No. 15-0903

IN THE SUPREME COURT OF TEXAS

IN RE STATE FARM LLOYDS,
Relator,

Original Proceedings From The
206th Judicial District Of Hidalgo County, Texas
The Honorable Rose Guerra Reyna Presiding
Cause No. C-3828-13-D

BRIEF OF UNITED POLICYHOLDERS AS AMICUS CURIAE IN SUPPORT OF THE REAL PARTIES IN INTEREST

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United Policyholders ("UP") respectfully submits this brief as *amicus curiae* in support of the Real Parties in Interest ("Ramirez" or "MDL Plaintiffs"). The Defendant-Petitioner is State Farm Lloyds Company (hereinafter "State Farm"). No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. UP is not a party to any of the underlying multi-district litigation, nor does it have any financial relationship with the MDL Plaintiffs or their counsel. UP has never received a monetary donation from The Mostyn Law Firm or Hogan and Hogan.

STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit 501(c)(3) organization that serves as a voice and information resource for individual and business insurance consumers in all 50 states. Since UP's founding in California in 1991, UP has been dedicated to educating individuals and businesses about insurance issues and consumer rights. UP protects the interests of policyholders and advocates for them through participation as *amicus curiae* in insurance claim and coverage cases throughout the country. Donations, foundation grants, and volunteer labor support UP's work. UP does not sell insurance or accept any funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, *e.g.*, the 2011 Bastrop County Complex Fire), *Roadmap to Preparedness* (insurance and financial literacy

and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms, and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org. Texas home and business owners use UP's "Ask an Expert" forum and disaster recovery resources. UP engages with Texas Insurance Commissioner David Mattax through UP's involvement with the National Association of Insurance Commissioners, where UP's Executive Director serves as an official consumer representative for insurance policyholders. UP also works with the Texas Office of Public Insurance Counsel on consumer initiatives.

Powered by a network of volunteers and advisers throughout the country and a small staff in California, UP offers assistance to state and federal courts as *amicus curiae.* Information and arguments in UP's briefs on claims and coverage issues, including fair claims standards, have been cited by the U.S. Supreme Court as well as by numerous state and federal appellate courts.[1] UP has participated as *amicus curiae* in more than 400 cases throughout the United States involving important insurance issues affecting homeowners and businesses, including insurance claim and coverage matters adjudicated before this Court, Texas appellate courts, and the United States Court of Appeals for the Fifth Circuit.[2]

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[1] *See, e.g., Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999).

[2] *See, e.g., U.S. Metals, Inc. v. Liberty Mut. Ins. Co.*, 490 S.W.3d 20 (Tex. 2016); *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404 (Tex. 2011); *Gilbert Texas*

In this brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."[3]

UP's 25 years of experience working with victims of natural disasters make it uniquely positioned to assist in this case. UP has seen firsthand that thorough investigation of a claim can make the difference in whether the insured receives a fair settlement. When an insurer fails to conduct such investigation, it must be held accountable. In such cases, discovery of the claim file in its native form is essential to providing the insured with a complete picture of what has transpired. Accordingly, this case presents an opportunity to clarify an insurer's discovery

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Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118 (Tex. 2010); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Crocker*, 246 S.W.3d 603 (Tex. 2008); *Excess Underwriters at Lloyd's, London v. Franks Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008); *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008); *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562 (5th Cir. 2010); *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367 (5th Cir. 2011); *Advanced Env. Recycling Tech. Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 399 F. App'x 869 (5th Cir. 2010); *Motiva Enters., LLC v. St. Paul Fire & Marine Ins. Co.*, 445 F.3d 381 (5th Cir. 2006).

[3] Robert L. Stern et al., *Supreme Court Practice 570-71* (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH U. L. REV. 603, 608 (1984)).

obligations under Tex. R. Civ. P. 196.4 and presents an important question of public policy affecting Texas insureds.

ISSUES ADDRESSED

In this brief, *amicus curiae* UP addresses the following issues raised by this appeal, as rectified in the MDL plaintiff's brief:

1. Did the MDL court abuse its discretion by interpreting TRCP 196.4 according to its plain language, by complying with the procedure expressly set forth by the Texas Supreme Court, and by reaching the same conclusion on electronic-discovery format as have the overwhelming majority of other courts, both in Texas and across the country?
2. Did the MDL court abuse its discretion in entering an e-discovery protocol when the objecting party presented no evidence that the protocol would be unduly burdensome, and the evidence affirmatively demonstrated that the protocol would not be burdensome to either party?

