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Proportionality Principles Distorted: Updates on a Proposed Proportionality Framework (formerly sponsored by the GW Humphrey Complex Litigation Center)

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On December 1, 2015, various amendments to the Federal Rules of Civil Procedure went into effect, including changes to Rule 26(b)(1) governing the scope of discovery. The revised scope permits discovery of non-privileged information only if it is both "relevant" and "proportional to the needs" of the case.

Our presentation discusses current efforts by the defense bar to weaponize proportionality. Below, we provide key exemplar case law illustrating how courts have applied proportionality over the last few years. But first, we present important cases, provided in proportionality discussions past, to assist plaintiffs' attorneys with properly framing the proportionality discussion.

I. Relevance Standard Is Unchanged, and Remains Primary in Determining Scope

- Relevance is first question; if information sought is not relevant, no need to address proportionality
- Relevance standard is unchanged, and still defined broadly by pre-December 1, 2015, case law, including *Oppenheimer Fund v. Sanders.*
  - *Lightsquared Inc. v. Deere & Co.*, No. 13CIV8157RMBJCF, 2015 WL 8675377, at *2 (S.D.N.Y. Dec. 10, 2015) (Under the amended Rule, while discovery no longer extends to anything related to the "subject matter" of the litigation, 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.) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *see also Walker v. H & M Hennes & Mauritz, L.P.*, No. 16 CIV. 3818 (JLC), 2016 WL 4742334, at *2 (S.D.N.Y. Sept. 12, 2016).

- The relevance standard is unchanged and still defined broadly notwithstanding the deletion of reference to the discoverability of information as "reasonably calculated to lead to admissible evidence".

- The defendants' belief that the plaintiffs' case lacks merit is not a basis for curtailing discovery. *Lightsquared Inc. v. Deere & Co.*, No. 13CIV8157RMBJCF, 2015 WL 8675377, at *4 (S.D.N.Y. Dec. 10, 2015) (where defendants would have the Court block discovery related to one aspect of the plaintiffs' claim because there is (according to the defendants) insufficient evidence to sustain a separate aspect of that claim, court found such an outcome would frustrate a core purpose of discovery —namely to enable parties to "obtain the factual information needed to prepare for trial." Court also found that a plaintiff alleging fraud or misrepresentation will often need sufficiently broad discovery to reveal evidence of the facts at issue.)

- The greater the relevance of the materials sought, the less likely its discovery will be found disproportionate. *Blackrock Allocation Target Shares: Series S Portfolio v. Bank of New York Mellon*, No. 14 Civ. 9372, 2018 WL 2215510 (S.D.N.Y. May 5, 2018) (Pitman, M.J.)

- The requesting party does not carry the burden to show that the requested discovery is proportional. The objecting party must show that the requested discovery is not proportional.

  - *Carter v. H2R Rest. Holdings LLC*, 2017 WL 2439439, at *4 (N.D. Tex. June 6, 2017) (rule changes "do not alter the basic allocation of the burden on the party resisting discovery").

  - *William Powell Co. v. Nat. Indemnity Co.*, 2017 WL 1326504, at *5 (S.D. Ohio Apr. 11, 2017) ("the amended rule did not shift the burden of proving proportionality to the party seeking discovery").

  - *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.").

  - *Nerium Skincare Inc. v. Olson*, 2017 WL 277634, at *3 (N.D. Tex. Jan. 20, 2017) ("a party seeking to resist discovery on these grounds still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by [Rule 26] by

coming forward with specific information to address [the proportionality factors]").

- *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").

- *Vallejo v. Amgen, Inc.*, --- F.3d ---, 2018 WL 4288360 (8th Cir. 2018) (discussing the magistrate judge's complaint that Amgen failed to provide her with concrete proof of any burden, leaving her with the "onerous responsibility" to wade through the filings and make a determination and her admonition that future discovery disputes must have the party opposing discovery "quantifiably explain the burden of providing the requested information.")

- *Winfield v. City of New York*, No. 15-CV-05236, 2018 WL 716013, at *4 (S.D.N.Y. Feb. 1, 2018) ("The party seeking discovery bears the initial burden of proving the discovery is relevant, and then the party withholding discovery on the grounds of burden, expense, privilege, or work product bears the burden of proving the discovery is in fact privileged or work product, unduly burdensome and/or expensive.").

