

**Revised Guidelines and Practices for Implementing the 2015 Discovery
Amendments to Achieve Proportionality
Duke Law Center for Judicial Studies**

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(Annotated Version)^a

I. GUIDELINES

The *Guidelines* for applying the 2015 “proportionality” amendments to the Federal Rules of Civil Procedure discuss what the amendments mean, what they did and did not change, and ways to understand their impact and meaning. The *Guidelines* add some flesh to the bones of the Rule text and Committee Notes and explore how the proportionality amendments intersect with other Rule provisions.^b

Guideline 1: Rule 26(b)(1) defines the scope of discovery as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”¹ Proposed discovery must be both relevant² and proportional to be within the scope that Rule 26(b)(1) permits.³ Information that is within the scope of discovery is discoverable even if it would not be admissible in evidence. The Rule 26(b)(1) amendments do not alter the parties’^c discovery obligations or create new burdens.⁴

Commentary

Discovery that seeks relevant and nonprivileged information is within the permitted scope of discovery⁵ only if it is proportional to the needs of the case.⁶

The 2015 amendments continue to express the longstanding principle that information does not itself have to be admissible in evidence in order to be discoverable. This is because the gathering of that information can itself be very valuable in obtaining admissible evidence. For example, it remains a staple of deposition practice to ask witnesses to testify to what they have heard other persons say, without regard to

^a Annotations prepared by Leah Brenner Duke Law School Class of 2018 and Glenn Chappell Duke Law School Class of 2017, under oversight of Thomas B. Metzloff, Professor of Law, Duke Law School. Annotations updated monthly. Additions and changes since last month’s annotations noted in color print.

^b The *Guidelines and Practices* are, of course, not part of the rules and have no binding effect. They are a resource for judges, lawyers, and litigants who must understand the amendments and their impact to use and comply with the rules governing discovery.

^c The *Guidelines and Practices* use the word “parties” to cover lawyers and represented litigants, although many of the practices apply usefully to cases involving unrepresented litigants as well.

whether the statements would be inadmissible as hearsay, because the questioner can use that information to identify and examine the person whose alleged statement was repeated.

The phrase “reasonably calculated to lead to the discovery of admissible evidence” is deleted because it was often misapplied, despite earlier revisions to clarify its meaning.⁷ Some lawyers and judges misunderstood the phrase to expand the scope of discovery to include irrelevant information if it was “reasonably calculated to lead to the discovery of” relevant information. That was and is wrong; discovery was and is limited to relevant information, revised in 2015 to add proportionality to what defines the scope of permissible discovery. The new phrasing deletes the “reasonably calculated” phrase and replaces it with a statement clearly rejecting admissibility as a limit on discoverability but just as clearly limiting the scope of discovery to relevant and proportional information.

Lawyers and judges must be careful when quoting older cases defining or describing the scope of discovery because some of the passages from those cases may have been construing rule text that has been superseded. For example, the Supreme Court stated in 1978 that the scope of discovery “has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). At the time of that case, however, the text of Rule 26(b)(1) linked the scope of discovery to “the subject matter involved,” and the Court specifically stated that it was interpreting that “key phrase.” Since then, the 2000 amendments altered the scope to permit subject-matter discovery only upon a showing of good cause and the 2015 amendments eliminated subject-matter discovery completely. *Oppenheimer* was decided before the concept of proportionality was added to Rule 26, first in the 1983 amendments adding limits to permissible discovery and explicitly in the 2015 amendments limiting the scope of permissible discovery to both relevant and proportional information.

The statement in *Oppenheimer* that describes the breadth of the relevance inquiry remains intact. In the discovery context, relevance is “construed broadly to encompass any matter that bears on” the matter in question. *Oppenheimer*, 437 U.S. at 351. The difference today is that the relevance inquiry is linked only to claims and defenses—not subject matter—and is joined by proportionality in defining scope.

The rule text no longer specifically states that discovery into the sources of information—discovery into the existence, description, or nature of documents, or the identity of witnesses—is part of the scope of discovery. The Committee Note explains

that the language was deleted solely out of a belief that “[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples.” Information about the existence and location of sources of information is relevant because it “bears on” the claims and defenses, and is therefore within the scope of discovery so long as it is proportional to the needs of the case.

Committee Note, Rule 26 (Dec. 1, 2015)

“Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.”

“The former provision for discovery of relevant but inadmissible information that appears ‘reasonably calculated to lead to the discovery of admissible evidence’ is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the ‘reasonably calculated’ phrase to define the scope of discovery ‘might swallow any other limitation on the scope of discovery.’ The 2000 amendments sought to prevent such misuse by adding the word ‘Relevant’ at the beginning of the sentence, making clear that ‘relevant’ means within the scope of discovery as defined in this subdivision’ The ‘reasonably calculated’ phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that ‘Information within this scope of discovery need not be admissible in evidence to be discoverable.’ Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.”

Guideline 2: Rule 26(b)(1) identifies six factors for the parties and the judge to consider in determining whether proposed discovery is “proportional to the needs of the case.”⁸ As discussed further in *Guideline 3*, the degree to which any factor applies and the way it applies depend on the facts and circumstances of each case.

Committee Note, Rule 26 (Dec. 1, 2015)

“The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of

the parties to consider these factors in making discovery requests, responses, or objections.”

Guideline 2(A): “*Importance of Issues at Stake*”—This factor focuses on measuring the importance of the issues at stake in the particular case.⁹ This factor recognizes that many cases raise issues that are important for reasons beyond any money the parties may stand to gain or lose in a particular case.¹⁰

Commentary

An action seeking to enforce constitutional, statutory, or common-law rights, including a case filed under a statute using attorney fee-shifting provisions to encourage enforcement, can serve public and private interests that have an importance beyond any damages sought or other monetary amounts the case may involve.¹¹

Committee Note, Rule 26 (Dec. 1, 2015)

“The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.”

Guideline 2(B): “*Amount in Controversy*”—This factor examines what the parties stand to gain or lose financially in a particular case as part of deciding what discovery burdens and expenses are reasonable for that case.¹² The amount in controversy is usually the amount the plaintiff claims or could claim in good faith.

Commentary

If a specific amount in controversy is alleged in the pleadings and challenged, or no specific amount is alleged and the pleading is limited to asserting that the amount exceeds the jurisdictional minimum, the issue is how much the plaintiff could recover based on the claims asserted and allegations made. When an injunction or declaratory

judgment is sought, the amount in controversy includes the pecuniary value of that relief. The amount in controversy calculation can change as the case progresses, the claims and defenses evolve, and the parties and judge learn more about the damages or the value of the equitable relief.

Committee Note, Rule 26 (Dec. 1, 2015)

“It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors.”

Guideline 2(C): “*Relative Access to Information*”---This factor addresses the extent to which each party has access to relevant information in the case.¹³ The issues to be examined include the extent to which a party needs formal discovery because relevant information is not otherwise available to that party.

Commentary

In a case involving “information asymmetry” or inequality, in which one party has or controls significantly more of the relevant information than other parties, the parties with less information or access to it depend on discovery to obtain relevant information. Parties who have more information or who control the access to it are often asked to produce significantly more information than they seek or are able to obtain from a party with less.

The fact that a party has little discoverable information to provide others does not create a cap on the amount of discovery it can obtain. A party’s ability to take discovery is not limited by the amount of relevant information it possesses or controls, by the amount of information other parties seek from it, or by the amount of information it must provide in return. Discovery costs and burdens may be heavier for the party that has or can easily get the bulk of the essential proof in a case.¹⁴

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information, but without the unfairness that can result if the asymmetries are leveraged by any party for tactical advantage. Unfairness can occur when a party with significantly less information imposes unreasonable demands on the party who has voluminous information. Unfairness can also occur when a party with significantly more information takes unreasonably restrictive or dilatory positions in response to the other party’s requests.

Committee Note, Rule 26 (Dec. 1, 2015)

“The direction to consider the parties’ relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called “information asymmetry.” One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.”

Guideline 2(D): “Parties’ Resources”—This factor examines what resources are available to the parties for gathering, reviewing, and producing information and for requesting, receiving, and reviewing information in discovery. “Resources” means more than a party’s financial resources. It includes the technological, administrative, and human resources needed to perform the discovery tasks.¹⁵

Commentary

In general, more can be expected of parties with greater resources and less of parties with scant resources, but the impact of the parties’ reasonably available resources on the extent or timing of discovery must be specifically determined for each case.

As with all of the factors, this factor is only one consideration. Even if one party has significantly greater resources, this factor does not require that party to provide all or most of the discovery proposed simply because the party is able to do so. Nor does this factor mean that parties with limited resources can refuse to provide relevant information simply because doing so would be difficult for financial or other reasons.¹⁶ A party’s ability to take discovery is not limited by the resources it has available to provide discovery in return.

The basic point is what resources a party reasonably has available for discovery, when it is needed. Evaluating the resources a party can reasonably be expected to expend on discovery may require considering that party’s competing demands for those resources.

Committee Note, Rule 26 (Dec. 1, 2015)

“So too, consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

Guideline 2(E): “Importance of Discovery”—This factor examines the importance of the discovery to resolving the issues in the case.¹⁷

Commentary

One aspect of this factor is to identify what issues or topics are the subject of the proposed discovery and how important those issues and topics are to resolving the overall case.¹⁸ Discovery relating to a central issue is more important than discovery relating to a peripheral issue.¹⁹

Another aspect is the role of the proposed discovery in resolving the issue to which the discovery is directed. Discovery that is essential to resolving that issue is more important than discovery that is cumulative or only tangentially related to that issue.²⁰

Understanding the importance of proposed discovery may involve assessing what the requesting party is realistically able to predict about what added information the proposed discovery will yield and how beneficial it will be.

Guideline 2(F): “Whether the Burden or Expense Outweighs Its Likely Benefit”—This factor identifies and weighs the burden or expense of the discovery in relation to its likely benefit.²¹ There is no fixed burden-to-benefit ratio that defines what is or is not proportional.

Commentary

The “importance of discovery factor” discussed in *Guideline 2(E)* addresses the likely benefits of proposed discovery based on its importance to resolving issues and the importance of those issues to resolving the case.

In general, proposed discovery that is likely to return important information on issues that must be resolved will justify expending more resources than proposed discovery seeking information that is unlikely to exist, that may be hard to find or retrieve, or that is on issues that may be of secondary importance to the case, that may be deferred until other threshold or more significant issues are resolved, or that may not need to be resolved at all.

If the information sought is important to resolving an issue, discovery to obtain that information can be expected to yield a greater benefit and justifies a heavier burden, especially if the issue is important to resolving the case or materially advances resolution. If the information sought is of marginal or speculative usefulness in resolving the issue, the burden is harder to justify, especially if the issue is not central to resolving the case or is unlikely to materially advance case resolution.²²

This factor focuses on the benefits of the information to be obtained and the burdens or expenses of obtaining that information. It is to be considered along with the other factors, which separately address and take into account the importance of the issues at stake and any resulting benefit to society associated with litigation of those issues.²³

Guideline 6 separately addresses which party bears the burden of providing specific information about the burdens, expense, or benefits of proposed discovery when proportionality disputes arise.

Rule 26(b)(2)(B) addresses a specific type of burden argument—that discovery should not proceed with respect to a particular source of electronically stored information because accessing information from that source is unduly burdensome or costly. Examples might include information stored using outdated or “legacy” technology or information stored for disaster recovery rather than archival purposes that would not be searchable or even usable without significant effort. Rule 26(b)(2)(B) has specific provisions for discovery from such sources. Those provisions do not apply to discovery from accessible sources, even if that discovery imposes significant burden or cost.²⁴

Committee Note, Rule 26 (Dec. 1, 2015)

“The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties

should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them.²⁵ The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery."

Guideline 3: Applying the six proportionality factors depends on the informed judgment of the parties and the judge analyzing the facts and circumstances of each case. The weight or importance of any factor varies depending on the facts and circumstances of each case.

Commentary

The significance of any factor depends on the case. The parties and the judge must consider each factor to determine the degree to which and the way the factor applies in that case.²⁶ The factors that apply and their weight or importance can vary at different times in the same case, changing as the case proceeds.

No proportionality factor has a prescribed or preset weight or significance. No one factor is intrinsically more important or entitled to greater weight than any other.²⁷

The order in which the proportionality factors appear in Rule 26(b)(1) does not signify preset importance or weight in a particular case. The 2015 amendments reordered some of the factors to defeat any argument that the amount in controversy was the most important factor because it was listed first.

Guideline 4: The 2015 rule amendments do not require a party seeking discovery to show in advance that the proposed discovery is proportional.

Commentary

The 2015 amendments do not alter the parties' existing discovery obligations. The obligations unchanged by the amendments include obligations under:

Rule 26(g), requiring parties to consider discovery burdens and benefits before requesting discovery or responding or objecting to discovery requests and to certify that their discovery requests, responses, and objections meet the rule requirements;

Rule 34, requiring parties to conduct a reasonable inquiry in responding to a discovery request; and

Rule 26(c), Rule 26(f), Rule 26(g), and Rule 37(a), among others, requiring parties to communicate with each other about discovery planning, issues, and disputes. The need for communication is particularly acute when questions concerning burden and benefit arise because one side often has information that the other side may not know or appreciate.

The 2015 amendments do not require the requesting party to make an advance showing of proportionality.²⁸ Unless specific questions about proportionality are raised by a party or the judge, there is no need for the requesting party to make a showing of or about proportionality. The amendments do not authorize a party to object to discovery solely on the ground that the requesting party has not made an advance showing of proportionality. As discussed in *Guideline 5*, the amendments do not authorize boilerplate, generalized objections to discovery on the ground that it is not proportional.

The amendments do not alter the existing principles or framework for determining which party must bear the costs of responding to discovery requests.

Committee Note, Rule 26 (Dec. 1, 2015)

“Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.”

“Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court

have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”

Guideline 5: The 2015 rule amendments do not authorize boilerplate, blanket, or conclusory objections or refusals to provide discovery on the ground that it is not proportional.

Commentary

The addition of proportionality to the Rule 26(b)(1) definition of the scope of discovery does not authorize a party to assert boilerplate, blanket, or conclusory objections to discovery or refusals to provide discovery.²⁹ To the contrary, Rule 34 is amended to require parties to state with specificity the grounds for objections or for refusals to produce documents or electronically stored information. Boilerplate objections or refusals to respond to discovery requests risk violating Rule 26(g). Objections that state with specificity why the proposed discovery is not proportional to the needs of the case are permissible.³⁰

Committee Note, Rule 34 (Dec. 1, 2015)

“Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad.³¹ Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.”

Guideline 6: When proportionality disputes arise, the party in the best position to provide information about the burdens, expense, or benefits of the proposed discovery ordinarily will bear the

responsibility for doing so. Which party that is depends on the circumstances.³² In general, the party from whom proposed discovery is sought ordinarily is in a better position to specify and support the burdens and expense of responding, while the party seeking proposed discovery ordinarily is in a better position to specify the likely benefits by explaining why it is seeking and needs the discovery.³³

Commentary

If a party objects that it would take too many hours, consume unreasonable amounts of other resources, or impose other burdens to respond to the proposed discovery,³⁴ the party should specify what it is about the search, retrieval, review, or production process that requires the work or time or that imposes other burdens.³⁵

If a party objects to the expense of responding to proposed discovery, the party should be prepared to support the objection with an informed estimate of what the expenses would be and how they were determined, specifying what it is about the source, search, retrieval, review, or production process that requires the expenses estimated.³⁶

If a party requests discovery and it is objected to as overly burdensome or expensive, the requesting party should be prepared to specify why it requested the information and why it expects the proposed discovery to yield that information.³⁷ Assessing whether the requesting party has adequately specified the likely benefits of the proposed discovery may involve assessing the information the requesting party already has, whether through its own knowledge, through publicly available sources, or through discovery already taken.³⁸

A party with inferior access to discoverable information relevant to the claims or defenses may also have inferior access to the information needed to evaluate the benefit, cost, and burden of the discovery sought.³⁹ Assessing the benefits of proposed discovery may also involve assessing how well the requesting party is able to predict what added information the proposed discovery will yield and how beneficial it will be.

Party cooperation is particularly important in understanding the burdens or benefits of proposed discovery and in resolving disputes.⁴⁰ The parties should be prepared to discuss with the judge whether and how they communicated with each other about those burdens or benefits. The parties should also be prepared to suggest ways to modify the requests or the responses, when appropriate, to reduce the burdens and

expense or to increase the likelihood that the proposed discovery will be beneficial to the case.⁴¹

Committee Note, Rule 1 (Dec. 1, 2015)

“Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage overuse, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.”

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| <p><i>Guideline 7:</i> If a party asserts that proposed discovery is not proportional because it will impose an undue burden, and the opposing party responds that the proposed discovery will provide important benefits, the judge should assess the competing claims under an objective reasonableness standard.⁴²</p> |
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Commentary

In deciding whether a discovery request is proportional to the needs of the case, only reasonable (or the reasonable parts of) expenses or burdens should be considered. Changes in technology can affect the context for applying the objective reasonableness standard. It is appropriate to consider claims of undue burden or expense in light of the benefits and costs of the technology that is reasonably available to the parties.⁴³

It is generally not appropriate for the judge to order a party to purchase or use a specific technology, or use a specific method, to respond to or to conduct discovery. In assessing discovery expenses and burdens and the time needed for discovery, however, it may be appropriate for the judge to consider whether a party has been unreasonable in choosing the technology or method it is using.⁴⁴

II. PRACTICES

The following practices suggest useful ways to achieve proportional discovery in specific cases. There is no one-size-fits-all approach. While practices that would advance proportional discovery in one case might hinder it in others, the suggestions may be helpful in many cases and worth considering in most. The suggestions are framed in terms of parties' as well as judges' case-management practices and are intended to provide help in carrying out the shared responsibility for discovery proportional to the needs of the case.

Practice 1: The parties should engage in early, ongoing, and meaningful discovery planning.⁴⁵ The parties should begin to work internally and with opposing parties on relevance and proportionality in discovery requests and responses from the outset, which can be well before a case is filed or served and before the Rule 26(f) meet-and-confer, the Rule 26(f) report, and the Rule 16 conference with the judge. The judge should make it clear from the outset that the parties are expected to plan for and work toward proportional discovery.⁴⁶

Commentary

The parties and judge share responsibility for ensuring that discovery is proportional to the needs of the case.⁴⁷

The parties are usually in the best position to know which subjects and sources will most clearly and easily yield the most promising discovery benefits. In many cases, the parties use their knowledge of the case to set discovery plans that achieve proportionality.⁴⁸ When that does not occur, or when discovery disputes nonetheless arise, judges play a critical role by taking appropriate steps to ensure that discovery is proportional to the needs of the case.⁴⁹

Parties and judges have a variety of practices to work toward proportionality. They include: (1) practices for the parties to identify and work together beginning early in the case to create and implement a discovery and case-management order that works toward proportional discovery; (2) orders that judges issue early in the case communicating the judge's expectations about how the parties will conduct discovery; (3) ways for parties to identify discovery disputes promptly, attempt to resolve them, and if unsuccessful to bring them to the judge for timely, efficient, and fair resolution;

(4) orders that judges issue early in the case setting procedures for the parties to promptly bring discovery disputes and related matters that they cannot resolve to the judge; (5) procedures for the parties to engage the judge promptly and efficiently when discovery and related pretrial disputes make it necessary; and (6) orders that judges issue communicating the willingness to be available when necessary.⁵⁰

The practices that follow provide examples of specific approaches that judges and parties across the country have used to work toward proportionality in discovery, including timely and efficiently resolving discovery disputes.⁵¹

While the judge has the ultimate responsibility for determining the boundaries of proportional discovery, the process of achieving proportional discovery is most effective and efficient, and the likelihood of achieving it is greatest, when the parties and the judge work together.

Committee Note, Rule 26 (Dec. 1, 2015)

“Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.”

“Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).”

Practice 2: As soon as possible and both before and in the Rule 26(f) meet-and-confer, the parties should talk in person or at least by telephone to discuss what the case is about and what information will be needed and to plan for proportional discovery.⁵² The parties' discussions should result in a proposed discovery/case-management plan with enough detail and specificity to demonstrate to the judge that the parties are working toward proportional discovery. The judge should consider issuing an order early in the case that clearly communicates what the judge expects the parties to discuss, to address in their Rule 26(f) report, and to be prepared to discuss at a Rule 16 conference with the judge.

Commentary

Early discussions between the parties, in person or by telephone, provide the best opportunity to meaningfully discuss what the discovery will be, where it should begin, and how it might relate to the overall case plan. Email or written exchanges alone are much less effective at facilitating detailed discovery planning or establishing a framework for identifying and resolving discovery and other pretrial disputes.

The parties' discussions, including in the Rule 26(f) meet-and-confer, and report should cover more than dates for pleading amendments, expert designations, discovery deadlines, motions, and trial, and should go beyond the Rule 26(f) required topics of preservation, protection against privilege waiver, and form of production. The discussions should result in a proposed discovery/case management plan detailed and specific enough to demonstrate to the judge that the parties are working toward proportional discovery.

The judge should make clear—by order or other manner the judge chooses—that the parties are expected to have a meaningful discussion and exchange of information during the Rule 26(f) meet-and-confer and what the parties are expected to cover. The judge should also make clear that the Rule 26(f) report will be reviewed and addressed at the Rule 16 conference. Judges following this practice often issue a form order that is routinely sent shortly after the case is filed, along with the order sent to set the dates to file the Rule 26(f) report or to hold the Rule 16 conference.

In a case in which the judge has a basis to expect that discovery will be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge might consider scheduling a conference call with the parties before they hold

their Rule 26(f) meet-and-confer and draft their joint discovery/case-management plan.

Some districts address these practices in their local guidelines or rules.

Committee Note, Rule 16 (Dec. 1, 2015)

“At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.”

Practice 3: On the judge’s own initiative or on the parties’ request, the judge should consider holding “live” Rule 16(b) case-management and other conferences, in person if practical or by a conference call, videoconference, or other means of having a real-time conversation if distance or other obstacles make in-person attendance too costly or difficult.

Commentary

A “live” interactive conference, in person if possible or if not by telephone, videoconference, or other means for having a real-time, interactive conversation, even among multiple parties, provides the judge and the parties the best opportunity to meaningfully discuss what the discovery will be, where it should focus and why, and how the planned discovery relates to the overall case plan. The parties and the judge should take advantage of technology to facilitate live interactive case-management and other conferences and hearings when in-person attendance is impractical.

A live interactive conference allows the judge to ask follow-up questions and probe the responses to obtain better information about the benefits and burdens likely to result from the proposed subjects and sources of discovery. A live interactive

conference also provides the judge an opportunity to explore related matters, such as whether an expected summary judgment motion might influence the timing, sequence, or scope of planned discovery.

A live interactive case-management conference allows the judge to identify early the relatively few cases that require more extensive case management. The conference provides the court the most effective way to monitor all cases with little judge or law clerk time required to determine whether the parties are planning proportional discovery, and to limit more extensive case management to the cases that need it.

In some cases, more than one live case-management conference might be appropriate. In a case in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge and parties should consider whether to schedule periodic live conferences or hearings, which can be canceled if not needed.

In cases involving complex or extensive electronic discovery, the parties and judge might consider whether to have IT personnel, records management personnel, or electronic discovery consultants attend the case-management conference.

Some districts address this practice in their local guidelines or rules.

Committee Note, Rule 16 (Dec. 1, 2015)

“The provision for consulting at a scheduling conference by “telephone, mail, or other means” is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.”

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| <p><i>Practice 4:</i> The judge should ensure that the parties have considered what facts can be stipulated to or are undisputed and can be removed from discovery.⁵³</p> |
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Commentary

Discovery about matters that are not in dispute and to which the parties can stipulate is often inherently disproportionate because it yields no benefit. The judge should ensure—through an order, in a Rule 16 conference, or in another manner—that the parties are not conducting discovery into matters subject to stipulation. The judge

should also work with the parties to identify matters that are not in dispute and need not be the subject of discovery, even if no formal stipulation issues.

Practice 5: In many cases, the parties will start discovery by seeking information relevant to the most important issues in a case, available from the most easily accessible sources.⁵⁴ In a case in which the parties have not done so, or in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about relevance or proportionality, the parties and the judge should consider and discuss starting discovery with the subjects and sources that are most clearly proportional to the needs of the case.⁵⁵ The parties and the judge can use the results of that discovery to guide decisions about further discovery.

Commentary

The information available at the start of the case is often enough to allow the parties to discuss with clients and each other the subjects and sources of information that are highly relevant to important issues in the case and can be obtained without undue burden or expense.⁵⁶ Discovery into those subjects and from those sources is usually proportional to the needs of the case because it is likely to yield valuable information with relatively less cost and effort. In many cases, the parties begin discovery on these subjects and sources without judicial involvement and without explicitly labeling it as “proportional” or “focused.” The process is simply the familiar one of making smart choices about the most productive steps to get the information the parties need most and first.

If the parties have not thought through discovery, or the discovery is likely to be voluminous or complex, or there is likely to be significant disagreement about relevance or proportionality, the judge should encourage the parties to consider starting discovery with the information central to the most important subjects, available from the most easily accessible sources of that information.⁵⁷ The parties and the judge can use this information to guide decisions about further discovery.⁵⁸ For example, the parties can use the information to decide whether to make additional discovery requests or how to frame them. The judge can use the information to help understand and resolve proportionality or other questions that may arise during further discovery. This approach does not foreclose additional discovery or predetermine that it will be required.

The objective of this approach is to identify good places for discovery to begin, deferring until later more difficult questions about where discovery should end. If more discovery is sought, no heightened showing is required. The parties and the judge will have more information to assess proportionality, but the factors and their application do not change simply because some discovery has occurred.

In some cases, the parties may want to start discovery by obtaining enough information to decide whether to file a dispositive motion, to try the case, or to work toward prompt settlement.⁵⁹ It may make sense for the parties and the judge to start discovery by seeking information directed to a particular issue, claim, or defense. For example, a case may raise threshold questions such as jurisdiction, venue, or limitations that are best decided early because the answers impact whether and what further discovery is needed. In some cases, this may be clear after initial disclosures are exchanged. In other cases, the parties may want to start by seeking information bearing on damages to make decisions about settlement value or how aggressively to pursue claims or defenses. In still other cases, discovery of information about a causation issue may be decisive.

In some cases, it may be necessary for the parties to exchange more information to identify where to start discovery. In other cases, with relatively few disputed issues and limited discoverable information available from relatively few sources, setting discovery priorities may not be necessary or useful at all.

A judge who holds a live Rule 16 conference can address with the parties the potential benefits of starting with focused or targeted discovery and his or her expectations about how the parties will conduct it. The judge can address concerns that one or more parties will misunderstand the process or engage in inappropriate tactics. The judge might consider discussing with the parties what objections typically would or would not be appropriate. If the parties have reached agreement on starting discovery to get the most important information from the most accessible sources, there should be few occasions for objections on relevance or proportionality grounds.

Judges should consider using other tools designed to facilitate and accelerate the exchange of information on issues central to the case. For example, judges should consider using the Initial Discovery Protocols for Employment Cases Alleging Adverse Action in cases where they apply. Developed jointly by experienced plaintiff and defense attorneys, these protocols are pattern discovery requests that identify documents and information that are presumptively not objectionable and that must be produced at the start of the lawsuit. The self-described purpose of these protocols is to “encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan

for more efficient and targeted discovery.” The protocols are another way to work toward proportional discovery and have been used effectively in courts around the country. It is expected that work will be undertaken to develop similar subject-specific discovery protocols for other practice areas.⁶⁰

Practice 6: In a case in which discovery will start with particular subjects or sources of information, the judge should consider including guidance in the Rule 16(b) case-management order.

Commentary

While starting discovery by seeking less information than the maximum conceivably allowed can advance the goal of proportionality, it can also cause concern to some litigants. Some may worry that it will be used as a tool to restrict discovery, fearing that they will be required to make a special case for proportionality before any additional discovery will be allowed. Others may worry that it will be used as a tool to protract discovery if additional rounds of discovery are viewed to be allowed as a given regardless of how robust the initial efforts were or what information they yielded. Still others may worry that expressing an interest in starting with less-than-maximum discovery will be mischaracterized or misunderstood as a desire for a rigidly phased or staged discovery process. Absent any guidance from the judge, these and other concerns may lead parties to forego or resist setting priorities for discovery even when it would make sense to do so.