INTRODUCTION

Insurance is different.[4] Insurance spreads risk and provides financial security, making it possible for people and businesses to thrive. The availability of Insurance coverage after loss can make the difference between recovery and ruin. Because insurance is of vital importance to the financial security of businesses and individuals, it is a highly regulated industry and imbued with the public interest.[5]

Oversight agencies in every state have the authority to regulate the financial affairs of insurance companies, the rates they charge, and the way they sell their products and process claims made by policyholders. Legislatures have enacted statutes and courts have rendered decisions that clearly define the standards of conduct that insurers must adhere to when dealing with their insureds. In the end,

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[4] "…Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a "hard-ball" approach. Insurance contracts are also unique in another respect. Unlike other contracts, the insured has no ability to 'cover' if the insurer refuses without justification to pay a claim. Insurance contracts are like many other contracts in that one party (the insured) renders performance first (by paying premiums) and then awaits the counter-performance in the event of a claim. Insurance is different, however, if the insurer breaches by refusing to render the counter-performance." *E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 447 (Del. 1996).

[5] *See, e.g., Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance]…affected with a vast public interest"); *Robertson v. California*, 328 U.S.. 440, 447 (1946); *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 at n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co*., 282 U.S. 251, 257 (1931) ("…insurance is so far affected with a public interest that the State may regulate…rates").

however, it is up to private litigants, such as the MDL Plaintiffs and state and federal courts, to enforce those standards.

After sustaining storm damage to their homes, the MDL Plaintiffs filed a claim with State Farm, seeking to hold State Farm accountable to the terms of its insurance contract and applicable standards of insurer conduct under Texas law. After State Farm failed to properly investigate the MDL Plaintiffs' claims, the MDL Plaintiffs had no choice but to seek the intervention of the justice system to recover their losses. The MDL Plaintiffs contend that State Farm underpaid their claims and – in doing so – committed fraud and breached the duty of good faith and fair dealing implied in every insurance contract.[6] In order to prove breach of the duty of good faith and fair dealing under Texas law, the MDL Plaintiffs must "enter the mind" of the insurer to show what State Farm knew or should have known about their claims.[7]

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[6] The MDL plaintiffs have alleged fraud, conspiracy to commit fraud, breach of contract, breach of the duty of good faith and fair dealing, and violations of Texas Insurance Code chapters 541 and 542. (*See* Brief of Real Parties in Interest at xi.)

[7] In *Aranda v. Insurance Co. of North America*, this Court established the legal standard and burden of proof for bad faith:

> A . . . claimant who asserts that a carrier has breached the duty of good faith and fair dealing by refusing to pay or delaying payment of a claim must establish (1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy *and* (2) that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim.

748 S.W.2d 210, 213 (1988).

In an effort to discover whether their allegations were further supported by evidence in the sole possession of State Farm, the MDL Plaintiffs followed the procedure established in Texas Rule of Civil Procedure 196.4 to request that State Farm produce its entire claim file in a specified form of production – native or near-native form. State Farm refused.

State Farm asserted that it would only produce those documents already contained in the Enterprise Claim System ("ECS") – a file which does not encompass the entire claim file and likely would involve production in a form other than native. State Farm's basis for its improper position was that it only needed to provide electronically stored information ("ESI") requested under Rule 196.4 in a form that was "reasonably useable." As the MDL Plaintiffs pointed out in response, where an insured has alleged that an insurer failed to properly investigate a claim, documents outside the ECS, such as photos from the initial inspection and a claim adjuster's notes are well within the scope of discovery.

For example, State Farm produced a photograph in a form that omitted the caption "missed by original adjuster." By not producing this photograph in conformance to ESI standards, the insurer concealed evidence from the insured that would have shown that the insurer failed to conduct a reasonable investigation. This photograph caption may have been seen by a finder of fact as an admission of negligence, or as evidence of a company-wide pattern and practice of intentional

underpayment of claims. Thus, by producing only those documents in the ECS and producing documents only in a form other than native or near-native, the relevant and substantively persuasive context contained in those documents has been hidden, despite the explicit requirements under Texas Rules requiring disclosure.