II. Proportionality "Restored" To Original Place in Defining Scope of Discovery

- "Proportionality, like other concepts, it is not self-defining; it requires a common sense and experiential assessment. *See, e.g., BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 326 F.R.D. 171, 175 (N.D. Ill. 2018). Indeed, Chief Justice Roberts' 2015 Year-End Report on the Federal Judiciary noted that the addition of 'proportionality' to Rule 26(b) 'crystalize[d] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.'" *LKQ Corp. v. Gen. Motors Co.*, No. 20 C 2753, 2021 WL 4127326, at *3 (N.D. Ill. Sept. 9, 2021).

- "Proportionality in discovery under the Federal Rules is nothing new. Old Rule 26(b)(2)(C)(iii) was clear that a court could limit discovery when burden outweighed benefit, and old Rule 26(g)(1)(B)(iii) was clear that a lawyer was obligated to certify that discovery served was not unduly burdensome. New Rule 26(b)(1), implemented by the December 1, 2015 amendments, simply takes the factors explicit or implicit in these old requirements to fix the scope of all discovery demands in the first instance." *Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 5:13-CV-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13,

2016) (explicitly denying discovery of otherwise relevant information based on proportionality grounds).

- Just as courts have always done, proportionality requires the court to make a common sense assessment, guided by the factors set forth below. *See, e.g.*, *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, --- F.R.D. ---, 2018 WL 3689046, at *4 (N.D. Ill. Aug. 3, 2018) ("Proportionality, like other concepts, requires a common sense and experiential assessment.").

III. Application of the Factors

- Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering (i) the issues at stake in the action, (ii) the amount in controversy, (iii) the parties' relative access to relevant information, (iv) the parties' resources, (v) the importance of the discovery in resolving the issues, and (vi) whether the burden or expense of the proposed discovery outweighs its likely benefit.

- **Importance of the issues at stake in the litigation**

  - *Greater New Orleans Fair Hous. Action Ctr. v. Kelly*, No. CV 18-8177, 2019 WL 9903800, at *1 (E.D. La. Nov. 6, 2019) ("The principal issue at stake in the case – alleged housing discrimination – is important, a factor that weighs in favor of broad discovery.").

  - *EEOC v. George Washington Univ.*, No. 17-CV-1978 (CKK/GMH), 2020 WL 3489478, at *5 (D.D.C. June 26, 2020) ("The advisory committee's notes to Rule 26 recognize 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.' Fed. R. Civ. P. 26, advisory committee's note to 2015 amendments (quoting Fed. R. Civ. P. 26, advisory committee's note to 1983 amendments). Here, GW acknowledges that there are important issues at stake in this case under the Equal Pay Act and Title VII. Mar. 12 Tr. at 21.").

  - *Frank Buchanan*, No. 20-CV-00138-NDF, 2021 WL 7278901, at *5 (D. Wyo. June 8, 2021) ("The resolution of this case is not only important to the parties, but will have ramifications across the state and beyond.")

  - *Washtenaw County Emples. Ret. Sys. v. Walgreen Co*., 2019 U.S. Dist. LEXIS 198978, 2019 WL 6108220 (N.D. Ill. Nov. 15, 2019) ("a court must ensure under Rule 26(b)(1) that even if the [Fed. R. Evid] 408-

protected materials are relevant, the threat that compelled production might pose to the policy behind Rule 408 does not render the production disproportionate to the needs of the case" by analyzing the "burden disclosure would impose upon important social policies or compliance systems").

- **The amount in controversy**

  - *Frank Buchanan*, No. 20-CV-00138-NDF, 2021 WL 7278901, at *5 (D. Wyo. June 8, 2021) ("First, there is no amount if controversy because this litigation addresses the constitutionality of a Wyoming State Statue and does not include any claim for monetary damages. However, the remaining factors support disclosure of the requested information.")

  - *United States Equal Emp. Opportunity Comm'n v. George Washington Univ.*, No. 17-CV-1978 (CKK/GMH), 2020 WL 3489478, at *6 (D.D.C. June 26, 2020) ("[T]his Court has in prior cases measured the amount in controversy for the purposes of proportionality review by taking in to account the upper range of the defendant's potential exposure. . . . While there may be some situations in which using a foreseeable range of damages may be useful—especially if the parties have conferred and agreed on such a range, here, the possible range would cover amounts from $90,000 (or, perhaps, $0) to $480,000, which seems too wide a domain to be helpful. The undersigned will therefore use $480,000 as the amount in controversy." (internal citations omitted)).

  - *Lynch v. Experian Info. Sols., Inc.*, No. 020CV2535KMMJFD, 2022 WL 190753, at *4 (D. Minn. Jan. 21, 2022) ("The Court rejects Experian's implicit argument that potential damages alone determine the scope of proportionality.").

