Tucker Ellis LLP

950 Main Avenue, Suite 1100 | Cleveland, OH 44113-7213 | TEL 216 592.5000 | FAX 216 592.5009

November 4, 2019

DIRECT DIAL 216.696.2699 | karl.bekeny@tuckerellis.com
DIRECT DIAL 216.696.5478 | anthony.petruzzi@tuckerellis.com

Jess Mosser
Interim Judicial and Legislative Affairs Counsel
Supreme Court of Ohio
65 South Front Street, 7th Floor
Columbus, Ohio 43215-3431
Jesse.Mosser@sc.ohio.gov

Re: Proposed Amendments to Ohio Rule of Civil Procedure 26(B)(1)

Dear Mr. Mosser:

Tucker Ellis LLP[1] submits the following comments in support of the proposed amendments to Civ.R. 26(B)(1), which will bring Ohio's Civil Rules in line with the Federal Rules in recognizing proportionality is necessary to provide for the just, speedy, and inexpensive administration of justice in modern civil cases. The Proposed Rule would modernize Ohio practice by empowering judges to craft discovery orders relative to the needs of each individual case. Advances in information technology in recent decades have changed the way Ohioans live and work. These advances have also dramatically increased the volume of information produced by society, which has correspondingly led to exponential growth in electronically-stored information ("ESI") possessed by litigants. Without corresponding changes in discovery rules to account for these changes, the costs to litigants in searching, reviewing, and producing ESI have become cost-prohibitive in many cases. *See* RAND Institute for Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, xiv, (2012) (finding that at least 73% of discovery costs were attributable to searching and reviewing ESI in surveyed cases);[2] Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L.REV. 19, 20 (2015) (emphasizing the need to understand proportionality due to the "exponential growth of electronically stored information and the challenges it imposes on parties in civil litigation"). Absent changes to recognize the new reality of civil litigation, growing discovery expenses threaten the ability of our courts to provide efficient and cost-effective dispute resolution. Rather than resolving disputes on the merits, parties often feel pressured to prematurely settle cases they believe lack merit because discovery costs make justice unaffordable. The Proposed Rule corrects this imbalance by empowering judges to ensure discovery is proportional to the issues at stake in a given case, allowing litigation to be decided on the merits, not the nuisance value created by unduly onerous discovery.

[1] Tucker Ellis LLP is a law firm consisting of 227 attorneys with offices in Cleveland, Columbus, Chicago, Houston, Los Angeles, San Francisco, and St. Louis, serving as national, regional, and local trial counsel in federal and state courts throughout the country, representing major pharmaceutical companies, manufacturers of medical, chemical, and aerospace products, industrial machinery, consumer products, and other public and privately held businesses in product liability, mass tort, property damage, premises liability, consumer product safety, commercial, and business-related actions.

[2] Available at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf

As the Rules Commission's summary of the Proposed Rule explains, incorporating the proportionality concept into the Civil Rules *allows* trial courts to consider the breadth and scope of discovery in a civil case in determining the appropriate type and quantity of discovery. This change is inherently reasonable. It imposes no hard limitations on permissible discovery; it merely provides guidance and discretion to shape the scope of permissible discovery, "considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' access to resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Proposed Civ.R. 26(B)(1). The proposed language is not based solely on the amount in controversy or the burden and expense imposed by discovery. Rather, the Proposed Rule requires consideration of these factors along with the importance of the issues in the action, the parties' relative access to information and resources, the importance of the discovery to resolve the issues, and the likely benefit of the proposed discovery. In addition to the inherent wisdom of this proposed approach, Ohio has the immense benefit of the Federal Judiciary's painstaking process in developing, modifying, and adopting the 2015 Amendments to Federal Rule 26(b)(1), upon which Proposed Ohio Rule 26(B)(1) is based.