The judge should consider taking steps to avoid misunderstanding and provide clarity. The judge might consider including a statement in the Rule 16(b) case-management order acknowledging that the parties are starting with discovery into certain issues or from certain sources and will use the results to guide decisions about further discovery.⁶¹ The order can convey the judge’s willingness to consider additional discovery and to be available when the parties disagree over whether that is proportional to the needs of the case.

The parties might consider asking the judge to divide the discovery period, using an interim deadline for completing early discovery and a later deadline for completing further discovery that is warranted. The parties might also consider asking the judge to schedule a discovery status conference or ask for a report after the early discovery is complete. The point is not to impose rigid “bifurcated” or “staged” discovery, but to work toward and implement a case-specific plan that is tailored to the needs of the case and flexible enough to evolve with the case.

If discovery starts with particular subjects or sources, the parties and the judge should consider whether this may require some individuals to be deposed more than once, or require the responding party to search a source more than once.⁶² The parties and the judge should address and consider ways to avoid repeat work, including by allowing the witness to be deposed on all matters in the case or by allowing a broad search from that source.⁶³

If the parties reach agreement on starting discovery with particular subjects or sources, a party stipulation or a court order might also specify ways to streamline that discovery, including arranging for the informal exchange of information.

Practice 7: If there are discovery disputes the parties cannot resolve, the parties should promptly bring them to the judge. The judge should make it clear from the outset that he or she will be available to promptly address the disputes.⁶⁴

Commentary

Procedures for the parties to promptly engage the judge in resolving discovery disputes that the parties are unable to resolve on their own are important to avoiding the costs and delays that frustrate efficient and cost-effective case management and defeat proportionality. Prompt resolution of discovery disputes prevents them from growing in intensity and complexity and allows discovery, motions, and pretrial preparations to continue rather than entirely stop while the dispute is pending. The judge should consider including in an order issued early in the case a procedure that makes clear the judge's availability to work with the parties in timely resolving discovery disputes.

Some districts address this practice in their local guidelines or rules.

Practice 8: On the judge's own initiative or on the parties' request, the judge should consider requiring the parties to request an in-person or telephone conference with the court after conferring with opposing parties and before filing a motion seeking to compel or to protect against discovery.⁶⁵ Some judges require the parties to request a conference on the basis of limited motions or short briefs.⁶⁶ These and similar practices avoid the often unnecessary costs and delays of fully briefed discovery motions.

Commentary

A live pre-motion or limited-motion conference between the parties and the court is often an effective way to promptly, efficiently, and fairly resolve a discovery dispute at considerably less judge- and law-clerk time than reading fully briefed motions, responses, and replies with attachments and issuing a written opinion.⁶⁷ The parties and the judge save time, work, and resources.

The live pre-motion or limited-motion conference can often be held shortly after the parties inform the judge's case manager or judicial assistant that a discovery dispute has arisen. The conference lets the parties tell the judge what the party seeking the discovery needs and what the party resisting the discovery is able to produce without undue burden, cost, or expense.

The live, interactive conference exchange allows the parties and the judge to productively focus on practical solutions to practical problems rather than on disagreements over jurisprudence. The conference exchange often resolves the discovery dispute, either by leading to an agreed resolution or by providing the judge with the information needed to rule fairly and accurately. Discovery can continue, allowing the case to stay on track instead of stopping while the judge reads extensive motions and briefs and writes a written opinion. The parties are saved the cost and delay of filing full motions and briefs, and the judge and her clerks are saved the work and time needed to read those motions and briefs and issue a written opinion.

If the pre-motion or limited-motion conference indicates that some briefing or additional information on specific issues would be helpful, the judge can focus further work on the specific issues that require it.

The judge might consider requiring the party requesting a pre-motion or limited-motion conference on a discovery dispute to send a short communication—often limited to two pages—describing (not arguing) the issues that need to be addressed and allowing a similarly limited response.

The judge might consider the best way to memorialize the results of the conference. Approaches can vary. Some judges have a court reporter present for the conference and hold it in the courtroom. Others hold the conference in chambers, sometimes with a court reporter and other times with a law clerk taking notes for a brief minute entry in the court's docket sheet. Other judges may ask one of the parties to draft and circulate a proposed order. Some cases may be better served by the courtroom formality and others by the more relaxed exchange in chambers.

The judge can include a pre-motion or limited-motion conference requirement and procedure in the case-management order issued under Rule 16(b). The procedure can include provisions for using telephone or video conferences if one or more of the parties cannot attend in person.

Some districts address this practice in their local guidelines or rules.⁶⁸

Committee Note, Rule 16 (Dec. 1, 2015)

“Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.”

Practice 9: When proposed discovery would not or might not be proportional if allowed in its entirety, the judge should consider whether it would be appropriate to grant the request in part and defer deciding the remaining issues.

Commentary

Allowing proposed discovery in part can further an iterative process. The discovery allowed may be all that is needed, or it may clarify what further discovery is appropriate.⁶⁹ Deferring a decision on whether to allow the rest of the proposed discovery gives the judge and parties more information to decide whether all or part of it is proportional.

Sampling can be used to determine whether the likely benefits of the proposed discovery, or the burdens and costs of producing it, warrant granting all or part of the remaining request at a later time.⁷⁰

If a modified request would be proportional, the judge ordinarily should permit the proportional part of the discovery. However, the judge is under no obligation to do so and may rule on the discovery request as made.

Practice 10: The parties and judge should consider other discovery rules and tools that may be helpful in achieving fair, efficient, and

cost-effective discovery. In particular, the parties should consider delivering discovery requests before their Rule 26(f) meet-and-confer.

Commentary

Other discovery rule changes and tools, not part of the proportionality amendments, should be considered as part of the judge's and parties' overall plan for fair, workable, efficient, and cost-effective discovery and case resolution.⁷¹

Rule 26(d) is amended to allow a requesting party to *deliver* document requests to another party before the Rule 26(f) conference. The requests are not considered *served* until the meeting, and the 30-day period to respond does not start until that date. The early opportunity to review the proposed requests allows the responding party to investigate and identify areas of concern or dispute. The parties can discuss and try to resolve those areas at the Rule 26(f) conference on an informed basis. If disputes remain, the parties should use the Rule 26(f) report and the Rule 16(b) conference to bring them to the court for early resolution.

As an alternative to the formal mechanism that now exists under Rule 34, some lawyers may prefer to share draft, unsigned document requests, interrogatories, and requests for admission. Both the formal and informal practices prompt an informed, early conversation about the parties' respective discovery needs and abilities.

Rule 26(c) makes explicit judges' authority to shift some or all of the reasonable costs of discovery on a good cause showing if a party from whom discovery is sought moves for a protective order.⁷² A judge may, as an alternative to denying all of the requested discovery, order that some or all of the discovery may proceed on the condition that the requesting party bear some or all of the reasonable costs to respond. The longstanding presumption in federal-court discovery practice is that the responding party bears the costs of complying with discovery requests.⁷³ That presumption continues to apply. The 2015 amendments to Rule 26(c) make that authority explicit but do not change the good cause requirement or the circumstances that can support finding good cause.⁷⁴

Rule 37(e) is amended to clarify when and how a judge may respond to a party's inability to produce electronically stored information because it was lost and the party failed to take reasonable steps to preserve it. It provides a nationally uniform standard for when a judge may impose an adverse inference instruction or other serious sanctions. It responds to the concern that some persons and entities were over-

preserving out of fear their actions would later be judged under the most demanding circuit standards. Working toward proportionality in preservation is an important part of achieving proportionality in discovery overall. Other rule amendments emphasize the need for careful attention to preservation issues. Rule 26(f) has been amended to add preservation of electronically stored information to the list of issues to be addressed in the parties' discovery plan. Rule 16(b) is amended to add preservation of electronically stored information to the list of issues the case-management order may address.

Rule 16(b) and Rule 26(f) have been amended to encourage the use of orders under Rule 502(d) of the Federal Rules of Evidence providing that producing information in the litigation does not waive attorney-client privilege or work-product protection, either in that litigation or in subsequent litigation. Nonwaiver orders under Federal Rule of Evidence 502(d) can promote proportionality by reducing the time, expense, and burden of privilege review and waiver disputes.

Questions impacting and approaches to discovery are usually best explored in a live conference between the judge and the parties, preferably before formal discovery-related motions (such as under Rule 26(c) or Rule 37(a)) and accompanying briefs are filed. A live Rule 16 or pre-motion conference enables the judge and the parties to examine how the various discovery tools can best be used to create and implement an effective discovery and case-management plan.

Committee Note, Rule 16 (Dec. 1, 2015)

“The [Rule 16 scheduling] order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).”

Committee Note, Rule 26 (Dec. 1, 2015)

“Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”

“Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.”

* * * *

“The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.”

Committee Note, Rule 34 (Dec. 1, 2015)

“Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties’ Rule 26(f) conference is 30 days after the first Rule 26(f) conference.”

“Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld.”

Practice 11: The parties must frame discovery requests and responses after considering the burdens and benefits. Rule 34 emphasizes this obligation by prohibiting general, boilerplate objections to production requests and requiring the responses to state objections with specificity, to state whether documents are being withheld on the basis of objections, and to state when discovery will be completed.⁷⁵ When necessary, the parties should ask the judge to enforce these discovery obligations, and judges should make themselves available to do so promptly and efficiently.

Commentary

A judge's prompt enforcement of the Rule 34 prohibition on conclusory and boilerplate objections, including to a lack of proportionality, can be a critical part of managing and achieving discovery that is both proportional and fair. Enforcing requirements for specific and clear objections can be as important to proportionality as limiting discovery requests to enforce the Rule 26(b)(1) definition of scope. Similarly, enforcing the requirements to state when documents will be produced and whether documents are being withheld on the basis of objections can help ensure proportionality by avoiding uncertainties that often led to more objections and disputes.

The Rule 34 requirements are consistent with the Rule 26(g) requirements to consider discovery burdens and benefits before requesting or objecting to discovery and to certify that the requests, responses, and objections meet the rule requirements.

The parties should identify ways to engage the judge when necessary to efficiently enforce the Rule 34 requirements for responding to production requests.

Practice 12: The parties and the judge should consider using technology to help achieve proportional discovery.

Commentary

Technology can help proportionality by decreasing the burden or expense, or by increasing the likely benefit, of the proposed discovery.

When the discovery involves voluminous amounts of electronically stored information, the parties and judge should consider using technologies designed to categorize or prioritize documents for human review.⁷⁶

Because technology evolves quickly, the parties and the judge should not limit themselves in advance to any particular technology or approach to using it. Instead, the parties and the judge should consider what specific technology and approach works best for the particular case and discovery.

¹ Scope of Discovery.

- 1st Cir. *Cont'l W. Ins. Co. v. Opechee Constr. Corp.*, 2016 WL 865232, at *3 (D.N.H. Mar. 2, 2016) (employer is not required to interview former employees for discoverable information because, e.g., it would be disproportional).
- 2d Cir. *Laydon v. Mizuho Bank, Ltd.*, 2016 WL 1718387, at *11 (S.D. N.Y. Apr. 29, 2016) (U.S. Federal Rules of Civil Procedure, instead of Hague Convention procedures, governed discovery of documents protected under European Data Protection laws after court applied comity analysis); *see also Creighton v. City of N.Y.*, 2016 WL 1178648, at *1 (S.D.N.Y. Mar. 17, 2016) (in cases involving “state statutes[, which] establish confidentiality under amended Rule 26(b)(1) is not as broad as subject matter).
- 5th Cir. *In re: Trevino*, 2017 WL 123756, at *8 (S.D. Tex. Jan. 12, 2017) (“scope of discovery, while still broad, was condensed in the 2015 amendment’s inclusion of a proportionality requirement”); *Celanese Corp. v. Clariant Corp.*, 2016 WL 1074573, at*6–7 (N.D. Tex. Mar. 18, 2016) (proportionality applies to issuance of nonparty witness subpoena).
- 6th Cir. *State Farm Mut. Auto. Ins. Co. v. Warren Chiropractic & Rehab Clinic, P.C.*, 2016 WL 3450834, at *2 (E.D. Mich. May 11, 2016) (“Although Rule 26(b) applies equally to discovery of nonparties, the fact of nonparty status may be considered by the court in weighing the burdens imposed in the circumstances.”) (quoting *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993)); *see also Martin v. Posey*, 2017 WL 412876, at *3 (S.D. Ohio Jan. 31, 2017) (“[D]espite other changes to Rule 26, it is still the case that information need not be admissible in evidence in order to be discoverable.”); *Simon v. Northwestern Univ.*, 2017 WL 467677, at *2 (N.D. Ill. Feb. 3, 2017) (“The 2015 amendments confirmed the concept of ‘proportionality’ by adding it to the language of Rule 26(b)(1).”); *Commerce and Indus. Ins. Co. v. Century Surety Co.*, 2017 WL 946984, at *2 (S.D. Ohio Mar. 10, 2017) (in dispute over insurer’s duty to defend defendant-employer after accident between defendant’s employee and employee of another contractor, interrogatory requests concerning scope employee’s work duties and status of work performed by defendant was not disproportional because it concerned “the issue at the heart of th[e] case”).
- 8th Cir. *Schultz v. Sentinel Ins. Co.*, 2016 WL 3149686, at *3 (D.S.D. June 3, 2016) (“the scope of discovery under Rule 26(b) is extremely broad.”).
- 9th Cir. *MicroTechnologies, LLC v. Autonomy, Inc.*, 2016 WL 1273266, at *1 (N.D. Cal. Mar. 14, 2016) (deposition pursuant to letter rogatory was subject to proportionality).
- 10th Cir. *Rickaby v. Hartford Life & Accident Ins. Co.*, 2016 WL 1597589, at *2 (D. Colo. Apr. 21, 2016) (in ERISA cases, courts must consider goals of ERISA and necessity of discovery, which “militate against broad discovery”).
- 11th Cir. *In re: Subpoena Upon NeJames Law, P.A.*, 2016 WL 1599831, at *5 (M.D. Fla. Apr. 21, 2016) (“In every civil case, questions concerning the scope of discovery start with Fed. R. Civ. P. 26(b).”); *see also Graham & Co. v. Liberty Mut. Fire Ins. Co.*, 2016 WL 1319697, at *2 (N.D. Ala. Apr. 5, 2016) (“Courts must accord discovery a broad and liberal scope in order to provide parties with information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement.”); *Steel Erectors, Inc. v. AIM Steel Int’l, Inc.*, 312 F.R.D. 673, 676 n.4 (S.D. Ga. Jan 4, 2016) (“It remains true today . . . the court is inclined to err in favor of discovery rather than against it.”).

Cf.

- 1st Cir. *Ferring Pharms. Inc. v. Braintree Labs., Inc.*, 168 F. Supp. 355, 363 (D. Mass. 2016) (judge’s failure to “expressly reference proportionality in her ruling does not render her ruling contrary to law.”).
- 3d Cir. *Solid Waster Servs., Inc. v. United States*, 2016 WL 687182, at *1 n.1 (E.D. Pa. Feb. 19, 2016) (court’s failure to explicitly apply proportionality analysis in IRS enforcement action was not in error when court instead applied *Powell* factors from *United States v. Powell*, 379 U.S. 48, 57–58 (1964)).
- 5th Cir. *In re: Application of RSM Prod. Corp.*, 2016 WL 3477244, at *6 (S.D. Tex. June 27, 2016) (finding discovery of information in foreign country in accordance with § 1782 to be overly burdensome and disproportionate).

² Discovery must be relevant.

- 1st Cir. *Primarque Prod. v. Williams West & Witt’s Prod. Co.*, 2016 WL 6090715, at *3 (D. Mass. Oct. 18, 2016) (finding discovery request for defendant’s nationwide sales information as a basis for comparison irrelevant because the dispute concerned only sales in New England).

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- 2d Cir. *Marom v. City of N.Y.*, 2016 WL 7048053, at *2 (S.D.N.Y. Nov. 30, 2016) (court granted discovery request because requested documents were “highly relevant to plaintiffs’ theory of the case,” as they might show required protocol was not followed).
 - 4th Cir. *Prusin v. Canton’s Pearls, LLC*, 2016 WL 7408840, at *4 (D. Md. Dec. 22, 2016) (though they contained sensitive information, defendant’s tax returns were relevant, as they might show whether defendant’s minimum wage obligations were offset).
 - 5th Cir. *In re: Xarelto (Rivaroxaban) Prods.*, 313 F.R.D. 32, 38 (E.D. La. 2016) (to obtain discovery of employee’s personnel files in advance of depositions, party must demonstrate relevancy on witness-by-witness basis); *see also ING Bank N.V. v. M/V Portland, IMO No. 9497854*, 2016 WL 3365426, at *8 n.12 (M.D. La. June 16, 2016) (“Relevance itself, a discrete and separate yet oft merged requirement, remains a relatively low threshold.”); *Williams v. U.S. Envtl. Servs., LLC*, 2016 WL 617447, at *7 (M.D. La. Feb. 16, 2016) (in employment discrimination case, other complaints of discrimination against employer are relevant if limited to: (a) same form of discrimination; (b) same department or agency at which plaintiff worked; and (c) reasonable time before and after discrimination occurred, usually three to five years); *Murillo Modular Grp, Ltd. v. Sullivan*, 2016 WL 6139096, at *5 (N.D. Tex. Oct. 20, 2016) (discovery of “information relevant to a party’s or witness’s credibility is relevant”; *Howard v. Seadrill Americas, Inc.*, 2016 WL 7012275, at *4 (E.D. La. Dec. 1, 2016) (denying discovery request for phone records because, while they would give information about the exact time a relevant phone call was placed, timing of call was “likely not important to resolving dispute”); *Leal v. Wal-Mart Stores*, 2017 WL 68528, at *3 (E.D. La. Jan. 6, 2017) (court denied discovery request for all database and pay data for all employees, regardless of their position, that worked in the same stores as plaintiff over a 14-year period as overly broad and irrelevant); *United States v. Wyeth*, 2017 WL 191258, at *2–3 (E.D. La. Jan. 13, 2017) (in attorneys’ fees dispute between pharmaceutical company and law firm, court denied discovery of one lawyer’s medical school grades and attendance because it was irrelevant).
 - 6th Cir. *State Farm Mut. Auto. Ins., Co. v. Universal Health Grp., Inc.*, 2016 WL 6822014, at *2 (E.D. Mich. Nov. 18, 2016) (terms of settlement agreement that are relevant and proportional to needs of case are discoverable).
 - 8th Cir. *Leseman, LLC v. Stratasys, Inc.*, 2016 WL 1117411, at *5 (D. Minn. Mar. 22, 2016) (in patent infringement lawsuit, magistrate judge correctly denied plaintiffs’ motion to compel business records for product that was experimental and limited in use).
 - 7th Cir. *Southport Bank v. Miles*, 2016 WL 7366885, at *3 (N.D. Ill. Dec. 19, 2016) (Plaintiff’s argument that it needs loan policies to veil pierce “seem[s] to be much more relevant to an independent, and as yet unfiled, claim . . . than to the more narrow purpose for which these post-judgment proceedings are designed.”); *see also Crabtree v. Angie’s List, Inc.*, 2017 WL 413242, at *5 (S.D. Ind. Jan. 31, 2017) (Court held that defendant’s “broad request” for plaintiff’s emails, texts, and social media posts “would clearly encompass personal communications” and had “absolutely no relevance to lawsuit.”); *Simon v. Northwestern Univ.*, 2017 WL 467677, at *5 (N.D. Ill. Feb. 3, 2017) (Court limited discovery of after-the-fact-evidence because, “[w]hile ‘other acts’ that occur after an event may be relevant to showing ‘knowledge’ or ‘intent’ at the time of the event [for purposes of Evidence Rule 404(b)], there is a steadily diminishing value of relevance . . . the further out in time the ‘other acts’ occur.”).
 - 9th Cir. *Deutsche Bank Nat’l Tr. Co. v. SFR Invs. Pool 1, LLC*, 2016 WL 3200104, at *1–2 (D. Nev. June 6, 2016) (finding discovery request for, e.g., two years of defendant’s litigation history irrelevant); *see also Am. Auto. Ins. Co. v. Haw. Nut & Bolt, Inc.*, 2017 WL 80248, at *5, 7 (D. Haw. Jan. 9, 2017) (personnel files of employees and third-party contractors who handled plaintiff’s insurance claim were relevant and therefore permissible, provided that certain information was redacted to protect the individuals’ privacy).
 - 11th Cir. *O’Boyle v. Sweetapple*, 2016 WL 492655, at *5 (S.D. Fl. Feb. 8, 2016) (“Permitting this subpoena to proceed would cause the parties to run down a rabbit hole chasing irrelevant information on collateral matters, resulting in the needless and wasteful expenditure of time and money by the parties.”).

3 Proportional discovery continues to be required.

- 2d Cir. *Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) (amendments to Rule 26(b)(1) restored importance of proportionality factors in defining scope of discovery); *see also Robertson v. People Magazine*, 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) (amendments to Rule 26(b)(1) restored importance of proportionality factors in defining scope of discovery).
- 3d Cir. *Trask v. Olin Corp.*, 2016 WL 1255302, at *2 n.5 (W.D. Pa. Mar. 31, 2016) (amendments to Rule 26 did not alter importance of considering proportionality and under both new and old versions of Rule 26; “the Court is to consider all of the facts and circumstances of the pending action.”); *see also Dixon v. Williams*, 2016 WL 631356, at

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- *2 (M.D. Pa. Feb 17, 2016) (amendments did not change responsibilities of court and parties in considering proportionality).
- 4th Cir. *Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205, 209 (W.D. Va. Jan. 25, 2016) (amendments to Rule 26(b)(1) did not change existing responsibilities of court and parties in considering proportionality).
 - 5th Cir. *Cottonham v. Allen*, 2016 WL 4035331, at *1 n.2 (M.D. La. July 25, 2016) (result of discovery dispute under amendments to Rule 26(b)(1) would be the same as under previous Rule 26(b)(2)(C)(iii) proportionality provision); *see also ING Bank N.V. v. M/V Portland, IMO No. 9497854*, 2016 WL 3365426, at *8 n.12 (M.D. La. June 16, 2016) (“While the Rules were amended effective December 1, 2015, the relevance standard for discovery has not changed. Instead, the proportionality factors once set in Rule 26(b)(2)(C) have now been moved into Rule 26(b)(1) so as to reemphasize the fact that evidence’s discoverability is subject to the proportionality test first adopted in 1983.”); *InforMD, LLC v. DocRX, Inc.*, 2016 WL 2343854, at *2 n.13 (M.D. La. May 3, 2016) (amendments to Rule 26(b)(1) restored importance of proportionality calculation); *see also Braud v. Geo Heat Exchangers, L.L.C.*, 2016 WL 1274558, at *4 (M.D. La. Mar. 31, 2016) (amendments to Rule 26(b)(1) restored importance of proportionality consideration); *Odeh v. City of Baton Rouge*, 314 F.R.D. 386, 389 (M.D. La. 2016) (amendments to Rule 26(b)(1) restored proportionality consideration but did not change existing responsibilities of court and parties to consider proportionality); *Williams v. U.S. Envtl. Servs., LLC*, 2016 WL 617447, at *1 n.2 (M.D. La. Feb. 16, 2016) (amendments did not change existing responsibilities of court and parties in considering proportionality); *Hume v. Consol. Grain & Barge, Inc.*, 2016 WL 7385699, at *3 (E.D. La. Dec. 21, 2016) (In denying discovery of a third party’s information, court noted that the “impact of inclusion of the proportionality concept within Rule 26(b)(1)’s threshold scope of discovery indicate[s] ‘that non-parties have greater protections from discovery and that burdens on non-parties will impact the proportionality analysis.’”) (quoting E. Laporte and J. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 57 (2015)).
 - 6th Cir. *In re: ClassicStar Mare Lease Litig.*, 2017 WL 27455, at *3, 4–5 (E.D. Ky. Jan. 3, 2017) (in a post-judgment discovery dispute, discovery of third-party’s records, such as emails, permissible to potentially determine an affiliation between defendant and third-party because “discovery . . . must be calculated to assist in judgment collection”).
 - 7th Cir. *Garner v. St. Clair Cty.*, 2016 WL 146691, at *1 n.1 (S.D. Ill. Jan. 13, 2016) (amendments to Rule 26(b)(1) did not change factors considered in assessing proportionality); *see also Noble Roman’s, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 311 (S.D. Ind., 2016) (“relevancy” alone is insufficient); *Hespe v. City of Chi.*, 2016 WL 7240754, at *3 (N.D. Ill. Dec. 15, 2016) (court not required to consider plaintiff’s undue burden or cost compared with defendant’s “good cause” for requesting discovery; discovery may be limited based on other proportionality and timeliness considerations); *Simon v. Northwestern Univ.*, 2017 WL 467677, at *2 (N.D. Ill. Feb. 3, 2017) (“The 2015 amendments confirmed the concept of ‘proportionality’ by adding it to the language of Rule 26(b)(1).”).
 - 8th Cir. *Harper v. Unum Grp.*, 2016 WL 4508238, at *3 (W.D. Ark. Aug. 29, 2016) (court rejected as disproportional request for records from all employees making disability decisions but allowed separate request limited to five reviewing individuals); *Schultz v. Sentinel Ins. Co.*, 2016 WL 3149686, at *7 (D.S.D. June 3, 2016) (court declined to retreat from earlier position in *Gowan*, noting that “rule [26], and the case law developed under the rule, have not been drastically altered.”); *see also Gowan v. Mid-Century Insur. Co.*, 2016 WL 126746, at *5 (D.S.D. Jan. 11, 2016) (proportionality requirements are “hardly new”).
 - 9th Cir. *Wit v. United Behavioral Health*, 2016 WL 258604, at *10 (N.D. Cal. Jan. 21, 2016) (amendments “restore[d] and reinforce[d] the focus on proportionality in discovery” but did not change existing responsibilities of court and parties in considering proportionality); *see also Ciuffitelli v. Deloitte & Touche LLP*, 2016 WL 6963039, at *5 (D. Or. Nov. 28, 2016) (“For Rule 26(b)(1)’s proportionality mandate to be meaningful, it must apply from the onset of the case.”); *Centeno v. City of Fresno*, 2016 WL 749634, at *7 (E.D. Cal. Dec. 29, 2016) (Court granted in part and denied in part a discovery request for prior complaints of misconduct by police officers, holding that such claims are only “discoverable when sufficiently similar to the claims brought in the instant suit.”); *Strickland Real Estate Holdings, LLC v. Texaco, Inc.*, 2016 WL 7243711, at *2 (W.D. Wash. Dec. 15, 2016) (Court granted discovery request because “the requested discovery goes to the heart of the dispute” and defendant “is the type of litigant that can respond to such a request.”).
 - 10th Cir. *In re: Vicki Milholland*, 2017 WL 895752, at fn. 28 (10th Cir. Bankruptcy Appellate Panel, Mar. 7, 2017) (“For more than thirty years, the Federal Rules of Civil Procedure have stressed the need for courts to actively manage discovery to prevent parties from using it to ‘wage a war of attrition or as a device to coerce a party, whether financially weak or affluent,’ and have emphasized the concept of proportionality.”); *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *12–19 (D.N.M. Apr. 1, 2016) (describing extensive background of Rule 26

- amendments, leading up to 2015 amendments); *see also* *Rowan v. Sunflower Elec. Power Corp.*, 2016 WL 2772210, at *3 (D. Kan. May 13, 2016) (“The consideration of proportionality is not new, as it has been part of the federal rules since 1983.”); *Arenas v. Unified Sch. Dist. No. 223*, 2016 WL 6071802, at *4 (D. Kan. Oct. 17, 2016) (“Although proportionality has long been a factor in ruling on discovery motions, the recent amendment to Rule 26 requires courts to be vigilant to concerns of proportionality.”); *Pertile v. Gen. Motors, LLC*, 2016 WL 1059450, at *2 (D. Colo. Mar. 17, 2016) (amendments did not change duty of court to consider proportionality); *Ark. River Power Auth. v. The Babcock & Wilson Co.*, 2016 WL 192269, at *4 (D. Colo. Jan. 15, 2016) (amendments did not change responsibilities of court and parties in considering proportionality); *Diesel Power Source v. Crazy Carl’s Turbos*, 2017 WL 57791, at *2 (D. Utah Jan. 5, 2017) (“recent amendments place greater emphasis on this important principle”). *Singh v. Shonrock*, 2017 WL 698472, at *2 (D. Kan. Feb. 22, 2017) (in employment discrimination case, plaintiff-employee’s request to depose employees of co-defendant to determine whether other employees were “disciplined, counseled, and/or nonrenewed” for same failure to follow common policy rubric allegedly giving rise to plaintiff’s termination was not disproportional in light of similar, prior document production and deposition testimony, because witnesses in that prior production and testimony could not “recall such information”).
- 11th Cir. *Herrera-Velasquez v. Plantation Sweets, Inc.*, 2016 WL 183058, at *4 n.6 (S.D. Ga. Jan. 14, 2016) (amendments to Rule 26(b)(1) elevated proportionality factors in different order).
 - D.C. Cir. *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016) (amendments did not change court’s responsibility to consider proportionality but instead moved proportionality factors to make “proportionality considerations unavoidable.”).