  - *Greater New Orleans Fair Hous. Action Ctr. v. Kelly*, No. CV 18-8177, 2019 WL 9903800, at *1 (E.D. La. Nov. 6, 2019) ("As to the amount in controversy, the complaint seeks not only injunctive and declaratory relief, but also compensatory and punitive damages. . . . Plaintiff's counsel conceded at oral argument, however, that plaintiff has never computed, either in its Rule 26(a)(1)(A)(iii) initial disclosures or otherwise, an actual dollar amount in controversy, suggesting that its damages, described vaguely and generally as 'frustrated ... mission, ... resource expenditures ... [and] diversion of resources,' are not susceptible to calculation. On this record, it appears that the dollar amount in controversy is not so substantial that all of the discovery

sought by plaintiff is permissibly proportional." (initial citations omitted)).

- *Freeman v. Ocwen Loan Servicing, LLC*, No. 118CV03844TWPDLP, 2022 WL 1019243, at *4 (S.D. Ind. Mar. 4, 2022) ("The amount in controversy is disputed at this time. This factor is neutral."), *objections overruled*, No. 118CV03844TWPDLP, 2022 WL 999780 (S.D. Ind. Apr. 4, 2022)

- **The parties' relative access to relevant information**

  - *Cloud v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 3:20-CV-1277-S, 2021 WL 4477720, at *7 (N.D. Tex. Sept. 30, 2021) (granting in part Plaintiffs' motion to compel where case was "highly asymmetric").

  - *Cary v. Ne. Illinois Reg'l Commuter R.R. Corp*, No. 19 C 3014, 2021 WL 678872, at *4 (N.D. Ill. Feb. 22, 2021) ("Indeed, because knowledge of the producing party's data is usually asymmetrical, it is possible that refusing to "aid" opposing counsel in designing an appropriate search protocol that the party holding the data knows will produce responsive documents could be tantamount to concealing relevant evidence.") (quoting The Case for Cooperation, 10 Sedona Conf. J. 339, 344 (2009)).

  - *Digital Assurance Certification, LLC v. Pendolino*, No. 6:17-CV-72-ORL-41TBS, 2017 WL 4342316, at *11 (M.D. Fla. Sept. 29, 2017) ("In all likelihood discovery in this case will be asymmetrical. By this the Court means that Pendolino and Lumesis probably control significantly more relevant information than DAC has. While proportionality requires that all parties have access to relevant information, the concept of proportionality exists to prevent one party, in this case DAC, from leveraging that asymmetry to obtain a tactical advantage over the Defendants. By like token, Defendants should not be permitted to leverage their access to information by employing dilatory tactics to withhold appropriate discovery from DAC.")

  - *Apex Bank v. Rainsford*, No. 3:19-CV-130, 2020 WL 12840131, at *5 (E.D. Tenn. Oct. 30, 2020) ("Rainsford cannot establish his truth defense without information that Apex alone holds, meaning that access to relevant information is both asymmetrical and critical to resolving the issues before the Court. And while Plaintiffs argue that it would be costly to produce these records, the Federal Rules scarcely allow them

to sue someone for two million dollars and then refuse to produce the only records that could substantiate that person's defense. Rainsford is entitled to present a truth defense, needs Apex's debt-collection records to do so, and now seeks those records. This is not a fishing expedition, as Plaintiffs contend, but necessary production under the Federal Rules. In sum, Plaintiffs subjected the truth of their business practices to the necessities of civil process when they sued Rainsford for defamation. The Court rejects Plaintiffs' hollow complaint that the same truth is too costly to produce.").

- **The parties' resources**

  - *Todd v. Ocwen Loan Servicing, Inc.*, No. 219CV00085JMSDLP, 2020 WL 1328640, at *4 (S.D. Ind. Jan. 30, 2020) ("Similarly, the Plaintiff is one man, while the Defendant is a billion dollar, publicly traded corporation. Both the issue of access and resources weigh in favor of the Plaintiff.").

- **The importance of the discovery in resolving the issues**

  - *P.H. Glatfelter Co. v. Babcock & Wilcox Power Generation Grp., Inc.*, No. 1:19-CV-2215, 2021 WL 3403531, at *3 (M.D. Pa. Aug. 4, 2021) ("Guided by the allegations in plaintiff's complaint, we find that the marketing representations made by Glatfelter at a time when the plaintiff alleges that the poor performance of the Babcock boilers 'caused Glatfelter to experience years of uncertainty and unreliable performance, [and] significant increased costs,' relate to an issue that Glatfelter has defined as a question of central importance to this case.").