The 2015 Amendments to Federal Rule of Civil Procedure 26 resulted from five years of "intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes." 2015 Year-End Report on the Federal Judiciary (C.J. Roberts) at 4. In 2010, the Federal Rules Advisory Committee sponsored a symposium on civil litigation that consisted of federal and state judges, law professors, and practitioners. *Id.*; *see also* Minutes, Civil Rules Advisory Committee Meeting Apr. 20-21, 2009 at 30 (noting the 2010 Rules Conference was held because of concerns about the "costs of litigation, especially discovery and e-discovery").[3] That symposium generated 40 papers and 25 data compilations, which confirmed that "in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts." *Id.* Based on these findings, the symposium identified the need for procedural reforms to:

1. encourage greater cooperation among counsel;
2. focus discovery on what is truly necessary;
3. engage judges in early and active case management; and
4. address serious new problems created by the vast amounts of ESI.

Id. at 5. In response to these concerns, the Federal Rules Advisory Committee drafted the proposed 2015 Amendments to the Federal Rules. *Id.* The Committee received over 2,300 comments and held public hearings in three cities, receiving testimony from over 120 witnesses. *Id.* The proposed amendments then were revised based on recommendations from the public. *Id.* As a result of these changes, the American Association for Justice—a plaintiff-friendly advocacy group—positively commented on the "improvements" made to

[3] https://www.uscourts.gov/sites/default/files/fr_import/CV04-2009-min.pdf

the proposed Amendments due to the public comment process.[4] The 2015 Amendments were further scrutinized by the Standing Committee, the Judicial Conference, and the U.S. Supreme Court before being submitted to Congress and going into effect December 1, 2015. *Id.* The Proposed Ohio Rule amendments are based on the fruits of this extensive and well-considered process, in addition to the success of the 2015 Federal Rules Amendments. Chief Justice Roberts has stated that these advances provide "reasonable limits on discovery through increased reliance on the common-sense concept of proportionality" and "efficient access to what is needed to prove a claim or defense," while eliminating "unnecessary or wasteful discovery." *Id.* at 6–7. This common-sense approach to discovery will enhance the experience of Ohio state court litigants as it has federal court litigants.

Adopting the Federal Rules' proportionality concept is not a significant departure from the values already reflected in Ohio's Rules. The most significant driver of increasing discovery costs and burdens is the exponential growth of ESI. Ohio's Civil Rules already recognize the need for proportionality when engaging in ESI discovery: A party may avoid discovery of ESI "when the production imposes undue burden or expense," but discovery may nonetheless be required for good cause after considering whether "the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues." Civ.R. 26(B)(4)(d). The Proposed Rule merely elevates the prominence of this existing proportionality policy reflected in the Civil Rules, allowing Ohio courts to apply this holistic proportionality assessment to all forms of discovery.

Any concern that the Proposed Rule will unfairly limit discovery ignores experience in federal and state courts, expresses a lack of faith in our judges, and inherently calls for disproportionate and unreasonable discovery. As noted above, proportionality already exists in Ohio's Civil Rules specific to ESI. These provisions have not proven unworkable or unfair, and there is no just reason to avoid making proportionality a rule of general applicability. Federal courts applying the amended Federal Rules have shown that incorporating proportionality into the discoverability analysis has not deprived parties of evidence necessary to litigate their cases.[5] As the Ohio Rules Committee recognizes, parties

---

[4] *See* AAJ Employment Rights Newsletter (2014) ("Due to your advocacy, the Standing committee unanimously voted to withdraw" the presumptive limits and recommended "improvements to the proposed amendments"), available at https://www.justice.org/sections/newsletters/articles/aaj-members-influence-changes-federal-ruels-civil-procedure; *see also* Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, TRIAL, 37, July 2015 ("the actual rule amendments do not support [the] perspective [of severe restrictions on discovery].").

[5] *See, e.g., Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 643 (W.D. Mo. 2016), *vacated sub nom. on other grounds, In re State Farm Fire & Cas. Co.*, 872 F.3d 567 (8th Cir. 2017) (rejecting undue burden and disproportionality arguments where discovery sought was "at the very heart" of the litigation and resisting party failed to demonstrate undue burden); *Wilmington Trust Co. v. AEP Generating Co.*, No. 2:13-cv-01213, 2016 WL 860693, at *3 (S.D. Ohio Mar. 7, 2016) (granting motion to compel in part where defendants had "not presented any specific argument about undue burden"); *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS (MEJ), 2016 WL 736213, at *4 (N.D. Cal. Feb. 25, 2016) (rejecting as inadequate argument regarding cost of proposed discovery when resisting party was likely the only source