Similarly, by limiting its production to only the ECS system, State Farm hid from the MDL Plaintiffs any correspondence between claim adjusters which may have been relied upon to demonstrate the improper handling of the claim. During oral argument before this Court, there was discussion regarding whether State Farm's lawyers had access to emails between claim adjusters that the MDL Plaintiffs would not see. Although counsel for State Farm indicated that State Farm's lawyers did not have access, counsel for MDL Plaintiff Ramirez raised the existence of the "ORT" database, which contains correspondence between claims adjusters and is used when claims are being reinvestigated. By omitting the "ORT" database from its production in violation of Texas rules, State Farm hid from the Plaintiffs relevant documents which could have been relied on to show State Farm's improper handling of their claims.

Thus, State Farm's unsupported position that it need only produce the evidence that State Farm systematically and intentionally chooses to place in its ECS file and in the format that State Farm wishes to produce it raises questions of

fundamental fairness and justice that the Texas Rules of Civil Procedure seek to address. As the two examples above demonstrate, access to all relevant documents that make up the complete claim file in its native form is essential to determining a complete picture of all the facts necessary to show the manner in which State Farm handled the Plaintiffs' claim. As State Farm knows, static images and the self-selected, limited universe of the ECS does not tell the whole story.

Putting aside the fact that the substantive information withheld by State Farm is damaging to its position in this litigation, State Farm is also motivated to avoid following the Texas Rules of Civil Procedure to save money. If requited to produce documents outside of the ECS, State Farm would incur additional cost. The record reflects, however, that State Farm never submitted any credible evidence that producing native claim files would be burdensome. Even if the MDL Plaintiffs claims were frivolous, as State Farm contends, such a conclusion can only be reached by a thorough review of the native documents and the complete claim file. However, by producing only static images contained within an ECS system containing a limited universe of relevant materials, State Farm has impeded the MDL Plaintiffs and the Court from properly assessing the pertinent issues in this case.

This case presents an opportunity to address the proper scope of Tex. R. Civ. P. 196.4 in the context of broader public policy questions regarding how Texas

discovery procedures advance the pursuit of the truth particularly where there is an inherent imbalance of power between the parties. Here, State Farm is asking this Court to re-write Rule 196.4 in direct opposition to this Court's precedent and parallel sections of the Federal Rules of Civil Procedure in a manner that would allow them to hide relevant evidence from the MDL Plaintiffs and the Court. Even more significantly, State Farm is asking this Court to make it more difficult for corporate and individual policyholders to discovery the truth in litigation against large, powerful insurance companies. A ruling in favor of State Farm in this case will further embolden already recalcitrant insurers to even more aggressively underpay or deny valid claims only to force Texas residents and businesses to pursue the insurance coverage they paid for by engaging in costly litigation that favors the party with the deepest pockets – i.e. the insurers.

ARGUMENT

I. State Farm Asks this Court to Effectively Re-Write Rule 196.4 to Allow Parties Receiving an Electronic Discovery Request to Unilaterally Re-Write the Rules and Change the Terms of the Request, Upsetting the Careful Balance Reflected in the Rule's Plain Language and Rendering Rule 196.4 Inconsistent with this Court's Precedent and the Federal Rules of Civil Procedure

A. The Plain Language of Rule 196.4 as Elaborated Upon by This Court Creates a Balanced Procedure for Electronic Discovery

This Court has been clear that the "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed." *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987)

(quoting *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex.1984)). Unfortunately, as this Court has noted, "truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise." *Id.* For deep-pocketed defendants like State Farm, for whom it is financially advantageous for litigation to proceed slowly, glossy denials and creative avoidance tactics are standard practice.

However, this Court has forcefully spoken out and acted to prevent such tactics in aid of ascertaining truth and promoting the efficient resolution of civil disputes by "articulat[ing] principles and adopt[ing] procedural devices to curb discovery abuse." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). Such principles and procedural devices ensure that "[a] party resisting discovery . . . cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing." *Id.* at 181. Additionally, this Court has armed trial courts with substantial discretion to enforce these principles according to the facts before them. *In re VERP Inv., LLC*, 457 S.W.3d 255, 260 (Tex. App.–Dallas 2015, no pet.) (trial court discovery decisions cannot be disturbed absent an abuse of discretion, which requires showing that "the trial court could reasonably have reached only one decision").