  - *Nicholas v. Noom Inc.*, 2021 U.S. Dist. LEXIS 46860, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021) ("mindful that. . . proportionality considerations may need to be re-balanced at later points in the litigation, and that discovery plans may be modified when new information is learned," the court held that "there has been no showing by Plaintiffs that they actually need to link to or even care about all of the hyperlinked documents" in the relevant Gmail communications, "it is not at all clear that Plaintiffs cannot identify the underlying hyperlinked documents or the quantity that are even material to this action," and "Noom argued persuasively that the redundancies of pulling hyperlinked documents would be burdensome," "increase the review population" and "complicated-duplication, delay production, and impose additional costs" on defendant).

- *Edwards v. PJ Ops Idaho*, 2022 WL 797599 (D. Idaho Mar. 16, 2022) (production of the "entire email mailboxes" of two custodians was proportional where the "critical[]" question of whether these custodians were "employers" could be elucidated through "a variety of situations in which [the custodians] could demonstrate their authority within the company, each of which would contain a different variety of key words and phrases" and "restrict[ing] the[] search to a specific set of key words and phrases" may "hamper[] [plaintiffs'] ability to demonstrate that [the custodians] were in positions of authority over" plaintiffs)

- *Blankenship v. Fox News Network*, 2020 WL 9718873 (S.D. W. Va. 2020) (granting plaintiff's motion to compel discovery from Fox News Network where plaintiff asserted that "his discovery requests are proportional to the needs of this case, given that . . . [t]he probative value of this information has substantial potential because it may be relevant to the factual issues that go to the heart of Plaintiff's theory of liability" —namely, a conspiracy "between and among FNN top brass, including its Board members and high-level executives, with high-ranking Republican party members").

- *Nat'l Urban League v. Ross*, 2020 U.S. Dist. LEXIS 233600 (N.D. Cal. Dec. 10, 2020) (the requesting party sought documents and data (and related metadata) from the Commerce Department related to the then-ongoing 2020 census; with respect to "importance," the court held that "[t]he production of relevant information is needed to resolve the issues in this important case, including the constitutionality of Defendants' truncated census count and data quality" and the "likely benefit" was access to "the information needed to timely resolve this case before the Secretary transmits redistricting data to the states . . . and the states redistrict pursuant to their statutory or constitutional deadlines.")

- *City of Rockford v. Mallinckrodt ARD, Inc.*, 326 F.R.D. 489 (N.D. Ill. 2018) (granting motion to compel sampling of null set where "ESI will play a key role in resolving the issues in these cases" and "the burden and expense of a random sampling of the null set does not outweigh its likely benefit of ensuring proper and reasonable — not perfect — document disclosure.").

- **Whether the burden or expense of the proposed discovery outweighs its likely benefit**

    - *Llera v. Tech Mahindra (Americas) Inc.*, No. C19-0445RSL, 2021 WL 5182346, at *3 (W.D. Wash. June 29, 2021) ("Defendant has not addressed the importance of the issues at stake in the litigation or about which plaintiff seeks discovery, its resources compared to plaintiff's resources, whether the tens of thousands of dollars it has spent reviewing and producing documents poses a hardship, the amount in controversy, or how plaintiff could obtain the information in a more efficient or economical way. Fed. R. Civ. P. 26(b)(1). Unlike many of the cases defendant cites, it provides no information regarding how difficult the requested searches might be, the number of hits generated, or the time/cost of a privilege review. Defendant, as the party resisting discovery, bears the initial burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b).").

    - *Benebone v. Pet Qwerks*, 2021 WL 831025 (C.D. Cal. Feb. 18, 2021) ("where [plaintiff] regularly uses Slack messaging for internal business communications and users of Slack including [plaintiff] marketing director, COO, and CEO (who is also a named inventor on the three asserted design patents)" and plaintiff "did not provide an e-discovery declaration or testimony to support its cost estimate or its position that producing the Slack messages represents an undue burden and is disproportional to the needs of this case," the court held that "requiring review and production of Slack messages by [plaintiff] is generally comparable to requiring search and production of emails and is not unduly burdensome or disproportional to the needs of this case — if the requests and searches are appropriately limited and focused").

    - *Deal Genius, LLC v. 02 Cool, LLC*, 2022 U.S. Dist. LEXIS 53131 (N.D. Ill. Mar. 24, 2022) ("[P]laintiff should make no mistake. It is going to have to perform searches that it would rather not make and to sift through large numbers of emails — a task that has become an accepted common-place in modern litigation. Plaintiff, after all, filed this lawsuit. It thought its necklace fans important enough to go through the significant toil and expense of federal litigation. . . . Discovery is almost always costly and difficult; it is, by its very nature, burdensome and often intrusive. But that does not make discovery improper. It only becomes so when it is unduly burdensome.").