

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0535

MICHAEL E. CULLEN, et al.,
Plaintiff-Appellees,

-vs-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO, CASE NO. 95925

PLAINTIFF-APPELLEES' MOTION FOR RECONSIDERATION

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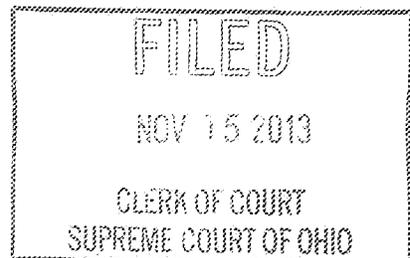
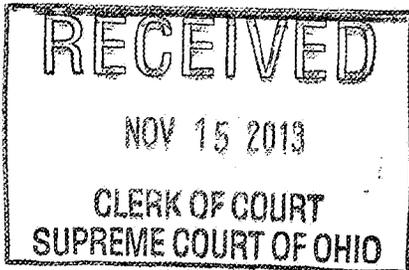
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MOTION

Plaintiff-Appellees, Michael E. Cullen, and the class he seeks to represent, request that this Court reconsider and clarify the decision that was released on November 5, 2013. *S. Ct. Prac. R. 18.02(B)(4)*. No attempt will be made to reargue the merits of this appeal. Instead, this Court should simply confirm the scope of the trial court's authority upon remand. Furnishing such an instruction in the mandate will prevent this class action lawsuit from being prematurely and unfairly extinguished before discovery is completed.

In resolving this interlocutory appeal, a majority of this Court determined that the Eighth District had erred in upholding the trial judge's certification of a narrow class of windshield damage claimants who had purchased comprehensive collision coverage from Defendant-Appellee, State Farm Mutual Automobile Insurance Company ("State Farm"). *Cullen v. State Farm Mut. Auto. Ins. Co.*, _____ Ohio St. 3d _____ 2013-Ohio-4733. Paragraph one of the syllabus establishes that:

A trial court must conduct a rigorous analysis when determining whether to certify a class pursuant to Civ.R. 23 and may grant certification only after finding that all of the requirements of the rule are satisfied; the analysis requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met.

Id.

While there was never any disagreement during these proceedings that a rigorous analysis is required by Civ. R. 23, State Farm had never gone so far as to argue that a resolution of disputed issues of fact was necessary. Such an effort would not have been practical until Plaintiff's discovery was completed. The insurer acknowledged instead to the trial judge that "class certification may not be denied or granted based upon the Court's view of the merit or lack of merit of the Named Plaintiff's claim[.]" *Defendant's*

Memorandum in Opposition to Plaintiff's Motion for Class Certification dated February 2, 2010, p. 29 (citation omitted). Likewise on appeal, State Farm's position was that "to be a valid basis for a class certification, a claim must be at least 'colorable.'" *State Farm's Court of Appeals Reply Brief dated April 4, 2011, p. 1* (citation omitted). The appellate court accepted the invitation to analyze the trial judge's decision under State Farm's "colorable" claim standard, but was reversed by a majority of this Court for doing so. *Cullen, 2013-Ohio-4732, ¶33-34.*

After reemphasizing that class certification orders are reviewed for an abuse of discretion, this Court proceeded to adopt a "preponderance of the evidence" standard that State Farm had never advocated during the trial court proceedings. *Cullen, 2013-Ohio-4733, ¶20.* The only authority cited in support of the new test is *Eastley v. Volkman*, 132 Ohio St. 3d 328, 2012-Ohio-2179, 972 N.E. 2d 517, which concerned a post-trial challenge to a jury verdict and not a motion for class certification. *Cullen, 2013-Ohio-4733, ¶20.* The preponderance of the evidence standard was then applied – for the first time in this lawsuit – during this Court's own review of the record. *Id., ¶36-50.*

Significantly for purposes of the instant Motion, the majority indicated in the final paragraph of the opinion that "we reverse the judgment of the appellate court and remand this matter to the trial court for further proceedings consistent with this opinion." *Cullen, 2013-Ohio-4733, ¶53.* The logical import of this directive is that the common pleas judge is expected upon remand to ensure that full and complete responses are finally furnished to the interrogatories and document requests that had been submitted early in the litigation. The Motion for Class Certification can then be reexamined in light of the new additions to the record and consistent with this Court's legal analysis.

Although the trial court had set October 30, 2009 as the deadline for completing class discovery, State Farm has yet to fully respond to the interrogatories and document requests that were served on July 5, 2005 and June 4, 2007. *See Journal Entry dated July 27, 2009, copy attached as Exhibit A.* Two motions to compel had been granted on April 26, 2006 and April 25, 2008, and sanctions had been imposed on July 27, 2009 after thousands of pages of previously undisclosed records were belatedly produced. *Id.* When even more highly-probative records were released only after depositions of several State Farm managers had been completed, the second Motion for Sanctions was filed on February 18, 2010, which remains pending. A copy of that application (without exhibits) is attached as Exhibit B and the corresponding Reply (without exhibits) is attached as Exhibit C.

As detailed in these filings, State Farm had been slowing releasing records well past the discovery cut-off date, which continued until just days before the class certification hearing commenced. *Exhibit B, pp. 12-18; Exhibit C, pp. 2-4.* There is no merit to the insurer's protests that these materials were only "marginally" or "arguably" relevant to the issue of certification. *Id.* More significantly for purposes of the instant Motion, Plaintiffs' counsel was advised after the hearing that the search for responsive records was still ongoing and a new potential source of information had been identified. *Exhibit C, pp. 4-5.* State Farm initiated this interlocutory appeal, however, before this remaining discovery was produced.

Plaintiffs suspect that, without clarification in the mandate, State Farm will attempt to argue in the trial court that the inappropriateness of class certification has been conclusively established and all that is left to do is enter a final dismissal order. If such a misguided effort is successful, the insurer will be well rewarded for its brazen disregard for the obligations imposed by the Civil Rules. Pivotal factual disputes will

have been resolved in the Supreme Court before Plaintiffs were furnished with all the potentially relevant records and information that remain due to them.

There can be no serious disagreement that this Court's review was based not only upon new legal standards, but also upon an incomplete evidentiary record. Many of this Court's findings appear to have been reached by accepting State Farm's affidavits as true.

For example, the determination that "policyholders had various individual, unscripted conversations with Lynx representatives, insurance agents, and repair-shop personnel" can only be based upon the unsubstantiated assertions of Glass Claims Manager Robert Bischoff ("Bischoff"). *Cullen*, 2013-Ohio-4733, ¶137. The insurer has yet to produce any unbiased witnesses or reliable records supporting this representation, and there was testimony to the contrary indicating that the insurer's representatives were expected to adhere closely to their scripts. *Deposition of Peter Cole taken February 10, 2006, p. 66.*

Likewise, this Court must have been relying upon State Farm expert Sean Kobel in concluding that: "****[T]he costs to repair or replace a particular windshield varied by make, model, and year of the covered vehicle and by time and place of repair." *Cullen*, 2013-Ohio-4733, ¶41. Plaintiff's own expert, Thomas Uhl, had detailed in his own affidavit how the Vehicle Identification Numbers (VIN) and databases such as the NAGS Catalog are available to accurately determine the cost of replacing any windshield in any modern vehicle. *Second Supplement of Plaintiff-Appellees dated October 9, 2012 ("Plaintiffs' Supp.")*, 000135-140. Plaintiffs had never been allowed to conclude their investigation on this and other significant issues, particularly through a review of State Farm's long existing practices for determining the benefits due to any policyholder whose windshield had to be replaced. Every day, thousands of claims were processed

for windshields that were too damaged to be repaired through the chemical patches, which required the replacement cost to be determined through an assessment of the particular characteristics of the vehicle and the applicable policy deductible. The insurer had even assured this Court that full windshield replacements are provided to anyone who complained about the quality of a chemical patch, thereby tacitly conceding that a process had indeed been developed for reliably determining the amount to be paid under each policy. *Merit Brief of Appellant State Farm Mutual Automobile Insurance Company dated August 17, 2012 ("Defendants' Brief")*, pp. 12-13.

