

1. A ruling from the Eastern District of Michigan denying the Plaintiffs' motion to compel the Defendant to use specific search terms to perform an additional search of certain custodians' files to respond to one of Plaintiffs' document requests because the additional search methodology was not proportional to the needs of the case.

In *Weidman v. Ford Motor Co.*, 2021 WL 2349400 (E.D. Mich. June 9, 2021), U.S. Magistrate Judge Elizabeth A. Stafford denied the Plaintiffs' motion to compel the Defendant to use specific search terms to perform an additional search of certain custodians' files to respond to one of Plaintiffs' document requests, finding that Plaintiff had failed to establish the requested additional search methodology was proportional to the needs of the case.

In this product liability case, Plaintiffs filed a motion near the end of the discovery period to compel Defendant to apply certain search terms to the documents of three custodians to locate and produce documents related to the presence of hydrocarbons (specifically engine oil) in other parts of vehicles manufactured by Defendant. *Id.* at \*1. Plaintiffs acknowledged that this so-called "hydrocarbon intrusion" concept was not explicitly alleged in their complaint but believed that recently uncovered evidence showed that it could be a cause of the defect at issue in the case. Defendant objected to the request as overly broad and unduly burdensome but nonetheless had conducted a search and produced 769 pages of documents related to this issue. Defendant argued on this basis that Plaintiffs had failed to show that more responsive materials existed.

Judge Stafford began her analysis with a survey of the applicable Federal Rules of Civil Procedure, including that "[p]arties 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." *Id.* (citing Rule 26). She noted that relevance is an "extremely low bar" and that the proportionality factors are "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." *Id.* (citing Rule 26(b)(1)).

Judge Stafford next addressed the applicability of proportionality to the discovery dispute, noting that Plaintiffs had argued that discovery under the Federal Rules is liberal and wide-ranging but only briefly addressed the proportionality factors in their papers. *Id.* at \*2. She noted that "many attorneys gloss over the operative rules requiring an assessment of proportionality," citing the Supreme Court's decision in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, where the Supreme Court said that the "key phrase" of Rule 26(b)(1) ("relevant to the subject matter involved in the pending action") had been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." But Judge Stafford noted that Rule 26(b)(1), as amended, does not include that "key phrase" from *Oppenheimer* and more narrowly allows discovery that "is relevant to any party's claim or defense and proportional to the needs of the case." *Id.* (citing Rule 26(b)(1)). Quoting from the 2015 advisory committee's notes to Rule 26, Judge Stafford noted that "[t]he 2015 rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."

Judge Stafford explained that “[t]he key phrase of the current Rule 26(b)(1) is the one describing proportionality” because “the change ensures that the parties and courts share the collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.” *Id.* at \*3 (citing *Helena Agri-Enterprises, LLC v. Great Lakes Grain, LLC*, 988 F.3d 260, 273 (6th Cir. 2021) (cleaned up)). She continued that “[i]t is now the power — and duty — of the district courts actively to manage discovery and to limit discovery that exceeds its proportional and proper bounds.” *Id.* (cleaned up). Judge Stafford concluded that under amended Rule 26(b)(1), a court does not fulfill its duty when it compels discovery based on relevance alone.

With these principles in mind, Judge Stafford found that Plaintiffs had failed to show that another search of Defendant’s custodians’ accounts would be proportional to the needs of the case by arguing that materials about hydrocarbon intrusion were highly relevant to their claims. Judge Stafford initially focused on Plaintiffs’ claim that Defendant’s earlier searches for documents were insufficient to uncover materials about hydrocarbon intrusion’s causing the alleged brake defect, describing the court’s orders on an earlier motion to compel and noting that her review of the documents Plaintiffs pointed to in support of this argument failed to reveal an obvious gap in the production.

Defendant argued that it had produced over 100,000 pages of documents in response to Plaintiffs’ requests for production of documents and interrogatories and noted that none of the deposition testimony in the case (including testimony pursuant to Rule 30(b)(6)) showed that more documents about the hydrocarbon issue existed. *Id.* at \*4. Defendant also claimed that it had fully responded to the request at issue in Plaintiffs’ motion to compel as required by Rule 26(g), which requires an attorney to sign a discovery response, thus certifying that the response was made after a reasonable inquiry, and Rule 34(b)(2)(C), which requires a responding party to state whether it withheld any responsive material as a result of its objections.

Judge Stafford further explained that “absent credible evidence, the responding party’s representation that there are no additional documents is sufficient to defeat a motion to compel.” *Id.* (collecting cases). “Credible evidence is more than mere speculation and must permit a reasonable deduction that other documents may exist or did exist and have been destroyed. Specifically, this might include presentation of responsive, but withheld, documents that the moving party obtained from another source or testimony demonstrating knowledge of the existence of responsive documents.”

While Judge Stafford noted Plaintiffs’ suspicion that Defendant had not produced all materials that existed in response to their request, she found that the emails Plaintiffs presented did not support their suspicion, and the deposition testimony highlighted by Defendant undermined Plaintiffs’ argument that “another search would unearth a meaningful amount of material not captured by earlier searches.” She concluded that “[t]urning over every stone to see if more documents about hydrocarbon intrusion exists would not be proportional to the needs of the case.”