4 Rule does not change parties’ existing discovery burdens.

- 1st Cir. *Cont’l W. Insur. Co. v. Opechee Constr. Corp.*, 2016 WL 865232, at *1 (D.N.H. Mar. 2, 2016) (“[P]arty seeking an order compelling discovery responses over the opponent’s objection bears the initial burden of showing that the discovery requested is relevant. . . . Once a showing of relevance has been made, the objecting party bears the burden of showing that discovery request is improper.”) (citations omitted).
- 2d Cir. *A.M. v. Am. Sch. for the Deaf*, 2016 WL 1117363, at *2 (D. Conn. Mar. 22, 2016) (“The burden of demonstrating relevance remains on the party seeking discovery, and the newly-revised rule ‘does not place on the party seeking discovery the burden of addressing all proportionality considerations.’ . . . Conversely, the ‘party resisting discovery has the burden of showing undue burden or expense.’”) (citation omitted) (quoting *State Farm Mut. Auto. Ins. Co. v. Fayda*, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015)); *see also* *Torcasio v. New Canaan Bd. of Educ.*, 2016 WL 299009, at *2 (D. Conn. Jan. 25, 2016) (party resisting discovery has burden of showing why discovery should be denied); *Lightsquared, Inc. v. Deere & Co.*, 2015 WL 8675377, at *5 (S.D.N.Y. Dec. 10, 2015) (party that seeks to compel discovery from additional custodians “bears the burden of establishing the relevance of the documents it seeks from those custodians”); *Robertson v. People Magazine*, 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) (“2015 amendment does not create a new standard”).
- 3d Cir. *Haines v. Cherian*, 2016 WL 831946, at * 3 (M.D. Pa. Feb. 29, 2016) (party resisting discovery has burden to show why discovery should be denied).
- 5th Cir. *Mir v. L-3 Commuc’ns Integrated Sys., L.P.*, 2016 WL 3959009, at *4 (N.D. Tex. July 22, 2016) (“[A]mendments to Rule 26 do not alter the burdens imposed on the party resisting discovery.”); *see also* *Hightower v. Grp. 1 Auto., Inc.*, 2016 WL 3430569, at *3 (E.D. La. June 22, 2016) (“[T]he 2015 amendments to the Rule did not change the law. Permissible discovery extends only to that which is nonprivileged, relevant to claims and defenses in the case and within the Rule’s proportionality limits.”) (emphasis in original); *Richmond v. SW Closeouts, Inc.*, 2016 WL 3090672, at *4 (N.D. Tex. June 2, 2016) (“[T]he amendments to Rule 26(b) do not alter the basic allocation of the burden on the party resisting discovery to – in order to successfully resist a motion to compel – specifically object and show that the requested discovery does not fall within Rule 26(b)(1)’s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable.”); *Gondola v. USMD PPM, LLC*, 2016 WL 3031852, at *3 (N.D. Tex. May 27, 2016) (amendments to Rule 26(b) did not alter existing discovery burdens); *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 2016 WL 3033544, at *4 (N.D. Tex. May 26, 2016) (“The amendments to Rule 26 do not alter the burdens” set out in Rules 26 and 45); *Orchestratshr, Inc. v. Trombetta*, 2016 WL 1555784, at *24 (N.D. Tex. Apr. 18, 2016) (“But the amendments to Rule 26(b) and Rule 26(c)(1) do not alter the basic allocation of the burden on the party resisting discovery to . . . specifically object and show that the requested discovery does not fall within Rule 26(b)(1)’s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable.”); *Harrison v. Wells Fargo Bank, N.A.*, 2016 WL 1392332, at *4 (N.D. Tex. Apr. 8, 2016) (“[A]mendments to Rule 26 do not alter the burdens imposed on the party resisting discovery”); *Celanese Corp. v.*

Clariant Corp., 2016 WL 1074573, at *3 (N.D. Tex. Mar. 18, 2016) (amendments did not change burdens on party resisting discovery); *Robinson v. Dallas Cty. Cmty. Coll. Dist.*, 2016 WL 1273900, at *2 (N.D. Tex. Feb. 18, 2016) (“amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery”); *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins.*, 2016 WL 98603, at *3 (N.D. Tex. Jan. 8, 2016) (amendments did not alter burdens placed on party resisting discovery; party resisting discovery must show that “requested discovery was overbroad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.”); *Nguyen v. Versacom, LLC*, 2015 WL 8316436, at *5 (N.D. Tex. Dec. 9, 2015) (amendments did not change burden placed on party resisting discovery to show that discovery request is not relevant, proportional, or “otherwise objectionable”); *Carr v. State Farm Mut. Auto. Ins.*, 312 F.R.D. 459 (N.D. Tex. 2015) (party resisting discovery must show why discovery request is not relevant or “otherwise objectionable, as, for example, overly broad, burdensome, or oppressive.”); *Keycorp v. Holland*, 2016 WL 6277813, at *5 (N.D. Tex. Oct. 26, 2016) (“A party seeking to resist discovery . . . still bears the burden of making a specific objection and showing that discovery” is not proportional); *Murillo Modular Grp, Ltd. v. Sullivan*, 2016 WL 6139096, at *9 (N.D. Tex. Oct. 20, 2016) (“The amendments . . . do not alter the basic allocation of the burden.”); *CGC Royalty Inv. I, LLC v. Bluewater Moorings, LLC*, 2017 WL 106795, at *4 (N.D. Tex. 2017) (“But a party seeking to resist discovery . . . still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation.”). *Samsung Elec. Am. Inc. v. Chung*, 2017 WL 896897, at *11 (N.D. Tex. Mar. 7, 2017) (“[A]mendments to Rule 26(b) do not alter the basic allocation of the burden on the party resisting discovery to . . . specifically object.”).

- 7th Cir. *In re: Cook Med., Inc.*, 2016 WL 2854169, at *1 (S.D. Ind. May 12, 2016) (party moving for protective order has burden to show that discovery request is burdensome); *see also Design Basics LLC v. Best Built Inc.*, 2016 WL 1060253, at *3 (E.D. Wis. Mar. 15, 2016) (“[A]mendment of Rule 26(b) to make the proportionality requirement explicit does not relieve the responding party of the burden to explain how a discovery request is burdensome.”); *Nerium Skincare, Inc. v. Olson*, 2017 WL 277634, at *3 (N.D. Tex. Jan. 20, 2017) (“[T]he amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery. . . . [A] party seeking to resist discovery . . . still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation.”).
- 8th Cir. *Cor Clearing, LLC v. Calissio Res. Grp., Inc.*, 2016 WL 2997463, at *2 (D. Neb. May 23, 2016) (quoting pre-amendment case law for the proposition that a “party seeking discovery must satisfy some threshold showing of relevancy before discovery is required.” But, “[o]nce that threshold has been met, the resisting party ‘must show specifically how . . . each . . . [request for production] is not relevant or how the discovery is overly broad, burdensome, or oppressive.”) (citations omitted); *see also Zurich Am. Ins. Co. v. Andrew*, 2016 WL 2350115, at *2 (D. Neb. May 4, 2016) (“Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity the information they hope to obtain and its importance to their case.”); *Sprint Commc’ns. Co. L.P. v. Crow Creek Sioux Tribal Court*, 316 F.R.D. 254, 276 (D.S.D. Feb. 26, 2016) (requesting party must show that “requested information falls within the scope of discovery under Rule 26(b)(1). . . . Once the requesting party has satisfied its threshold showing, the burden then shifts to the party resisting discovery to show specific facts demonstrating that the discovery is irrelevant or disproportional.”).
- 9th Cir. *Stoba v. Saveology.com, LLC*, 2016 WL 3356796, at *2 (S.D. Cal. June 3, 2016) (“Once the party seeking discovery establishes that the request meets this broadly-construed relevancy requirement, ‘the party opposing discovery has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining or supporting its objections’”); *see also Dao v. Liberty Life Assur. Co.*, 2016 WL 796095, at *3 (N.D. Cal. Feb. 23, 2016) (“[W]hile the language of the Rule has changed, the amended rule does not actually place a greater burden on the parties with respect to their discovery obligations, including the obligation to consider proportionality, than did the previous version of the Rule.”); *Clymore v. Fed. R.R. Admin.*, 2015 WL 7760086, at *2 (E.D. Cal. Dec. 2, 2015) (party requesting discovery has burden of showing that it has satisfied the requirements of Rule 26).
- 10th Cir. *Bd. of Comm’rs of Shawnee Cty. v. Daimler Trucks N. Am., LLC*, 2015 WL 8664202, at *2 (D. Kan. Dec. 11, 2016) (“where the relevance of a particular request is not readily apparent, the proponent of a discovery request must, in the first instance, show the relevance of the requested information to the claims or defenses in the case. Where relevance is apparent, or the proponent of the evidence has shown it is relevant, the burden then shifts to the objecting party to establish a lack of relevance by demonstrating that the requested discovery either does not come within the scope of relevance as defined by Rule 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad discovery.”); *see also Frick v. Henry Indus., Inc.*, 2016 WL 6966971, at *3 (D. Kan. Nov. 29, 2016) (opposing party failed to meet burden of demonstrating that discovery was disproportionate); *Duffy v. Lawrence Memorial Hosp.*, 2016 WL 7386413, at *2 (D. Kan. Dec. 21, 2016) (The amendments “do not place on the party seeking discovery the burden of addressing all

proportionality considerations[, but instead,] the parties' responsibilities remain the same as under the pre-amendment Rule.”).

- 11th Cir. *Edmonson v. Velvet Lifestyles, LLC*, 2016 WL 7048363, at *7 (S.D. Fla. Dec. 5, 2016) (“Plaintiffs here must make a ‘threshold showing’ and confront reality that ‘[m]ere speculation that information might be useful will not suffice.’”) (quoting *Sprint Commc’ns Co., L.P. v. Crow Creek Sioux Tribal Court*, 316 F.R.D. 254, 263 (D.S.D. Feb. 26, 2016)).
- D.C. Cir. *United States ex rel. Shamesh v. CA., Inc.*, 2016 WL 74394, at *8 (D.D.C. Jan. 6, 2016) (“Once the relevancy of the materials being sought has been established, the objecting party then bears the burden of ‘showing why discovery should not be permitted.’”).

5 Federal rules contemplate liberal discovery.

- 2d Cir. *Am. Fed’n of Musicians v. Sony Music Entm’t, Inc.*, 2016 WL 2609307, at *3 (S.D.N.Y. Apr. 29, 2016) (“2015 amendments did not alter the underlying concept of relevance, which ‘is a matter of degree, and the standard is applied more liberally in discovery than it is at trial’”) (quoting *Vaigasi v. Solow Mgmt. Corp.*, 2015 WL 616386, at * 11 (S.D.N.Y. Feb. 16, 2016)).
- 4th Cir. *Scott Hutchison Enters., Inc. v. Cranberry Pipeline Corp.*, 2016 WL 5219633, at *2 (S.D. W. Va. Sept. 20, 2016) (“[N]otwithstanding Rule 26(b)(1)’s recent amendment placing an emphasis on the proportionality of discovery, the discovery rules, including Rule 26, remain subject to ‘broad and liberal construction.’”) (quoting *Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205, 209 (W.D. Va. Jan. 25, 2016)); *In re: American Med. Sys., Inc.*, 2016 WL 3077904 (S.D. W. Va. May 31, 2016) (“[N]otwithstanding Rule 26(b)(1)’s recent amendment placing an emphasis on the proportionality of discovery, the discovery rules, including Rule 26, are still ‘to be accorded broad and liberal construction.’”) (quoting *Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205, 209 (W.D. Va. Jan. 25, 2016)).
- 5th Cir. *ING Bank N.V. v. M/V Portland, IMO No. 9497854*, 2016 WL 3365426, at *2 (M.D. La. June 16, 2016) (“[T]he scope of discovery under the Federal Rules of Civil Procedure is broad, bounded by a few construed limits.”).
- 6th Cir. *He v. Rom*, 2016 WL 5682012, at *10 (N.D. Ohio Oct. 3, 2016) (“2015 amendments do not alter the basic tenet that Rule 26 is to be liberally construed to permit broad discovery.”).
- 8th Cir. *Zurich Am. Ins. Co. v. Andrew*, 2016 WL 2350115, at *2 (D. Neb. May 4, 2016) (“[R]elevance is to be broadly construed for discovery purposes.”).

6 Proportionality related to relevance.

- 2d Cir. *Am. Fed’n of Musicians v. Sony Music Entm’t, Inc.*, 2016 WL 2609307, at *5 (S.D.N.Y. Apr. 29, 2016) (producing party need not present evidence addressing burdens of broad discovery, if requested information is not relevant); *see also Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016) (discovery that is relevant is more likely to be proportionate).
- 3d Cir. *CDK Glob., LLC v. Tulley Auto. Grp., Inc.*, 2016 WL 1718100, at *8 (D.N.J. Apr. 29, 2016) (magistrate judge found “a nexus between the requested information” and defendant’s counterclaims after weighing proportionality factors in denying plaintiff’s motion to quash non-party subpoenas).
- 5th Cir. *Brand Serv., LLC v. Irex Corp.*, 2017 WL 67517, at *2–3 (E.D. La. Jan. 6, 2017) (Court denied plaintiff’s request for discovery of defendant’s entire computer. But, because parties agreed that information on the computer was relevant, court ordered ESI keyword discovery “to control costs and to keep discovery proportional to the needs of this case.”).
- 6th Cir. *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (court found discovery request was not proportional because it was not relevant to plaintiff’s claims); *see also Owens v. Liberty Life Assurance Co. of Boston*, 2016 WL 6156182, at *3 (W.D. Ky. Oct. 21, 2016) (rejecting proportionality challenge because magistrate judge significantly narrowed requested scope of discovery to relevant information).
- 7th Cir. *Elliott v. Superior Pool Prods., LLC*, 2016 WL 29243, at *2 (C.D. Ill. Jan. 4, 2016) (“[A]pplication of the concept of proportionality often turns on how ‘central’ (or relevant) the proposed discovery may be to overcome any number of objections.”) (quoting Elizabeth D. Laporte & Jonathon M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CT. L. REV. 20, 53 (2015)).
- 9th Cir. *Malibu Media, LLC v. Doe*, 2016 WL 7425923, at * (N.D. Cal. Dec. 23, 2016) (plaintiff “fail[ed] to even address the importance” of proposed discovery; because plaintiff did not assert relevance, discovery was not proportional).
- 11th Cir. *Noveshen v. Bridgewater Assocs. LP*, 2016 WL 3902542, at *2 (S.D. Fla. Feb. 22, 2016) (court found discovery request to be relevant, proportional, and not burdensome); *see also Flynn v. Square One Distrib., Inc.*,

2016 WL 2997673, at *4 (M.D. Fla. May 25, 2016) (court noted that to be discoverable information on development of product warning label must be relevant and proportional); *Steel Erectors, Inc. v. AIM Steel Int'l, Inc.*, 312 F.R.D. 673, 676–77 (S.D. Ga. Jan. 4, 2016) (court denied plaintiff's motion to compel irrelevant material to prevent needless litigation costs, which would defeat Rule 26(b)(1)'s goal of proportionality); *Edmonson v. Velvet Lifestyles, LLC*, 2016 WL 7048363, at *6 (S.D. Fla. Dec. 5, 2016) (“Proportionality and relevance are ‘conjoined’ concepts; the greater the relevance . . . the less likely its discovery will be found to be disproportionate.”) (quoting *Viagasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016)).

Cf.

- 2d Cir. *Black v. Buffalo Meat Serv.*, 2016 WL 6962444, at *5 (W.D.N.Y. Nov. 29, 2016) (Although information was relevant, “relevant is [but] one aspect of what is now discoverable under the amended Rule 26; a key factor is the proportionality of obtaining relevant material.”).
- 4th Cir. *Miller v. Garibaldi's, Inc.*, 2016 WL 7257035, at *2 (S.D. Ga. Dec. 15, 2016) (“If the documents are irrelevant, the overbreadth objection is moot.”).

⁷ **“Reasonably calculated to lead to admissible evidence” phrase deleted.**

- 2d Cir. *Edebali v. Bankers Standard Ins. Co.*, 2016 WL 4621077, at *1 (E.D. N.Y. Sept. 6, 2016) (“[R]ationale behind the elimination of [the phrase “reasonably calculated to lead”] is the finding that it ‘has been used by some, incorrectly, to define the scope of discovery.’”) (quoting *Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016)); *Sibley v. Choice Hotels Int'l*, 2015 WL 9413101, at *2 (E.D.N.Y. Dec. 22, 2015) (“[N]otably absent from the present Rule 26 is the all too familiar, but never correct, iteration of the permissible scope [of] discovery as including all matter that is ‘reasonably calculated to lead to’ the discovery of admissible evidence.”); *see also Bagley v. Yale Univ.*, 2015 WL 8750901, at *8 (D. Conn. Dec. 14, 2015) (amendments to Rule 26 deleted “reasonably calculated to lead to admissible evidence” language); *see also Henry v. Morgan's Hotel Grp., Inc.*, 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016) (“Defendant has mistakenly invoked the ‘reasonably calculated to lead to the discovery of admissible evidence’ standard of the prior version of Rule 26(b)(1). That rule was amended last year and this language, long relied on by counsel to seek wide-ranging discovery, has now been eliminated.”).
- 3d Cir. *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 2016 WL 5025751, at *10 (W.D. Pa. Sept. 20, 2016) (“Supreme Court in *Oppenheimer* did not construe just the term ‘relevant;’ rather, the Supreme Court construed the phrase ‘relevant to the subject matter involved in the pending action,’ which is a phrase that no longer appears in amended Rule 26(b)(1). The Court’s definition of ‘relevant to the subject matter involved in the pending action,’ therefore, has no application to the text of amended Rule 26(b)(1), and it would be inappropriate to continue to cite to *Oppenheimer* for the purpose of construing the scope of discovery under amended Rule 26(b)(1).”).
- 4th Cir. *In re: American Medical Sys., Inc.*, 2016 WL 3077904, at *4 (S.D. W. Va. May 31, 2016) (“Although the rule was recently amended to remove language permitting the discovery of ‘any matter relevant to the subject matter involved in the action’ . . . and ‘relevant information . . . reasonably calculated to lead to the discovery of admissible evidence,’ the rule in its current form still contemplates the discovery of information relevant to the subject matter involved in the action, as well as relevant information that would be inadmissible at trial.”) (emphasis in original).
- **5th Cir. *Mendoza v. Old Republic Ins. Co.*, 2017 WL 636069, at *4–6 (E.D. La. Feb. 16, 2017) (Court allowed, as proportional and relevant, discovery of a handwritten settlement agreement with certain terms scratched out, because it found that agreement was relevant to plaintiffs’ claim that defendants used settlement agreement “to manufacture a right to removal”).**
- 6th Cir. *Quality Mfg. Sys., Inc. v. RX Automation Sol., Inc.*, 2016 WL 1244697, at *2 (M.D. Tenn. Mar. 30, 2016) (amendments to Rule 26 deleted “reasonably calculated” phrase); *see also Raub v. Moon Lake Prop. Owners Ass’n*, 2016 WL 6275392, at *2 (E.D. Mich. Oct. 27, 2016) (the phrase was “deleted to address concerns that the exemption was swallowing the limitations placed on the scope of discovery”).
- 7th Cir. *Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC*, 2016 WL 614144, at *5, 7 (N.D. Ind. Feb. 16, 2016) (amendments to Rule 26 removed language that relevant information does not need to be admissible if it “is reasonably calculated to lead to the discovery of admissible evidence,” but settlement documents, inadmissible as evidence under Fed. R. Evid. 408, remain discoverable).
- 9th Cir. *In re: Bard IVC Filters Prods. Liability Litig.*, 2016 WL 4943393, at *2 (D. Ariz. Sept. 16, 2016) (“Thus, just as a statute could effectively overrule cases applying a former legal standard, the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1). The test going forward is whether evidence is ‘relevant to any party’s claim or defense,’ not whether it is ‘reasonably calculated to lead to admissible evidence.’”); *Centeno v. City of Fresno*, 2016 WL 749634, at *4 (E.D. Cal. Dec. 29, 2016) (same); *Gilead Scis., Inc. v. Merck & Co.*, 2016

- WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (“No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone); *see also Dao v. Liberty Life Assurance Co. of Boston*, 2016 WL 796095, at *2 (N.D. Cal. Feb. 23, 2016) (amendments to Rule 26 deleted language that permitted discovery of any information that “might lead to the discovery of admissible evidence.”).
- 10th Cir. *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *12 (D.N.M. Apr. 1, 2016) (“A district court is not . . . ‘required to permit plaintiff to engage in a ‘fishing expedition’ in the hope of supporting his claim.”); *see also Rowan v. Sunflower Elec. Power Corp.*, 2016 WL 2772210, at *3 (D. Kan. May 13, 2016) (“The amendment deleted ‘reasonably calculated to lead to the discovery of admissible evidence’ phrase, however, because it was often misused to define the scope of discovery and had the potential to ‘swallow any other limitation.’”); *Duffy v. Lawrence Memorial Hosp.*, 2016 WL 7386413, at *2 (D. Kan. Dec. 21, 2016) (same).
- Cf.*
- 1st Cir. *Green v. Cosby*, 2015 WL 9594287, at *2 (C.D. Mass. Dec. 31, 2015) (amendments to Rule 26 deleted “reasonably calculated to lead to the discovery of admissible evidence” phrase. “As the Supreme Court has instructed, because discovery itself is designed to help define and clarify the issues, the limits set forth in Rule 26 must be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.”).
 - 2d Cir. *Lightsquared, Inc. v. Deere & Co.*, 2015 WL 8675377, at *2 (S.D.N.Y. Dec. 10, 2015) (“[R]elevance is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense.”) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).
 - 3d Cir. *Haines v. Cherian*, 2016 WL 831946, at *3 (M.D. Pa. Feb. 29, 2016) (“[D]iscovery need not be confined to items of admissible evidence but may encompass that which appears reasonable calculated to lead to the discovery of admissible evidence.”); *see also Dixon v. Williams*, 2016 WL 631356, at *2 (M.D. Pa. Feb 17, 2016) (discoverable information is item that is “relevant or may lead to the discovery of relevant information.”); *Wertz v. GEA Heat Exchangers Inc.*, 2015 WL 8959408, at *1 (M.D. Pa. Dec. 16, 2015) (under Rule 26’s liberal discovery policy, discoverable information is item that is “relevant or may lead to the discovery of relevant information.”).
 - 4th Cir. *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, 2016 WL 4287929, at *1 (E.D.N.C. Aug. 15, 2016) (“A discovery request is relevant if it is ‘reasonably calculated to lead to discovery of admissible evidence.’”); *Townsend v. Nestle Healthcare Nutrition, Corp.*, 2016 WL 1629363, at *3 (S.D. W. Va. Apr. 22, 2016) (“[R]ule 26(b)(1) does not precisely define relevancy. . . . Although the rule was recently amended to remove language permitting the discovery of ‘any matter relevant to the subject matter involved in the action’ . . . and ‘relevant information . . . reasonably calculated to lead to the discovery of admissible evidence,’ the rule in its current form still contemplates the discovery of information relevant to the subject matter involved in the action, as well as relevant information that would be inadmissible at trial.”); *see also Fid. & Guar. Life Ins. Co. v. United Advisory Grp., Inc.*, 2016 WL 632025, at *4 (D. Md. Feb. 17, 2016) (discoverable information must be “reasonably calculated to lead to the discovery of admissible evidence.”); *Moses H. Cone Mem’l Hosp. Operating Corp. v. Conifer Physician Servs., Inc.*, 2016 WL 430494, at *6 (M.D.N.C. Feb. 3, 2016) (denial of request for tax returns because information would not “reasonably lead to relevant information” pertinent to parties’ claims); *White v. Sam’s E., Inc.*, 2016 WL 205494, at *1 (S.D. W. Va. Jan. 15, 2016) (discoverable information need not be admissible if it is “reasonably calculated to lead to the discovery of admissible evidence.”); *Columbia Gas Transmission, LLC v. Balt. Cty., Md.*, 2016 WL 7167979, at *2 (D. Md. Dec. 8, 2016) (“Information sought need only appear to be reasonably calculated to lead to the discovery of permissible evidence.”) (internal quotation omitted).
 - 5th Cir. *La. Crawfish Producers Ass’n- W. v. Mallard Basin, Inc.*, 2015 WL 8074260, at *2 (W.D. La. Dec. 4, 2015) (relevancy means “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”).
 - 6th Cir. *Bentley v. Highlands Hosp. Corp.*, 2016 WL 762686, at *1 (E.D. Ky. Feb. 23, 2016) (court should allow plaintiffs access to information necessary for investigating their claims but should also prevent “fishing expeditions”); *see also Marsden v. Nationwide Biweekly Admin., Inc.*, 2016 WL 471364, at *1–2 (S.D. Ohio Feb. 8, 2016) (court must balance party’s “right to discovery with the need to prevent ‘fishing expeditions.’”); *Hadfield v. Newpage Corp.*, 2016 WL 427924, at *3 (W.D. Ky. Feb. 3, 2016) (relevance to be “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party’s claim or defense.”).
 - 7th Cir. *Murillo v. Kohl’s Corp.*, 2016 WL 4705550, at *2 (E.D. Wisc. Sept. 8, 2016) (“For the purpose of discovery, relevancy is construed broadly to encompass ‘any matter that bears on, or that reasonably could lead to

other matter[s] that could bear on, any issue that is or may be in the case.”); *Elliott v. Superior Pool Prods., LLC*, 2016 WL 29243, at *2 (C.D. Ill. Jan. 4, 2016) (relevancy refers to requirement that discoverable information must be “reasonably calculated to lead to the discovery of relevant information.”).

- 8th Cir. *Orduno v. Pietrzak*, 2016 WL 5853723, at *3 (D. Minn. Oct. 5, 2016) (favorably quoting *Oppenheimer* passage); *Harper v. Unum Grp.*, 2016 WL 4508238, at *1 (W.D. Ark. Aug. 29, 2016) (“Relevance under Rule 26 has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.”); *Schultz v. Sentinel Ins. Co.*, 2016 WL 3149686, at *3 (D.S.D. June 3, 2016) (“Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. Relevancy . . . encompass[es] ‘any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’”); see also *Cor Clearing, LLC v. Calissio Res. Grp., Inc.*, 2016 WL 2997463, at *2 (D. Neb. May 23, 2016) (“The United States Supreme Court has held that discovery under Rule 26 should be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’”); *Hodges v. Pfizer, Inc.*, 2016 WL 1222229, at *2 (D. Minn. Mar. 28, 2016) (discoverable information is “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case”).
- 9th Cir. *Gonzales v. City of Bakersfield*, 2016 WL 4474600, at *2 (E.D. Cal. Aug. 25, 2016) (“Relevancy to a subject matter is interpreted ‘broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.’”); *Gibson v. SDCC*, 2016 WL 845308, at *4 (D. Nev. Mar. 2, 2016) (relevant information is “information reasonably calculated to lead to the discovery of admissible evidence.”); *Lauris v. Novartis*, 2016 WL 7178602, at *2 (E.D. Cal. Dec. 8, 2016) (same).
- 10th Cir. *Navajo Nation Human Rights Comm’n v. San Juan Cty.*, 2016 WL 3079740, at *3 (D. Utah May 31, 2016) (“Relevance is ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense.”); see also *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *17 (D.N.M. Apr. 1, 2016) (“Relevance is still [post-2015 amendments] to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense.”) (quoting *State Farm Mut. Auto Ins. Co. v. Fayda*, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015)); *Arenas v. Unified Sch. Dist. No. 223*, 2016 WL 5122872, at *2 (D. Kan. Sept. 21, 2016) (“Relevance is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense,” despite acknowledging that amendments deleted the phrase.).
- D.C. Cir. *United States ex rel. Shamash v. CA, Inc.*, 2016 WL 74394, at *6–7 (D.D.C. Jan. 6, 2016) (amendments to Rule 26 deleted “reasonably calculated to lead to the discovery of admissible evidence” phrase because it was “often misconstrued to define the scope of discovery,” but “relevance is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense.”) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

§ Proportionality depends on needs of case.