If the discovery that remains to be produced upon remand confirms both that the cost of windshield replacements and the applicable deductibles can be established for each class member through existing mechanisms, then nothing more will be required for calculating the benefits that remain due to each of them. It should be remembered that even Manager Bischoff acknowledged that this sum would average \$342.00 per claim, which is considerably more than the cost of the glass patches that the policyholders were urged to accept. *Deposition of Robert Bischoff taken July 14, 2006 ("Bischoff Depo.")*, p. 90.

The incompleteness of the evidentiary record is reflected in this Court's analysis of the "actual cash value" requirements of the policies. *Cullen*, 2013-Ohio-4733, ¶138-40. Perhaps the only issue of significance that was not in dispute between the parties had been "that actual cash value does not apply to windshield claims." *Defendants' Brief*, p. 8 (footnote omitted). Plaintiffs were in complete agreement with State Farm on this point. *Merit Brief of Plaintiff-Appellees dated October 9, 2012 ("Plaintiffs' Brief")*, p. 13. Actual cash value is relevant only in the event of a "total loss" when the damage cannot be either repaired or replaced, which is never the case with windshields. *Defendant's Brief*, p. 8; *Plaintiffs' Brief*, p. 13. In order to ensure that actual cash value

never came into play, the trial judge had restricted the class definition to “Glass Only” claims. *Journal Entry dated September 29, 2010, p. 8*. State Farm was quite correct that its “obligation is either to *pay to repair* the damaged property or part or to *pay to replace* the property or part.” *Defendant’s Brief, pp. 8-9* (emphasis original). But the question remains as to whether the more advantageous option (“pay to replace”) was disclosed as required by Ohio Admin. Code 3901-1-54(E)(1) during the carefully orchestrated conversations.

Other concerns that had been identified by this Court can be rectified upon remand by further narrowing the class definition. For instance, material distinctions between the various versions of the insuring agreement that have existed since 1991 can be rendered moot by restricting the class period to those policies that are indistinguishable from that which had been in force when the Named Plaintiff’s claim arose. *Cullen, 2013-Ohio-4733, ¶38-40*.

The remainder of the opinion addresses the expert testimony Plaintiffs had furnished to establish that the glass patches were both imperfect and temporary. *Cullen, 2013-Ohio-4733, ¶42-48*. That evidence was not essential to the claims that had been raised, and was introduced solely to rebut State Farm’s theory that the repairs were indistinguishable from windshield replacements. Some of the discovery that had been produced before the appeal was commenced lent considerable support to Plaintiff’s position, such as the State Farm Participant Guide that warned that a repair “will never restore 100% of the optical clarity nor be truly invisible.” *Plaintiff Supp., 00071*. One of the independent reports that was divulged had been prepared by the National Glass Association and had identified test results indicating that repaired glass is “not as strong” as the original. *Bischoff Depo., pp. 96-106*. There is no telling whether State Farm remains in possession of even more warnings and advisories that undermine the

argument that there is no practical difference between a windshield repair and replacement.

The new preponderance of the evidence standard that has been established by this Court for class action rulings necessarily entails an assessment of credibility and a resolution of factual disputes. Such a comprehensive evaluation can be conducted only after the parties have been afforded a full and fair opportunity to conduct discovery upon the Civ. R. 23 requirements for certification. That point was never reached in the proceedings below as a result of the commencement of this interlocutory appeal. *Exhibit C. pp. 2-5.* The trial judge had yet to confirm that State Farm had finally responded in full to the interrogatories and document requests that were served on July 5, 2005 and June 4, 2007, and no follow-up discovery remains to be completed.

Given that the common pleas court is the most suitable forum for judging witness credibility and resolving factual discrepancies under a preponderance of the evidence standard, this Court should confirm in the mandate that, once discovery has been concluded, the appropriateness of class certification is to be reexamined in the context of the entire evidentiary record and consistent with the majority's legal analysis.

CONCLUSION

In order to avoid needless confusion and the potential for an unjust result, this Court should clarify in the mandate that will be issued in accordance with S. Ct. Prac. R. 18.04 that once discovery has been completed upon remand, the trial judge will possess the discretion to revisit the appropriateness of class certification under the new preponderance of the evidence standard that has been established by this Court.

Respectfully Submitted,



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Michael E. Cullen, et al.*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Motion** has been sent by e-mail on this 15th day of November, 2013 to:

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58601807

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

MICHAEL E. CULLEN
Plaintiff

STATE FARM MUTUAL AUTO. INS. CO.
Defendant

Case No: CV-05-555183

Judge: DAVID T MATIA

JOURNAL ENTRY

ATTORNEY CONFERENCE WAS HELD ON 5/12/09. ALL COUNSEL WERE PRESENT. DEFENDANT WAS ADVISED THAT IT HAD UNTIL 6/11/09 WITHIN WHICH TO FILE A MOTION TO RECUSE AS THE COURT RECEIVED AN INVITATION TO THE WEDDING OF RICHARD BASHEIN. DEFENDANT WAS GRANTED UNTIL 6/2/09 WITHIN WHICH TO FILE A RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS. PLAINTIFF WAS GRANTED UNTIL 5/26/09 WITHIN WHICH TO FILE A MOTION FOR PROTECTIVE ORDER REGARDING THE SUBJECT VEHICLE.

PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS, FILED 5/12/09, IS GRANTED IN PART AND DENIED IN PART. PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS IS GRANTED AS TO PLAINTIFF'S REQUEST TO BE REIMBURSED FOR FEES AND EXPENSES NECESSITATED BY THE DISCOVERY ABUSES DESCRIBED IN PLAINTIFF'S MOTION FOR SANCTIONS. PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS IS DENIED AS TO ALL OTHER SANCTIONS SOUGHT BY PLAINTIFF IN HIS MOTION FOR DISCOVERY SANCTIONS. PLAINTIFF IS ORDERED TO PROVIDE AN ITEMIZED LIST OF THE TIME AND COSTS INCURRED IN PREPARING HIS MOTION FOR DISCOVERY SANCTIONS AND THE COSTS AND TIME INCURRED IN RE-DEPOSING THE WITNESSES THAT HAVE ALREADY BEEN DEPOSED. THE COURT SHALL AWARD SPECIFIC FEES AT A LATER DATE. IF THE PARTIES DO NOT STIPULATE AS TO THE REASONABLENESS OF PLAINTIFF'S ATTORNEYS FEES AND EXPENSES ASSOCIATED WITH THE PREPARATION OF PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS AND THE RE-DEPOSITION OF WITNESSES, THE COURT SHALL DETERMINE THE REASONABLENESS OF SAID FEES AT THE TIME OF THE HEARING ON CLASS CERTIFICATION.

