requesting party finds a producing party and its IT systems as they are and not as they wish them to be." Sedona Database Principles, at 15. If a court could properly penalize a party according to the court's belief about what information "should be" readily accessible, then the Rule 26 proportionality mandate would largely be an empty promise.

Amended Rule 26 does not direct companies to implement any particular sort of storage system. And it in no way suggests that courts may use disproportionately burdensome discovery to penalize parties whose lawful record-keeping practices are not capable of inexpensively delivering massive quantities of data sorted to fit its opponent's legal theories. To the contrary, "absent evidence that a party has purposefully designed its data systems to thwart

discovery," arguments that "parties may not 'hide' behind" the limits of their data management systems are "inconsistent with Fed. R. Civ. P. 26(b)(2)(C)(iii)." Sedona Database Principles, at 14.

Finally, the district court's dismissal of State Farm's representations and evidence of burden as "incredible" reflects a more general failure to engage with both sides to address proportionality and require them "to work cooperatively in controlling the expense and time demands of litigation" under amended Rule 1. *Year-End Report*, at 6.

To be sure, amended Rule 26 does not place on a requesting party the burden to address all proportionality considerations. *See* Fed. R. Civ. P. 26(b)(1) advisory comm. notes (2015). But neither does it contemplate that the requesting party may demand any broadly relevant information, and then simply expect the responding party to find a way to provide it. Rather, amended Rule 26 reflects the view that the "parties and the court ***have a collective responsibility*** to consider the proportionality of all discovery and consider it in resolving discovery disputes." *Id* (emphasis added). "The intent is to prompt a dialogue among the parties and, if necessary, the judge concerning the amount of discovery reasonably needed to resolve the case." Campbell, at 21.

The plaintiff and the district court in large measure bypassed the critically important concepts of cooperation and collective responsibility. The plaintiff's

lone contribution to the "dialogue" apparently consisted of asserting and insisting on the relevance of claim-specific facts and legal theories to the merits of each class member's claim. What she failed to articulate is how individualized evidence of liability and defenses would aid resolution of the merits given the representative nature of class actions and her burden to proffer ***class-wide*** proof of key issues.

Nor does it appear that the district court challenged the plaintiff to articulate how the class member-specific information she sought squared either with her pre-certification burden to prove commonality and predominance, or her post-certification burden to represent the class by adjudicating common issues with common proof. As already discussed, the court, too, failed to factor in the necessity of common proof to the proportionality calculus. Instead, noting that "State Farm does not dispute that the discovery sought is relevant" (A3840), it took as a given the plaintiff's entitlement to all that she asked, and labeled State Farm "intransigent" and "obstructionist" for not finding a way to produce it. (A3844.)

For instance, before propounding the disproportional interrogatories at issue, the plaintiff sought unfettered access to State Farm's proprietary databases. State Farm objected to this aggressively disproportional request, and rightly so. *See* Sedona Database Principles, at iii. ("Absent a specific showing of need, a requesting party is entitled only to database fields that contain relevant information . . . and not to the entire database in which the information resides . . . ."). The

district court, however, effectively found that State Farm's objection to this first disproportional discovery request legitimized the plaintiff's second disproportional discovery request and justified whatever expense was necessary for State Farm to answer it. (*See* A3844 ("A litigant cannot keep its own system secret and then refuse to gather the information itself.").)

This reasoning rewards rather than discourages disproportional discovery. Continuing to object to the serial failure by one's opponent to craft proportional discovery requests is not intransigence deserving of punishment. The Federal Rules of Civil Procedure do not permit courts to put the objecting party to the Hobson's choice of picking which disproportional request to answer, or choosing between giving up proprietary information to a litigation opponent and shouldering the entire burden of unreasonable discovery costs.

In like manner, the district court dismissed State Farm's pre-certification proffer of a sample of claim-specific information pertaining to 398 absent class members. As State Farm showed, this sort of information can be highly relevant to whether common proof is available and thus whether a class may properly be certified. (*See* Dkt. No. 136 at 8–9 & n.12.) But the district court faulted State Farm's attempted compromise as unresponsive, since "phased, sampled, or delayed [discovery is something] which the Court has never permitted in the year since

State Farm removed this case from state court." (A3844.) The district court order certifying a class, moreover, does not reflect consideration of this information.

In all of these respects, the district court's approach to the parties' discovery dispute marginalized proportionality, failed to engage both sides in a meaningful dialogue, and overlooked Rule 1's admonition to parties and courts to employ the Federal Rules of Civil Procedure to achieve a "just, speedy, and inexpensive" resolution.

CONCLUSION

The Discovery Orders reflect the "business as usual" attitude that will doom the significant reforms embodied in the 2015 Amendments if not corrected. Coupled with the class certification order, they also undermine the due process-preserving limits of Rule 23 by using disproportional, class member-by-class member discovery as a substitute for common proof. The Court should grant State Farm's petition for writ of mandamus and reverse the Discovery Orders and class certification order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,002 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportional typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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December 8, 2016

CERTIFICATE OF SERVICE

I certify that on December 8, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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December 8, 2016