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Proportionality Requirements in Discovery

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Under the Federal Rules, discovery is limited to non-privileged material that is both “relevant to any party’s claim or defense and proportional to the needs of the case.”² According to the rules, when addressing the proportionality requirement courts should consider “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”³

The proportionality requirement was incorporated into the rule through a 2015 amendment,⁴ but such limitations are not new. Prior to the 2015 amendment, most of the proportionality factors appeared in Rule 26(b)(2)(C)(iii), which was first adopted in 1983 “to deal with the problem of over-discovery.”⁵ But incorporating the factors into the definition of the scope of discovery and including an explicit proportionality requirement evidence a renewed focus on limiting discovery in civil litigation in the United States. In his 2015 year-end report, Chief Justice John Roberts noted that “[t]he amendments may not look like a big deal at first glance but they are. . . . Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case.”⁶

Under appropriate facts, courts have interpreted the amended rule to limit discovery. Some courts have found that the limited practical importance of an issue, the adequacy of more targeted means of discovery, the time and expense required to respond, and privacy concerns weigh against overbroad discovery. Such limits, however, are not self-executing. Courts may require specific support demonstrating why the limitation on discovery is appropriate.

I. Limited Practical Importance

In *RealPage, Inc. v. Enterprise Risk Control, LLC*, the plaintiff, RealPage, alleged that the defendants misappropriated its trade secret and confidential information to create a competing product.⁷ When RealPage was required to post an injunction bond under Federal Rule of Civil Procedure 65(c), it filed a motion to compel the defendants to produce documents related to revenue derived from the defendants’ product.⁸ The defendants agreed to provide documents relied upon in requesting a preliminary injunction bond but refused further production.⁹ The court denied the motion to compel, finding that requiring further production was not proportional to the needs of the case.¹⁰ The court reasoned that the amount of the bond was not an important issue because the court sets the amount, the damages resulting from an erroneous preliminary injunction cannot exceed the bond amount, and RealPage had not indicated that it would be unable to post a certain bond amount.¹¹ The court also considered that the defendants’ burden of disclosing their revenue to a competitor outweighed any likely benefit stemming from the production.¹²

II. Other Discovery Sufficient

In *Novanta Corp. v. Iridion Laser, Inc.*, a district of Delaware magistrate denied the plaintiff, Novanta’s, discovery request that sought production relating to a prior litigation because such production was not “proportional to the claims in issue.”¹³ In 2012, Novanta filed a complaint for patent infringement against Iridion, but

later dismissed the complaint after inspecting a component part of the accused gas lasers that was provided by Iradion and concluding that it did not infringe.¹⁴ After resolution of the 2012 litigation, Novanta obtained additional information regarding previously unexamined Iradion gas lasers.¹⁵ Based on the new information, Novanta filed a second infringement complaint against Iradion in 2015, aimed at the newly examined devices.¹⁶

During discovery, Novanta sought documents related to the 2012 litigation and the previously accused products.¹⁷ Unsatisfied with Iradion's response, Novanta moved the court to compel Iradion to supplement its discovery responses.¹⁸ Novanta agreed that the products involved in the 2012 litigation did not infringe but argued that information about how Iradion designed the newly accused products based on the products involved in the 2012 litigation was relevant to willfulness.¹⁹ The magistrate denied Novanta's motion, finding that, while perhaps relevant, a request for documents that did not involve the matters at issue in the present litigation was not proportional to the present claims and that Novanta had failed to show that sufficient information on the development of the accused products was absent from Iradion's production.²⁰

III. Privacy Concerns

In *Henson v. Turn, Inc.*, the plaintiffs, Anthony Henson and William Cintron, filed a data-privacy class action lawsuit against Turn, Inc., alleging that Turn used partner Web sites to place "zombie cookies" (cookies that users cannot delete or block) on their devices to track users' Web activities.²¹ Turn requested that the plaintiffs produce either their mobile devices or complete forensic images of their devices for inspection.²² The Plaintiffs opposed the request as overbroad.²³ Turn argued that the plaintiffs' claims were wholly dependent on the content of their phones, for example, if and when Turn had placed cookies on the phones, the type of cookies, and what information was gathered.²⁴ The plaintiffs, on the other hand, argued that allowing the company to access the full contents of their devices violated both the relevancy and proportionality requirements of Rule 26(b).²⁵

The magistrate assigned to the case agreed with the plaintiffs and denied Turn's request, finding that the request both called for irrelevant information and was disproportionate to the needs of the case.²⁶ The magistrate explained that proportionality is not limited to the time or expense required to respond to a discovery request, but also includes "the adverse consequences of the disclosure of sensitive, albeit unprivileged, material."²⁷ Such privacy concerns were said to be relevant "particularly in the context of a request to inspect personal electronic

devices."²⁸ Turn failed to establish that it needed access to the devices or full forensic images, especially given that the plaintiffs had already forensically imaged their devices and were producing information from those images.²⁹