Texas Rule of Civil Procedure 196.4 is just one example of procedural devices adopted in Texas to help parties ascertain the truth. Rule 196.4 creates a reasonable, balanced four-step process for the production of ESI. Rule 196.4 states:

> To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot--through reasonable efforts--retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

Tex. R. Civ. P. 196.4. In the seminal case of *In re Weekley Homes, L.P.*, this Court elaborated upon the procedures established under this rule:

> — the party seeking to discover electronic information must make a specific request for that information and specify the form of production.
>
> — The responding party must then produce any electronic information that is responsive to the request and ... reasonably available to the responding party in its ordinary course of business.
>
> — If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must object on those grounds.
>
> — The parties should make reasonable efforts to resolve the dispute without court intervention.

> — If the parties are unable to resolve the dispute, either party may request a hearing on the objection . . . at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost . . .
>
> — If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4's discovery limitations.
>
> — If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.
>
> — Finally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion.

295 S.W.3d 309, 322 (Tex. 2009) (citations and quotation marks omitted).

These detailed instructions were informed by this Court's interpretation of the guiding principles of Rule 192.4 and Advisory Committee Notes from the similar Rule 26 of the Federal Rules of Civil Procedure. *Id.* at 315-316, 321-22. In short, Rule 196.4, as elaborated upon by *Weekley Homes*, is consistent with the goals of ascertaining truth and avoiding undue expense or delay because it allows the requesting party to establish the framework of the request, provides a fair opportunity for the responding party to object, and then provides trial courts with the appropriate discretion to reach a fair, efficient decision in collaboration with

the parties that gives due respect to the facts and circumstances unique to each case. To the extent that this Court seeks a "limiting principle" to combat ESI discovery abuses, the plain language of Rule 196.4 and *Weekley Homes* already provides such remedy.

As reflected in the merits briefs, the MDL Plaintiffs and State Farm followed Rule 196.4's procedures as intended: (1) the MDL Plaintiffs proposed an ESI protocol requesting that ESI specifically be produced in "native" format unless it was infeasible, in which case "near-native" production was specified (s*ee* Merits Brief at 5; Merits Resp. at 2); (2) State Farm objected; (3) the MDL court reviewed evidence and heard witness testimony from lay and expert witnesses on behalf of both parties (Merits Brief at 11; Merits Resp. at 2-7); and (4) having reviewed the facts presented, the MDL court entered the MDL Plaintiffs' proposed protocol (Merits Brief at 11; Merits Resp. at 7.)

While parties' may disagree about the weight of the evidence presented to the MDL court, the submissions collectively demonstrate that each party had a fair opportunity to present evidence to the MDL court, providing the court with sufficient testimony to render a decision consistent with the guiding principles set forth by *Weekley Homes* and the Texas Rules of Civil Procedure. The MDL court determined in its discretion that the best avenue for ascertaining the truth in this

matter required State Farm to produce native files and not be limited to the ECS.[8] Thus, as the proceedings below reflect, Rule 196.4 worked exactly as this Court intended.

Having lost in a fair proceeding before the MDL court, State Farm now seeks to unjustly re-litigate this dispute by asking this Court to ignore its prior guidance in *Weekley Homes* and re-write Rule 196.4.

B. State Farm's Interpretation of Rule 196.4 is Inconsistent with the Plain Language of Rule 196.4 and Contradicts the Goals of Discovery Under the Texas Rules of Civil Procedure

Despite the MDL court entering an ESI protocol pursuant to Rule 196.4, State Farm asserts that Rule 196.4 empowers it to disregard the form of production requested by the MDL Plaintiffs and required by the MDL court order. (*See* Merits Brief at 28.) State Farm instead asserts that the "legislative history" of Rule 196.4, as allegedly reflected in the 1999 Comments to Rule 196.7, allows it to instead respond to the MDL Plaintiffs' request by producing documents in any "reasonably useable" form. Comment 3 to Rule 196.7 states:

> A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only

[8] At least one Texas court hearing a substantially similar dispute has held that ordering the production of documents in native format was not an abuse of discretion, nor presented an undue burden on the responding party. *See In re Waste Mgmt. of Texas, Inc.*, 392 S.W.3d 861, 876 (Tex. App.—Texarkana 2013, orig. proceeding).

