

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

KATHLEEN SCHAFER, ET AL	*	CIVIL ACTION NO. 06-8262
	*	
	*	SECTION: "K" (5)
Versus	*	
	*	JUDGE DUVAL
	*	
STATE FARM FIRE & CASUALTY, ET AL	*	MAGISTRATE JUDGE CHASEZ
	*	
* * * * *	*	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL PRODUCTION OF ELECTRONIC DATA
FROM DEFENDANT STATE FARM**

Plaintiffs respectfully submit the following Memorandum in support of their Motion to Compel production of electronic data (and/or documents) from State Farm:

MAY IT PLEASE THE COURT:

Plaintiffs' seek to compel production of electronic (or, to the extent not available, documentary) evidence in response to Plaintiffs' Request for Electronic Evidence No. 1¹ – which data is central to Plaintiffs' motion to certify claims that State Farm, utilizing the Xactimate computer database, systematically underpaid Katrina, Rita and other first-party homeowners' claims, for class treatment under Rule 23. State Farm's own witness has established that much, if not all,

¹See EXHIBIT "A", at pp.4-5.

of the electronic data is indeed “*accessible*”, and have refused or otherwise failed to provide the plaintiffs with *evidence* of alleged undue burden or cost.² In addition, the limited price lists which have been produced have apparently been converted to .pdf and are therefore (based on Plaintiffs’ knowledge and understanding) not “as ordinarily maintained or in reasonably usable form.”³ For these reasons, and for the reasons further provided below, Plaintiffs’ Motion to Compel should be granted.

The Relevance of the Requested Data to Class Certification

As noted by Judge Duval in denying State Farm’s renewed Motion to Strike Class Allegations, the plaintiffs will carry the burden on class certification to demonstrate that the elements of Rule 23 have been met.⁴

The ultimate question in this class action is likely to be whether the relief can “be awarded without requiring a specific or time-consuming inquiry into the varying circumstances and merits of each class member’s individual case,” and is “capable of calculation by means of objective standards and not dependent in any significant way upon the intangible, subjective differences of each class member’s circumstances;” *or* whether it will “require additional hearings to resolve the disparate merits of each individual’s case” (?)⁵

Plaintiffs have taken the position, in this regard, that there are no individualized questions of “the nature and extent of damage, the timing and adjustment of each class member’s claim, how

²See FED. RULE CIV. PRO. 26(b)(2)(B).

³See FED. RULE CIV. PRO. 34(b)(2)(E)(ii).

⁴ORDER AND REASONS [Doc 96] p.8; *citing*, O’Sullivan v. Countrywide, 319 F.3d 732, 737-738 (5th Cir. 2003).

⁵See Allison v. CITGO Petroleum Corp., 151 F.3d 402, 414-415 (5th Cir. 1998).

much each class member was paid for his claim and for what damage, and whether that amount was sufficient and timely.”⁶ We know what State Farm paid. When know when State Farm paid it. Hence, there are no questions of timing or coverage. State Farm has *admitted* that the items were covered and due at the time the payments were made.

The only question is what they *should* have been, instead.

This question – *i.e.* the “actual” price or cost which should have been paid – can (and arguably can *only*) be established on a common and class-wide basis. The “raw data” sought by Plaintiffs in this Motion is indeed such *common* evidence. The fact that (according to State Farm’s own records) a given good or service was invoiced or purchased or estimated at a given cost or price on a given day is commonly relevant to not only Mr. & Mrs. Schafer’s claim with respect to those goods and services, but with respect to the claims of each and every classmember.

With respect to the related issues of predominance and manageability under Rule 23(b)(3), Plaintiffs contend that determining an appropriate allocation or award to each class member would not require individualized jury trials with individualized testimony from the plaintiffs or others. All it would require is a reliable audit or accounting.

State Farm, at the same time, has taken the position that Plaintiffs are required to demonstrate at the class certification stage “what this accounting or mathematical formula would look like.”⁷

Plaintiffs, accordingly, believe that the “raw data” is directly relevant to class certification,

⁶See ORDER AND REASONS [Doc 96] pp.9-10; *distinguishing from*, Aguilar v. Allstate Fire & Casualty, No.06-4660, 2007 WL 734809, at p.*3 (E.D.La. March 6, 2007) (Feldman, J.), *and*, Spiers v. Liberty Mutual Fire Ins. Co., No.06-4493 (E.D.La. Nov. 21, 2006) (Feldman, J.).