IV. Specific Support Required

In *Spendlove v. RapidCourt, LLC*, the Eastern District of Virginia overruled a series of discovery objections based on both the relevance and proportionality of the discovery sought.³⁰ Spendlove brought a class action lawsuit against RapidCourt, LLC under the Fair Credit Reporting Act, and the court granted Spendlove's motion for jurisdictional discovery.³¹ After serving three sets of interrogatories and requests for production, Spendlove moved the court to compel the defendant to provide full and complete responses to certain requests.³² RapidCourt made what it called "common specific objections" for relevance, overbreadth, and excessive burden.³³ Spendlove argued that RapidCourt's objections were not stated with sufficient specificity under the Federal Rules of Civil Procedure.³⁴ The court agreed, finding that RapidCourt's "common specific objections" were in fact improper general objections.³⁵

The court explained that once a moving party establishes that the discovery it seeks is permissible, "the burden shifts 'to the opposing party to specify how the discovery request is irrelevant, overly broad, burdensome, or oppressive.'"³⁶ For example, an objection alleging that a discovery request is over burdensome must be supported by affidavits or other evidence of the asserted burden.³⁷ "The principle problems with general objections," the court explained, "are that (1) they reach so broadly that the requesting party cannot determine what is being answered or responded to and what is not; and (2) the generality obscures what the general objection is foreclosing from discovery."³⁸ In the present case, RapidCourt's objections were "insufficient to tee up . . . the issue of proportionality," among other issues.³⁹ Consequently, all RapidCourt's objections were overruled and the plaintiff's motion to compel was granted.⁴⁰

V. Conclusion

There are many factors to be considered when determining whether a given discovery request is proportional to the needs of the case including the importance of an issue, the adequacy of alternative discovery measures, and the privacy concerns involved. Future cases will continue to define the contours of the proportionality requirement surrounding these and other issues.

1. The authors are attorneys at the intellectual property firm of Finnegan, Henderson, Farabow, Garrett & Dunner LLP. This article is for informational purposes, is not intended to constitute legal advice, and may be considered advertising under applicable state laws. This article is only the opinion of the authors and is not attributable to Finnegan, Henderson, Farabow, Garrett & Dunner LLP, or the firm's clients.
2. Fed. R. Civ. P. 26(b)(1).
3. *Id.*
4. Advisory Committee Notes, 2015 Amendment.
5. *Id.*
6. John Roberts, 2015 Year-End Report on the Federal Judiciary (Dec. 31, 2015), available at <http://www.supremecourt.gov> under "News Media" tab. Last accessed August 18, 2020.
7. *RealPage, Inc. v. Enter. Risk Control, LLC*, No. 4:16-CV-00737, 2017 U.S. Dist. LEXIS 46270, at *1–2 (E.D. Tex. March 29, 2017).
8. *Id.* at *25.
9. *Id.*
10. *Id.* at *25–27.
11. *Id.* at *26.
12. *Id.*
13. *Novanta Corp. v. Iridion Laser, Inc.*, No. 15-1033-SLR-SRF, 2016 U.S. Dist. LEXIS 126042, at *14–16 (D. Del. Sept. 16, 2016).
14. *Id.* at *2–3.
15. *Id.* at *3–4.
16. *Id.* at *4.
17. *Id.* at *14.
18. *Id.* at *4.
19. *Id.* at *15.
20. *Id.* at *16.
21. *Henson v. Turn, Inc.*, No. 15-cv-01497-JSW (LB), 2018 U.S. Dist. LEXIS 181037, at *1–2 (N.D. Cal. Oct. 22, 2018).
22. *Id.* at *2.
23. *Id.* at *3.
24. *Id.* at *9.
25. *Id.* at *10.
26. *Id.* at *13.
27. *Id.* at *15–17.
28. *Id.* at *15.
29. *Id.* at *20.
30. *Spendlove v. RapidCourt, LLC*, No. 3:18-cv-856, 2019 U.S. Dist. LEXIS 2200392 (E.D. Va. Dec. 23, 2019).
31. *Id.* at *2–4.
32. *Id.* at *3–5.
33. *Id.* at *6.
34. *Id.*
35. *Id.* at *9.
36. *Id.* at *27.
37. *Id.* at *13.
38. *Id.* at *8.
39. *Id.* at *9.
40. *Id.* at *10, 31.

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