> produce the data reasonably available in the ordinary course of business in *reasonably usable form*. (emphasis added)

Tex. R. Civ. P. 196.7, Comment 3; (*see* Merits Reply at 5.)

According to State Farm, the final sentence of Comment 3 provides State Farm with a basis to only produce documents in a "reasonably usable format," notwithstanding a *specific request* from the MDL Plaintiffs to produce native and/or near-native files and the entry of the MDL Plaintiffs' ESI protocol by the MDL court pursuant to the Rule 196.4 procedure. (*Id.* at 5-9.) State Farm's position has no basis in the plain language of Rule 196.4, nor in this Court's specific instructions regarding compliance with Rule 196.4.

Analysis of Texas's procedural rules is subject to "the same rules of construction that govern the interpretation of statutes." *In re Bridgestone Americas Tire Operations, LLC,* 459 S.W.3d 565, 569 (Tex. 2015). The first step in statutory construction under Texas law requires courts to "look first to the rule's language and construe it according to its plain meaning." *Id.* If the words contain an unambiguous meaning, courts "adopt, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms. Further, if a [rule] is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-6 (Tex. 1999). In interpreting a rule of civil procedure, the Court must be mindful that "the rules are given a liberal construction in order to obtain 'a

just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.'" *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d at 569 (citing Tex. R. Civ. P. 1.)

With these principles in mind, we examine Rule 196.4. The first sentence of the rule requires that parties seeking ESI ***must*** request such data specifically ***and*** "specify the form in which the requesting party wants it produced." Tex. R. Civ. P. 196.4. Thus, it is mandatory that the specific form of production be included in the request. *See In re Weekley Homes, L.P.*, 295 S.W.3d at 314 ("The purpose of Rule 196.4's specificity requirement is to ensure that requests for electronic information are clearly understood and disputes avoided."); *In re Harris*, 315 S.W.3d 685, 700 (Tex. App. – Houston [1st Dist.] 2010, orig. proceeding) (analyzing the specificity of a Rule 196.4 request). Following a ***specific*** request, the next two sentences of the Rule gives the responding party two options: (1) produce the responsive ESI that is "reasonably available to the responding party in its ordinary course of business" or (2) object. Tex. R. Civ. P. 196.4. The remaining sentence of Rule 196.4 responds to situations where a court finds "extraordinary steps" are required to produce the information requested – which is inapplicable here. *Id.*

At no point in these final three sentences does Rule 196.4 contemplate, explicitly or implicitly, that the responding party may unilaterally modify the terms of the original request and produce data in a format that differs from the ***specific***

format requested – as State Farm seeks to do here. To the contrary, it is reasonable to believe that, if Rule 196.4 contemplated such a framework, it would have explicitly stated this, particularly given the precision of Rule 196.4's requirements. The plain language of Rule 196.4 demands that the responding party ***must*** either produce responsive data that is "reasonably available . . . in its ordinary course of business" or object. While the responding party may object to the scope of the requested data and/or the specific production form requested, this binary choice does not allow the responding party to substitute its own production preference. Thus, because the plain language of Rule 196.4 is unambiguous and dispositive of this issue, the Court need not go further. *In re Bridgestone Americas Tire Operations, LLC*, *supra.*

Even if the Court considers the "drafting history" of Rule 196.4, which it need not do here, this Court's ruling in *Weekley Homes* confirms that State Farm's position fails. In the *Weekley Homes* procedural summary of Rule 196.4, the Court affirms the plain language of the rule in espousing the responding party's options:

> — The responding party must then produce any electronic information that is responsive to the request and ... reasonably available to the responding party in its ordinary course of business.
>
> — If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must object on those grounds.