- 6th Cir. *Buchanan v. Chi. Transit Auth.*, 2016 WL 7116591, at *8 (N.D. Ill. Dec. 7, 2016) (court denied request for records supporting defendant’s claim that leave-notice procedure was “usual and customary,” in FMLA case, because plaintiff “vastly overstated the need” for employees’ records substantiating compliance with notice requirements, burden to retrieve information was substantial, and there were other methods of discovery available to collect same information); *In re: ClassicStar Mare Lease Litig.*, 2017 WL 27455, at *3, 4–5 (E.D. Ky. Jan. 3, 2017) (“The particular context—attempting to ‘follow the money’ in collecting a judgment through evaluating the interconnectivity of numerous related entities—indicates to the Court that the creditors here have highly restrained access to the information sought, suggesting subpoenaed production is appropriate.”).
- 9th Cir. *Morrison v. Quest Diagnostics Inc.*, 2016 WL 355120, at *1–2 (D. Nev. Jan. 27, 2016) (under amended Rule 26(b)(1), “lawyers must size and shape their discovery requests to the requisites of a case.”).
Cf.
- 5th Cir. *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 2016 WL 5922315, at *2 (W.D. Tex. Oct. 11, 2016) (“Sheer number of attorneys who have made appearances in the case (24 by the Court’s count) is a persuasive demonstration of the importance of the issues at stake here, the value of the case, and that the parties have significant resources available to them. Proportionality is thus not at issue in this discovery dispute.”)

9 Importance of issues at stake critical in proportionality analysis.

- 3d Cir. *Fassett v. Sears Holdings Corp.*, 2017 WL 386646, at *4 (M.D. Pa. Jan. 27, 2017) (“Although this is not a case involving, for instance, constitutional rights or matters of national significance, to these particular litigants, it [serious bodily injures] is a matter of grave import.”); *but cf. Liberty Int’l Underwriters Can. v. Scottsdale Ins. Co.*, 2017 WL 721105, at *4 (D.N.J. Feb. 23, 2017) (“even if facts are ‘vital, highly probative, and directly relevant or go to the heart of an issue,’ this does not justify a privilege waiver”).
- 6th Cir. *In re: E/I. Du Pont de Nemours and Co. C-8 Pers. Inj. Litig.*, 2016 WL 5884964, at *7 (S.D. Ohio Oct. 7, 2016) (“importance of the issues at stake cannot be overstated” because requested information linking disease and exposure to C-8 chemical is relevant to claims of more than 3500 plaintiffs in MDL).

10 Proportionality addresses whether discovery would assist in vindicating personal or public values.

- 1st Cir. *Doe v. Trs. of Boston Coll.*, 2015 WL 9048225, at *1 (D. Mass. Dec. 16, 2015) (court should consider whether discovery would assist in resolving issues that vindicate personal or public values).
- 3d Cir. *Vay v. Huston*, 2016 WL 1408116, at *6 (W.D. Pa. Apr. 11, 2016) (court considered public value of vindicating constitutional rights).
- 4th Cir. *Santiago v. S. Health Partners*, 2016 WL 4435229, at *3 (M.D.N.C. Aug. 19, 2016) (“For proportionality purposes, however, the reduced monetary stakes represents ‘only one factor, to be balanced against other factors.’”).
- 5th Cir. *Cain v. City of New Orleans*, 2016 WL 7156071, at *7 (E.D. La. Dec. 8, 2016) (“As to the specific proportionality factors, the issues at stake [due process rights to neutral judge abused when portion of court-imposed fines finance court functions] are important matters of civil rights and public interest.”).

11 Public policy considerations.

- 7th Cir. *Perez v. Mueller*, 2016 WL 3360422, at *1 (E.D. Wis. May 27, 2016) (in ERISA case by Secretary of Labor, court considered cost of litigation to public in determining proportionality of defendants’ discovery requests); *see also id.* at *3 (court viewed government’s pursuit of litigation over several years at taxpayers’ expense as indicative of important public-policy weight in assessing whether discovery request was proportional to needs of case); *Simon v. Northwestern Univ.*, 2017 WL 467677, at *2 (N.D. Ill. Feb. 3, 2017) (court noted “the loss of liberty alone” resulting from fabricating false evidence in criminal trial was an “extremely significant” public policy consideration, but found “this case to be of utmost importance” because it questioned “the legitimacy of the criminal justice system”).

12 Weight of amount in controversy.

- 3d Cir. *First Niagara Risk Mgmt. v. Folino*, 2016 WL 4247654 (E.D. Pa. Aug. 11, 2016) (court found that amount-in-controversy factor weighed in favor of party resisting discovery because amount was unknown at time of request and resisting party maintained that “unknown damages cannot justify exorbitant discovery requests.”); *Bell v. Reading Hosp.*, 2016 WL 162991, at *3 (E.D. Pa. Jan. 14, 2016) (amount-in-controversy factor weighs in favor of discovery when discovery costs would certainly not exceed amount in controversy).
- 5th Cir. *Fidelis Grp. Holdings, LLC v. Chalmers Auto., LLC*, 2016 WL 6157601, at *3 (E.D. La. Oct. 24, 2016) (“Given that the amount in controversy is barely above [\$75,000] . . . the request are [sic] disproportionate and beyond the scope discovery”).

13 Relative access to information.

- 1st Cir. *Cont’l W. Ins. Co. v. Opechee Constr. Corp.*, 2016 WL 865232, at *3 (D.N.H. Mar. 2, 2016) (information requested of former employees was “not proportional to needs of the case . . . given the parties’ relative access to the requested information and their respective resources.”).
- 3d Cir. *Vay v. Huston*, 2016 WL 1408116, at *5 (W.D. Pa. Apr. 11, 2016) (defendant’s greater access to information weighed in favor of finding extensive discovery to be proportional).
- 6th Cir. *Albritton v. CVS Caremark Corp.*, 2016 WL 3580790, at *4 (W.D. Ky. June 28, 2016) (court held that information in the sole possession of defendant is a fact weighing in favor of proportionality; the “touchstone” of revised scope of discovery); *see also Kelley v. Apria Healthcare, Inc.*, 2016 WL 737919, at *4 (E.D. Tenn. Feb. 2, 2016) (court considered defendant’s lack of access to confidential final settlement agreement in ordering production subject to protective order).
- 8th Cir. *Schultz v. Sentinel Ins. Co.*, 2016 WL 3149686, at *6 (D.S.D. June 3, 2016) (court determined that defendant insurance company’s greater access to proof weighed in favor of finding that plaintiff’s discovery requests were proportional); *see also Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 643 (W.D. Mo. May

9, 2016) (court considered defendant's "national presence, with sophisticated access to data" in ordering that it answer plaintiff's interrogatories).

- 10th Cir. *Digital Ally, Inc. v. Util. Assocs.*, 2016 WL 1535979, at *4 (D. Kan. Apr. 15, 2016) (plaintiff argued that discovery was proportional because information was "easy to search or locate, either electronically or in paper files.").
- 11th Cir. *Williams v. Am. Int'l Grp., Inc.*, 2016 WL 3456927, at *2 (M.D. Ala. June 21, 2016) (court found proportionality analysis weighed in favor of compelling plaintiff to authorize disclosure of private social security disability records because only plaintiff had access to them).

14 Ease of Access to Information.

- 2d Cir. *Patient A v. Vt. Agency of Human Servs.*, 2016 WL 880036, at *3 (D. Vt. Mar. 1, 2016) (court found plaintiff's discovery request proportional because defendant healthcare service admitted to possessing some responsive data and was obligated under its contract with the state to "track and report information that [was] responsive to certain elements of the proposed deposition topic."); *see also Marom v. City of N.Y.*, 2016 WL 7048053, at *2 (S.D.N.Y. Nov. 30, 2016) (discovery request for eight officers' memo book entries and 108 documents, which were on "readily accessible database," was not unduly burdensome).
- 5th Cir. *In re: Trevino*, 2017 WL 123756, at *20, 23 (S.D. Tex. Jan. 12, 2017) (Court denied request that "appear[ed] to be an attempt . . . to shift researching public information from [p]laintiffs to . . . [d]efendants under the guise of the discovery process," noting that "[p]laintiffs have utterly failed to carry their burden of demonstrating that the requested discovery falls within Rule 26.").
- 6th Cir. *Owens v. Liberty Life Assurance Co. of Boston*, 2016 WL 6156182, at *3 (W.D. Ky. Oct. 21, 2016) (Although defendant "does not maintain the requested records nor does it have employees whose job duties are dedicated to performing the claim file analysis required," discovery was warranted because of information's relevance.).
- 8th Cir. *Prime Aid Pharm. Corp. v. Express Scripts, Inc.*, 2017 WL 67526, at *4 (E.D. Mo. Jan. 6, 2017) (Court rejected defendant's proportionality objection because it "amounts to an assertion that it does not maintain its records in a searchable format," which is inadequate to establish undue burden.).
- 11th Cir. *Pilver v. Hillsborough Cty.*, 2016 WL 4129282, at *3 (M.D. Fla. Aug. 3, 2016) (court found discovery request to be disproportional because it sought information that "can be obtained from some other source that is more convenient, less burdensome, or less expensive," i.e., records in PACER).

Cf.

- 4th Cir. *In re: NC Swine Farm Nuisance Litig.*, 2016 WL 3661266, at *3 (E.D.N.C. July 1, 2016) (court held defendant did not have possession, custody, or control of information and never reached defendant's argument that plaintiffs' request for discovery for documents in control of non-party with parent-subsidiary relationship was not proportional because information could be better accessed through subpoenas to third party).

15 Burden on personnel resources.

- 6th Cir. *Marsden v. Nationwide Biweekly Admin., Inc.*, 2016 WL 471364, at *1-2 (S.D. Ohio Feb. 8, 2016) (expenditure of significant personnel resources to comply with unsupported discovery request outweighed benefits of production).

16 Parties' resources not determinative.

- 9th Cir. *Salazar v. McDonald Corp.*, 2016 WL 736213, at *4 (N.D. Cal. Feb. 25, 2016) ("Consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party."); *see also Goes Int'l, AB v. Dodur Ltd.*, 2016 WL 427369 (N.D. Cal. Feb. 4, 2016) ("although it is a concern, the defendant's financial wherewithal is not decisive" in producing requested discovery).
- 11th Cir. *Llanten v. Am. Sec. Ins. Co.*, 2017 WL 951629, at *4 (M.D. Fla. Mar. 10, 2017) ("The mere fact that compliance with an inspection order will cause great labor and expense or even considerable hardship . . . does not of itself require denial of the motion" to compel.)

Cf.

- 3d Cir. *Vay v. Huston*, 2016 WL 1408116, at *5 (W.D. Pa. Apr. 11, 2016) (defendant's greater resources weighed in favor of finding extensive discovery to be proportional).

17 Importance of discovery to resolving case.

- 2d Cir. *Creighton v. City of N.Y.*, 2016 WL 1178648, at *1 (S.D.N.Y. Mar. 17, 2016) (“Even where relevance may be established, proportionality considerations concerns look to, *inter alia*, ‘the importance of the discovery in resolving the issues’ in the case.”).
 - 3d Cir. *In re: Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 2016 WL 3519618, at *7 (E.D. Pa. June 27, 2016) (discovery was proportional where information went to “heart” of one theory of liability).
 - 4th Cir. *Holcombe v. Helena Chem. Co.*, 2016 WL 2897942, at *3 (D.S.C. May 18, 2016) (court permitted two additional interrogatory questions beyond maximum because, e.g., information sought was probative of plaintiff’s liability theory).
 - 5th Cir. *La. Crawfish Producers Ass’n- W. v. Mallard Basin, Inc.*, 2015 WL 8074260, at *4 (W.D. La. Dec. 4, 2015) (on-site inspection was appropriate in case concerning environmental-impact of permits issued by U.S. Army Corps of Engineers).
 - 8th Cir. *Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 641 (W.D. Mo. May 9, 2016) (despite defendant’s claims that answering interrogatories would involve large amounts of time and high costs, court found that discovery was not disproportional because it involved “critical information” to resolution of issues).
 - 10th Cir. *Boone v. Tfi Family Servs., Inc.*, 2016 WL 3124850, at *2 (D. Kan. June 3, 2016) (denying request for protective order in case involving death of child in custody of family services where, e.g., defendant “failed to establish that its resources or burden of the potential expense outweigh[ed] the undeniably important nature of the issues at stake in th[e] case.”).
 - 11th Cir. *Herman v. Seaworld Parks & Entm’t, Inc.*, 2016 WL 3746421, at *3 (M.D. Fla. July 13, 2016) (denying defendant’s motion to compel disclosure of undisputed, unrelated contracts, as irrelevant and, correspondingly, disproportional because they had “no ‘importance’ or ‘likely benefit’ in resolving” contract dispute).
- Cf.*
- 7th Cir. *AVNET, Inc. v. MOTIO, Inc.*, 2016 WL 3365430, at *3 (N.D. Ill. June 15, 2016) (denying plaintiffs’ motion to strike expert reports in part and rejecting plaintiff’s argument that expert reports that are duplicative and cumulative of earlier expert reports run counter to purpose of proportionality rule and “would inexorably lead to needless increase in cost of litigation.”);
 - 11th Cir. *Bingham v. Baycare Health Sys.*, 2016 WL 4467213, at *4 (M.D. Fla. Aug. 24, 2016) (“[D]iscovery rules do not expressly limit the sources from whom discovery may be sought [when requested documents from another source have been produced], the rules provide that discovery must be proportional to the needs of the case...and must be limited if the discovery sought is unreasonably cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”).

18 Discovery for purposes of class-action certification.

- 3d Cir. *Bell v. Reading Hosp.*, 2016 WL 162991, at *2 (E.D. Pa. Jan. 14, 2016) (discovery was not disproportionate because information would assist in determining whether final certification of class was appropriate); *see also In re: Riddell Concussion Reduction Litig.*, 2016 WL 4119807, at *4 (D.N.J. July 7, 2016) (discovery request was proportional because, e.g., information was “relevant to important class certification requirements.”).
- 8th Cir. *Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 641 (W.D. Mo. May 9, 2016) (“Eighth Circuit Court of Appeals has generally endorsed broad discovery prior to class certification.”); *see also Klein v. TD Ameritrade Holding Corp.*, 2016 WL 7156476, at *2 (D. Neb. Dec. 7, 2016) (court bifurcated merits and class certification discovery and held that discovery of all defendant’s clients and all communications, with no time frame limitation, exceeded scope of class certification issue and was not proportional for purposes of class action certification).
- 9th Cir. *Ciuffitelli v. Deloitte & Touche LLP*, 2016 WL 6963039, at *9 (D. Or. Nov. 28, 2016) (“Limited, focused merits discovery will be allowed while the motions to dismiss are pending” in putative class action.); *Carroll v. Wells Fargo & Co.*, 2016 WL 4696852, at *3 (N.D. Cal. Sept. 8, 2016) (“Court [found] that the 25% sample [contact information for putative class-action members] requested by Plaintiff [was] fair and proportional to the needs of the case.”); *O’Connor v. Uber Techs., Inc.*, 2016 WL 107461, at *4 (N.D. Cal. Jan. 11, 2016) (defendant’s request for names and contact information of class members, and communications between class members and class counsel was disproportional because discovery lacked importance to resolution of issues); *Talavera v. Sun Maid Growers of Cal.*, 2017 WL 495635, at *4 (E.D. Cal. Feb. 6, 2017) (“[D]iscovery of all putative class member pay, punch, and time information goes to the merits and is beyond the scope of discovery needed in preparing the class certification motion.”).

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- 11th Cir. *Hankinson v. R.T.G. Furniture Corp.*, 2016 WL 1182768 (S.D. Fla. Mar. 28, 2016) (court determined that discovery of non-party online and out-of-state affiliates was not proportional at pre-class-action certification stage).

19 Discovery related to central issue more important than discovery related to peripheral issue.

- 9th Cir. *Van v. Language Line Servs.*, ___WL___ (N.D. Cal. Mar. 2, 2016) (party was not required to answer requests for production that sought “low-probative-value information”).
- 11th Cir. *Flynn v. Square One Distrib., Inc.*, 2016 WL 2997673, at *4 (M.D. Fla. May 25, 2016) (“[R]equested information must also satisfy the proportionality requirement meaning it must be more than tangentially related to the issues that are actually at stake in the litigation.”).

20 Marginal utility discovery.

- 2d Cir. *Woodward v. Afify*, 2017 WL 279555, at *7–8 (W.D.N.Y. Jan. 23, 2017) (inmate “misbehavior reports written by defendant [officials] about other inmates while arguably relevant, do not appear to be highly probative of the allegations in this lawsuit” and outweigh burden); *Armstrong Pump, Inc. v. Hartman*, 2016 WL 7208753, at *3 (W.D.N.Y. Dec. 13, 2016) (discovery reached “point of diminishing returns” after six years of discovery and production of approximately 1.5 million pages of documents); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2016 WL 6779901, at *3 (S.D.N.Y. Nov. 16, 2016) (Request for “all” information, in addition to more than 1.5 million documents previously produced to various regulatory agencies in connection with investigations of manipulating benchmark interest rate, was too expensive to meet marginal utility requirement.); *see also Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016) (“Proportionality focuses on the marginal utility of the discovery sought.”).
- 4th Cir. *Johnson v. Ford Motor Co.*, 2016 WL 4577419, at *3 (S.D. W. Va. Sept. 1, 2016) (court limited discovery to disclosure only of source code implicated by plaintiffs’ defect theory); *Dwoskin v. Bank of Am., N.A.*, 2016 WL 3955932, at *2 (D. Md. July 22, 2016) (court denied plaintiffs’ request for additional discovery because plaintiffs failed to show that discovery would contradict evidence already produced); *see also Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205, (W.D. Va. Jan. 25, 2016) (party resisting discovery may show that requested information is not relevant or is “of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption of broad discovery”).
- 5th Cir. *Garcia v. Prof'l Contract Serv., Inc.*, 2017 WL 187577, at *2 (W.D. Tex. Jan. 17, 2017) (denying defendant’s request for “fishing expedition” of past employee records from another former employer because defendant already had ten years of employment data, and records from company that plaintiff left voluntarily would likely be irrelevant).
- 9th Cir. *IDS Prop. & Cas. Ins. Co. v. Fellows*, 2017 WL 202128, at *4–5 (W.D. Wash. Jan. 18, 2017) (Because defendant had already produced approximately 6,000 emails, court held discovery of all emails regarding single employee’s reputation was “negligibly relevant, potentially privileged, and unduly burdensome,” and thus disproportional.); *Lauris v. Novartis*, 2016 WL 7178602, at *4 (E.D. Cal. Dec. 8, 2016) (e-discovery of apex executives was burdensome and unlikely to yield non-duplicative relevant information because of extensive discovery of key custodians); *In re: Bard IVC Filters Prod. Liab. Litig.*, 2016 WL 4943393, at *4 (D. Ariz. Sept. 16, 2016) (court found burden incurred in providing ESI from custodians in foreign countries for last 13 years outweighed benefit of “marginally relevant” evidence); *Dobro v. Allstate Ins. Co.*, 2016 WL 4595149, at *8 (S.D. Cal. Sept. 2, 2016) (“[A]ssertion that some of the 10,082 files may contain relevant claims was insufficient to justify the extremely time- and labor-intensive search.”); *Santoyo v. Howmedica Osteonics Corp.*, 2016 WL 2595199, at *3 (W.D. Wash. May 5, 2016) (“In light of the slight relevance at this point, the amount in controversy, and the vast amount of discovery sought,” court granted protective order denying discovery request).
- 10th Cir. *Ark. River Power Auth. v. The Babcock & Wilson Co.*, 2016 WL 192269, at *4 (D. Colo. Jan. 15, 2016) (“Once the discovery sought appears relevant, the party resisting discovery has the burden to establish lack of relevance or that the information is of such marginal relevance that the potential harm occasioned by the discovery outweighs the benefit of production.”); *Coleman v. Reed*, 2016 WL 4523915, at *2 (W.D. Okla. Aug. 22, 2016) (despite no evidence that truck driver was using cell phone at time of traffic accident, court granted, but limited, discovery request of data records of cell phone tower records, which could “potentially calculate his driving speeds” and use of phone); *but cf.* 2d Cir. *Gonzalez v. Allied Concrete Indus., Inc.*, 2016 WL 4444789, at *4 (E.D.N.Y. Aug. 23, 2016) (court denied request to disclose ATM receipts and cell phone records as potential evidence showing plaintiffs’ whereabouts in FLSA case claiming overtime compensation because request was too speculative).

- 11th Cir. *Steel Erectors, Inc. v. AIM Steel Int'l, Inc.*, 312 F.R.D. 673, 677 (S.D. Ga. Jan. 4, 2016) (court denied discovery request, which was “based solely on plaintiff’s speculation” that information was relevant in face of contrary evidence in discovery responses).

²¹ **Burden or expense outweighing benefits of discovery.**

- 1st Cir. *Wal-Mart P.R., Inc. v. Zaragoza-Gomez*, 152 F. Supp. 3d 67, 73 (D.P.R. 2016) (burden of producing discovery is not outweighed by benefits when party is able to “deliver a paper copy of the discovery to the court approximately two and one-half hours after [the court] ordered its production for *in camera* review”).
- 3d Cir. *Capetillo v. Primecare Med., Inc.*, 2016 WL 3551625, at *3, n.2 (E.D. Pa. June 28, 2016) (finding discovery request for inmate medical care complaints over 5-10 year period unduly burdensome and limiting it to 18-months and by subject matter because it triggered onerous manual review of database); *see also Guerrido-Lopez v. City of Allentown*, 2016 WL 1182158, at *1 (E.D. Pa. Mar. 28, 2016) (court denied plaintiff’s motion for reconsideration because court had “impos[ed] reasonable limits on Plaintiff’s boundless discovery requests that permit[ed] the discovery of evidence the Plaintiff needs to prove his case without unnecessarily expanding the burden and cost of production”). *Blackrock Allocation Target Shares v. Wells Fargo Bank, Nat’l Ass’n*, 2017 WL 953550, at *4 (S.D.N.Y. Mar. 10, 2017) (denying, in breach-of-contract claim, plaintiffs’ request to conduct second statistical sampling of loans to determine loan breach rates in order to prove liability and damages, because such sampling would take several months to conduct, would cost “hundreds of thousands, if not millions, of dollars,” and probably would not prove liability and damages since such claims must be proven “on a loan-by-loan and trust-by-trust basis” at summary judgment or trial); *Royal Park Inv. v. HSBC Bank USA Nat’l Ass’n*, 2017 WL 945099, at *4 (S.D.N.Y. Mar. 10, 2017) (same).
- 4th Cir. *White v. Sam’s E., Inc.*, 2016 WL 205494, at *1 (S.D. W. Va. Jan. 15, 2016) (in case alleging violations of state law, plaintiff’s discovery requests for nationwide discovery were overbroad).
- 5th Cir. *Duvall v. BOPCO, L.P.*, 2016 WL 1268343, at *2 (E.D. La. April 1, 2016) (court denied plaintiff’s request to inspect and test barge equipment because steps were “unduly burdensome, hazardous and disruptive of defendant’s operations”).
- 6th Cir. *Arthur J. Gallagher & Co. v. Anthony*, 2016 WL 2997599, at *1 (N.D. Ohio May 24, 2016) (court denied plaintiff’s motion for expedited responses to subpoena duces tecum from third party because request was overly broad and plaintiff “had ample opportunity to conduct discovery with [third party]... and this late request for expedited production of text messages, cell phone records, and metadata would be unduly burdensome to produce”); *see also Marsden v. Nationwide Biweekly Admin., Inc.*, 2016 WL 471364, at *1–2 (S.D. Ohio Feb. 8, 2016) (expenditure of significant financial and personnel resources to comply with unsupported discovery request outweighed benefits of production); *Siriano v. Goodman Mfg. Co., L.P.*, 2015 WL 8259548, at *6 (S.D. Ohio Dec. 9, 2015) (court should limit scope of discovery only when compliance would “prove *unduly* burdensome, not merely expensive or time-consuming”); *Murillo v. Dillard*, 2017 WL 471570, at *3 (W.D. Ken. Feb. 3, 2017) (in dispute regarding whether 24 depositions of impoverished migrant workers would occur in Mexico or Kentucky, court held that defendants’ “preference for conducting the depositions in forum is substantially outweighed by the difficulty and expense that [p]laintiffs would incur in order to appear for their depositions in Kentucky”).
- 8th Cir. *Vallejo v. Amgen, Inc.*, 2016 WL 2986250, at *4 (D. Neb. May 20, 2016) (court affirmed magistrate judge’s finding that plaintiff’s discovery request was disproportional based on “a variety of factors – including the volume of reports Plaintiff’s requests would return, the amount of irrelevant information likely to be included, and the number of employees who would have to be questioned”); *Perez v. KDP Hosp., LLC*, 2016 WL 2746926, at *3 (W.D. Mo. May 6, 2016) (in FSLA case, court denied defendants’ request for immigration status of informers and claimants because “potential damage and prejudice” outweighed relevance of information).
- 9th Cir. *Gilead Scis., Inc. v. Merck & Co.*, 2016 WL 146574, at *2 (N.D. Cal. Jan. 13, 2016) (cost and delay outweighed benefits of discovery when requests were for information that was irrelevant to disputes in case); *see also ChriMar Systems v. Cisco Systems, Inc.*, 312 F.R.D. 560, 564 (N.D. Cal. Jan. 12, 2016) (amendments to Rule 26 balance proportionality needs of case considering burdens involved). *Sec’y of Labor, United States Dep’t of Labor v. Kazu Constr., LLC*, 2017 WL 628455, at *12 (D. Haw. Feb. 15, 2017) (in Fair Labor Standards Act case, denying issuance of a protective order because defendants’ requests for financial, phone, and social media records was proportional to litigation, but in order “to assuage concerns of overbreadth and undue burden, and to promote proportionality,” narrowing scope of those requests to documents falling within three-month period giving rise to claims and modifying requests to require only names of relevant financial institutions, cell-phone carrier names, and social media posts produced or received by subpoenaed plaintiffs).

- 10th Cir. *Echon v. Sackett*, 2016 WL 943485, at *2 (D. Colo. Jan. 27, 2016) (defendants’ discovery requests were overbroad because defendants did not provide court with information about people and entities from whom discovery was sought, requests were not limited to claims or defenses, and some requests were “outright offensive”).
- D.C. Cir. *Dell Inc. v. DeCosta*, 2017 WL 177618, at *2 (D.D.C. Jan. 17, 2017) (court denied discovery of broad patent-related documents because it “would impose an undue and disproportionate burden on [d]efendants to prepare a privilege log” and most documents would be protected by attorney-client privilege).
Cf.
- 9th Cir. *Wilson v. Wal-Mart Stores, Inc.*, 2016 WL 526225, at *3 (D. Nev. Feb. 9, 2016) (defendant’s argument that videotaping worksite was burdensome was not persuasive).

22 If burden and cost modest, balance strikes in favor of requesting party.

- 5th Cir. *Mr. Mudbug, Inc. v. Bloomin’ Brands, Inc.*, 2017 WL 448575, at *3 (E.D. La. Feb. 1, 2017) (court granted motion to compel facility-site inspections when “[p]laintiff did not object to the inspection” and request was found “reasonably specific, relevant and proportional”).