THE COURT NOTES THAT THIS CASE WAS FILED ON 2/18/05 AND IS BEYOND SUPREME COURT GUIDELINES. THIS CASE IS, BY FAR, THE OLDEST CASE ON THE COURT'S DOCKET. DEPOSITIONS REGARDING CLASS CERTIFICATION WERE TO HAVE BEEN COMPLETED BY 2/13/09. THE COURT FURTHER NOTES THAT PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY WERE PREVIOUSLY GRANTED ON 4/25/06 AND 4/25/08. RECENTLY, APPROXIMATELY 13,000 DISCOVERABLE DOCUMENTS WERE TURNED OVER TO PLAINTIFF AFTER THE DISCOVERY CUT-OFF. THE COURT FINDS THAT DEFENDANT WAS WITHOUT SUFFICIENT JUSTIFICATION FOR THIS IMPEDIMENT. IT IS APPARENT THAT THIS DISCOVERY INFRACTION SHALL DELAY THIS CASE EVEN FURTHER.

PLAINTIFF'S MOTION FOR EXTENSION OF TIME, FILED 6/9/09, IS GRANTED.

DEFENDANT'S MOTION TO COMPEL INSPECTION OF PLAINTIFF'S VEHICLE, FILED 5/26/09, IS GRANTED. PLAINTIFF SHALL MAKE THE SUBJECT VEHICLE AVAILABLE FOR INSPECTION WITHIN 60 DAYS OF THIS ORDER.

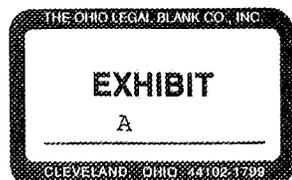
PLAINTIFF'S FIRST MOTION IN LIMINE: PROHIBITED EXPERT TESTIMONY, FILED 7/1/09, IS DENIED.

PLAINTIFF'S MOTION FOR LEAVE TO FILE A REPLY BRIEF, FILED 7/16/09, IS DENIED AS MOOT IN LIGHT OF THE COURT'S ABOVE RULING ON PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS, FILED 5/12/09.

DEFENDANT'S MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL

07/22/2009

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INSPECTION OF PLAINTIFF'S VEHICLE, FILED 7/13/09, IS DENIED AS MOOT IN LIGHT OF THE COURT'S ABOVE RULING ON DEFENDANT'S MOTION TO COMPEL, FILED 5/26/09.

THE CASE MANAGEMENT SCHEDULE IS ALTERED AS FOLLOWS:

FACT DISCOVERY REGARDING CLASS CERTIFICATION ISSUES SHALL BE COMPLETED BY 10/30/09. PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT (IF ANY) IS DUE 11/6/09. PLAINTIFF'S SUPPLEMENTAL MOTION/BRIEF REGARDING CLASS CERTIFICATION AND SUPPLEMENTAL EXPERT REPORTS ARE DUE 11/20/09. DISCOVERY OF PLAINTIFF'S SUPPLEMENTAL EXPERTS TO BE COMPLETED BY 12/11/09. DEFENDANT'S BRIEF IN OPPOSITION TO CLASS CERTIFICATION AND EXPERT REPORTS ARE DUE 1/9/10. DISCOVERY OF DEFENDANT'S EXPERT WITNESSES TO BE COMPLETED BY 1/29/10. PLAINTIFF'S REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION IS DUE 2/12/10.

HEARING ON CLASS CERTIFICATION SHALL BE HELD ON 3/3/10 AT 9:00 A.M. ALL PARTIES WITH AUTHORITY TO SETTLE MUST BE PRESENT IN PERSON. MOTIONS IN LIMINE, IF ANY, ARE TO BE FILED AT LEAST SEVEN DAYS PRIOR TO THE HEARING. (COPIES TO BE HAND-DELIVERED TO COURTROOM 17-D.) PARTIES TO EXCHANGE PROPOSED STIPULATIONS 14 DAYS PRIOR TO THE HEARING. COUNSEL ARE TO PROVIDE COPIES OF ALL EXHIBITS TO OPPOSING COUNSEL AND TO THE COURT. COUNSEL TO PROVIDE THE COURT WITH WITNESS LISTS ON MORNING OF THE HEARING.

HEARING SET FOR 03/03/2010 AT 09:00 AM.

Judge Signature

07/24/2009

07/22/2009

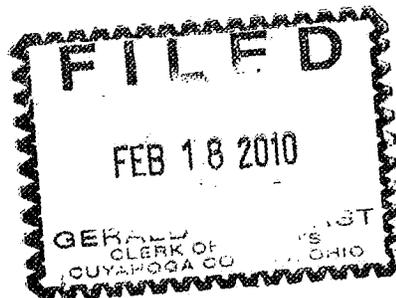
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

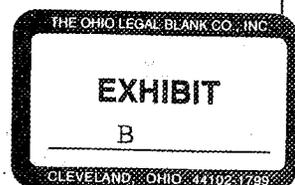
MICHAEL E. CULLEN, <i>et al.</i>)	CASE NO. 555183
)	
Plaintiff,)	JUDGE DAVID T. MATIA
)	
vs.)	<u>PLAINTIFFS' SECOND</u>
)	<u>MOTION FOR DISCOVERY</u>
STATE FARM MUTUAL)	<u>SANCTIONS</u>
AUTOMOBILE INSURANCE)	
COMPANY)	
)	
Defendants.)	

MOTION

Plaintiff, Michael E. Cullen, individually and on behalf of the class he seeks to represent, hereby requests additional discovery sanctions as permitted under this Court's inherent authority and Civ. R. 37. As will be developed in the attached Memorandum, Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), recently produced over 2,200 pages of highly probative records which had been requested over four years ago. As was undoubtedly envisioned, Plaintiff's ability to establish the merits of his claims and justify class certification has been impaired by the insurer's penchant for releasing relevant records only after depositions have been conducted and critical filings have been submitted. In order to redress the harm which has been inflicted and to deter further discovery abuses, additional sanctions are warranted at this time.



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MEMORANDUM

I. CASE HISTORY.

A. BACKGROUND OF THE CLASS ACTION PROCEEDING

Plaintiff is seeking in this litigation, on behalf of himself and thousands of other policyholders, to recover insurance benefits that should have been paid by Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), once a valid claim was made for cracked or chipped motor vehicle windshields. At least half a dozen senior State Farm managers have confirmed that the policyholders were entitled to receive payment for the cash value of a windshield replacement less the applicable deductible. This has been described as the "cash-out" option. Rather than tendering that sum, which would have ranged between \$300 and \$500 depending upon the make of the vehicle, State Farm only paid for the chips and cracks to be filled with a chemical compound at a cost of about \$30.

State Farm launched a national campaign which was designed to pressure the insureds into accepting the quick-fix windshield repairs. According to company statistics, a one percent increase in repairs resulted in a savings of \$5,000,000.00 which otherwise would have been paid to the claimants. In order to encourage acceptance of the glass patches, State Farm even waived the insureds' deductibles.