295 S.W.3d at 322. These instructions leave no room for the responding party to unilaterally modify the specific form of production requested. State Farm asserts that the 1999 Comments "modify" Rule 196.4. Yet, *Weekley Homes* was decided a decade after the 1999 Comments to Rule 196.4 were issued and cited to the Comments. *Id.* at 315. If this Court believed as State Farm does that the responding party could ignore the specific form of production requested in favor of a "reasonably usable" form, this Court had the opportunity espouse such clarification when it summarized the "proper procedure" under Rule 196.4. *Id.* To wit, the term "reasonably usable" is ***entirely absent*** from *Weekley Homes*. Similarly absent is any mention of a standard or procedure that could be even remotely interpreted to provide support for State Farm's position.[9]

Moreover, it would be inconsistent with a "just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law" and would be contrary to the purposes of discovery to re-write Rule 196.4 to include the "reasonably usable" standard. As one Texas court noted, "[t]he purpose of discovery is to try cases based on what the facts reveal, not what they

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[9] Even if State Farm's interpretation of the 1999 Comments is correct (which it is not), the sentence from which State Farm derives its rule states "***[u]nless ordered otherwise***, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form." Tex. R. Civ. P. 196.7, Comment 3. The MDL court's entry of the ESI protocol should not be interpreted as anything other than ordering State Farm to produce native and/or near native documents; thus, rendering State Farm liable to produce pursuant to the ESI protocol even under its own standard of choice.

conceal." *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 453 (Tex. App.—San Antonio 1991.) However, an adversarial approach to discovery, where parties treat the Texas Rules of Civil Procedure as "'rules of the game' encourage[s] parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts." *Garcia*, 734 S.W.2d at 347.

State Farm's proposed reading of Rule 196.4 would only further the adversarial nature of discovery by allowing a party receiving a discovery request to unilaterally alter the terms of a specific request for production in a specific form. In this case, the native and near-native forms were requested by the MDL Plaintiffs because they believed that such data would materially assist in recovery of information potentially relevant to their claims. (See Merits Resp., at 2-4.) After hearing testimony from both sides, the MDL court agreed. None of the goals that Texas law seeks to achieve during discovery – justice, fairness, efficiency, impartiality – are served by contorting Rule 196.4 to allow parties to effectively ignore the requesting party's specific, strategic request for production in a certain form.

State Farm had the opportunity, consistent with the plain language of Rule 196.4 and *Weekley Homes* to fairly and completely litigate its objections to producing its entire claim file in native and near-native form by providing evidence of burden and other factors to the MDL court. State Farm's request to have a

second bite at the apple by modifying Rule 196.4 to introduce a new "reasonably usable" standard that is absent from the Rule's plain language and seminal judicial interpretation would baselessly move the goal posts for future requesting parties and provide responding parties with nearly unlimited power to ignore requests properly made under Rule 196.4.

C. State Farm Seeks a Ruling Inconsistent with Federal Rule of Civil Procedure 34.

As the Merits briefs demonstrated, Texas looks to the Federal Rules of Civil Procedure for guidance on ESI discovery issues. State Farm has incorrectly argued that the MDL court interpreted Rule 196.4 in a manner inconsistent with the Federal Rules. (See Merits Brief at 34.) State Farm again began its analysis of the Federal Rules by erroneously focusing on the "legislative history" of the Rules rather than the plain language of Rule 34. (See *id.* at 34-35.) Amazingly, State Farm's Merits Brief ignores the plain language of Rule 34 to the point of failing to quote any of the relevant language of the rule. Perhaps it is because the plain language of Federal Rule of Civil Procedure 34 is ***consistent*** with Rule 196.4 as written and ***does not*** authorize the production of documents in a "reasonably usable" format unless specific conditions are met – conditions which are not met here.

As with the Texas Rules, the Federal Rules of Civil Procedure are interpreted according to their plain meaning. *Business Guides, Inc. v. Chromatic*

Communications Enters., Inc., 498 U.S. 533, 540 (1991). "As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous." *Id.* at 540-541; *see also Yesh Music v. Lakewood Church*, 727 F.3d 356, 359 (5th Cir. 2013). Rule 34 of the Federal Rules addresses the responsibilities of a party responding to a request for discovery of ESI and mirrors Rule 196.4 in a number of ways, including that the responding party "must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reason." Fed. R. Civ. P. 34. Regarding the production of ESI, Rule 34(2)(E) states:

> Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
>
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
>
> (ii) ***If a request does not specify a form for producing electronically stored information***, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms . . . .

Fed. R. Civ. P. 34. Thus, under the plain language of the rule, a responding party cannot simply choose to produce ESI in a "reasonably useable" form. It may ***only*** do so ***on the condition that*** the initial request did not specify the form of production. *Id.* Had this case been before a federal court and the MDL Plaintiffs offered an identical ESI proposal, State Farm would similar have been unable under Rule 34 to ignore the MDL Plaintiffs' specifically requested form of

production. The MDL Plaintiffs' Merit Brief provides additional analysis on this issue. (*See* Merits Resp. at 26-27.)

Even if the Court considers the 2006 Advisory Committee Notes to Federal Rule 34 (which it need not do to ascertain the plain meaning of the Rule), the notes similarly provide support for Rule 196.4 as written and affirm the qualifying condition that a "reasonably usable" form is not considered unless the form of production was not specified by the requesting party. Fed. R. Civ. P. 34 Advisory Committee Note (2006). The Notes explicitly contradict State Farm's desire to avoid producing native files, stating:

> The rule does not require a party to produce electronically stored information in the form it which it is ordinarily maintained, as long as it is produced in a reasonably usable form. ***But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation***. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Id. (emphasis added). The plain language of this guidance reaffirms the view that State Farm is not free to unilaterally ignore the ESI protocol, particularly where its production would alter the form of the documents. (*See* Merits Resp. at 6 (citing expert testimony regarding State Farm production strategy of providing documents to its attorneys in native, but producing stripped down versions of the

documents to its insureds).) Speaking directly to the larger concerns of this case, at least one federal court in Texas has endorsed a standard of production consistent with the MDL Plaintiff's ESI protocol:

> Production "as kept in the ordinary course of business" generally requires turning over electronic documents in the format in which they are kept on the user's hard drive or other storage device. ***A file that is converted to another format solely for production, or for which the application metadata has been scrubbed or altered, is not produced as kept in the ordinary course of business. If a document is maintained on a hard drive or in a storage device in the form in which it is created and edited (its "native" format, in the technical sense of the term), it must be produced in native format to be produced as it is kept in the ordinary course of business. Preservation of format is important because conversion from native format may eliminate or degrade search and other information processing features (e.g., copy, paste, and sort).***

Mckinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co., No. 3:14-CV-2498-B, 2016 WL 98603, at *11 (N.D. Tex. Jan. 8, 2016) (quoting *Teledyne Instruments, Inc. v. Cairns*, No. 6:12-cv-854-Orl-28TBS, 2013 WL 5781274 (M.D. Fla. Oct. 25, 2013)) (emphasis added). At a minimum, *Mckinney* must give this Court pause before considering State Farm's advancing of *Dizdar v. State Farm Lloyds*, No. 7:14-CV-402, 2015 WL 12780640 (S.D. Tex. Jan. 21, 2015) as a valid standard for federal practice and ESI in Texas, particularly because *Mckinney* is the more recent decision.

Ultimately, the plain language of Rule 34(b)(2)(E)(ii), which makes the responding party's production in a "reasonably usable" form conditional upon the

requesting party's failure to specific a requested form, is dispositive of whether this rule conflicts with Rule 196.4 as written. Both rules only need consider a "reasonably usable" form in the absence of a specific request for production in a specific form and/or an objection to the requested form of production by the responding party. Therefore, State Farm's desire to inject the "reasonably usable" standard into Rule 196.4 would diverge from the prevailing federal rule, hindering the ability of Texas courts to apply the state and federal rules with uniformity.

CONCLUSION

For the foregoing reasons, amicus curiae United Policyholders respectfully requests this Court affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and word-count requirements set forth in the Texas Rules of Appellate Procedure. This brief has been prepared using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes. This brief contains 6,111 words, as determined by Microsoft Word's word count feature, excluding those portions of the brief that the Texas Rules of Appellate Procedure allow to be excluded.

/s/ *J. James Cooper*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served on all counsel of record on April 14, 2017, through the official electronic filing system in compliance with the Texas Rules of Appellate Procedure.

/s/ *J. James Cooper*