23 Proportionality considerations include effects on non-parties.

- 5th Cir. *Hahn v. Hunt*, 2016 WL 1587405, at *2 (E.D. La. Apr. 20, 2016) (“[N]on-parties have greater protections from discovery, and . . . burdens on non-parties . . . impact the proportionality analysis.”) (citing E. Laporte & J. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure* 26, 9 FED. CTS. L. REV. 57 (2015)).
- 9th Cir. *D.F. v. Sikorsky Aircraft Corp.*, 2016 WL 3360515, at *7 (S.D. Cal. June 13, 2016) (court did not require third party to produce privilege log or otherwise “assemble a formal, detailed privilege claim” while questioning whether associated burden and expense outweighed benefits).
- 11th Cir. *Williams v. Am. Int’l Grp., Inc.*, 2016 WL 3156066, at *2 (M.D. Ala. June 3, 2016) (discovery of non-parties’ HIPPA-protected health information was disproportional considering limited relevance of information).

24 Information not reasonably accessible.

- 8th Cir. *Duhigg v. Goodwill Industries*, 2016 WL 4991480, at *3 (D. Neb. Sept. 16, 2016) (court erroneously conflates determination of accessible information under Rule 26(b)(2)(B) with burden analysis under Rule 26(b)(1)).

25 Burden on party seeking more than presumptive number of depositions.

- 4th Cir. *Miller v. Garibaldi’s, Inc.*, 2016 WL 7257035, at *6 (S.D. Ga. Dec. 15, 2016) (court denied additional depositions because defendant had not established that the depositions of each individual plaintiff were necessary).
- 5th Cir. *Allen-Pieroni v. Sw. Correctional*, 2016 WL 4439997, at *7 (N.D. Tex. Aug. 23, 2016) (request for six depositions beyond ten that were taken was “proportional to the needs of case” after court found the first ten depositions were necessary).
- 6th Cir. *Murillo v. Dillard*, 2017 WL 471570, at *5 (W.D. Ken. Feb. 3, 2017) (While “plaintiffs ha[d] the burden of persuading the Court that taking the depositions of the remaining 21 [p]laintiffs [was] necessary,” burden met where depositions would “provide evidence that is relevant to the claims and defenses . . . and proportional to the needs of this case” and were “not unreasonably cumulative or duplicative.”).
- 11th Cir. *Williams v. Am. Int’l Grp., Inc.*, 2016 WL 2747020, at *1 (M.D. Ala. May 2, 2016) (“party seeking to exceed the presumptive number of depositions must make a ‘particularized showing of why the discovery is necessary’” and “address Rule 26(b)(1)’s proportionality analysis”).

26 Court’s failure to reference proportionality.

- 1st Cir. *Ferring Pharms. Inc. v. Braintree Labs., Inc.*, 168 F. Supp. 3d 355, 363 (D. Mass. 2016) (failure of judge to “expressly reference proportionality in her ruling does not render her ruling contrary to law”).
- 2d Cir. *Patient A v. Vt. Agency of Human Servs.*, 2016 WL 880036, at *3 (D. Vt. Mar. 1, 2016) (“Court is not obligated to make formal and explicit findings regarding each of the[se] factors.”) (quoting *Meeker v. Life Care Ctrs. of Am., Inc.*, 2015 WL 7882695, at *3 (D. Colo. Dec. 4, 2015)); *In re: Catalyst Managerial Serv.*, 2017 WL 716846, at *2 (2nd Cir. Feb. 23, 2017) (in affirming district court’s motion to compel production, court rejected intervenor’s argument that district court must explicitly conduct proportionality analysis when defendant’s responses and responsive documents it submitted cast completeness of its disclosure into doubt and thus warranted additional discovery to allow plaintiffs to check accuracy of defendant’s disclosures).

- 3d Cir. *CDK Glob., LLC v. Tulley Auto. Grp., Inc.*, 2016 WL 1718100, at *8 (D.N.J. Apr. 29, 2016) (district judge rejected plaintiff's motion that magistrate judge failed to consider proportionality factors in denying discovery request).

27 No priority among proportionality factors.

- 3d Cir. *Capetillo v. Primecare Med., Inc.*, 2016 WL 3551625, at *2 (E.D. Pa. June 28, 2016) (“[N]o single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional.”) (quoting *Bell v. Reading Hosp.*, 2016 WL 162991, at *2 (E.D. Pa. Jan. 14, 2016)).

28 Requesting party does not have responsibility to make advance showing of proportionality.

- 2d Cir. *State Farm Mut. Auto. Ins. v. Fayda*, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015) (Committee Note to 2015 amendment explains that rule “does not place on the party seeking discovery the burden of addressing all proportionality considerations”).
- 5th Cir. *Samsung Elec. Am. Inc. v. Chung*, 2017 WL 896897, at *13 (N.D. Tex. Mar. 7, 2017) (“Rule 26(g)(1) does not impose on a party filing a motion to compel the burden to show relevance and proportionality in the first instance.”); *Hightower v. Grp. 1 Auto., Inc.*, 2016 WL 3430569, at *3 (E.D. La. June 22, 2016) (considering plaintiff's argument, which cited *Duke Law Proportionality Guidelines and Practices*, Guideline 2(F), stating that there is no requirement to make advance showing of proportionality). 9th Cir. *In re: Bard IVC Filters Prod. Liab. Litig.*, 2016 WL 4943393, at *2 (D. Ariz. Sept. 16, 2016) (“[A]mendment does not place the burden of proving proportionality on the party seeking discovery.”).
- 10th Cir. *Hibu Inc. v. Peck*, 2016 WL 4702422, at *2 (D. Kan. Sept. 8, 2016) (“Moving the proportionality provisions to Rule 26 does not place on the party seeking discovery the burden of addressing all proportionality considerations.”).

29 Boilerplate objections insufficient.

- 2nd Cir. *Ramos v. Town of E. Hartford*, 2016 WL 7340282, at *2 (D. Conn. Dec. 19, 2016) (“[t]he 2015 revision of the Federal Rules precludes the use of the type of boilerplate objections on which Defendants rely.”); *Leibovitz v. The City of New York*, 2017 WL 462515, at *2 (S.D.N.Y. Feb. 3, 2017) (Court overruled defendant's “general, boilerplate objections to each of plaintiff's requests for production” because “such objections violate Fed.R.Civ.P. 34(b)(2)(B).”).
 - 4th Cir. *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, 2016 WL 4287929, at *2 (E.D.N.C. Aug. 15, 2016) (“[N]othing more than boilerplate objections: they fail to specify why the requested documents are not relevant to a party's claim or defense and not proportional to the needs of the case.”).
 - 5th Cir. *Rosalez Funez v. E.M.S.P., LLC*, 2016 WL 5337981, at *2-3 (E.D. La. Sept. 23, 2016) (“General objections ... are meaningless and constitute a waste of time for opposing counsel and the court.”); *see also Keycorp v. Holland*, 2016 WL 6277813, at *5 (N.D. Tex. Oct. 26, 2016) (Boilerplate objections failed to “provide specific reasons for the overly broad, overly burdensome and vague objections”).
 - 6th Cir. *Martin v. Posey*, 2017 WL 412876, at *2 (S.D. Ohio Jan. 31, 2017) (“Fed. R. Civ. P. 26(b)(1)'s inclusion of the proportionality factors enforces the collective obligation to consider proportionality in discovery disputes; it does not, however, permit a party to refuse discovery simply by making a boilerplate objection that the information requested is not proportional.”).
 - 7th Cir. *Baires Blue Cross Blue Shield of Minn. v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4591905, at *5 (E.D. Wis. Sept. 2, 2016) (“[B]oilerplate objections such as relevancy and ‘not proportional’ are insufficient”).
 - 8th Cir. *Schultz v. Sentinel Ins., Ltd.*, 2016 WL 3149686, at *7 (D.S.D. June 3, 2016) (“[B]oilerplate ‘general objections’ fail to preserve any valid objection at all because they are not specific to a particular discovery request.”); *see also Sprint Commc'ns. Co. L.P. v. Crow Creek Sioux Tribal Court*, 316 F.R.D. 254, 264 (D.S.D. Feb. 26, 2016) (“Amended Rule 34(b) now prohibits boilerplate objections.”).
 - 9th Cir. *Gibson v. SDCC*, 2016 WL 845308, at *6 (D. Nev. Mar. 2, 2016) (boilerplate objections insufficient to show discovery should not be allowed).
 - 10th Cir. *Duffy v. Lawrence Memorial Hosp.*, 2016 WL 7386413, at *2-3 (D. Kan. Dec. 21, 2016) (Court rejected boilerplate objections because they provide no explanation for the objection and they “leave the reader confused as to whether the answers are complete and all requested documents are identified.”).
- Cf.*

- 3d Cir. *Haines v. Cherian*, 2016 WL 831946, at *7 (M.D. Pa. Feb. 29, 2016) (court sustained boilerplate objection that request was overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence).

³⁰ **Objection to discovery request must be specific.**

- 2d Cir. *Fischer v. Forrest*, 2017 WL 773694 (S.D.N.Y. Feb. 27, 2017), ___ F.Supp.3d ___ 2017 (“It is time, once again, to issue a discovery wake-up call to the Bar in this District” to state grounds for objecting to discovery request with specificity under Rule 34).
- 4th Cir. *Raab v. Smith & Nephew, Inc.*, 2016 WL 2587188, at *4 (S.D. W. Va. May 4, 2016) (defendant failed to provide specific objection to discovery requests).
- 5th Cir. *Allen-Pieroni v. Sw. Corr., LLC*, 2016 WL 1750325, at *4 (N.D. Tex. May 2, 2016) (“Party seeking to resist discovery on these grounds still bears the burden of making a specific objection and showing that the discovery fail[ed] the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address.”); *see also Orchestratehr, Inc. v. Trombetta*, 2016 WL 1555784, at *24 (N.D. Tex. Apr. 18, 2016) (same); *Holmes v. N. Tex. Health Care Laundry Coop. Ass’n*, 2016 WL 1366269, at *5 (N.D. Tex. Apr. 6, 2016) (party resisting discovery “bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b)”); *Robinson v. Dallas Cty. Cmty. Coll. Dist.*, 2016 WL 1273900, at *3 (N.D. Tex. Feb. 18, 2016) (“[P]arty resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable.”).
- 6th Cir. *Commerce and Indus. Ins. Co. v. Century Surety Co.*, 2017 WL 946984, at *2 (S.D. Ohio Mar. 10, 2017) (because specific objections are required, “[p]laintiff’s general objection that discovery is unnecessary is without merit”)
- 8th Cir. *Sprint Commc’ns. Co. L.P. v. Crow Creek Sioux Tribal Court*, 316 F.R.D. 254, 263 (D.S.D. Feb. 26, 2016) (objecting party must “state with specificity the grounds for objecting, including the reasons” and “whether any responsive materials are being withheld”).
- 10th Cir. *N.U. v. Wal-Mart Stores, Inc.*, 2016 WL 3654759, at *2 (D. Kan. July 8, 2016) (granting plaintiff’s motion to compel in part because defendant relied on “conclusory assertions that the scope of the requests [was] too broad without adequately demonstrating that responding to the requests would pose an undue burden or that the scope of the requests encompass[ed] irrelevant information”); *see also Digital Ally, Inc. v. Util. Assocs., Inc.*, 2016 WL 1535979, at *4 (D. Kan. Apr. 15, 2016) (court overruled defendant’s objections to discovery requests because defendant failed to expound upon objections to discovery’s proportionality and relevance); *Fish v. Kobach*, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) (“Objections based on undue burden must be clearly supported by an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.”).

³¹ **Discovery request too broad.**

- 2d Cir. *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2016 WL 6779901, at *3 (S.D.N.Y. Nov. 16, 2016) (plaintiff’s “general contention that every communication and work product related to the regulatory investigations is “likely” to contain additional relevant information” insufficient to support broad request).
- 9th Cir. *Thakkar v. Honeywell Int’l Inc. Short-Term Disability Plan*, 2016 WL 6832708, at *4 (D. Ariz. Nov. 21, 2016) (broad discovery request for all communications in company, without specifying department or employee level, not proportional to needs of case).

³² **Court may rely on counsel’s representations.**

- 6th Cir. *Martin v. Posey*, 2017 WL 412876, at *8 (S.D. Ohio Jan. 31, 2017) (FRCP do not provide for discovery in the form of compelling polygraph examinations of parties or other individuals); *Burfitt v. Bear*, 2016 WL 5848844, at *3 (S.D. Ohio Oct. 10, 2016) (court accepted government-counsel’s representation that discovery requested by prisoner was burdensome particularly because it posed security risk).
- 11th Cir. *Hunter v. Corr. Corp. of Am.*, 2016 WL 943752, at *2 (S.D. Ga. Feb. 5, 2016) (court generally may rely on counsel’s representations about availability of responsive documents, absent suspicion that representation is false).
Cf.
- 2d Cir. *Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc.*, 2016 WL 4703656, at *11 (E.D.N.Y. Sept. 7, 2016) (based on counsel’s representation that no documents existed, court required “affidavit setting forth (1) the specific details of the search undertaken for these materials; (2) what was discovered as a result of the search; and (3) to the extent the Nationwide Defendants maintain[ed] that no responsive materials were found, the defendants’ particularized explanation as to why no materials were uncovered”).

- 7th Cir. *Elliott v. Superior Pool Prods., LLC*, 2016 WL 29243, at *6 (C.D. Ill. Jan. 4, 2016) (defense counsel’s “factual contentions concerning the completeness of their document production to the Plaintiff ha[d] sufficient evidentiary support”).

³³ **Burden of persuasion.**

- 2d Cir. *Black v. Buffalo Meat Serv., Inc.*, 2016 WL 4363506, at *6 (W.D.N.Y. Aug. 16, 2016) (“Prior to the 2015 amendments, defendants would have to show that the requests were unduly burdensome; now, the issue is whether the quantity of requests for relevant material is such that it is out of proportion to the scope of the case.”); *State Farm Mut. Auto. Ins. Co. v. Fayda*, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015) (amendments did not alter burdens on parties; party seeking discovery must show that item is relevant, and party resisting discovery must show “undue burden or expense”); *Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc.*, 2016 WL 4703656, at *2 (E.D.N.Y. Sept. 7, 2016) (“[P]arty seeking discovery must make a *prima facie* showing that the discovery sought is more than merely a fishing expedition.”); *see also Certain Underwriters at Lloyd’s v. Nat’l R.R. Passenger Corp.*, 2016 WL 7017356, at *5 (E.D.N.Y. Nov. 30, 2016) (same).
- 4th Cir. *Santiago v. S. Health Partners*, 2016 WL 4435229, at *2 (M.D.N.C. Aug. 19, 2016) (amended Rule 26 does not “require shifting the burden of persuasion” from the “parties resisting discovery[, who continue to] bear the burden of persuasion in a discovery dispute”); *Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205, 209 (W.D. Va. Jan. 25, 2016) (party who moves to compel discovery has initial burden of showing that information is discoverable; party resisting discovery then has burden of proving that court should not grant motion to compel. Party resisting discovery may show that requested information is not relevant or is “of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption of broad discovery”)
- 10th Cir. *Ark. River Power Auth. v. The Babcock & Wilson Co.*, 2016 WL 192269, at *4 (D. Colo. Jan. 15, 2016) (party seeking discovery has burden of establishing that “information sought is relevant to a claim or defense in the case. Once the discovery sought appears relevant, the party resisting discovery has the burden to establish lack of relevance or that the information is of such marginal relevance that the potential harm occasioned by the discovery outweighs the benefit of production”); *see also Arenas v. Unified Sch. Dist. No. 223*, 2016 WL 5122872, at *2 (D. Kan. Sept. 21, 2016) (“Moving the proportionality provisions to Rule 26 does not place on the party seeking discovery the burden of addressing all proportionality considerations.”).
- 11th Cir. *Bright v. Frix*, 2016 WL 1011441, at *1 (M.D. Fla. Jan. 22, 2016) (party who moves to compel discovery has initial burden of proving that requested information is relevant).

³⁴ **Use of GPS data.**

- 5th Cir. *Kirk v. Invesco, Ltd.*, 2016 WL 4394336, at *5 (S.D. Tex. Aug. 18, 2016) (GPS records submitted to show whereabouts of employee for FLSA overtime compensation purposes were inconclusive and did not support inference that employee worked overtime).
- 6th Cir. *Raub v. Moon Lake Prop. Owners Ass’n*, 2016 WL 6275392, at *3 (E.D. Mich. Oct. 27, 2016) (Property owner’s discovery request of property owners’ association’s computer and phone records, including passwords, GPS locations, text messages, photos, and voicemails, for past ten years in a case alleging retaliation for filing ADA complaint was “breathhtakingly broad, burdensome, and intrusive.”).
- 7th Cir. *Crabtree v. Angie’s List, Inc.*, 2017 WL 413242, at *3 (S.D. Ind. Jan. 31, 2017) (Court denied request for forensic examination of plaintiffs’ election devices to get GPS data when defendant already had plaintiffs’ cell phone records and log-ins data, finding that such request was “not proportional to the needs of the case because any benefit the data might provide is outweighed by Plaintiffs’ significant privacy and confidentiality interests.”).

³⁵ **Consideration of burdens other than expense typically incurred in discovery.**

- 4th Cir. *Conn. Gen. Life Ins. Co. v. Advanced Surgery Ctr. of Bethesda, LLC*, 2016 WL 7115952, at *3 (D. Md. Dec. 7, 2016) (court recognized potential burden of conferring with counsel from dozens of other cases who would need to concur with disclosure of certain deposition transcripts subject to confidentiality orders, but rejected the burdensome-claim, absent showing of “allege[d] specific facts that indicate the nature and extent of the burden”); *Fish v. Air & Liquid Sys. Corp.*, 2017 WL 697663, at *18 (D. Md. Feb. 21, 2017) (citing irrelevance and burden, as well as expense, an overbroad date range, concerns about privacy regarding discovery of employee information, and likely work product protection, court denied request for information on auto manufacturer’s record retention policy, when plaintiff had not identified “any document or group of documents at issue.”)
- 5th Cir. *Biggio v. H2O Hair, Inc.*, 2016 WL 7116025, at *3 (E.D. La. Dec. 7, 2016) (deposition questions concerning employment histories of nonparties, including allegedly detrimental personnel actions taken against them, may

reveal information relevant to their retaliation and willful misconduct claims, but court must balance parties' interests in obtaining permissible discovery against privacy interests of individual nonparties); *see also In re: Xarelto (Rivaroxaban) Prods.*, 313 F.R.D. 32, 38 (E.D. La. 2016) (request for employees' personnel files maintained by HR department, as opposed to employees' custodial files, raised privacy concerns and required "individualized showing of relevancy, proportionality, and particularity"); *see also McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 2016 WL 2609994, at *11 (N.D. Tex. May 6, 2016) (court denied plaintiff's motion to squash subpoena for deposition finding that payment of attorney's fees in connection with deposition is "not an undue burden under the circumstances").

- 9th Cir. *Dobro v. Allstate Ins. Co.*, 2016 WL 4595149, at *8 (S.D. Cal. Sept. 2, 2016) ("Court [found] that the requested procedure [seeking written consent from affected individuals to disclose certain information] would inappropriately impact the privacy rights of numerous third-party insureds and [was] not proportional to the needs of this case."); *Gonzales v. City of Bakersfield*, 2016 WL 4474600, at *2 (E.D. Cal. Aug. 25, 2016) ("Court [found] that the privacy interests [disclosure of police personnel files were] outweighed by the need for disclosure.").
- 11th Cir. *Williams v. Am. Int'l Grp., Inc.*, 2016 WL 2747020, at *2 (M.D. Ala. May 2, 2016) (HIPPA privacy "concerns tip the scales of proportionality against disclosure" of third-party health information).

36 Affidavits or other evidentiary proof showing burden with specificity required.

- 2d Cir. *Knight v. Local 25 IBEW*, __ WL __ (E.D.N.Y. Mar. 31, 2016) (defendant's conclusory argument that redacting social security numbers on standard reports was burdensome was not persuasive).
- 4th Cir. *Scott Hutchison Enter., Inc. v. Cranberry Pipeline Corp.*, 2016 WL 5219633, at *3 (S.D. W. Va. Sept. 20, 2016) (collection of cases that require specific proof); *Ashmore v. Allied Energy, Inc.*, 2016 WL 301169, at *3 (D.S.C. Jan. 25, 2016) (court denied defendant's claim that discovery was not proportional because defendant failed to "submit any documentation that either establishes the proposed cost of production or a cost estimate for an alternative form of production").
- 5th Cir. *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 2016 WL 98603, at *3 (N.D. Tex. Jan. 8, 2016) (party resisting discovery must show that "requested discovery was overbroad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.").
- 8th Cir. *Vallejo v. Amgen, Inc.*, 2016 WL 2986250, at *3, n. 6 (D. Neb. May 20, 2016) (court retained discretion to find discovery request not proportional when neither party provided "substantial and reasonable guidance" forcing court "to wade through generalized and conflated arguments of need, burden, and relevance").
- 9th Cir. *Santoyo v. Howmedica Osteonics Corp.*, 2016 WL 2595199, at *3 (W.D. Wash. May 5, 2016) (court noted that party resisting discovery should provide more specific proof of cost of discovery beyond estimates based on lawyer's similar prior litigation experiences).
- 10th Cir. *Fish v. Kobach*, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) ("Objections based on undue burden must be clearly supported by an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.").
- 11th Cir. *In re: Subpoena Upon NeJame Law, P.A.*, 2016 WL 1599831, at *5 (M.D. Fla. Apr. 21, 2016) (requested discovery was seemingly overbroad, but court nonetheless ordered it because party failed to provide evidence of any burden in retrieving, reviewing, or producing it).

37 Party requesting discovery may need to make showing.

- 2d Cir. *Blodgett v. Siemens Indus., Inc.*, 2016 WL 4203490, at *3 (E.D.N.Y. Aug. 9, 2016) (court denied discovery request because requesting party failed to provide any "basis beyond speculation to believe that relevant information [was] likely to be uncovered as a result of requiring Defendant to undertake an additional search for the proposed three month period").
- 5th Cir. *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins.*, 2016 WL 98603, at *3 (N.D. Tex. Jan. 8, 2016) (in opposition to resisting party's showing, party seeking discovery "may well need to make its own showing of many or all of the proportionality factors, including the importance of the issues at stake in the litigation, the amount in controversy, the parties' relative access to relevant information"); *see also Keycorp v. Holland*, 2016 WL 6277813, at *5 (N.D. Tex. Oct. 26, 2016) (requesting party "may well need to make its own showing of the proportionality factors").
- 6th Cir. *Martin v. Posey*, 2017 WL 412876, at *4 (S.D. Ohio Jan. 31, 2017) (Where plaintiff asked for additional requests for admissions due to "defendants' inconsistent answers," court denied such requests because plaintiff "has not shown why he needs more requests for admission or how any additional requests will help him obtain the information he needs to prosecute his claims.").

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- 10th Cir. *Xmission, L.C. v. Adknowledge, Inc.*, 2016 WL 6108556, at *3 (D. Utah Oct. 19, 2016) (request denied for information “that was mooted and resolved over a year ago” because plaintiff “does little to explain[] the relevance of these discovery requests to the current litigation”).

³⁸ **Unsupported assertions insufficient.**

- 2d Cir. *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2016 WL 6779901, at *4 (S.D.N.Y. Nov. 16, 2016) (court denied plaintiff’s requests because “plaintiffs [had] not sufficiently articulated the relevance of documents sought,” but plaintiffs were allowed to renew motion if requests were more specific “detailing requested documents or topics” (quoting *Okla. v. Tyson Foods*, 2006 WL 2862216, at *1 (N.D. Okla. Oct. 4, 2006)); see also *LightSquared, Inc. v. Deere & Co.*, 2015 WL 8675377, at *5 (S.D.N.Y. Dec. 10, 2015) (court denied plaintiff’s request to search files of additional custodians based on plaintiff’s unsupported assertions).
- 9th Cir. *Dao v. Liberty Life Assurance Co. of Boston*, 2016 WL 796095, at *5 (N.D. Cal. Feb. 23, 2016) (court found that plaintiff failed to show the value of her case that exceeded actual damages and therefore burden and expense of broad discovery outweighed its likely benefits).

³⁹ **Inferior access to information.**

- 5th Cir. *Duvall v. BOPCO, L.P.*, 2016 WL 1268343, at *3 (E.D. La. April 1, 2016) (court denied plaintiff’s request to inspect and test barge equipment despite inferior access to information when Rule 34 inspection had already occurred and plaintiff retained engineering expert).

⁴⁰ **Party cooperation.**

- 6th Cir. *Rui He v. Rom*, 2016 WL 909405, at *6 (N.D. Ohio Mar. 10, 2016) (court noted that “parties and their counsel ha[d] not made a sincere attempt to cooperate in pretrial discovery and thus encourage[d] all case participants to try to minimize further needless frustration, time, and expense associated with the discovery process”); see also *Siriano v. Goodman Mfg. Co., L.P.*, 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015) (court urged parties to “engage in further cooperate dialogue in an effort to come to an agreement regarding proportional discovery”).
- 9th Cir. *Martinelli v. Johnson & Johnson*, 2016 WL 1458109, at *1 (E.D. Cal. Apr. 13, 2016) (parties agreed to ESI protocol, which provided that “counsel’s zealous representation of them [was] not compromised by conducting discovery in a cooperative manner”); see also *Wichansky v. Zowine*, 2016 U.S. Dist. LEXIS 37065, at *5 (D. Ariz. March 22, 2016) (“‘[P]arties share the responsibility’ to achieve Rule 1’s goal, and emphasizes that ‘[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use’ of the rules of procedure. The parties should cooperate during trial to minimize delay and wasted time.”); *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016) (Chief Justice Robert’s year-end Report said that “Rule 1 was expanded . . . to emphasize ‘the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation’”).

⁴¹ **Lawyers should work together.**

- 9th Cir. *D.F. v. Sikorsky Aircraft Corp.*, 2016 WL 3360515, at *7 (S.D. Cal. June 13, 2016) (in light of third-party’s cooperation and good-faith attempts to provide requested information, court declined to require submission of formal privilege log or affidavit evidence to support privilege claim); *Roberts v. Clark County Sch. Dist.*, 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016) (Chief Justice Robert’s Year-End report stated that lawyers representing adverse parties “have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes”).
- 10th Cir. *Digital Ally, Inc. v. Util. Assocs. Inc.*, 2016 WL 1535979, at *2 (D. Kan. Apr. 15, 2016) (parties “engaged in discussions to resolve the issues of whether the information sought was, in fact, responsive to the previous discovery and whether Defendant was required to produce it. Those communications between the parties led to resolution of six categories of requests”).

⁴² **Specific evidence required to refute claim that discovery is burdensome.**

- 7th Cir. *Acheron Med. Supply, LLC v. Cook Med. Inc.*, 2016 WL 5466309, at *6 (S.D. Ind. Sept. 9, 2016) (court found general estimates of discovery burden did “not refute the specific evidence submitted by responding party”).

43 Technology can affect proportionality analysis.

- 9th Cir. *Bank of Am., N.A. v. Auburn & Bradford at Providence Homeowners' Ass'n*, ___ WL ___ (D. Nev. Aug. 1, 2016) (motion for protective order granted, requiring Rule 30(b)(6) deposition to be video-conferenced in Dallas, location of corporate designees, to avoid unnecessary expense).

44 Limiting review when party fails to maintain automated statistical reporting system to respond to discovery request.

Cf.

- 3d Cir. *Capetillo v. Primecare Med., Inc.*, 2016 WL 3551625, at *3, n.2 (E.D. Pa. June 28, 2016) (finding discovery request for inmate medical care complaints over 5-10 year period unduly burdensome and limiting it to 18-months and by subject matter because it triggered onerous manual review of database).
- 6th Cir. *Suzette Scott-Warren v. Liberty Life Assur. Co. of Boston*, 2016 WL 5661774, at *5 (W.D. Ky. Sept. 29, 2016) (because defendant did not possess aggregate data on insurance claims, court limited number of claims to be reviewed manually).

45 Prioritization of discovery.

- 3d Cir. *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 2016 WL 5799660, at *13 (3d Cir. 2016) (“The instant matter . . . require[d] the active involvement of the District Court, in conjunction with counsel and their clients, to limit the expense and burden of discovery while still providing enough information to allow CFI to test its claims on the merits.”)
- 9th Cir. *Loop AI Labs Inc v. Gatti*, 2016 WL 1273914, at *1 (N.D. Cal. Feb. 5, 2016) (court ordered parties to “prioritize determining what can be provided without controversy first, and then produce that material expeditiously, rather than using formalistic discovery disputes and objections at the margins as an excuse to delay *any* production”).