During carefully-scripted discussions with the customer service representatives (CSRs), none of the State Farm policyholders were advised of the cash-out option as required by Ohio Department of Insurance regulations. Nor were they warned of the studies and reports indicating that the glass patching process produced blemished and inferior windshields. Although extremely inexpensive, the chemical fillers were

incapable of returning the insureds' windshields to their true pre-accident condition as required by the standardized motor vehicle insurance policies.

In an effort to recover the "cash out" benefits which should have been disclosed and paid to the State Farm policyholders once their windshield damage claims had been approved, Plaintiff filed his Class Action Complaint on February 18, 2005. He maintained, on behalf of himself and all other similarly situated individuals, that State Farm had violated the terms of the applicable policies and engaged in deceptive practices by misleading him into accepting the cheap chemical filler repair without disclosing the cash-out option as required by Ohio regulations and the fiduciary responsibilities which are owed by insurers conducting business in this State. Separate claims were raised for Breach of Contract (Count I), Bad Faith/Breach of Fiduciary Duties (Count II), and Declaratory Relief (Count III). An Answer was submitted by the carrier on March 15, 2005, denying liability.

B. THE FIRST MOTION TO COMPEL

On July 5, 2005, Plaintiff submitted his First Set of Interrogatories and First Request for Production of Documents. Rudimentary information was sought with regard to State Farm's glass claims operations and practices during the relevant period. The insurer did not respond until September 23, 2005. *Exhibits B & C, appended hereto.* Virtually every request was met with a lengthy boilerplate objection, most of which complained that the inquiry was "overly broad and unduly burdensome." *Id.*

The few materials which were produced revealed that State Farm had adopted a comprehensive policy to persuade the insureds to agree to the quick-fix repairs, which were far cheaper for the insurer to provide than the cash-out payments for a

windshield replacement. Prefabricated “scripts” were provided to the CSRs to ensure that just the right words were used to lead the insured towards the right choice. No mention was ever made of the problems associated with “repairs” that had been well known to State Farm and its third-party administrator, Lynx Services, L.L.C. (hereinafter “LYNX”). The purported benefits of the glass patches were touted by the CSRs, who were urged in manuals to “**Sell! Sell! Sell!**” such repairs to State Farm insureds. The insurer’s established practice was to aggressively mislead the insureds into believing that payment for a chemical patch filler was not just the only option available under their policies, but would also full restore the windshield to its pre-accident condition as required by the policy.

It was also revealed during this initial round of discovery that State Farm had been in possession of research studies conducted well before the Named Plaintiff submitted his claim. This data had confirmed that the chemical patches were potentially unreliable and inadequate to fully restore damaged windshields. State Farm thus fully appreciated at the time the Named Plaintiff’s claim was processed that the vehicles were not actually being repaired as the policy required (*i.e.* returned to pre-loss condition). None of this information was shared, of course, with the insureds, who were being misled to believe that the glass fillers were a reliable and complete remedy.

Plaintiff’s counsel issued a lengthy correspondence to the insurer’s lawyers on December 30, 2005, attempting to amicably resolve this discovery dispute. *Exhibit D*. Once it became evident that judicial intervention would be necessary, Plaintiff’s counsel filed their first Motion to Compel Discovery and requested an extension of the

discovery deadline on March 1, 2006. A Brief in Opposition was submitted by State Farm vehemently arguing that absolutely nothing further was required to be disclosed. This Court disagreed and granted the Motion to Compel in an Entry dated April 26, 2006. *Exhibit E*.

C. THE SECOND MOTION TO COMPEL

Following substantial briefing, this Court denied State Farm's Motion for Summary Judgment in an Entry dated March 29, 2007. After a pre-trial was conducted with counsel, a further Order was issued on April 16, 2007, directing, in pertinent part, that:

*** FACT DISCOVERY AS TO CLASS CERTIFICATION
DEADLINE IS 7/13/07.

The potential validity of the Named Plaintiff's claim having been established, the parties proceeded with discovery upon both class certification and classwide liability.

Plaintiff served his Second Request for Production of Documents and Second Set of Interrogatories on June 4, 2007. When no responses had been received within the deadlines established by the Civil Rules, his counsel issued a letter on August 15, 2007 to defense counsel addressing the situation. *Exhibit F*. The answers were then dispatched on August 21, 2007, and were replete with objections. *Exhibits G & H*. Every one of the sixty-three separate document requests was met with at least one (but often many) objections, either directly or by reference. Of the forty interrogatories, only one was answered directly without at least some sort of objection being lodged.¹

¹ The only interrogatory that appears to have been answered without objection is the first one, in which Plaintiffs requested the identity of the individuals providing the information. *Exhibit G, pp. 2-3*. Arguably at least, this answer is still subject to the twelve "General Objections and Responses" that preference State Farm's Responses to

Even though the Class Action Complaint raised serious allegations of wrongdoing involving potentially tens of thousands of State Farm insureds across Ohio, all that the insurer was willing to produce was slightly over 1,800 pages of somewhat duplicative documents which easily fit into a standard 9.5" x 11" stationery box.

Attempting to convince the insurer to fulfill its discovery obligations, several letters were issued by Plaintiff's counsel in the following months. *Exhibits I, J, K & L*. In response, State Farm offered only vague promises that a determination would be made "whether supplementation" was "necessary or appropriate." For the most part, the carrier refused to withdraw the vast majority of the objections. As summarized in a correspondence dated November 5, 2007, the parties' attorneys met on October 31, 2007, to discuss the discovery dispute, but nothing was accomplished. *Exhibit K*.

Plaintiffs were thus forced to file their Second Motion to Compel Discovery on November 19, 2007. Their primary contention was that State Farm appeared to be withholding potentially relevant records on the basis of the seemingly endless series of objections which had been interposed.

A virulent Brief Opposing and Motion to Strike, Plaintiffs' Second Motion to Compel was dispatched on December 6, 2007. The insurer refused to withdraw a single objection or to produce any further materials. Instead, State Farm insisted that this Court had no authority to grant any relief because Plaintiff had supposedly failed to attempt to resolve the dispute in good-faith. *Id.*, pp. 1 & 17.

The remainder of the denunciation was devoted to lambasting Plaintiff for having the temerity to insinuate that there could possibly be anything left for State

(..continued)
Plaintiffs' Second Set of Interrogatories. *Id.*, pp. 1-2.

Farm to turn over. For example, this Court was assured that: "In response to that first set of discovery, defendant produced every document having anything to do with Plaintiff or his insurance claim." *Id.*, p. 6. Significantly for purposes of the instant Motion, State Farm declared that:

In responding to those requests that were actually new, and as was done earlier in responding to plaintiff's first round of discovery, defendant's counsel contacted all individuals and internal departments that might have responsive documents and instructed them to diligently search their electronic and paper files for responsive documents. Defendant also re-reviewed its earlier responses to ensure that all relevant responsive documents had been collected and produced. As a result of this search, defendant identified and produced more than 1860 additional responsive documents. Defendant also offered to produce tens of thousands of pages of "back-up" data for the statistical information provided in its interrogatory answers, but plaintiff never bothered to respond to that offer.

Id., p. 8 (emphasis added, footnote omitted). Plaintiffs' Reply in Support of Second Motion to Compel Discovery followed on January 9, 2008.