⁷ORDER AND REASONS [Doc 96] p.9. Plaintiffs, of course, likely disagree with the defendants as to the extent to which such must be proven at the certification stage.

as: (i) the data will be utilized to establish an actual price/cost, and thereby illustrate how the Court can mechanically conduct the accounting, by subtracting the tendered amount from the common “actual” or “should-have-been” cost, to get the damages owed to a specific classmember; (ii) the way in which the data is stored and utilized within the State Farm (and/or Xactware) systems will likely provide an illustration of the way in which the evidence can be effectively managed; and (iii) the algorithms or processes employed by State Farm (and/or Xactware) may likely provide a formula or formulas by which some or all of the damages can be mechanically determined.

Plaintiffs’ Efforts to Understand and Evaluate Defendants’ Data, Any Allegations of Inaccessibility or Other Undue Cost or Burdens, and Other Technological Issues in Transferring and Utilizing the Data in Question

Plaintiffs, rather than attempting to work in a vacuum, have tried from the very beginning to understand Defendants’ systems, data, and the technological issues, so that they could work with Defendants to accomplish any electronic production in a mutually efficient and effective manner, and, in the event of any dispute, to come before the Court with an *evidentiary record* upon which the Court might be able to consider the parties’ relative positions.

Plaintiffs initially served Defendants with 30(b)(6) Deposition Notices relating to Information Systems (IS) and/or Information Technology (IT) issues. Defendants objected to these depositions as unduly burdensome and overbroad, and through the meet and confer process, Plaintiffs agreed to take the depositions of individual employees who could hopefully address the relevant IT/IS issues based upon personal knowledge.

Plaintiffs first took the deposition of James Burt, of Xactware, who explained some of the Xactware architecture, and confirmed that at least some of the data sought by Plaintiffs would be accessible on-line. Mr. Burt, however, was unable to quantify specifically what cost (if any) or

burden (if any) would be associated with the extraction and production of relevant data by Xactware.

In the hope that it might be helpful to State Farm to have Plaintiffs' Initial Requests prior to the IT deposition, Plaintiffs served Defendants with initial discovery requests, including specific Requests for Electronic Evidence (and corresponding Interrogatories relating to an alleged "undue burden" or "inaccessibility"),⁸ on November 4, 2008.

State Farm produced Dan Kuntz to address IT/IS issues on November 12, 2008.⁹ Mr. Kuntz explained that much of the relevant pricing data is maintained on 28 Unix DB2 databases which are housed on 7 servers. The data goes back to 2001. The data is active, on-line and "accessible" without resort to back-up tapes, etc. While Mr. Kuntz thought it might be "burdensome" to do some of the "interpretation" of data across different formats, (*i.e.* a burden likely falling on *Plaintiffs*),¹⁰ and perhaps some burden due to the "sheer volume" of data, (much of which – due to time frame and geographical location – could likely be segregated out from the production), "but copying it would not be a complete burden".¹¹

Mr. Kuntz further confirmed that:

- He is not aware of any material changes in the Records Management Manual between August 2005 and December 2007.¹²
- The First Goal of the Record Management Program is "to provide consistent management of records stored on all media" – including the 28 pricing

⁸See EXHIBIT "A".

⁹The Deposition of Mr. Kuntz is submitted as EXHIBIT "B". Designated "confidential" by State Farm under the existing Protective Order, the Deposition is being filed UNDER SEAL.

¹⁰See *slao*, FED. RULE CIV. PRO. 34(a), which may requires a party to "translate" the data into a reasonably usable form.

¹¹KUNTZ DEPO, pp.7-12.

¹²KUNTZ DEPO, p.25.

databases.¹³

- The pricing data contained within the 28 databases are “Records” of State Farm.¹⁴
- “Records” are, according to State Farm Guidelines “to be retained so as to be *accessible* and *retrievable* for normal business operations, litigation, government investigation, and audit needs.”¹⁵
- **The 28 databases of pricing data were, in fact, kept so as to be *accessible* and *retrievable* for normal business operations, litigation, government investigation, and audit needs.**¹⁶

While Plaintiffs were and remain willing to work through the scope, volume, interpretation and other technological issues with State Farm,¹⁷ Defendant has, up until this point, exhibited little desire to work with the plaintiffs in this regard.