46 Ordering parties to meet-and-confer.

- 9th Cir. *Timothy v. Oneida Cty.*, 2016 WL 2910270, at *5 (D. Idaho May 18, 2016) (court “expect[ed] counsel to meet immediately and confer in good faith to identify a limited number of examples where the parties disagree[d] as to whether certain discovery [was or was] not relevant and proportional to the needs of the case”); *see also Bank of Am., N.A. v. SFR Invs. Pool 1 LLC*, 2016 WL 2843802, at *1 (D. Nev. May 12, 2016) (court ordered parties to meet and confer to discuss whether defendant could seek “supplementation of . . . written responses, conduct a follow-up Rule 30(b)(6) deposition, or possibly both”); *Federal Trade Comm’n v. Directv, Inc.*, 2016 WL 1741137, at *2 (N.D. Cal. May 3, 2016) (court ordered parties to meet-and-confer to determine if they could agree on narrower production).

47 Court and parties share responsibility for ensuring discovery is proportional.

- 7th Cir. *Noble Roman’s, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 308–09 (S.D. Ind. Mar. 24, 2016) (courts and parties share responsibility for applying proportionality requirements to discovery requests).
- 9th Cir. *Salazar v. McDonald’s Corp.*, 2016 WL 736213, at *2 (N.D. Cal. Feb. 25, 2016) (“Under the Court’s reading, the revised rule places a shared responsibility on all parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts.”); *Goes Int’l, AB v. Dodur Ltd.*, 2016 WL 427369, at *4 (N.D. Cal. Feb. 4, 2016) (“[P]arties and the court have a collective responsibility to consider proportionality of all discovery and consider it in resolving discovery disputes.”).
- 10th Cir. *Frick v. Henry Indus., Inc.*, 2016 WL 6966971, at *3 (D. Kan. Nov. 29, 2016) (court noted that amendments to Rule 26(b) “reinforced the need for parties, and the Court when necessary, to focus on the avoidance of undue expense to parties”).

48 Lawyers should rely on common-sense concept of proportionality.

- 9th Cir. *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016) (Chief Justice Robert’s year-end Report said that “fundamental principle of amended Rule 26(b)(1) is that ‘lawyers must size and shape their discovery requests to the requisites of the case’”); *see also Ciuffitelli v. Deloitte & Touche LLP*, 2016 WL 6963039, at *5 (D. Or. Nov. 28, 2016) (same).

49 Court should consider proportionality in absence of motion.

- 4th Cir. *Beasley v. Novant Health, Inc.*, 2016 WL 4435230, at *4 (M.D.N.C. Aug. 19, 2016) (court granted defendant’s motion to compel discovery production request but limited time period because it was “disproportionate to the needs of this routine employment case”).
 - 5th Cir. *Orchestratehr, Inc. v. Trombetta*, 2016 WL 1555784, at *23 (N.D. Tex. Apr. 18, 2016) (court must consider proportionality in absence of motion); *see also Harrison v. Wells Fargo Bank, N.A.*, 2016 WL 1392332, at *4 (N.D. Tex. Apr. 8, 2016) (same); *Holmes v. N. Tex. Health Care Laundry Coop. Ass’n*, 2016 WL 1366269, at *5 (N.D. Tex. Apr. 6, 2016) (same); *Areizaga v. ADW Corp.*, 314 F.R.D. 428, 365 (N.D. Tex. Apr. 4, 2016) (same); *Curtis v. Metro. Life Ins. Co.*, 2016 WL 687164, at *3 (N.D. Tex. Feb. 19, 2016) (same).
 - 7th Cir. *Arcelormittal Ind. Harbor LLC, v. Amex Nooter, LLC*, 2016 WL 4077154, at *4 (N.D. Ind. July 8, 2016) (“Court’s consideration of the controlling, applicable Federal Rule of Civil Procedure on the issue directly before the Court does not constitute making ‘a decision outside the adversarial issues presented by the parties.’”).
 - 10th Cir. *Rowan v. Sunflower Elec. Power Corp.*, 2016 WL 2772210, at *3–4 (D. Kan. May 13, 2016) (even if parties did not mention proportionality, court has “obligation to limit the frequency or extent of discovery” where, e.g., it is disproportional); *see also Navajo Nation Human Rights Comm’n v. San Juan Cty.*, 2016 WL 3079740, at *4 (D. Utah May 31, 2016) (same).
- Cf.*
- 11th Cir. *City of Jacksonville v. Shoppes of Lakeside, Inc.*, 2016 WL 3447383, at *4 n.8 (M.D. Fla. June 23, 2016) (parties did not address proportionality and court found no reason to limit discovery on its own based on proportionality).

50 Court should communicate its availability to resolve discovery disputes.

- 9th Cir. *In re: AutoZone, Inc.*, 2016 WL 4136520 (N.D. Cal. May 16, 2016) (court stated directed parties to set status conference if parties were unable to come to a resolution); *see also Timothy v. Oneida Cty.*, 2016 WL 2910270, at *5 (D. Idaho May 18, 2016) (court explained that it would be “available for a short conference with counsel in an effort to create more meaningful guidelines” after parties conferred on discovery disputes).

51 Approaches to timely and efficiently resolving discovery disputes.

- 3d Cir. *Vay v. Huston*, 2016 WL 1408116, at *5 (W.D. Pa. Apr. 11, 2016) (court gave parties “myriad opportunities” to “meet and confer and resolve [discovery disputes] amicably”).
- 6th Cir. *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (court listed tools to implement proportionality amendments, including: “case management conferences early in the litigation; requiring parties to submit joint discovery plans; the judge being available to timely resolve disputes; regular discovery conferences or hearings; stays of discovery to resolve pure legal issues; the use of affidavits to determine whether more costly avenues of discovery, such as depositions, would be justified; and the rolling submission of information produced during discovery to the court so that it can better evaluate the need for additional discovery in light of the discovered facts”); *see also Siriano v. Goodman Mfg. Co., L.P.*, 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015) (court urged parties to “engage in further cooperate dialogue in an effort to come to an agreement regarding proportional discovery”).
- 7th Cir. *Amarei v. City of Chi.*, 2016 WL 3693425, at *1, n.1 (N.D. Ill. July 12, 2016) (court lamented that discovery disputes resolved by mutual party consent at court hearing could have been resolved before hearing if the parties had held proper meet-and-confer meeting).
- 9th Cir. *24/7 Customer, Inc. v. Liveperson, Inc.*, 2016 WL 4054884, at *3 (N.D. Cal. July 29, 2016) (court denied request to compel response to interrogatory on grounds that response was premature because “benefit [was] not only minimal, but [was] surely outweighed by the burden imposed by responding to 122 claims when the claims [were] in the process of being whittled down”).

52 Face-to-face discussions with opposing counsel better than email exchanges.

- 7th Cir. *Infowhyse GmbH v. Fleetwood Grp.*, 2016 WL 4063168, at *1 (N.D. Ill. July 29, 2016) (local rule required parties to “make ‘good faith attempts to resolve differences’ over discovery issues through ‘consultation in person or by telephone’” for Rule 26(f) meet-and-confer purposes).

⁵³ **Parties encouraged to agree on facts when appropriate to eliminate discovery.**

- 5th Cir. *Rosalez Funez v. E.M.S.P., LLC*, 2016 WL 5337981, at *2-3 (E.D. La. Sept. 23, 2016) (defendant agreed to admission that it exceeded FLSA-threshold gross-revenue requirement, eliminating need for discovery of tax returns).

⁵⁴ **Party requested targeted discovery.**

- 2d Cir. *LightSquared, Inc. v. Deere & Co.*, 2015 WL 8675377, at *2 (S.D.N.Y. Dec. 10, 2015) (defendants asked court to order “initial, targeted discovery” concerning one element of cause of action).

⁵⁵ **Targeted discovery.**

- 2d Cir. *Sibley v. Choice Hotels Int’l*, 2015 WL 9413101, at *2 (E.D.N.Y. Dec. 22, 2015) (court defined disputed issues and provided for “limited targeted discovery” that was “proportional to the needs of the case”).
- 3d Cir. *Fassett v. Sears Holdings Corp.*, 2017 WL 386646, at *1 (M.D. Pa. Jan. 27, 2017) (“[I]n a products liability suit . . . faithful adherence to amended Rule 26(b)(1)’s renewed proportionality mandate is furthered considerably by implementation of a sliding scale analysis: material corresponding to alternative designs or components that exhibit significant similarities to the design or component at issue should be discoverable in the greatest quantities and for the most varied purposes; however, material corresponding to alternative designs or components that share less in common with the contested design or component should be incrementally less discoverable—and for more limited purposes—as those similarities diminish.”); *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 2016 WL 5799660, at *12 (3d Cir. Oct. 5, 2016) (“It will be up to the District Court and counsel to determine an appropriately limited discovery plan, perhaps reviewing the documents and duties paid on a representative sample of the shipments identified by CFI.”).
- 5th Cir. *ING Bank N.V. v. M/V Portland, IMO No. 9497854*, 2016 WL 3365426, at *10 (M.D. La. June 16, 2016) (granting motion to compel disclosures limited to determining jurisdiction where party failed to produce evidence that discovery would be unnecessarily burdensome or futile).
- 9th Cir. *Oracle Am., Inc. v. Google, Inc.*, 2015 WL 7775243, at *2 (N.D. Cal. Dec. 3, 2015) (because parties represented that they needed “limited targeted discovery” and failed to address proportionality factors, court allowed plaintiff to choose ten additional custodians from its original list of 22 custodians to search for relevant information); *see also O’Connor v. Uber Techs.*, 2016 WL 107461, at *4 (N.D. Cal. Jan. 11, 2016) (court denied defendant’s overly broad discovery request, noting however, that defendant would have been entitled to targeted discovery).

⁵⁶ **Identifying discoverable information available at beginning of case.**

- 6th Cir. *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (“adoption of certain protocols or measures will advance” discovery amendments, including “rolling submission of information produced during discovery to the court so that it can better evaluate the need for additional discovery in light of the discovered facts”).
- 8th Cir. *Design Basics LLC v. Ahmann Design, Inc.*, 2016 WL 4251076, at *4 (N.D. Iowa Aug. 10, 2016) (before permitting additional discovery, plaintiff limited to eight-hour inspection of defendant’s paper files in banker boxes, containing 1,100 custom home-design plans over 23-year period, for evidence that defendant had engaged in copyright infringement).
- 10th Cir. *Meeker v. Life Care Ctrs. of Am., Inc.*, 2016 WL 1403335, at *7 (D. Colo. Apr. 11, 2016) (court explained that had defendant identified information available at beginning of case, “the court could have used its judicial resources expended in the informal discovery conferences discussing and evaluating concrete facts about the burdens and benefits of the requested discovery, instead of generalities”).

⁵⁷ **Court may order focused discovery.**

- 2d Cir. *Sky Med.I Supply Inc. v. SCS Support Claim Servs., Inc.*, 2016 WL 4703656, at *14 (E.D.N.Y. Sept. 7, 2016) (“Once the production of items (1) and (2) have been completed and have been assessed by the Plaintiff, if and only if the Plaintiff can establish ‘good cause’ for any further production may the Plaintiff come back to the Court with a further motion.”).
- 5th Cir. *Hahn v. Hunt*, 2016 WL 1587405, at *3 (E.D. La. Apr. 20, 2016) (court limited discoverable information from third party, including information from his deposition, to materials relevant to disputed issues)
- 6th Cir. *Arthur J. Gallagher & Co. v. Anthony*, 2016 WL 4076819 (N.D. Ohio June 22, 2016) (limiting scope of subpoena for production of documents from third party); *see also Wilmington Tr. Co. v. AEP Generating Co.*, 2016 WL 860693, at *3 (S.D. Ohio Mar. 7, 2016) (court ordered defendants “to search the records of the four persons they believe to be the most likely to have such records”).

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- 7th Cir. *Robinson v. Gateway Tech. Coll.*, 2016 WL 344959, at *4 (E.D. Wis. Jan. 26, 2016) (“To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.”).
 - 8th Cir. *In re: Fluoroquinolone Prods. Liab. Litig.*, 2016 WL 4045414, at *1 (D. Minn. July 20, 2016) (court limited search in MDL action to existing databases and central repositories, but left open possibility of searching individual custodial files “if the information available in these structured databases turns out to be insufficient”).
 - 9th Cir. *Lauris v. Novartis*, 2016 WL 7178602, at *5 (E.D. Cal. Dec. 8, 2016) (court denied request to expand discovery without prejudice, noting that if, after the ordered discovery, the parties still disagreed, court would revisit scope of discovery).
 - 10th Cir. *Meeker v. Life Care Ctrs. Of Am., Inc.*, 2016 WL 1403335, at *2 (D. Colo. Apr. 11, 2016) (court ordered defendants to search for emails using list of relevant search terms).

58 Early focused discovery may make full discovery request unnecessary.

- 3d Cir. *In re: Domestic Drywall Antitrust Litig.*, 2016 WL 4414640, at *2 (E.D. Pa. Aug. 18, 2016) (court adopted “discovery fence” metaphor to “limit the appropriate scope of discovery, at least as to this initial round of document requests and interrogatories”).
- 8th Cir. *Schultz v. Sentinel Ins. Co.*, 2016 WL 3149686, at *12 (D.S.D. June 3, 2016) (court compelled search of insurance claim file database to retrieve claims “first made within the last ten years” in lieu of broader request).
- 9th Cir. *Wide Voice, LLC v. Sprint Commc’ns. Co. L.P.*, 2016 WL 155031, at *2 (D. Nev. Jan. 12, 2016) (“The parties and court should consider sequencing discovery to focus on those issues with the greatest likelihood to resolve the case, and the biggest bang-for the buck at the outset, with more discovery, later, as the case deserves.”) (quoting Laurence Pulgram, *The Top 7 Takeaways from the 2015 Federal Rules Amendments*, A.B.A. (Dec. 2015), <http://www.americanbar.org/publications/youraba/2015/december-2015/the-top-7-takeaways-from-the-2015-federal-rules-amendments.html>).

59 Court may order sequenced discovery.

- 1st Cir. *Primarque Prod. v. Williams West & Witt’s Prod. Co.*, 2016 WL 6090715, at *4 (D. Mass. Oct. 18, 2016) (To avoid “unnecessarily duplicative or cumulative discovery” and to minimize burden, court permitted discovery of records beyond ninety-day period only if no evidence was found in initial discovery.).
- 6th Cir. *Siriano v. Goodman Mfg. Co., L.P.*, 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015) (court scheduled discovery conference to discuss whether discovery would proceed in phases).
- 9th Cir. *Wide Voice, LLC v. Sprint Commc’ns. Co. L.P.*, 2016 WL 155031, at *2 (D. Nev. Jan. 12, 2016) (court ordered sequenced discovery to focus on issues that are most likely to resolve case).

60 Establishing ESI-production protocols.

- 5th Cir. *Brand Serv., LLC v. Irex Corp.*, 2017 WL 67517, at *3 (E.D. La. Jan. 6, 2017) (court ordered the parties “to develop an ESI protocol that contemplates key word searches so as to control costs and to keep discovery proportional to the needs of this case”); *Mr. Mudbug, Inc. v. Bloomin’ Brands, Inc.*, 2017 WL 111268, at *3 (E.D. La. Jan. 11, 2017) (defendant’s second request for documents in PDF or Word format canceled its initial request for documents in their original format, so plaintiff properly complied with defendant’s discovery request by providing PDF documents).
- 9th Cir. *Martinelli v. Johnson & Johnson*, 2016 WL 1458109, at *1 (E.D. Cal. Apr. 13, 2016) (court established protocols to “facilitate the just, speedy, and inexpensive completion of discovery of ESI and hardcopy documents and to promote, whenever possible, the early resolution of disputes, including any disputes pertaining to scope or costs regarding the discovery of ESI without Court intervention”); *see also Am. Auto. Ins. Co. v. Haw. Nut & Bolt, Inc.*, 2017 WL 80248, at *5 (D. Haw. Jan. 9, 2017) (“The parties should put their respective IT representatives in contact to see if an understanding can be reached about the format in which ESI can be produced, as well as the related metadata.”).

61 Court should be clear about initial limitations on discovery and opportunities to follow-up discovery when setting initial boundaries of scope of discovery.

- 2d Cir. *Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc.*, 2016 WL 4703656, at *8 (E.D.N.Y Sept. 7, 2016) (parties were directed to “focus on the claims that we know about right now that deal specifically with the damages that you’re claiming” but if more discovery becomes necessary, “then we’ll worry about a second wave of discovery”).

- 3d Cir. *In re: Domestic Drywall Antitrust Litig.*, 2016 WL 4414640, at *2 (E.D. Pa. Aug. 18, 2016) (“[D]iscovery fence’ [initial boundary set for discovery] must be flexible to account for changes in the focus by the parties brought on by additional discovery or their own investigation.”).
- 5th Cir. *Cain v. City of New Orleans*, 2016 WL 7156071, at *7 (E.D. La. Dec. 8, 2016) (court expressly recognizes that plaintiffs are entitled “to file a new motion seeking particularly identified additional responsive materials,” if defendant’s original discovery production is insufficient).

⁶² Deposing same individual twice.

- 7th Cir. *Babjak v. Arcelormittal USA, LLC*, 2016 WL 4191050, at *1 (N.D. Ind. Aug. 9, 2016) (proposed deposition of individual under *Rule 30(b)(6)* after being deposed as fact witness was not duplicative and did not violate *Rule 26* proportionality requirements “because depositions given by individuals on their own behalf and depositions given by organizations’ designees are qualitatively different”).
- 9th Cir. *Salazar v. McDonald’s Corp.*, 2016 WL 736213, at *4 (N.D. Cal. Feb. 25, 2016) (court denied request for second deposition because it was made too late in litigation, acknowledging that “second deposition may have made sense months ago”); *see also Cisco Sys. v. Arista Networks, Inc.*, 2016 WL 632000, at *2 (N.D. Cal. Feb. 17, 2016) (court denied request to depose witnesses exceeding ten permitted by rule because defendant failed to show particularized need).
- 10th Cir. *Merlin v. Crawford*, 2016 WL 814580, at *3 (D. Colo. Mar. 2, 2016) (court denied defendants’ motion to depose non-party witnesses second time so as to videotape their testimony for use at trial because burden outweighed likely benefits).

⁶³ Burden on party seeking more than presumptive number of depositions.

- 5th Cir. *Allen-Pieroni v. Sw. Corr., LLC*, 2016 WL 4439997, at *7 (N.D. Tex. Aug. 23, 2016) (request for six depositions beyond ten that were taken was “proportional to the needs of case” after court finds that first ten depositions were necessary).
- 11th Cir. *Williams v. Am. Int’l Grp., Inc.*, 2016 WL 2747020, at *1 (M.D. Ala. May 2, 2016) (“[P]arty seeking to exceed the presumptive number of depositions must make a ‘particularized showing of why the discovery is necessary’ [and] . . . address *Rule 26(b)(1)*’s proportionality analysis.”).
- Fed. Cl. *Cellcast Tech., LLC v. United States*, 2016 WL 5335798, at *1 (Fed. Cl. Sept. 23, 2016) (parties allowed to request leave to exceed 20 oral depositions, which court found to be “proportional to the needs of the case,” on showing of “particularized need”).

⁶⁴ Chief Justice Roberts urges greater judicial-case management.

- 3d Cir. *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 2016 WL 5799660, at *12 (3d Cir. Oct. 5, 2016) (quotes Chief Justice’s statement that: “‘key here is careful and realistic assessment of actual need’ that may ‘require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery’”).
- 2d Cir. *Armstrong Pump, Inc. v. Hartman*, 2016 WL 7208753, at *3 (W.D.N.Y. Dec. 13, 2016) (quoting Report to support importance of case management at early trial stages).
- 6th Cir. *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (agreeing with Chief Justice’s report, “court believes that implementation of the new discovery rules will require improved case management by district judges, a culture of cooperation among lawyers, and active and early involvement by judges to fashion discovery that is proportional to the needs of the case”).
- 7th Cir. *Noble Roman’s, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 308 (S.D. Ind. Mar. 24, 2016) (amendments designed to emphasize judicial management of discovery process, “especially for those cases in which the parties do not themselves effectively manage discovery”).
- 8th Cir. *Sprint Commc’ns. Co. L.P. v. Crow Creek Sioux Tribal Court*, 316 F.R.D. 254, 263 (D.S.D. Feb. 26, 2016) (Chief Justice Robert’s year-end Report on the federal judiciary addresses 2015 amendments).
- 9th Cir. *McSwain v. United States*, 2016 WL 4530461, at *3 (D. Nev. Aug. 30, 2016) (favorable reference to Chief Justice’s end-of-year report); *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016) (as explained by Chief Justice Roberts in his year-end Report, amendments “may not look like a big deal at first glance, but they are.” He went on to say that accomplishing the amendments’ goals will only occur “if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change”); *see also Gibson v. SDCC*, 2016 WL 845308, at *4 (D. Nev. Mar. 2, 2016) (“Chief Justice Roberts asked federal judges [in his year-end Report] ‘to take on a stewardship role, managing their cases from the onset rather than allowing parties

alone to dictate the scope of discovery’ and to actively engage in case management to ‘identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.’”).

- 10th Cir. *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *18 (D.N.M. Apr. 1, 2016) (Chief Justice Roberts explained that proportionality “assessment may, as a practical matter, require ‘judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality before ordering production of relevant information’”).
- D.C. Cir. *United States ex rel. Shamesh v. CA., Inc.*, 314 F.R.D. 1, 8, (D.D.C. Jan. 6, 2016) (Rule 26 proportionality factors “encourage judges to be more aggressive in identifying and discouraging discovery overuse and to make proportionality considerations unavoidable”).

⁶⁵ **Preference for pre-motion conference over motion practice.**

- 2d Cir. *Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *3–7 (S.D.N.Y. Feb. 16, 2016) (court held multiple discovery conferences with parties to resolve discovery disputes).
- 3d Cir. *Fassett v. Sears Holdings Corp.*, 2017 WL 386646, at *2 (M.D. Pa. Jan. 27, 2017) (court held two pre-motion status conferences in unsuccessful attempt to resolve discovery dispute without motions); *In re: Domestic Drywall Antitrust Litig.*, 2016 WL 4414640, at *2 (E.D. Pa. Aug. 18, 2016) (telephone conference with parties clarified extent of discovery request); *CDK Glob., LLC v. Tulley Auto. Grp., Inc.*, 2016 WL 1718100, at *2 (D.N.J. Apr. 29, 2016) (magistrate judge held telephone conference on quashing subpoena seeking discovery); *Vay v. Huston*, 2016 WL 1408116, at *10 (W.D. Pa. Apr. 11, 2016) (lawyers’ “reliance on email communications [was] unavailing,” as substitute for conferences under local practices); *see also Bell v. Reading Hosp.*, 2016 WL 162991, at *1 (E.D. Pa. Jan. 14, 2016) (court held telephone discovery conference).
- 5th Cir. *InforMD, LLC v. DocRX, Inc.*, 2016 WL 2343854, at *2 (M.D. La. May 3, 2016) (court held in-court status conference to consider discovery issues); *see also Krantz v. State Farm Fire & Cas. Co.*, 2016 WL 320148, at *1 (M.D. La. Jan. 25, 2016) (parties held discovery conference).
- 8th Cir. *Perez v. KDP Hosp., LLC*, 2016 WL 2746926, at *1 (W.D. Mo. May 6, 2016) (court held telephone conference to hear argument on disputed discovery issues).
- 9th Cir. *Wichansky v. Zowine*, 2016 U.S. Dist. LEXIS 37065, at 3 (D. Ariz. March 22, 2016) (“The Court, which seeks to avoid delay and expense by hearing discovery disputes in telephone conferences without the filing of motions (allowing expedited briefing where needed), has held 10 separate discovery dispute conference calls with parties.”); *see also Talavera v. Sun Maid Growers of Cal.*, 2017 WL 495635, at *1 (E.D. Cal. Feb. 6, 2017) (court held informal telephonic pre-motion conference on discovery disputes regarding class-action certification).
- 10th Cir. *Meecker v. Life Care Ctrs. of Am., Inc.*, 2016 WL 1403335, at *7 (D. Colo. Apr. 11, 2016) (court held several informal discovery conferences).

Cf.

- 5th Cir. *La. Crawfish Producers Ass’n- W. v. Mallard Basin, Inc.*, 2015 WL 8074260, at *3 (W.D. La. Dec. 4, 2015) (court ordered that “all proposed specific discovery requests not agreed to by the Defendants shall first be presented to the Magistrate Judge with a request and justification for the allowance of the discovery.” Defendants had not followed practice ordered by judge).

⁶⁶ **Pre-motion conference informal letter in lieu of motion and brief.**

- 3d Cir. *Bell v. Reading Hosp.*, 2016 WL 162991, at *1 (E.D. Pa. Jan. 14, 2016) (plaintiffs submitted “informal motion to compel”).
- 9th Cir. *Loop AI Labs Inc. v. Gatti*, 2016 WL 1273914, at *1 (N.D. Cal. Feb. 5, 2016) (court ordered parties to submit briefs of “no more than 5 pages regarding the Court’s authority to require the parties to bear the cost of a discovery Special Master absent the parties’ agreement to do so”); *Salazar v. McDonald’s Corp.*, 2016 WL 736213, at *1 (N.D. Cal. Feb. 25, 2016) (parties filed joint letter addressing failure to respond to discovery requests).

⁶⁷ **Rule 16(b)(3)(v) contemplates discovery conference requested before motion filed.**

- 8th Cir. *Duhigg v. Goodwill Industries*, 2016 WL 4991480, at *2 (D. Neb. Sept. 16, 2016) (although court was amendable to holding pre-motion discovery conference as provided under Rule 16, opportunity to hold discovery conference passed because party filed motion to compel prior to request for conference).

⁶⁸ **Local rules governing pre-motion conferences.**

- 7th Cir. *Acheron Med. Supply, LLC v. Cook Med. Inc.*, 2016 WL 5466309, at *5 (S.D. Ind. Sept. 9, 2016) (court cited Local Rule 37-1(a), which states: “counsel are encouraged to contact the chambers of the assigned Magistrate Judge to determine whether the Magistrate Judge is available to resolve the discovery dispute by way of a telephone conference or other proceeding prior to counsel filing a formal discovery motion”).

⁶⁹ **Granting discovery request in part may satisfy proportionality requirement.**

- 7th Cir. *The Surgery Ctr. at 900 N. Mich. Ave., LLC v. Am. Physicians Assurance Corp., Inc.*, 2016 WL 6962840, at *7–8 (N.D. Ill. Nov. 29, 2016) (Although plaintiff requested discovery of all bad-faith suits against defendants, court granted discovery only within 4-year period. Court also found that defendant waived privilege claims because privilege log failed to establish elements of privilege, allowing discovery of withheld documents, except those pertaining to unrelated claims.).
- 8th Cir. *Orduno v. Pietrzak*, 2016 WL 5853723, at *3 (D. Minn. Oct. 5, 2016) (court narrowed discovery search of records from 5000 to 200 individuals).

⁷⁰ **Court may order random sampling.**

- 2nd Cir. *Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, 2016 WL 7017356, at *7 (E.D.N.Y. Nov. 30, 2016) (after primary custodians produced substantial discovery, court approved parties' proposed solution to select a few additional custodians to test plaintiff's theory that they possessed relevant non-duplicative documents).
- 6th Cir. *Solo v. United Parcel Serv. Co.*, 2017 WL 85832, at *3 (E.D. Mich. Jan. 10, 2017) (court ordered sampling but noted that if parties were unable to agree on sampling methodology, plaintiff would have the option of requesting that defendant produce certain information from the relevant time period).
- 9th Cir. *Federal Trade Comm'n v. Directv, Inc.*, 2016 WL 3351945, at *2 (N.D. Cal. June 9, 2016) (finding that random sampling of electronic documents to identify relevant materials early in discovery process “would achieve Rule 26's demand for proportionality”); *see also Talavera v. Sun Maid Growers of Cal.*, 2017 WL 495635, at *5 (E.D. Cal. Feb. 6, 2017) (court ordered ten percent random sampling of defendant's pay, punch, and time records of all employees for relevant time period for class-action certification, in addition to discovery of records for 142 employees who opted into the case).