In a Journal Entry dated April 25, 2008, this Court granted the Second Motion to Compel in its entirety. *See Exhibit M.* Despite the prior promises that "every document having anything to do with Plaintiff or his insurance claim" had already been divulged, State Farm proceeded to produce thousands of pages of new records in the following weeks. By all outward appearances, the insurer's responses were then finally complete.

D. THE FIRST MOTION FOR SANCTIONS

Throughout the remainder of 2008, numerous depositions were conducted in Bloomington, Illinois (State Farm's corporate headquarters) and Virginia. Questioning

of these officials and managers revealed that a considerable number of documents which had previously been requested years earlier still had not been produced by State Farm. Defense counsel nevertheless insisted that this could not possibly be the case. During the videotaped deposition of David Williams alone, State Farm's attorney represented no less than four times that the insurer's responses were complete, and that nothing was being withheld. *Exhibit N, pp. 154-158.*

A letter was nevertheless sent to defense counsel on December 18, 2008, seeking the immediate production of a number of items referenced during depositions. *Exhibit O.* A response was issued the next day, which was largely dismissive of the concerns which had been raised. *Exhibit P.*

Out of the blue on January 29, 2009, State Farm's counsel sent a two-sentence cover letter announcing the release of an additional 1,316 pages of relevant and responsive documents. *Exhibit Q.* The materials were produced more than a year and a half after the second set of discovery requests were served and more than nine months after the granting of Plaintiff's Second Motion to Compel. All of the documents were responsive and non-privileged, including the following: Lynx scripting for Glass Central claims handling, PowerPoint slides regarding glass repair and glass claims processing, State Farm policyholder claims marketing materials, and even e-mails to and from management employees who had already been deposed (*e.g.*, David Williams and Robert Bischoff). Some of these documents were dated as far back as the year 2000. Curiously, the cover letter from defense counsel contained no explanation for why these highly probative materials had not been produced when originally requested and ordered by the Court. *Id.*

Plaintiff's counsel responded with a letter dated February 4, 2009, expressing his astonishment over the belated production of the discoverable records. *Exhibit R*.

He observed that:

Regardless of the circumstances, Defendant's failure to previously produce these relevant and responsive documents shows either a fundamental lack of good faith by your client in their document production or, at a minimum, a lack of due diligence and reasonable effort on their part. As a result, my office will likely incur numerous hours in attorneys fees and litigation expenses as a result of State Farm's failure to provide these documents in a timely manner.

Id., p. 2. State Farm's counsel responded on February 9, 2009, with a letter offering a series of nonsensical explanations for the belated production. *Exhibit S*. It was asserted *inter alia* that the records had recently been "located in Glass Claims Services department files." *Id.*, p. 1.

Defense counsel's letter also disclosed that a "significant" number of "additional potentially responsive documents" had been identified beyond the 1,316 pages which had just been released. *Exhibit S*, p. 1 (emphasis original). Between February 26, 2009, and March 20, 2009, approximately 11,802 new records were received by Plaintiffs' counsel. Some of these documents were created in 1996 and had been sitting in State Farm files for roughly thirteen years. They included e-mails of key managers within Glass Claim Central, spreadsheets bearing important Ohio glass repair numbers, and a recording involving William Hardt ("Hardt"), then Glass Central Claim Manager, in a 1997 video of a mock Glass Central windshield damage claim.

Since it was evident that nearly 14,000 documents and items had been concealed for years despite two Journal Entries overruling all objections and ordering

their production, Plaintiff filed his First Motion for Discovery Sanctions on May 12, 2009. The affidavit and evidentiary materials appended thereto confirmed that thousands of pages of highly relevant documents had been produced roughly four years after they were requested (Exhibits B & C), approximately eighteen months after this Court was advised that the insurer had “produced every document having anything to do with Plaintiff or his insurance claim” (*Defendant’s Brief Opposing, and Motion to Strike, Plaintiff’s Second Motion to Compel dated December 5, 2007, p. 6*), and over a year after the granting of the Second Motion to Compel (Exhibit M). Roughly a dozen depositions had been conducted in distant states without the benefit of these materials.

State Farm’s Memorandum in Opposition followed on June 2, 2009. As in the past, this Court was advised that:

To respond to the Second Requests, as it had done in responding to the First Requests, State Farm undertook a comprehensive search for responsive documents through the Litigation Support Unit of its corporate legal department. [emphasis added, citations omitted]

Id., p. 8. In an effort to establish that compliance with the two court orders was now complete, the insurer represented that:

All told, in working to comply with the Court’s Order granting the second motion to compel, State Farm produced roughly 56,000 additional pages of documents, which included all responsive documents that had been located. It did not conceal or hide any responsive documents, then or at any time.

Id., p. 13. Towards the conclusion of the seemingly endless 35 page discourse, this Court was assured that: “State Farm engaged in a good faith, non-negligent, and extensive efforts to comply with the Court’s order and has now fully complied.” *Id.*, p. 34 (emphasis added). The insurer continued to insist that “the fact is that plaintiff’s

counsel has been responsible for most of the delays." *Id.*, p. 3.

In a Journal Entry dated June 27, 2009, this Court granted the Motion for Discovery Sanctions in part and explained that:

THE COURT NOTES THAT THIS CASE WAS FILED ON 2/18/05 AND IS BEYOND SUPREME COURT GUIDELINES. THIS CASE IS, BY FAR, THE OLDEST CASE ON THE COURT'S DOCKET. DEPOSITIONS REGARDING GLASS CERTIFICATION WERE TO HAVE BEEN COMPLETED BY 2/13/09. THE COURT FURTHER NOTES THAT PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY WERE PREVIOUSLY GRANTED ON 4/25/06 AND 4/25/08. RECENTLY, APPROXIMATELY 13,000 DISCOVERABLE DOCUMENTS WERE TURNED OVER TO PLAINTIFF AFTER THE DISCOVERY CUT-OFF. THE COURT FINDS THAT DEFENDANT WAS WITHOUT SUFFICIENT JUSTIFICATION FOR THIS IMPEDIMENT. IT IS APPARENT THAT THIS DISCOVERY INFRACTION SHALL DELAY THIS CASE EVEN FURTHER. ***
[footnote omitted]

Exhibit T. While this Court declined to impose some of the more onerous sanctions which have been proposed by Plaintiff, State Farm was ordered to pay the expenses and attorney fees which had been generated by its abusive discovery tactics. *Id.* Plaintiff then proceeded to re-open discovery and re-depose witnesses based upon the newly-disclosed materials.

E. THE CONTINUED CONCEALMENT OF REQUESTED DISCOVERY

As set forth in the extended scheduling order (Exhibit T), discovery regarding class certification closed on October 30, 2009. Plaintiff's opportunity to amend their complaint expired on November 6, 2009.

Roughly a month later, Plaintiffs' counsel received a stack of documents in

excess of 700 pages on December 7 and 9, 2009. *See Exhibits U & W.*² Included with this belated submission were several CD's containing countless electronic files. *Id.* Sample pages revealed that State Farm had been keeping careful track in 2002 of "Repair Versus Replace" benefit payouts by agent. *Exhibit U, p. CULLENM00074813PROD.*³ The "POTENTIAL SAVINGS" had been computed to the dollar for each agent. *Id.* A "Glass Claims Services 2006 Audit Report Response" was also produced which warned that "Claim Processors did not have a license to adjust claims in states that require a license." *Exhibit W, p. CULLENM00074859PROD.* Plaintiff still proceeded to file his Supplement to Motion for Class Certification on December 22, 2009.