Mr. Kuntz never attempted to quantify any alleged “burden” or “cost” to State Farm.

Defendants requested and Plaintiffs granted an extension to respond to Plaintiffs’ formal Requests. Shortly before Christmas, State Farm produced a box of documents with written objections and responses.¹⁸

¹³KUNTZ DEPO, p.25.

¹⁴KUNTZ DEPO, p.27.

¹⁵KUNTZ DEPO, p.31.

¹⁶KUNTZ DEPO, p.31.

¹⁷Plaintiffs had hoped, either in response to Plaintiffs’ formal Requests, or in response to the January 2, 2009 correspondence, or during the January 16, 2009 conference call that State Farm would suggest that their IT people confer with Plaintiffs’ IT consultants, in order to discuss these issues. Unfortunately, State Farm’s position seems to be that the Request is “unduly burdensome” and it is up to the plaintiffs to make a reasonable proposal. Plaintiffs are, of course, happy to work with Defendants, but remain largely in the dark regarding the volume of data and the alleged “burdens” or other technological hurdles in extracting, transferring, interpreting and/or utilizing the data.

¹⁸State Farm inadvertently omitted two CDs from their production. Undersigned Counsel, similarly, inadvertently reviewed the formal responses and documents, without carefully reviewing the cover letter, and did not pick up on the mistake. The CDs were immediately produced by State Farm on Friday, January 16, 2009, when everyone realized what had occurred. State Farm’s formal written OBJECTIONS AND RESPONSES have been designated “confidential” under the Protective Order and are therefore being filed - as EXHIBIT “C” - UNDER SEAL.

Plaintiffs wrote to Counsel for State Farm on January 2, 2009, raising the following issues:

....with respect to the Requests for Electronic Data, (and Response to Interrogatory No. 2), we have two overarching issues: **(i)** in terms of substance, it appears that you are only producing the formal “final” Price Lists, and refusing to produce the other relevant Pricing Information, including the “raw data” upon which such pricing / Price Lists is (or at least arguably should be) based; such information is clearly relevant to class certification; in addition **(ii)** in terms of format, it is State Farm’s burden under Rule 26(b)(2)(B) to identify the sources of information which State Farm contends are not reasonably accessible because of undue burden or cost, which State Farm has not done. In addition, it is State Farm’s burden under Rule 26(b)(2)(B) to make an evidentiary showing, upon either a Motion for Protective Order and/or Motion to Compel, that such information is in fact not reasonably accessible because of undue burden or cost.¹⁹ Through both written discovery and Mr. Kuntz’s Deposition, Plaintiffs have attempted to ascertain and evaluate the *evidence* (if any) upon which State Farm would base such contentions. To date, no such evidence has been provided. Indeed, it was fairly clear from Mr. Kuntz’s testimony that the Pricing Information sought is accessible.

A formal meet and confer called was held on January 16, 2009, at which time State Farm advised that it was not producing the data, as it was “unduly burdensome”.

State Farm’s Failure to Produce Pricing Lists in Either “Ordinary” or “Usable” Form

Under the current version of Rule 34, a party is required to produce electronically stored information “in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” FED RULE CIV. PRO. 34(b)(2)(E)(ii). Although Plaintiffs specifically requested the pricing information “as it is ordinarily maintained, in its native electronic format,”²⁰ the price lists produced by State Farm had apparently been converted to .pdf. In its native format, (based on

¹⁹See, e.g., *Auto Club Family Ins. Co. v. Ahner*, No.05-5723, 2007 WL 2480322, at p.*3 (E.D.La. Aug. 29, 2007) (party seeking a protective order must make an *evidentiary showing*, noting that the statement of a lawyer in a memorandum is not evidence).

²⁰See EXHIBIT “A”, p.4.