⁷¹ **Alternative discovery tools may be less expensive.**

- 4th Cir. *In re: American Med. Sys., Inc. Pelvic Repair Systems Prod. Liability Litig.*, 2016 WL 4411506, at *4 (S.D. W. Va. Aug. 17, 2016) (court rejected plaintiff's argument that cost and burdens incurred in orally deposing non-party witnesses, instead of deposing witnesses under Rule 31 with written questions, were significantly greater); *Brown v. Mountainview Cutters, LLC*, 2016 WL 3045349, at *4 (W.D. Va. May 27, 2016) (court quashed defendant's subpoena duces tecum as being overly broad and instead ordered plaintiff to produce answers to interrogatories, which was “the least burdensome source” for information).
- 8th Cir. *Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 642 (W.D. Mo. 2016) (party ordered to respond to interrogatories in lieu of producing documents, which it claimed would be burdensome).
- 9th Cir. *Ballentine v. Las Vegas Metro. Police Dep't*, 2016 WL 2743504, at *7 (D. Nev. May 9, 2016) (“Where responsive information can be provided more accurately and with less burden through one method of discovery, that method should be used.”); *cf. HSBC Bank USA v. Green Valley Pecos Homeowners Ass'n, Inc.*, 2016 WL 6915301 (D. Nev. Nov. 21, 2016) (“The general statement . . . regarding a party's right to pursue less efficient or duplicative discovery avenues can no longer be justified under amended Rule 26(b) given its greater emphasis on the need for proportionality in discovery.”).
- 10th Cir. *Hinzo v. N.M. Corr. Dep't*, 2016 WL 3156071, at *4 (D.N.M. May 19, 2016) (court determined that plaintiff's request to interview prison staff and inmates was acceptable method of gathering factual information to be used in forming and offering an expert opinion” in lieu of depositions);
Cf.
- 9th Cir. *Gilbert v. Money Mut., LLC*, 2016 WL 3196605, at *7 (N.D. Cal. June 9, 2016) (denying motion to depose attorney only where party did not establish that discovery had not, or could not, be obtained by other means).
- 10th Cir. *Fasesin v. Henry Indus., Inc.*, 2016 WL 3654740, at *5 (D. Kan. July 8, 2016) (ordering parties to obtain free tax-return transcripts instead of requested completed tax returns because of cost concerns).

⁷² **Court may order cost-shifting.**

- 4th Cir. *Ashmore v. Allied Energy, Inc.*, 2016 WL 301169, at *2 (D.S.C. Jan. 25, 2016) (court may order cost-shifting under Rule 26(c)).
- 7th Cir. *Knauf Insulation, LLC v. Johns Manville Corp.*, 2015 WL 7089725, at *3 (S.D. Ind. Nov. 13, 2015) (court ordered plaintiff to bear costs of responding to discovery request from 38 email custodians if search did not yield at least 500 relevant documents).
- 10th Cir. *Navajo Nation Human Rights Comm’n v. San Juan Cty.*, 2016 WL 3079740, at *4 (D. Utah May 31, 2016) (court ordered plaintiffs to bear cost of expedited document discovery because information was available from other less expensive sources, such as previously provided e-mail responses).

Cf.

- 2d Cir. *Woodward v. Afify*, 2017 WL 279555, at *7–8 (W.D.N.Y. Jan. 23, 2017) (court denied discovery because burden and expense outweighed benefits when plaintiff-inmate requested discovery of publicly available information seemingly to shift cost of printing court documents to defendant and non-party lawyers).
- 11th Cir. *Graham & Co. v. Liberty Mut. Fire Ins. Co.*, 2016 WL 1319697, at *11 (N.D. Ala. Apr. 5, 2016) (court refused to order cost-shifting and “[deferred] to the parties to work out payment of complying with discovery costs”).

⁷³ **Presumption that responding party bears costs of complying with discovery requests.**

- 4th Cir. *Ashmore v. Allied Energy, Inc.*, 2016 WL 301169, at *2 (D.S.C. Jan. 25, 2016) (“In determining whether to shift the costs of discovery to the requesting party, factors to consider include: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.”).
- 7th Cir. *Knauf Insulation, LLC v. Johns Manville Corp.*, 2015 WL 7089725, at *3 (S.D. Ind. Nov. 13, 2015) (“[P]resumption is that the responding party pays for discovery requests.”).
- 8th Cir. *Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 642 (W.D. Mo. May 9, 2016) (because of its interest in keeping its computer system secret, defendant was ordered to bear “cost of doing any additional programming to pull out the information required by the [plaintiff’s] interrogatories”).

⁷⁴ **Proportionality distinct from grounds for issuing Rule 26(c) protective order.**

- 6th Cir. *MicroTechnologies, LLC v. Autonomy, Inc.*, 2016 WL 1273266, at *2 (N.D. Cal. Mar. 14, 2016) (question of proportionality is distinct from grounds for issuing Rule 26(c) protective order, including oppression); *see also Kacmarik v. Mitchell*, 2017 WL 131582, at *3 (N.D. Ohio Jan. 13, 2017) (discovery granted because parts of requested discovery might lead to discovery of relevant information and privacy concerns could adequately be addressed in a protective order).

Cf.

- 4th Cir. *Prusin v. Canton’s Pearls, LLC*, 2016 WL 7408840, at *2 (D. Md. Dec. 22, 2016) (“[I]f the discovery sought has no bearing on an issue of material fact—i.e., if it is not relevant—a protective order is proper.”) (citation omitted) (internal quotation omitted); *Jos. A. Bank Clothiers, Inc. v. J.A.B.-Columbia, Inc.*, 2017 WL 75746, at *1, 3 (D. Md. Jan. 6, 2017) (granting in part plaintiff’s motion for a protective order because requested discovery would be unduly burdensome under Rule 26(b)).
- 5th Cir. *In re: Wright*, 2017 WL 685562, at *9 (S.D. Tex. Feb. 21, 2017) (granting in part defendants’ motion for protective order under Rule 26(c), in part “pursuant to the proportionality requirements of Fed. R. Civ. P. 26(b)(1)”).

⁷⁵ **Party must state if documents being withheld.**

- 5th Cir. *Fidelis Grp. Holdings, LLC v. Chalmers Auto., LLC*, 2016 WL 6157601, at *6 (E.D. La. Oct. 24, 2016) (“[M]erely responding ‘Defendants will provide such documents that exist’” does not identify which documents are responsive); *Keycorp v. Holland*, 2016 WL 6277813, at *11 (N.D. Tex. Oct. 26, 2016) (“[R]esponding to a document request or interrogatory ‘subject to’ and ‘without waiving’ objections is not consistent with the Federal Rules or warranted by existing law.”).
- 7th Cir. *Crabtree v. Angie’s List, Inc.*, 2017 WL 413242, at *4 (S.D. Ind. Jan. 31, 2017) (parties “have no obligation to affirmatively state that they are not withholding documents”).

- 8th Cir. *Sprint Commc'ns. Co. L.P. v. Crow Creek Sioux Tribal Court* 316 F.R.D. 254, 263 (D.S.D. Feb. 26, 2016) (objecting party must “state with specificity the grounds for objecting, including the reasons” and “whether any responsive materials are being withheld”).
- 9th Cir. *Brown v. Dobler*, 2015 WL 9581414, at *4 (D. Idaho Dec. 29, 2015) (party must state if there are documents withheld because of objections to discovery requests).
- 10th Cir. *Echon v. Sackett*, 2016 WL 943485, at *4 (D. Colo. Jan. 27, 2016) (party must state if there are documents withheld because of objections to discovery requests); *see also Hibu Inc. v. Peck*, 2016 WL 4702422, at *4 (D. Kan. Sept. 8, 2016) (court found “conditional objections [invalid, which] occur when ‘a party asserts objections, but then provides a response ‘subject to’ or ‘without waiving’ the stated objections”).

⁷⁶ **Technology assisted review.**

- 2d Cir. *Hyles v. N.Y.C.*, 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016) (although court believed that TAR was “the best and most efficient search tool” and that “there may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR,” it declined to compel defendant to use it instead of key-word searching).

TABLE OF CASES

1st Circuit

Cont'l W. Ins. Co. v. Opechee Constr. Corp., 2016 WL 865232 (D.N.H. Mar. 2, 2016) (DiClerico, Jr., D.J.)
Doe v. Trs. of Boston Coll., 2015 WL 9048225 (D. Mass. Dec. 16, 2015) (Bowler, M.J.)
Ferring Pharms. Inc. v. Braintree Labs., Inc., 168 F. Supp. 355 (D. Mass. 2016) (Gorton, D.J.)
Green v. Cosby, 2015 WL 9594287 (C.D. Mass. Dec. 31, 2015) (Hennessey, M.J.)
Primarque Prod. v. Williams West & Witt's Prod. Co., 2016 WL 6090715 (D. Mass. Oct. 18, 2016) (Hennessy, M.J.)
Wal-Mart P.R., Inc. v. Zaragoza-Gomez, 152 F. Supp. 3d 67 (D.P.R. 2016) (Fuste, D.J.)

2d Circuit

A.M. v. Am. Sch. for the Deaf, 2016 WL 1117363 (D. Conn. Mar. 22, 2016) (Margolis, M.J.)
Alaska Elec. Pension Fund v. Bank of Am. Corp., 2016 WL 6779901 (S.D.N.Y. Nov. 16, 2016) (Furman, D.J.)
Am. Fed'n of Musicians v. Sony Music Entm't, Inc., 2016 WL 2609307 (S.D.N.Y. Apr. 29, 2016) (Moses, M.J.)
Armstrong Pump, Inc. v. Hartman, 2016 WL 7208753 (W.D.N.Y. Dec. 13, 2016) (Scott, M.J.)
Bagley v. Yale Univ., 2015 WL 8750901 (D. Conn. Dec. 14, 2015) (Haight, D.J.)
Black v. Buffalo Meat Serv., 2016 WL 6962444 (W.D.N.Y. Nov. 29, 2016) (Scott, M.J.)
Black v. Buffalo Meat Serv., Inc., 2016 WL 4363506 (W.D.N.Y. Aug. 16, 2016) (Scott, M.J.)
Blackrock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n, 2017 WL 953550 (S.D.N.Y. Mar. 10, 2017) (Netburn, M.J.)
Blodgett v. Siemens Indus., Inc., 2016 WL 4203490 (E.D.N.Y. Aug. 9, 2016) (Tomlinson, M.J.)
Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp., 2016 WL 7017356 (E.D.N.Y. Nov. 30, 2016) (Mann, M.J.)
Creighton v. City of N.Y., 2016 WL 1178648 (S.D.N.Y. Mar. 17, 2016) (Freeman, M.J.)
Edebali v. Bankers Standard Ins. Co., 2016 WL 4621077 (E.D. N.Y. Sept. 6, 2016) (Tomlinson, M.J.)
Fischer v. Forrest, 2017 WL 773694 (S.D.N.Y. Feb. 27, 2017) (Peck, M.J.) ___ F.Supp.3d ___ 2017
Gonzalez v. Allied Concrete Indus., Inc., 2016 WL 4444789 (E.D.N.Y. Aug. 23, 2016) (Tomlinson, M.J.)
Henry v. Morgan's Hotel Grp., Inc., 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016) (Cott, M.J.)
Hyatt v. Rock, 2016 WL 6820378 (N.D.N.Y. Nov. 18, 2016) (Stewart, M.J.)
Hyles v. N.Y.C., 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016) (Peck, M.J.)
In re: Catalyst Managerial Serv., 2017 WL 716846 (2nd Cir. Feb. 23, 2017) (Parker, C.J.)
Knight v. Local 25 IBEW, ___ WL ___ (E.D.N.Y. Mar. 31, 2016) (Tomlinson, M.J.)
Laydon v. Mizuho Bank, Ltd., 2016 WL 1718387 (S.D.N.Y. Apr. 29, 2016) (Pitman, M.J.)
Leibovitz v. The City of New York, 2017 WL 462515 (S.D.N.Y. Feb. 3, 2017) (Pitman, M.J.)
Lightsquared, Inc. v. Deere & Co., 2015 WL 8675377 (S.D.N.Y. Dec. 10, 2015) (Francis, IV, M.J.)
Marom v. City of N.Y., 2016 WL 7048053 (S.D.N.Y. Nov. 30, 2016) (Netburn, M.J.)
Patient A v. Vt. Agency of Human Servs., 2016 WL 880036 (D. Vt. Mar. 1, 2016) (Crawford, D.J.)
Ramos v. Town of E. Hartford, 2016 WL 7340282 (D. Conn. Dec. 19, 2016) (Bryant, D.J.)
Robertson v. People Magazine, 2015 WL 9077111 (S.D.N.Y. Dec. 16, 2015) (Crotty, D.J.)

Royal Park Inv. v. HSBC Bank USA Nat'l Ass'n, 2017 WL 945099 (S.D.N.Y. Mar. 10, 2017) (Netburn, M.J.)
Sibley v. Choice Hotels Int'l, 2015 WL 9413101 (E.D.N.Y. Dec. 22, 2015) (Shields, M.J.)
Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc., 2016 WL 4703656 (E.D.N.Y. Sept. 7, 2016) (Tomlinson, M.J.)
State Farm Mut. Auto. Ins. v. Fayda, 2015 WL 7871037 (S.D.N.Y. Dec. 3, 2015) (Francis, IV, M.J.)
Torcasio v. New Canaan Bd. of Educ., 2016 WL 299009 (D. Conn. Jan. 25, 2016) (Merriam, M.J.)
Vaigasi v. Solow Mgmt. Corp., 2016 WL 616386 (S.D.N.Y. Feb. 16, 2016) (Pitman, M.J.)
Woodward v. Afify, 2017 WL 279555 (W.D.N.Y. Jan. 23, 2017) (Roemer, M.J.)

3d Circuit

Bell v. Reading Hosp., 2016 WL 162991 (E.D. Pa. Jan. 14, 2016) (Perkin, M.J.)
Capetillo v. Primecare Med., Inc., 2016 WL 3551625 (E.D. Pa. June 28, 2016) (Hey, M.J.)
CDK Glob., LLC v. Tulley Auto. Grp., Inc., 2016 WL 1718100 (D.N.J. Apr. 29, 2016) (McNulty, D.J.)
Cole's Wexford Hotel, Inc. v. Highmark Inc., 2016 WL 5025751 (W.D. Pa. Sept. 20, 2016) (Conti, D.J.)
Dixon v. Williams, 2016 WL 631356 (M.D. Pa. Feb. 17, 2016) (Mehalchick, M.J.)
Fassett v. Sears Holdings Corp., 2017 WL 386646 (M.D. Pa. Jan. 27, 2017) (Brann, D.J.)
First Niagara Risk Mgmt. v. Folino, 2016 WL 4247654 (E.D. Pa. Aug. 11, 2016) (Dalzell, D.J.)
Guerrido-Lopez v. City of Allentown, 2016 WL 1182158 (E.D. Pa. Mar. 28, 2016) (Heffley, M.J.)
Haines v. Cherian, 2016 WL 831946 (M.D. Pa. Feb. 29, 2016) (Saporito, Jr., M.J.)
In re: Domestic Drywall Antitrust Litig., 2016 WL 4414640 (E.D. Pa. Aug. 18, 2016) (Baylson, D.J.)
In re: Riddell Concussion Reduction Litig., 2016 WL 4119807 (D.N.J. July 7, 2016) (Schneider, M.J.)
In re: Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 2016 WL 3519618 (E.D. Pa. June 27, 2016) (Goldberg, D.J.)
Liberty Int'l Underwriters Can. v. Scottsdale Ins. Co., 2017 WL 721105 (D.N.J. Feb. 23, 2017) (Schneider, M.J.)
Solid Waster Servs., Inc. v. United States, 2016 WL 687182 (E.D. Pa. Feb. 19, 2016) (Jones, II, D.J.)
Trask v. Olin Corp., 2016 WL 1255302 (W.D. Pa. Mar. 31, 2016) (Fischer, D.J.)
U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 2016 WL 5799660 (3d Cir. 2016) (Fuentes, C.J.)
Vay v. Huston, 2016 WL 1408116 (W.D. Pa. Apr. 11, 2016) (Fischer, D.J.)
Wertz v. GEA Heat Exchangers Inc., 2015 WL 8959408 (M.D. Pa. Dec. 16, 2015) (Mehalchick, M.J.)

4th Circuit

Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC, 2016 WL 4287929 (E.D.N.C. Aug. 15, 2016) (Numbers, II, M.J.)
Ashmore v. Allied Energy, Inc., 2016 WL 301169 (D.S.C. Jan. 25, 2016) (Childs, D.J.)
Beasley v. Novant Health, Inc., 2016 WL 4435230 (M.D.N.C. Aug. 19, 2016) (Auld, M.J.)
Brown v. Mountainview Cutters, LLC, 2016 WL 3045349 (W.D. Va. May 27, 2016) (Conrad, D.J.)
Columbia Gas Transmission, LLC v. Balt. Cty., Md., 2016 WL 7167979 (D. Md. Dec. 8, 2016) (Gallagher, M.J.)
Conn. Gen. Life Ins. Co. v. Advanced Surgery Ctr. of Bethesda, LLC, 2016 WL 7115952 (D. Md. Dec. 7, 2016) (Chasanow, D.J.)
Dwoskin v. Bank of Am., N.A., 2016 WL 3955932 (D. Md. July 22, 2016) (Blake, D.J.)
Eramo v. Rolling Stone, LLC, 314 F.R.D. 205 (W.D. Va. Jan. 25, 2016) (Conrad, D.J.)
Fid. & Guar. Life Ins. Co. v. United Advisory Grp., Inc., 2016 WL 632025 (D. Md. Feb. 17, 2016) (Gallagher, M.J.)
Fish v. Air & Liquid Sys. Corp., 2017 WL 697663 (D. Md. Feb. 21, 2017) (Copperthite, M.J.)
Holcombe v. Helena Chem. Co., 2016 WL 2897942 (D. S.C. May 18, 2016) (Duffy, D.J.)
In re: American Med. Sys., Inc. Pelvic Repair Systems Prod. Liability Litig., 2016 WL 4411506 (S.D. W.Va. Aug. 17, 2016) (Eifert M.J.)
In re: American Med. Sys., Inc., 2016 WL 3077904 (S.D. W.Va. May 31, 2016) (Eifert M.J.)
In re: NC Swine Farm Nuisance Litig., 2016 WL 3661266 (E.D.N.C. July 1, 2016) (Jones, Jr., M.J.)
Johnson v. Ford Motor Co., 2016 WL 4577419 (S.D. W. Va. Sept. 1, 2016) (Eifert, M.J.)
Jos. A. Bank Clothiers, Inc. v. J.A.B.-Columbia, Inc., 2017 WL 75746 (D. Md. Jan. 6, 2017) (Gallagher, M.J.)
Moses H. Cone Mem'l Hosp. Operating Corp. v. Conifer Physician Servs., Inc., 2016 WL 430494 (M.D.N.C. Feb. 3, 2016) (Webster, M.J.)
Prusin v. Canton's Pearls, LLC, 2016 WL 7408840 (D. Md. Dec. 22, 2016) (Gallagher, M.J.)
Raab v. Smith & Nephew, Inc., 2016 WL 2587188 (S.D. W. Va. May 4, 2016) (Eifert, M.J.)
Santiago v. S. Health Partners, 2016 WL 4435229 (M.D.N.C. Aug. 19, 2016) (Auld, M.J.)
Scott Hutchison Enters., Inc. v. Cranberry Pipeline Corp., 2016 WL 5219633 (S.D. W. Va. Sept. 20, 2016) (Eifert, M.J.)

Townsend v. Nestle Healthcare Nutrition, Corp., 2016 WL 1629363 (S.D. W. Va. Apr. 22, 2016) (Eifert, M.J.)
White v. Sam's E., Inc., 2016 WL 205494 (S.D. W. Va. Jan. 15, 2016) (Aboulhosn, M.J.)

5th Circuit

Allen-Pieroni v. Sw. Corr., LLC, 2016 WL 1750325 (N.D. Tex. May 2, 2016) (Horan, M.J.)
Allen-Pieroni v. Sw. Correctional, 2016 WL 4439997 (N.D. Tex. Aug. 23, 2016) (Horan, M.J.)
Areizaga v. ADW Corp., 314 F.R.D. 428 (N.D. Tex. Apr. 4, 2016) (Horan, M.J.)
Biggio v. H2O Hair, Inc., 2016 WL 7116025 (E.D. La. Dec. 7, 2016) (Wilkinson, Jr., M.J.)
Braud v. Geo Heat Exchangers, L.L.C., 2016 WL 1274558 (M.D. La. Mar. 31, 2016) (Bourgeois, Jr., M.J.)
Brand Serv., LLC v. Irex Corp., 2017 WL 67517 (E.D. La. Jan. 6, 2017) (Roby, M.J.)
Cain v. City of New Orleans, 2016 WL 7156071 (E.D. La. Dec. 8, 2016) (Wilkinson, Jr., M.J.)
Carr v. State Farm Mut. Auto. Ins., 312 F.R.D. 459 (N.D. Tex. 2015) (Horan, M.J.)
Celanese Corp. v. Clariant Corp., 2016 WL 1074573 (N.D. Tex. Mar. 18, 2016) (Horan, M.J.)
CGC Royalty Inv. I, LLC v. Bluewater Moorings, LLC, 2017 WL 106795 (N.D. Tex. 2017) (Horan, M.J.)
Cottonham v. Allen, 2016 WL 4035331 (M.D. La. July 25, 2016) (Bourgeois, Jr., M.J.)
Curtis v. Metro. Life Ins. Co., 2016 WL 687164 (N.D. Tex. Feb. 19, 2016) (Horan, M.J.)
Duvall v. BOPCO, L.P., 2016 WL 1268343 (E.D. La. April 1, 2016) (Wilkinson, M.J.)
Fidelis Grp. Holdings, LLC v. Chalmers Auto., LLC, 2016 WL 6157601 (E.D. La. Oct. 24, 2016) (Roby, M.J.)
Garcia v. Prof'l Contract Serv., Inc., 2017 WL 187577 (W.D. Tex. Jan. 17, 2017) (Austin, M.J.)
Gondola v. USMD PPM, LLC, 2016 WL 3031852 (N.D. Tex. May 27, 2016) (Horan, M.J.)
Hahn v. Hunt, 2016 WL 1587405 (E.D. La. Apr. 20, 2016) (Wilkinson, M.J.)
Harrison v. Wells Fargo Bank, N.A., 2016 WL 1392332 (N.D. Tex. Apr. 8, 2016) (Horan, M.J.)
Hightower v. Grp. 1 Auto., Inc., 2016 WL 3430569 (E.D. La. June 22, 2016) (Wilkinson, M.J.)
Holmes v. N. Tex. Health Care Laundry Coop. Ass'n, 2016 WL 1366269 (N.D. Tex. Apr. 6, 2016) (Horan, M.J.)
Howard v. Seadrill Americas, Inc., 2016 WL 7012275 (E.D. La. Dec. 1, 2016) (Roby, M.J.)
Hume v. Consol. Grain & Barge, Inc., 2016 WL 7385699 (E.D. La. Dec. 21, 2016) (Wilkinson, M.J.)
In re: Application of RSM Prod. Corp., 2016 WL 3477244 (S.D. Tex. June 27, 2016) (Miller, D.J.)
In re: Wright, 2017 WL 685562 (S.D. Tex. Feb. 21, 2017) (Rodriguez, D.J.)
In re: Trevino, 2017 WL 123756 (S.D. Tex. Jan. 12, 2017) (Rodriguez, D.J.)
In re: Xarelto (Rivaroxaban) Prods., 313 F.R.D. 32 (E.D. La. 2016) (Fallon, D.J.)
InforMD, LLC v. DocRX, Inc., 2016 WL 2343854 (M.D. La. May 3, 2016) (Wilder-Doomes, M.J.)
ING Bank N.V. v. M/V Portland, IMO No. 9497854, 2016 WL 3365426 (M.D. La. June 16, 2016) (DeGravelles, D.J.)
Keycorp v. Holland, 2016 WL 6277813 (N.D. Tex. Oct. 26, 2016) (Horan, M.J.)
Kirk v. Invesco, Ltd., 2016 WL 4394336 (S.D. Tex. Aug. 18, 2016) (Miller, D.J.)
Krantz v. State Farm Fire & Cas. Co., 2016 WL 320148 (M.D. La. Jan. 25, 2016) (Bourgeois, Jr., M.J.)
La. Crawfish Producers Ass'n- W. v. Mallard Basin, Inc., 2015 WL 8074260 (W.D. La. Dec. 4, 2015) (Hanna, M.J.)
Leal v. Wal-Mart Stores, 2017 WL 68528 (E.D. La. Jan. 6, 2017) (Roby, M.J.)
Lopez v. Warren Transp., Inc., 2017 WL 551680 (N.D. Tex. Feb. 10, 2017) (Horan, M.J.)
McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co., 2016 WL 98603 (N.D. Tex. Jan. 8, 2016) (Horan, M.J.)
McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co., 2016 WL 3033544 (N.D. Tex. May 26, 2016) (Horan, M.J.)
McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co., 2016 WL 2609994 (N.D. Tex. May 6, 2016) (Horan, M.J.)
Mendoza v. Old Republic Ins. Co., 2017 WL 636069 (E.D. La. Feb. 16, 2017) (Roby, M.J.)
Mir v. L-3 Commuc'ns Integrated Sys., L.P., 2016 WL 3959009 (N.D. Tex. July 22, 2016) (Horan, M.J.)
Mr. Mudbug, Inc. v. Bloomin' Brands, Inc., 2017 WL 111268 (E.D. La. Jan. 11, 2017) (Roby, M.J.)
Mr. Mudbug, Inc. v. Bloomin' Brands, Inc., 2017 WL 448575 (E.D. La. Feb. 1, 2017) (Roby, M.J.)
Murillo Modular Grp. Ltd. v. Sullivan, 2016 WL 6139096 (N.D. Tex. Oct. 20, 2016) (Horan, M.J.)
Nerium Skincare, Inc. v. Olson, 2017 WL 277634 (N.D. Tex. Jan. 20, 2017) (Horan, M.J.)
Nguyen v. Versacom, LLC, 2015 WL 8316436 (N.D. Tex. Dec. 9, 2015) (Horan, M.J.)
Odeh v. City of Baton Rouge, 314 F.R.D. 386 (M.D. La. 2016) (Bourgeois, Jr., M.J.)
Orchestratshr, Inc. v. Trombetta, 2016 WL 1555784 (N.D. Tex. Apr. 18, 2016) (Horan, M.J.)
Richmond v. SW Closeouts, Inc., 2016 WL 3090672 (N.D. Tex. June 2, 2016) (Horan, M.J.)
Robinson v. Dallas Cty. Cmty. Coll. Dist., 2016 WL 1273900 (N.D. Tex. Feb. 18, 2016) (Horan, M.J.)
Rosalez Funez v. E.M.S.P., LLC, 2016 WL 5337981 (E.D. La. Sept. 23, 2016) (Roby, M.J.)
Samsung Elec. Am. Inc. v. Chung, 2017 WL 896897 (N.D. Tex. Mar. 7, 2017) (Horan, M.J.)

United States v. Wyeth, 2017 WL 191258 (E.D. La. Jan. 13, 2017) (Roby, M.J.)
Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 2016 WL 5922315 (W.D. Tex. Oct. 11, 2016) (Austin, M.J.)
Williams v. U.S. Envtl. Servs., LLC, 2016 WL 617447 (M.D. La. Feb. 16, 2016) (Bourgeois, Jr., M.J.)