On December 21, 2009, which was one day before Plaintiff filed his Supplement, State Farm mailed 659 pages of previously undisclosed records to Plaintiff's counsel. *Exhibit X.* No suggestion was made in defense counsel's cover letter that the documents had been recently located or some justification existed for the four-year long delay in production. *Id.*

Many of these records were plainly relevant and would have prompted substantial questioning if they had been disclosed prior to the discovery depositions. For example, a section of one memorandum explained how State Farm representatives were to respond to "**Failed Repairs.**" *Exhibit U, p. CULLENM00075439PROD*

² In order to avoid overburdening the Clerk's office, Plaintiff has not attached all of the discovery materials with the cover letters submitted that have been marked as Exhibits U through AA. Only examples of those items which are especially relevant to the issues in dispute have been included.

³ The page numbers which begin with "CULLENM" that appear in the lower left hand corner of the exhibits were added to them by State Farm. Defense counsel's cover letters (Exhibits U through AA) indicate through these page numbers which documents

(emphasis original). This internal document confirmed that the insurer had fully appreciated that the quick-fix chemical patches were prone to failure.

Another memorandum titled "**99 Days for Shops to Invoice or Forfeit Payment**" addressed the Offer and Acceptance (O & A) program through which State Farm arranged vehicle repairs with approved auto body shops. *Exhibit X, p. CULLENM00075565PROD* (emphasis original). This report confirmed that the insureds were entitled under their policies to receive payment for the cost of repairs without actually having to have the work performed:

*** If the insured decides not to get the work completed, then the shop would not invoice but the loss exposure still exists and we would still owe the insured for the their [sic] loss. [emphasis added]

Id., pp. CULLENM00075565PROD- CULLENM00075566PROD. A form letter was also furnished which quoted the pertinent policy language and advised the policyholder that the direct payment was being issued. *Id., p. CULLENM00075428PROD.*

Had they been available, these materials could have been used to impeach and discredit the former Assistant Vice-President of Auto Claims, William Hardt, when he was deposed on October 23, 2009. He had suddenly denied that the cash-out option existed and claimed that the policyholders were entitled to no more than either a windshield repair or replacement to be arranged by the insurer. *Deposition of William Hardt taken October 23, 2009, pp. 54-56, pertinent portions as Exhibit BB.* At least six State Farm senior managers had previously observed that cash-out was indeed one of the benefits available under the standardized policies. The aforementioned documents confirmed that they were telling the truth, and Hardt had not.

(...continued)
were produced at which time.

Perhaps most significantly, the December 21, 2009, disclosures included the Lynx State Farm Insurance Business Rules dated May 1, 2006. *Exhibit X*, pp. *CULLENM00075822PROD - CULLENM00075838PROD*. The manual detailed how the glass-only claims were to be handled by the insurer and third party administrator, and it identified the responsibilities of each. Their respective roles in regard to the O & A program were also delineated. Timely disclosure of these Rules would have enabled Plaintiffs' counsel to question numerous State Farm and Lynx officials more comprehensively on key issues in dispute.

Exactly one week later on December 28, 2009, defense counsel produced 588 pages of additional materials. *Exhibit Y*. Once again, no attempt was made to suggest that the insurer's failure to disclose the records years earlier was somehow justified. *Id.*

Included within these materials was a copy of an e-mail message which had been issued by Wendy S. Rogers ("Rogers"), on October 19, 2005. *Exhibit Y*, p. *CULLENM00075950PROD*. The Director of Glass Claims Services had detailed the highlights of the "Auto Glass Replacement Safety Standards Conference" she had attended in Las Vegas. *Id.* She acknowledged that: "The issues of safety with replacement and repair are long overdue." *Id.* Plaintiff was successfully precluded from questioning her about these windshield safety issues during her deposition of December 11, 2009, which was just seventeen days before the suspiciously-timed disclosure of the October 2005 e-mail message. *Exhibit CC*.

At that same time, State Farm also produced a 43-page outline of the presentation which Manager of Glass Claims Services, Robert Bischoff ("Bischoff"),

had provided to the Auto Glass Replacement Safety Standards Conference in October 2005. *Exhibit Y, pp. CULLENM00075953PROD - CULLENM00075996PROD.* Bischoff had been deposed on July 14, 2006, and thus was never required to answer any questions about the representations and acknowledgements set forth in the outline. This was also true with regard to an e-mail message he had issued on November 17, 2004, in which he addressed the cost savings which would be realized by the insurer if the policy was changed to waive deductibles for windshield repairs. *Id., p. CULLENM00076042PROD.* The high-level manager also could not be asked about the e-mail message he had issued on November 30, 2004, which disclosed a number of figures that supported his belief that encouraging windshield repairs would furnish a substantial financial benefit to State Farm. *Id., p. CULLENM00076045PROD.*

The significance of the decision to waive deductibles was reflected in an e-mail message which Rogers dispatched to Bischoff on May 26, 2005. *Exhibit Y, p. CULLENM00076358PROD.* Not surprisingly, she designated the “**Importance**” of this communication as “High.” *Id.* (emphasis original). The ultimate expectation was that “about 33% of 1.4 [million] claims will disappear due to the repair cost being less than the deductible and the repair paid by the insured.” *Id., p. CULLENM00076359PROD.* The short-term nature of the glass patches was fully appreciated, as the e-mail acknowledged that: “About 18% of windshield repair claims eventually either become replacement claims at some future date, or there is a replacement claim at a later date.” *Id.*

Because it was not disclosed until December 28, 2009, Plaintiffs were never able to question Bischoff (even during his second court-ordered deposition) about a

puzzling e-mail he had issued on May 17, 2005. *Exhibit Y, pp. CULLENM00076362PROD.* The following quotes from a proposed article were attributed to him:

State Farm has already said that deductibles played a role in its decision to eliminate repair, though Bischoff insists the insurer still values the practice. While he admits the script that the LYNX customer service representatives give insureds will change, they will still the customer about repair [sic]. Now that consumers have accepted repair, Bischoff thinks they will choose it because a typical repair is less expensive than having to pay for a deductible.

“Repair could be less than the deductible,” Bischoff said. “The customer can pay the \$50 dollar down for the repair instead of their \$250 deductible.”

Id., pp. CULLENM000776362PROD - CULLENM00076363PROD. As written, the second sentence makes no sense and appears to have been doctored. The word “educate” may have been removed, as the phrase “they will still educate the customer about repair” would be grammatically correct. But Rogers had unequivocally testified seventeen days before the e-mail message was produced to Plaintiff’s counsel that an insurer should never attempt to sell anything to a policyholder in connection with a claim. *Deposition of Wendy Rogers taken December 11, 2009, pp. 81-87, pertinent portions appended hereto as Exhibit Y.* The final portion of the quote from Bischoff’s May 17, 2005, e-mail message confirms that State Farm appreciated that once the deductible was waived, the insureds would be far more likely to accept the windshield repairs rather than a full glass replacement. *Id., p. CULLENM00076363PROD.*

As if that were not enough, 256 pages of new materials were dispatched to Plaintiff’s counsel on January 11 and 12, 2010, once again without any suggestion that some valid reason existed for their delayed production. *Exhibits Z & AA.* As they had

in the past, State Farm represented merely that:

All responsive documents located by State Farm to date have now been produced. State Farm does not anticipate the production of any additional documents in response to Plaintiff's first or second request for production.