Plaintiffs' knowledge and understanding), the price lists are interactive. Specific lists for specific time periods, regions and items can be created and modified. (Allowing the plaintiffs to test hypotheses and run illustrations more efficiently and effectively.) The .pdf format robs the price lists of virtually all functionality.

State Farm Did Not Identify the Sources of Information Which It Contends Are "Inaccessible"

Under the current version of Rule 26, a party that withholds electronically-stored information is required to "identify" the "sources" that it claims are not reasonably accessible due to undue burden or cost. *See* FED. RULE CIV. PRO. 26(b)(2)(B); *see also*, ADVISORY COMMITTEE NOTES, Fed. Rule Civ. Pro. 26, Subsection (b)(2) (2006 Amendment) ("The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing").

In this case, Mr. Kuntz has already testified that much, if not all, of the pricing information requested **has been retained "so as to be *accessible and retrievable* for normal business operations, *litigation*, government investigation, and audit needs."**²¹ Hence, State Farm should have produced such electronically-stored information, as it is "relevant, not privileged, and reasonably accessible."²²

However, in the alternative, and at the very least, State Farm should have identified the sources it contends are "inaccessible".

²¹KUNTZ DEPO, p.31.

²²ADVISORY COMMITTEE NOTES, Fed. Rule Civ. Pro. 26, Subsection (b)(2) (2006 Amendment); *see generally*, FED. RULES CIV. PRO. 26(b)(1), 26(b)(2)(B), 34(a)(1), and 34(b)(2)(E).

State Farm Has Refused to Provide Plaintiffs with Its Evidentiary Basis (If Any) for “Undue Burden” or “Cost”

Plaintiffs have attempted – through written discovery on IS/IT issues, by deposition of Mr. Kuntz, through contention interrogatory, and through the meet and confer process – to understand and evaluate the volume of data, the potential costs and burdens, and other technological issues potentially involved in the retrieval, transfer, and use of such data. State Farm merely points to an alleged “problem” created by differences in the applications or software,²³ while completely disregarding the testimony that these potential “problems” relate to the “interpretation” of the data (by Plaintiffs), “but copying it would not be a complete burden”.²⁴

Plaintiffs are more than happy to try to have IT consultants work through some of these potential issues, but State Farm has neither provided sufficient information relating to these alleged “problems” nor exhibited any willingness to engage in such a process.

Even assuming *arguendo* that any “personal” information relating to other State Farm policyholders could not be easily stripped or otherwise segregated out of the production, (for which State Farm has provided no evidence or proof), State Farm’s alleged concerns in this regard are largely if not entirely belied by the Protective Order already in place.

To the Extent that “Sheer Volume” is the Issue, Plaintiffs Suspect that There is a Way to Extract an Appropriate Sampling

If the issue is “sheer volume” of data, Plaintiffs suspect that there is a way to extract an appropriate sampling that would provide sufficient evidence for the Court to make a reliable

²³See ANSWER TO INTERROGATORY NO. 2 [Exhibit “C”].

²⁴KUNTZ DEPO, pp.12.

determination at the class certification stage.²⁵ But neither in Mr. Kuntz's deposition, nor in its objections and responses to Plaintiffs' Requests for Electronic Evidence, nor in response to the correspondence of January 2, 2009, nor during the meet and confer call of January 16, 2009, has State Farm ever advised Plaintiffs of the actual volume, articulated the alleged "burden", explained the technical or other complications, nor offered any potential solutions. Perhaps such information or proposal will be forthcoming in the Opposition to this Motion.

Conclusion

For the above and foregoing reasons, Defendant State Farm should be compelled to work with Plaintiffs to produce the requested data, (or some reasonable portion thereof), in a reasonably usable format, in a manner that is fair and efficient for all parties.

This 21st day of January, 2009.

Respectfully Submitted,

/s/ Stephen J. Herman

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²⁵Indeed, State Farm's own expert has apparently engaged in his own "sampling" of State Farm claims files. Plaintiffs have not yet had the opportunity to depose Mr. Adrian to better understand the nature of the source data or the methodology employed in extracting, reviewing, managing or otherwise utilizing the data, (including any technological problems - if any).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Memorandum will be filed electronically with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system thereby serving notice on all counsel this 21st day of January, 2009.

/s/ Stephen J. Herman