may have different information concerning different proportionality factors, and the newly revised Rule encourages parties to first work together to try to come to a resolution. If a resolution is not forthcoming, the court will be empowered to make a decision "using all the information provided by the parties" and to consider all of the factors in the Proposed Rule "in reaching a case-specific determination of the appropriate scope of discovery." Further, the Committee rightly recognizes that the explosion of ESI in recent decades has increased potential discovery costs, and with it, the potential for parties to use disproportionate discovery as an instrument for delay and oppression. Any argument against proportionality necessarily calls for disproportionate—and thus inherently unreasonable—discovery. Such a position is contrary to Civ.R. 1(B)'s command that the Rules "be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice."

Tucker Ellis also supports adoption of the Proposed Rule because it makes clear that discovery may be had on any (1) non-privileged matter, (2) that is relevant to any party's claim or defense, and (3) proportional to the needs of the case. The proposed language improves upon the existing language because it revises the confusing statement that it is "not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The Proposed Rule improves this language by directly stating: "Information within this scope of discovery need not be admissible in evidence to be discoverable." By stating the rule in the affirmative, rather than as a negative gloss on its intended meaning, the Proposed Rule will avoid the confusion often resulting from the current language. The experience of Tucker Ellis attorneys has been that this "reasonably calculated" phrase has led to interpretations suggesting that the scope of discovery is governed by a standard of "reasonably calculated to lead to the discovery of admissible evidence," rather than a standard of relevance to the claims and defenses of the parties. This has resulted in incorrect contentions that information not relevant to the claims or defenses of the parties—and therefore outside the scope of discovery—is nevertheless discoverable if it is intended to lead to the discovery of admissible evidence.

---

of requested information and delaying production could in fact increase litigation costs in long-term); *In re: Am. Med. Sys., Inc.*, No. 2325, 2016 WL 3077904, at *4 (S.D.W. Va. May 31, 2016) (noting that "notwithstanding Rule 26(b)(1)'s recent amendment placing an emphasis on the proportionality of discovery, the discovery rules, including Rule 26, are still 'to be accorded broad and liberal construction'" (quoting *Eramo v. Rolling Stone LLC*, No. 3:15-MC-11, 2016 WL 304319, at *3 (W.D. Va. Jan. 25, 2016)); *Siriano v. Goodman Mfg. Co., L.P.*, No. 2:14-CV-1131, 2015 WL 8259548, at *4 (S.D. Ohio Dec. 9, 2015) (explaining that "the scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad . . . [and] more liberal than the trial setting, as Rule 26(b) allows discovery 'regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case'")(citations omitted); *Cargill Meat Sols. Corp. v. Premium Beef Feeders, LLC*, No. 13-CV-1168-EFM-TJJ, 2015 WL 3937410, at *3–4 (D. Kan. June 26, 2015) (rejecting proportionality argument where party resisting discovery did not put forth evidence regarding time or expense required to respond to discovery request).

The Advisory Committee Notes to the analogous Federal Rule explain the original intent of this language and make a similar observation:

> This [reasonably calculated] provision traces back to 1946, when it was added to overcome decisions that denied discovery solely on the ground that the requested information would not be admissible in evidence. A common example was hearsay. Although a witness often could not testify that someone told him the defendant ran through a red light, knowing who it was that told that to the witness could readily lead to admissible testimony. This sentence was amended in 2000 to add "Relevant" as the first word. The 2000 Committee Note reflects concern that the "reasonably calculated" standard "might swallow any other limitation on the scope of discovery." "Relevant" was added "to clarify that information must be relevant to be discoverable * * *." Despite the 2000 amendment, many cases continue to cite the "reasonably calculated" language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery.

In sum, Tucker Ellis supports adoption of Proposed Rule 26(B)(1). The Proposed Rule clearly and succinctly describes the appropriate scope of discovery, while making the proportionality concept already present in the Civil Rules' ESI provisions generally applicable to all discovery and largely mirroring the thoroughly-vetted and widely-welcomed 2015 Federal Rules Amendments.

Sincerely,

TUCKER ELLIS LLP

Karl A. Bekeny
Chair, Trial Department

Anthony R. Petruzzi
Chair, E-Discovery Practice Group