6th Circuit

Albritton v. CVS Caremark Corp., 2016 WL 3580790 (W.D. Ky. June 28, 2016) (Stivers, D.J.)
Arthur J. Gallagher & Co. v. Anthony, 2016 WL 4076819 (N.D. Ohio June 22, 2016) (Gwin, D.J.)
Arthur J. Gallagher & Co. v. Anthony, 2016 WL 2997599 (N.D. Ohio May 24, 2016) (Gwin, D.J.)
Bentley v. Highlands Hosp. Corp., 2016 WL 762686 (E.D. Ky. Feb. 23, 2016) (Atkins, M.J.)
Burfitt v. Bear, 2016 WL 5848844 (S.D. Ohio Oct. 10, 2016) (Bowman, M.J.)
Commerce and Indus. Ins. Co. v. Century Surety Co., 2017 WL 946984 (S.D. Ohio Mar. 10, 2017) (Jolson, M.J.)
Hadfield v. Newpage Corp., 2016 WL 427924 (W.D. Ky. Feb. 3, 2016) (Russell, D.J.)
He v. Rom, 2016 WL 5682012 (N.D. Ohio Oct. 3, 2016) (Gwin, D.J.)
In re: ClassicStar Mare Lease Litig., 2017 WL 27455 (E.D. Ky. Jan. 3, 2017) (Wier, M.J.)
In re: E/I. Du Pont de Nemours and Co. C-8 Pers. Inj. Litig., 2016 WL 5884964 (S.D. Ohio Oct. 7, 2016) (Sargus, Jr., C.D.J.)
Kacmarik v. Mitchell, 2017 WL 131582 (N.D. Ohio Jan. 13, 2017) (Greenberg, M.J.)
Kelley v. Apria Healthcare, Inc., 2016 WL 737919 (E.D. Tenn. Feb. 2, 2016) (Guyton, M.J.)
Marsden v. Nationwide Biweekly Admin., Inc., 2016 WL 471364 (S.D. Ohio Feb. 8, 2016) (Ovington, C.M.J.)
Martin v. Posey, 2017 WL 412876 (S.D. Ohio Jan. 31, 2017) (Kemp, M.J.)
Murillo v. Dillard, 2017 WL 471570 (W.D. Ken. Feb. 3, 2017) (Brennenstuhl, M.J.)
Owens v. Liberty Life Assurance Co. of Boston, 2016 WL 6156182 (W.D. Ky. Oct. 21, 2016) (McKinley, C.D.J.)
Quality Mfg. Sys., Inc. v. R/X Automation Sol., Inc., 2016 WL 1244697 (M.D. Tenn. Mar. 30, 2016) (Bryant, M.J.)
Raub v. Moon Lake Prop. Owners Ass'n, 2016 WL 6275392 (E.D. Mich. Oct. 27, 2016) (Ludington, D.J.)
Rui He v. Rom, 2016 WL 909405 (N.D. Ohio Mar. 10, 2016) (Gwin, D.J.)
Siriano v. Goodman Mfg. Co., L.P., 2015 WL 8259548 (S.D. Ohio Dec. 9, 2015) (Deavers, M.J.)
Solo v. United Parcel Serv. Co., 2017 WL 85832 (E.D. Mich. Jan. 10, 2017) (Whalen, M.J.)
State Farm Mut. Auto. Ins. Co. v. Universal Health Grp., Inc., 2016 WL 6822014 (E.D. Mich. Nov. 18, 2016) (Levy, D.J.)
State Farm Mut. Auto. Ins. Co. v. Warren Chiropractic & Rehab Clinic, P.C., 2016 WL 3450834 (E.D. Mich. May 11, 2016) (Goldsmith, D.J.)
Suzette Scott-Warren v. Liberty Life Assur. Co. of Boston, 2016 WL 5661774 (W.D. Ky. Sept. 29, 2016) (Simpson, III, S.J.)
Waters v. Drake, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (Graham, D.J.)
Wilmington Tr. Co. v. AEP Generating Co., 2016 WL 860693 (S.D. Ohio Mar. 7, 2016) (Kemp, M.J.)

7th Circuit

Acheron Med. Supply, LLC v. Cook Med. Inc., 2016 WL 5466309 (S.D. Ind. Sept. 9, 2016) (LaRue, M.J.)
Amarei v. City of Chi., 2016 WL 3693425 (N.D. Ill. July 12, 2016) (Weisman, M.J.)
Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC, 2016 WL 4077154 (N.D. Ind. July 8, 2016) (Cherry, M.J.)
Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC, 2016 WL 614144 (ND. Ind. Feb. 16, 2016) (Cherry, M.J.)
AVNET, Inc. v. MOTIO, Inc., 2016 WL 3365430 (N.D. Ill. June 15, 2016) (Schenkier, M.J.)
Babjak v. Arcelormittal USA, LLC, 2016 WL 4191050 (N.D. Ind. Aug. 9, 2016) (Cherry, M.J.)
Baires Blue Cross Blue Shield of Minn. v. State Farm Mut. Auto. Ins. Co., 2016 WL 4591905 (E.D. Wis. Sept. 2, 2016) (Stadtmueller, D.J.)
Buchanan v. Chi. Transit Auth., 2016 WL 7116591 (N.D. Ill. Dec. 7, 2016) (Blakey, D.J.)
Crabtree v. Angie's List, Inc., 2017 WL 413242 (S.D. Ind. Jan. 31, 2017) (Dinsmore, M.J.)
Design Basics LLC v. Best Built Inc., 2016 WL 1060253 (E.D. Wis. Mar. 15, 2016) (Griesbach, D.J.)
Elliott v. Superior Pool Prods., LLC, 2016 WL 29243 (C.D. Ill. Jan. 4, 2016) (Schanzle-Haskins, M.J.)
Garner v. St. Clair Cty., 2016 WL 146691 (S.D. Ill. Jan. 13, 2016) (Wilkerson, M.J.)
Hespe v. City of Chi., 2016 WL 7240754 (N.D. Ill. Dec. 15, 2016) (Alonso, D.J.)
In re: Cook Med., Inc., 2016 WL 2854169 (S.D. Ind. May 12, 2016) (Baker, M.J.)
Infowhyse GmbH v. Fleetwood Grp., 2016 WL 4063168 (N.D. Ill. July 29, 2016) (Cole, M.J.)
Knauf Insulation, LLC v. Johns Manville Corp., 2015 WL 7089725 (S.D. Ind. Nov. 13, 2015) (Dinsmore, M.J.)
Murillo v. Kohl's Corp., 2016 WL 4705550 (E.D. Wisc. Sept. 8, 2016) (Stadtmueller, D.J.)

Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304 (S.D. Ind., 2016) (Lynch, M.J.)
Perez v. Mueller, 2016 WL 3360422 (E.D. Wis. May 27, 2016) (Randa, D.J.)
Robinson v. Gateway Tech. Coll., 2016 WL 344959 (E.D. Wis. Jan. 26, 2016) (Randa, D.J.)
Simon v. Northwestern Univ., 2017 WL 467677 (N.D. Ill. Feb. 3, 2017) (Weisman, M.J.)
Southport Bank v. Miles, 2016 WL 7366885 (N.D. Ill., Dec. 19, 2016) (Gilbert, M.J.)
The Surgery Ctr. at 900 N. Mich. Ave., LLC v. Am. Physicians Assurance Corp., Inc., 2016 WL 6962840 (N.D. Ill. Nov. 29, 2016) (Cole, M.J.)

8th Circuit

Cor Clearing, LLC v. Calissio Res. Grp., Inc., 2016 WL 2997463 (D. Neb. May 23, 2016) (Strom, D.J.)
Design Basics LLC v. Ahmann Design, Inc., 2016 WL 4251076 (N.D. Iowa Aug. 10, 2016) (Scoles, M.J.)
Duhigg v. Goodwill Industries, 2016 WL 4991480 (D. Neb. Sept. 16, 2016) (Gossett, M.J.)
Gowan v. Mid-Century Insur. Co., 2016 WL 126746 (D.S.D. Jan. 11, 2016) (Duffy, M.J.)
Harper v. Unum Grp., 2016 WL 4508238 (W.D. Ark. Aug. 29, 2016) (Holmes, D.J.)
Hodges v. Pfizer, Inc., 2016 WL 1222229 (D. Minn. Mar. 28, 2016) (Montgomery, D.J.)
In re: Fluoroquinolone Prods. Liab. Litig., 2016 WL 4045414 (D. Minn. July 20, 2016) (Tunheim, D.J.)
Klein v. TD Ameritrade Holding Corp., 2016 WL 7156476 (D. Neb. Dec. 7, 2016) (Thalken, M.J.)
Labrier v. State Farm Fire & Cas. Co., 314 F.R.D. 637 (W.D. Mo. May 9, 2016) (Nelson, D.J.)
Leseman, LLC v. Stratasys, Inc., 2016 WL 1117411 (D. Minn. Mar. 22, 2016) (Laughrey, D.J.)
Orduño v. Pietrzak, 2016 WL 5853723 (D. Minn. Oct. 5, 2016) (Montgomery, D.J.)
Perez v. KDP Hosp., LLC, 2016 WL 2746926 (W.D. Mo. May 6, 2016) (Harpool, D.J.)
Prime Aid Pharm. Corp. v. Express Scripts, Inc., 2017 WL 67526 (E.D. Mo. Jan. 6, 2017) (Jackson, D.J.)
Schultz v. Sentinel Ins. Co., 2016 WL 3149686 (D.S.D. June 3, 2016) (Duffy, M.J.)
Sprint Commc'ns. Co. L.P. v. Crow Creek Sioux Tribal Court, 316 F.R.D. 254 (D.S.D. Feb. 26, 2016) (Schreier, D.J.)
Vallejo v. Amgen, Inc., 2016 WL 2986250 (D. Neb. May 20, 2016) (Camp, D.J.)
Zurich Am. Ins. Co. v. Andrew, 2016 WL 2350115 (D. Neb. May 4, 2016) (Gossett, M.J.)

9th Circuit

24/7 Customer, Inc. v. Liveperson, Inc., 2016 WL 4054884 (N.D. Cal. July 29, 2016) (Westmore, M.J.)
Am. Auto. Ins. Co. v. Haw. Nut & Bolt, Inc., 2017 WL 80248 (D. Haw. Jan. 9, 2017) (Chang, M.J.)
Ballentine v. Las Vegas Metro. Police Dep't, 2016 WL 2743504 (D. Nev. May 9, 2016) (Foley, Jr., M.J.)
Bank of Am., N.A. v. Auburn & Bradford at Providence Homeowners' Ass'n, ___ WL ___ (D. Nev. Aug. 1, 2016) (Koppe, M.J.)
Bank of Am., N.A. v. SFR Invs. Pool I LLC, 2016 WL 2843802 (D. Nev. May 12, 2016) (Foley, Jr., M.J.)
Brown v. Dobler, 2015 WL 9581414 (D. Idaho Dec. 29, 2015) (Dale, M.J.)
Carroll v. Wells Fargo & Co., 2016 WL 4696852 (N.D. Cal. Sept. 8, 2016) (Westmore, M.J.)
Centeno v. City of Fresno, 2016 WL 749634 (E.D. Cal. Dec. 29, 2016) (Boone, M.J.)
ChriMar Systems v. Cisco Systems, Inc., 312 F.R.D. 560 (N.D. Cal. Jan. 12, 2016) (James, M.J.)
Cisco Sys. v. Arista Networks, Inc., 2016 WL 632000 (N.D. Cal. Feb. 17, 2016) (Freeman, D.J.)
Ciuffitelli v. Deloitte & Touche LLP, 2016 WL 6963039 (D. Or. Nov. 28, 2016) (Acosta, M.J.)
Clymore v. Fed. R.R. Admin., 2015 WL 7760086 (E.D. Cal. Dec. 2, 2015) (Synder, M.J.)
D.F. v. Sikorsky Aircraft Corp., 2016 WL 3360515 (S.D. Cal. June 13, 2016) (Crawford, M.J.)
Dao v. Liberty Life Assur. Co., 2016 WL 796095 (N.D. Cal. Feb. 23, 2016) (Laporte, M.J.)
Deutsche Bank Nat'l Tr. Co. v. SFR Invs. Pool I, LLC, 2016 WL 3200104 (D. Nev. June 6, 2016) (Ferenbach, M.J.)
Dobro v. Allstate Ins. Co., 2016 WL 4595149 (S.D. Cal. Sept. 2, 2016) (Major, M.J.)
Federal Trade Comm'n v. Directv, Inc., 2016 WL 1741137 (N.D. Cal. May 3, 2016) (James, M.J.)
Federal Trade Comm'n v. Directv, Inc., 2016 WL 3351945 (N.D. Cal. June 9, 2016) (James, M.J.)
Gibson v. SDCC, 2016 WL 845308 (D. Nev. Mar. 2, 2016) (Leen, M.J.)
Gilbert v. Money Mut., LLC, 2016 WL 3196605 (N.D. Cal. June 9, 2016) (Beeler, M.J.)
Gilead Scis., Inc. v. Merck & Co., 2016 WL 146574 (N.D. Cal. Jan. 13, 2016) (Grewal, M.J.)
Goes Int'l, AB v. Dodur Ltd., 2016 WL 427369 (N.D. Cal. Feb. 4, 2016) (Beeler, M.J.)
Gonzales v. City of Bakersfield, 2016 WL 4474600 (E.D. Cal. Aug. 25, 2016) (Thurston, M.J.)
HSBC Bank USA v. Green Valley Pecos Homeowners Ass'n, Inc., 2016 WL 6915301 (D. Nev. Nov. 21, 2016) (Foley, Jr., M.J.)
IDS Prop. & Cas. Ins. Co. v. Fellows, 2017 WL 202128 (W.D. Wash. Jan. 18, 2017) (Donohue, M.J.)
In re: AutoZone, Inc., 2016 WL 4136520 (N.D. Cal. May 16, 2016) (Corley, M.J.)

In re: Bard IVC Filters Prods. Liability Litig., 2016 WL 4943393 (D. Ariz. Sept. 16, 2016) (Campbell, D.J.)
Lauris v. Novartis, 2016 WL 7178602 (E.D. Cal. Dec. 8, 2016) (M.J.)
Loop AI Labs Inc v. Gatti, 2016 WL 1273914 (N.D. Cal. Feb. 5, 2016) (Gilliam, Jr., D.J.)
Malibu Media, LLC v. Doe, 2016 WL 7425923 (N.D. Cal. Dec. 23, 2016) (Alsup, D.J.)
Martinelli v. Johnson & Johnson, 2016 WL 1458109 (E.D. Cal. Apr. 13, 2016) (England, Jr., D.J.)
McSwain v. United States, 2016 WL 4530461 (D. Nev. Aug. 30, 2016) (Foley, M.J.)
MicroTechnologies, LLC v. Autonomy, Inc., 2016 WL 1273266 (N.D. Cal. Mar. 14, 2016) (Lloyd, M.J.)
Morrison v. Quest Diagnostics Inc., 2016 WL 355120 (D. Nev. Jan. 27, 2016) (Leen, M.J.)
O'Connor v. Uber Techs., Inc., 2016 WL 107461 (N.D. Cal. Jan. 11, 2016) (Ryu, M.J.)
Oracle Am., Inc. v. Google, Inc., 2015 WL 7775243 (N.D. Cal. Dec. 3, 2015) (Ryu, M.J.)
***Perez v. Kazu Const., LLC*, 2017 WL 628455 (D. Haw. Feb. 15, 2017) (Chang, M.J.)**
Roberts v. Clark Cty. Sch. Dist., 312 F.R.D. 594 (D. Nev. Jan. 11, 2016) (Leen, M.J.)
Salazar v. McDonald Corp., 2016 WL 736213 (N.D. Cal. Feb. 25, 2016) (James, M.J.)
Santoyo v. Howmedica Osteonics Corp., 2016 WL 2595199 (W.D. Wash. May 5, 2016) (Settle, D.J.)
Stoba v. Saveology.com, LLC, 2016 WL 3356796 (S.D. Cal. June 3, 2016) (Stormes, M.J.)
Strickland Real Estate Holdings, LLC v. Texaco, Inc., 2016 WL 7243711 (W.D. Wash. Dec. 15, 2016) (Coughenour, D.J.)
Talavera v. Sun Maid Growers of Cal., 2017 WL 495635 (E.D. Cal. Feb. 6, 2017) (Boone, M.J.)
Thakkar v. Honeywell Int'l Inc. Short-Term Disability Plan, 2016 WL 6832708 (D. Ariz. Nov. 21, 2016) (Tuchi, D.J.)
Timothy v. Oneida Cty., 2016 WL 2910270 (D. Idaho May 18, 2016) (Winmill, D.J.)
Van v. Language Line Servs., ___ WL ___ (N.D. Cal. Mar. 2, 2016) (Lloyd, M.J.)
Wichansky v. Zowine, 2016 U.S. Dist. LEXIS 37065 (D. Ariz. March 22, 2016) (Campbell, D.J.)
Wide Voice, LLC v. Sprint Commc'ns. Co. L.P., 2016 WL 155031 (D. Nev. Jan. 12, 2016) (Ferenbach, M.J.)
Wilson v. Wal-Mart Stores, Inc., 2016 WL 526225 (D. Nev. Feb. 9, 2016) (Ferenbch, M.J.)
Wit v. United Behavioral Health, 2016 WL 258604 (N.D. Cal. Jan. 21, 2016) (Spero, M.J.)

10th Circuit

Arenas v. Unified Sch. Dist. No. 223, 2016 WL 5122872 (D. Kan. Sept. 21, 2016) (James, M.J.)
Arenas v. Unified Sch. Dist. No. 223, 2016 WL 6071802 (D. Kan. Oct. 17, 2016) (James, M.J.)
Ark. River Power Auth. v. The Babcock & Wilson Co., 2016 WL 192269 (D. Colo. Jan. 15, 2016) (Wang, M.J.)
Bd. of Comm'rs of Shawnee Cty. v. Daimler Trucks N. Am., LLC, 2015 WL 8664202 (D. Kan. Dec. 11, 2016) (Sebelius, M.J.)
Boone v. Tfi Family Servs., Inc., 2016 WL 3124850 (D. Kan. June 3, 2016) (Gale, M.J.)
Coleman v. Reed, 2016 WL 4523915 (W.D. Okla. Aug. 22, 2016) (Miles-LaGrange, D.J.)
Diesel Power Source v. Crazy Carl's Turbos, 2017 WL 57791 (D. Utah, Jan. 5, 2017) (Wells, M.J.)
Digital Ally, Inc. v. Util. Assocs., 2016 WL 1535979 (D. Kan. Apr. 15, 2016) (Birzer, M.J.)
Duffy v. Lawrence Memorial Hosp., 2016 WL 7386413 (D. Kan. Dec. 21, 2016) (James, M.J.)
Echon v. Sackett, 2016 WL 943485 (D. Colo. Jan. 27, 2016) (Wang, M.J.)
Fasesin v. Henry Indus., Inc., 2016 WL 3654740 (D. Kan. July 8, 2016) (Birzer, M.J.)
Fish v. Kobach, 2016 WL 893787 (D. Kan. Mar. 8, 2016) (O'Hara, M.J.)
Frick v. Henry Indus., Inc., 2016 WL 6966971 (D. Kan. Nov. 29, 2016) (Birzer, M.J.)
Hibu Inc. v. Peck, 2016 WL 4702422 (D. Kan. Sept. 8, 2016) (James, M.J.)
Hinzo v. N.M. Corr. Dep't, 2016 WL 3156071 (D.N.M. May 19, 2016) (Molzen, M.J.)
***In re: Vicki Milholland*, 2017 WL 895752 (10th Cir. Bankruptcy Appellate Panel, Mar. 7, 2017) (Karlin, C.J.)**
Meeker v. Life Care Ctrs. of Am., Inc., 2016 WL 1403335 (D. Colo. Apr. 11, 2016) (Wang, M.J.)
Merlin v. Crawford, 2016 WL 814580 (D. Colo. Mar. 2, 2016) (Wang, M.J.)
N.U. v. Wal-Mart Stores, Inc., 2016 WL 3654759 (D. Kan. July 8, 2016) (Sebelius, M.J.)
Navajo Nation Human Rights Comm'n v. San Juan Cty., 2016 WL 3079740 (D. Utah May 31, 2016) (Wells, M.J.)
Pertile v. Gen. Motors, LLC, 2016 WL 1059450 (D. Colo. Mar. 17, 2016) (Wang, M.J.)
Rickaby v. Hartford Life & Accident Ins. Co., 2016 WL 1597589 (D. Colo. Apr. 21, 2016) (Wang, M.J.)
Rowan v. Sunflower Elec. Power Corp., 2016 WL 2772210 (D. Kan. May 13, 2016) (James, M.J.)
***Singh v. Shonrock*, 2017 WL 698472 (D. Kan. Feb. 22, 2017) (Birzer, M.J.)**
Xmission, L.C. v. Adknowledge, Inc., 2016 WL 6108556 (D. Utah Oct. 19, 2016) (Pead, M.J.)
XTO Energy, Inc. v. ATD, LLC, 2016 WL 1730171 (D.N.M. Apr. 1, 2016) (Browning, D.J.)

11th Circuit

Bingham v. Baycare Health Sys., 2016 WL 4467213 (M.D. Fla. Aug. 24, 2016) (Sneed, M.J.)
Bright v. Frix, 2016 WL 1011441 (M.D. Fla. Jan. 22, 2016) (Pizzo, M.J.)
City of Jacksonville v. Shoppes of Lakeside, Inc., 2016 WL 3447383 (M.D. Fla. June 23, 2016) (Richardson, M.J.)
Edmonson v. Velvet Lifestyles, LLC, 2016 WL 7048363 (S.D. Fla. Dec. 5, 2016) (Goodman, M.J.)
Flynn v. Square One Distrib., Inc., 2016 WL 2997673 (M.D. Fla. May 25, 2016) (Smith, M.J.)
Graham & Co. v. Liberty Mut. Fire Ins. Co., 2016 WL 1319697 (N.D. Ala. Apr. 5, 2016) (Hancock, J.)
Hankinson v. R.T.G. Furniture Corp., 2016 WL 1182768 (S.D. Fla. Mar. 28, 2016) (Seltzer, M.J.)
Herman v. Seaworld Parks & Entm't, Inc., 2016 WL 3746421 (M.D. Fla. July 13, 2016) (Sneed, M.J.)
Herrera-Velasquez v. Plantation Sweets, Inc., 2016 WL 183058 (S.D. Ga. Jan. 14, 2016) (Smith, M.J.)
Hunter v. Corr. Corp. of Am., 2016 WL 943752 (S.D. Ga. Feb. 5, 2016) (Epps, M.J.)
In re: Subpoena Upon NeJames Law, P.A., 2016 WL 1599831 (M.D. Fla. Apr. 21, 2016) (Smith, M.J.)
Llanten v. Am. Sec. Ins. Co., 2017 WL 951629 (M.D. Fla. Mar. 10, 2017) (Sneed, M.J.)
Miller v. Garibaldi's, Inc., 2016 WL 7257035 (S.D. Ga. Dec. 15, 2016) (Smith, M.J.)
Noveshen v. Bridgewater Assocs. LP, 2016 WL 3902542 (S.D. Fla. Feb. 22, 2016) (Matthewman, M.J.)
O'Boyle v. Sweetapple, 2016 WL 492655 (S.D. Fl. Feb. 8, 2016) (Matthewman, M.J.)
Pilver v. Hillsborough Cty., 2016 WL 4129282 (M.D. Fla. Aug. 3, 2016) (Sneed, M.J.)
Steel Erectors, Inc. v. AIM Steel Int'l, Inc., 312 F.R.D. 673 (S.D. Ga. Jan. 4, 2016) (Smith, M.J.)
Williams v. Am. Int'l Grp., Inc., 2016 WL 2747020 (M.D. Ala. May 2, 2016) (Borden, M.J.)
Williams v. Am. Int'l Grp., Inc., 2016 WL 3456927 (M.D. Ala. June 21, 2016) (Borden, M.J.)

D.C. Circuit

Dell Inc. v. DeCosta, 2017 WL 177618 (D.D.C. Jan. 17, 2017) (Collyer, J.)
United States ex rel. Shamesh v. CA, Inc., 314 F.R.D. 1 (D.D.C. 2016) (Kay, M.J.)

Fed. Claims

Cellcast Tech., LLC v. United States, 2016 WL 5335798 (Fed. Cl. Sept. 23, 2016) (Wolski, J.)

TABLE OF JUDGES

1st Circuit

Bowler, M.J.; DiClerico, Jr., D.J.; Fuste, D.J.; Gorton, D.J.; Hennessey, M.J.

2d Circuit

Bryant, D.J.; Cott, M.J.; Crawford, D.J.; Crotty, D.J.; Francis, IV, M.J.; Freeman, M.J.; Furman, D.J.; Haight, S.D.J.; Mann, M.J.; Margolis, M.J.; Merriam, M.J.; Moses, M.J.; Netburn, M.J.; Peck, M.J.; Pitman, M.J.; Roemer, M.J.; Scott, M.J.; Shields, M.J.; Stewart, M.J.; Tomlinson, M.J.

3d Circuit

Baylson, D.J.; Brann, D.J.; Conti, D.J.; Dalzell, D.J.; Fischer, D.J.; Goldberg, D.J.; Heffley, M.J.; Hey, M.J.; Jones, II, D.J.; McNulty, D.J.; Mehalchick, M.J.; Perkin, M.J.; Saporito, Jr., M.J.; Schneider, M.J.

4th Circuit

Aboulhosn, M.J.; Auld, M.J.; Blake, D.J.; Chasanow, D.J.; Childs, D.J.; Conrad, D.J.; **Copperthite, M.J.**; Duffy, D.J.; Eifert, M.J.; Gallagher, M.J.; Jones, Jr., M.J.; Numbers, II, M.J.; Webster, M.J.

5th Circuit

Austin, M.J.; Bourgeois, Jr., M.J.; DeGravelles, D.J.; Fallon, D.J.; Hanna, M.J.; Horan, M.J.; Miller, D.J.; Roby, M.J.; Rodriguez, D.J.; Wilder-Doomes, M.J.; Wilkinson, M.J.

6th Circuit

Atkins, M.J.; Bowman, M.J.; Brennenstuhl, M.J.; Bryant, M.J.; Deavers, M.J.; Goldsmith, D.J.; Graham, D.J.; Greenberg, M.J.; Guyton, M.J.; Gwin, D.J.; **Jolson, M.J.**; Kemp, M.J.; Levy, D.J.; Ludington, D.J.; McKinley, C.D.J.; Ovington, C.M.J.; Russell, D.J.; Sargus, Jr., C.D.J.; Simpson, III, S.J.; Stivers, D.J.; Whalen, M.J.; Wier, M.J.

7th Circuit

Alonso, D.J.; Baker, M.J.; Blakey, D.J.; Cherry, M.J.; Cole, M.J.; Dinsmore, M.J.; Gilbert, M.J.; Griesbach, D.J.; LaRue, M.J.; Lynch, M.J.; Randa, J.; Schanzle-Haskins, M.J.; Schenkier, M.J.; Stadtmueller, D.J.; Weisman, M.J.; Wilkerson, M.J.

8th Circuit

Camp, D.J.; Duffy, M.J.; Gossett, M.J.; Harpool, D.J.; Holmes, D.J.; Laughrey, D.J.; Montgomery, D.J.; Nelson, D.J.; Schreier, D.J.; Scoles, M.J.; Strom, D.J.; Thalken, M.J.; Tunheim, D.J.

9th Circuit

Alsup, D.J.; Ascota, M.J.; Beeler, M.J.; Boone, M.J.; Campbell, D.J.; Chang, M.J.; Corley, M.J.; Coughenour, D.J.; Crawford, M.J.; Dale, M.J.; Donohue, M.J.; England, Jr., D.J.; Ferenbach, M.J.; Foley, Jr., M.J.; Freeman, D.J.; Gilliam, Jr., D.J.; Grewal, M.J.; James, M.J.; Koppe, M.J.; Laporte, M.J.; Leen, M.J.; Lloyd, M.J.; Major, M.J.; Ryu, M.J.; Settle, D.J.; Spero, M.J.; Stormes, M.J.; Synder, M.J.; Thurston, M.J.; Tuchi, D.J.; Westmore, M.J.; Winmill, D.J.

10th Circuit

Birzer, M.J.; Browning, D.J.; Gale, M.J.; James, M.J.; **Karlin, C.J.**; Miles-LaGrange, D.J.; Molzen, M.J.; O'Hara, M.J.; Pead, M.J.; Sebelius, M.J.; Wang, M.J.; Wells, M.J.

11th Circuit

Borden, M.J.; Epps, M.J.; Goodman, M.J.; Hancock, D.J.; Matthewman, M.J.; Pizzo, M.J.; Richardson, M.J.; Seltzer, M.J.; Smith, M.J.; Sneed, M.J.

D.C. Circuit

Collyer, J.; Kay, M.J.

Fed. Claims

Wolski, J.