Exhibit AA. One of the pages consisted of a portion of the Lynx Participant Guide which had never been disclosed previously. *Id.*, p. CULLENM00076706PROD. The document furnished more details about the O & A program which would have prompted additional questioning during depositions. *Id.* Plaintiff was also supplied, for the first time, with (1) the Glass Central Management Questions and Answers Memorandum dated December 7, 2000 (*Exhibit Z*, pp. CULLENM00076470PROD- CULLENM00076482PROD), (2) the Glass Central Training Manual dated August 24, 2001 (*Id.*, CULLENM00076483PROD- CULLENM00076489PROD), and (3) the Questions and Answers State Farm Insurance Glass Central Program dated March 23, 2001 (*Id.*, pp. CULLENM00076549PROD- CULLENM00076556PROD). The latter document was particularly noteworthy in that the policyholder's rights to a "cash-out" payment was specifically acknowledged:

State Farm will remit to the policyholder an amount equal to the cost under the Offer and Acceptance Pricing. The insured will be responsible for any difference between the O & A price and the price actually charged for the job.

Id., p. CULLENM00076555PROD. Contrary to what Hardt had represented almost three month earlier during his deposition (*Exhibit BB*) and State Farm's counsel has been arguing in their briefing, the option thus was available for the insureds to collect the cash-out payment equal to the cost of the windshield replacement (as determined through the O & A program) and then pay for the repair or replacement on their own.

Id.

F. EXPERT ANALYSIS

Appended hereto as Exhibit EE is an affidavit from Donald Wochna, Esq., who has developed an expertise in electronic discovery. His impressive legal experience includes serving as a partner at Baker & Hostetler, which is currently representing State Farm in the instant proceedings. He has reviewed the most significant aspects of the discovery conducted to date in this action, including State Farm's responses and previous depositions. *Id.*, paragraph 7. With convincing detail, Wochna has identified numerous breaches of contemporary legal standards. *Id.*, paragraphs 8-12. Many of the violations have been found to be "willful," such as failing to search records which were known to exist in storage. *Id.*, paragraph 12a. Numerous other instances have been described as "grossly negligent." *Id.*, paragraph 12b.

Wochna was particularly critical of State Farm's failure to preserve the records and data maintained in the Glass Claims Services Department, which was responsible for nearly all of the operations under scrutiny in this litigation. He has determined that the insurer violated the discovery obligations which were owed by:

iv. Failing to properly identify sources of discoverable information, including the work computer of Wendy S. Rogers, Director of Glass Claims Services from March 2005 through 2007. Glass Claims Services is the department of State Farm directly involved with the claims, defenses, and subject matter of the Cullen complaint. Ms. Rogers' computer was not identified and searched until early 2008 even though the complaint was filed in 2005. (Rogers deposition page 17 and page 21. 113);

v. Failing to preserve and search key player computer for electronic data (Rogers deposition page 21);

vi. Failure to identify and intersect Wendy S. Rogers' normal business process ("working an email") that resulted in the deletion of data (Rogers deposition page 22) during time when Rogers knew [the] Cullen case was pending (Rogers deposition, page 22);

vii. Failing to alter Wendy S. Rogers' normal business practice of saving documents only if Rogers "felt there was a reason to save" documents, to a practice that required saving documents related to the claims, defenses, and subject matter of the Cullen action (Rogers deposition page 47);

viii. Failing to issue Glass Claims Services Department litigation hold for documents relevant to the Cullen case during [the] time Rogers was director (2005 through 2007) (Rogers deposition, page 26);

Exhibit EE, pp. 8-9.

II. STANDARDS.

Ohio courts enjoy inherent authority to do all things necessary to protect judicial integrity and process. *State ex rel. Pfeiffer v. Common Pleas Ct. of Lorain Cty.* (1968), 13 Ohio St.2d 133, 235 N.E.2d 232, 235; *State, ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, 423 N.E.2d 80, 83; 22 OHIO JURISPRUDENCE 3d (1980) 375, Courts & Judges, Section 247. "These inherent powers include the power to prevent abuse committed by counsel upon the court's processes." *Slabinski v. Servisteel Holding Co.* (9th Dist. 1986), 33 Ohio App.3d 345, 346, 515 N.E.2d 1021, 1023.

Additionally, sanctions can be imposed in response to discovery abuses pursuant to Civ.R. 37. *MaCarthy v. Dunfee* (9th Dist. 1984), 19 Ohio App.3d 68, 482 N.E.2d 1291. In *Hlavin v. W.E. Plechary Co.* (8th Dist. 1971), 28 Ohio App.2d 43, 274 N.E.2d 570, 572, the Cuyahoga County Court of Appeals declared:

Sanctions are a necessary element in the scheme for liberal

discovery. Obviously, if discovery could be blocked or resisted with impunity the benefits intended to be derived therefrom would be lost. The policy of permitting discovery requires that there be sanctions and that they be enforced.

The trial judge enjoys considerable discretion in selecting the appropriate sanction for a discovery rule violation. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St. 3d 254, 1996-Ohio 159, 662 N.E. 2d 1, syllabus; *State ex rel. Dunkin v. Village of Middlefield*, 120 Ohio St. 3d 313, 319, 2008-Ohio-6200, 898 N.E. 2d 952, 958; *Evans v. Smith* (1st Dist. 1991), 75 Ohio App.3d 160, 163, 598 N.E.2d 1287.

These sound principles are particularly applicable when a litigant has responded to discovery and the responses are later found to have been incomplete. In *Cincinnati Bd. of Educ. v. Armstrong World Indust., Inc.* (Oct. 28, 1992), 1st Dist. No. C-910803, 1992 W.L. 314206, the plaintiff sought certain documents written by or retained by any defendant. The defendant did not supplement its responses and failed to disclose a document that had apparently been produced in litigation elsewhere. Upon motion, the court ordered sanctions against the defendant for what it termed abusive discovery and misleading of the court and plaintiff. The appeals court rejected the defendant's argument that the court lacked inherent power to award sanctions. The panel reasoned that:

The inherent powers of a court include the means to protect its power and processes against abuse committed by counsel. . . . As appellants themselves contend, when a party or its counsel has acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons, a court may exercise its inherent powers to sanction. *Gahanna v. Eastgate Properties, Inc.* (1988), 36 Ohio St.3d 65, 66, 521 N.E.2d 814, 816, citing with approval *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 347 N.E.2d 181; *Sladoje v. Slettebak* (1988), 44 Ohio App.3d 206, 207, 542

N.E.2d 701, 703.

Bad faith is defined as “a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.” *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 187 N.E.2d 45, paragraph two of the syllabus. . . . It is clear, therefore, that sanctions based upon a court’s inherent power may be imposed against parties or their attorneys to prevent abuse of the judicial process, particularly when the sanctions are imposed to punish misrepresentation of well-known material facts.

Id. at pp. *4-5.

III. ANALYSIS.

A. OVERVIEW

The conclusion is inescapable that State Farm has concealed probative, and often highly relevant, records from Plaintiff which had been requested early in this protracted class action litigation. State Farm has violated the terms of not just one, but two, orders granting Motions to Compel. *Exhibits E & M*. Every single objection had been overruled and no conceivable excuse remained for withholding any records following the second entry of April 25, 2008. Yet even after sanctions were imposed on July 27, 2009 (Exhibit T), it took nearly half a year for 2204 pages and several CDs filled with files to be released (Exhibits U through AA). It was hardly a coincidence that depositions had been concluded, the class discovery deadline had expired, and Plaintiff had supplemented their Motion for Class Certification shortly before the last of these records were divulged. State Farm’s brazen defiance of this Court’s explicit directives should not be tolerated.

B. STATE FARM'S MISREPRESENTATIONS

1. Department Director Wendy Rogers

New, substantially harsher, sanctions beyond those which were imposed on July 27, 2009, are warranted by the recent discovery of blatant acts of deception. As previously observed, this Court had been assured over two years ago that when responses were being prepared to both rounds of written discovery requests “defendant’s counsel contacted all individuals and internal departments that might have responsive documents and instructed them to diligently search their electronic and paper files for responsive documents.” *Defendant’s Brief Opposing, and Motion to Strike, Plaintiff’s Second Motion to Compel dated December 6, 2007, p. 8.* The deposition of Wendy Rogers proved that this representation was untrue.

After the two Motions to Compel were granted and sanctions were imposed, Plaintiff was able to depose Rogers on December 11, 2009. *Exhibit CC.* She had been responsible for overseeing State Farm’s Glass Claim Services Department from approximately April 2005 through December 2007. *Id., p. 8.* She thus would have been in charge of the department at the focus of this lawsuit when the first round of discovery requests were issued on July 5, 2005, as well as the second round of June 4, 2007.

Despite the written representation which had been made to this Court, Rogers disclosed that she had not been asked by anyone to search for anything until 2008. *Exhibit CC, p. 17.* That would have been over two years after the service of the initial incomplete responses of September 23, 2005 (Exhibits B & C), and four months after the follow-up responses of August 21, 2007 (Exhibits G & H). Indeed, the First Motion

to Compel was granted twenty months before anyone bothered to approach the head of the Glass Claims Services Department about producing requested records. *Exhibit E*. The department head's testimony could not have been mistaken, as she confirmed, without equivocation that:

Q. *** [S]o you've done two searches in your career related to this case during your tenure at State Farm.

One was the early part of 2008 and one was the end of 2008; is that, is that accurate?

A. Yes. Both were in response to a request from counsel.

Q. Okay. Can we agree that prior to the beginning of 2008, you never conducted any document searches?

A. I may have done a document search for another case or for something else at State Farm.

Q. Okay. Let me restate it. Prior to 2008, you never did any document searches for Cullen case, correct?

A. That's correct.

Q. And you were head of this department for two-and-a-half years ending December of '07; is that accurate?

A. Yes. I actually went, returned to being a claim consultant the first week of December in 2007.

Exhibit CC, pp. 20-21. When afforded an opportunity to modify or recant her stunning revelations, Rogers refused to budge:

Q. And why didn't you ever conduct any document searches while you were in charge of claims, glass claims?

A. For what reason?

Q. You were never asked to?

A. As, as I said, I could have conducted a document

search for another case—

Q. Okay.

A. --or for another reason but --

Q. You weren't asked to in this case?

A. No. No.

Q. Is that accurate?

A. That's very accurate. I was asked twice. I produced information twice.

Id., pp. 21-22.

2. Team Manager Melissa Kern

State Farm's deliberately lackadaisical approach to responding to the discovery requests was further confirmed when Melissa Kern ("Kern"), was deposed on November 11, 2009. *Exhibit DD*. This questioning took place after the first round of sanctions had been imposed but before the latest flood of documents was released in December 2009. Kern had been the key witness in the insurer's opposition to the first request for sanctions and her affidavit had been attached as Exhibit A to the Appendix which was filed on June 2, 2009.

Kern had been the "Claim Team Manager in the Glass Claims Services Department" since June 2004. *Defendant's Appendix filed June 2, 2009, p. A-1*. In an effort to avoid the imposition of sanctions, she maintained in her sworn statement that some "boxes of older documents" had been moved when the Department transferred to a new location in October 2006. *Id.*, pp. A2-3 – A-3. She further testified that in January 2009 she "realized, for the first time, the documents in those boxes were potentially responsive to Plaintiff's Second Requests and had not previously been

provided to counsel.” *Id.*, p. A-4.

When she was deposed approximately five months later, Team Manager Kern was asked about her affidavit. *Exhibit DD*, p. 29. She then acknowledged that she had known that the newly discovered records had been in storage. *Id.*, p. 34. Defense counsel promptly asked Kern whether she needed a break and, to no one’s surprise, she quickly agreed. *Id.*, p. 34. Even though the questioning had been underway for just thirty-one minutes, the Team Manager was able to meet privately with her counsel during the abrupt recess.⁴

When Plaintiff’s counsel was allowed to resume his questioning, Team Manager Kern acknowledged that the boxes of “older files” which she had referenced in her affidavit had simply been moved to unused cubicles within their Department, which occupied a fairly small area. *Exhibit DD*, pp. 107-108. She then conceded that:

Q. And you’re saying those documents were there the entire time they’d been requested by plaintiffs?

A. It’s my understanding.

Q. And they were⁶ in what kind of boxes? Bankers boxes, the longer ones?

A. Bankers boxes and in empty file drawers.

Q. Okay. Are you telling me that no one opened the boxes or the empty file drawers before you did after the Court granted a motion to compel?

A. Correct. That’s my understanding.

Q. Even though they were sitting there the whole time.

A. (Nodding head).

⁴ According to the transcript, the questioning started at 9:22 a.m. and Kern took her first break at her attorney’s urging at 9:53 a.m. *Exhibit DD*, pp. 5 & 35.

Id., p. 108. Kern would “walk by the desk” where the documents were located. *Id.*, p. 109. The following exchange then took place:

Q. And you’re telling us that when the original document request was served you never opened those cabinets?

A. Correct.

Q. And you never opened the boxes that you saw in plain view.

A. Correct. They were in cubicles. They were not in plain view.

Q. Well, were they covered up with something or were they sitting on the cubicles?

A. They were sitting in the cubicle.

Q. So if you walked by the cubicle you could see the boxes.

A. Or walked into the cubicle.

Q. Okay. And you knew they were there, right? You said you saw them there.

A. I’m sure at some point I walked by and saw them there, yes.

Q. So when this request was served you never opened the cabinets, you never opened the boxes.

A. I did not.

Id., pp. 109-110.

Even though the Team Manager understood that she “had to exercise due diligence in locating documents[,]” she did not believe it was reasonable to look through the boxes within the cubicle. *Exhibit DD*, pp. 110-111. Despite the fact that she

had assured this Court in her sworn statement just a few months earlier that the Glass Claims Service Department had been diligently and thoroughly searched, she was no longer able to recall during her deposition precisely what had been done in responding to the four year old discovery request. *Id.*, pp. 118-124. The line of questioning concluded with the following telling acknowledgement:

Q. Do you believe that not opening file cabinets or opening boxes after being ordered to produce documents by the Court constituted your, quote, best efforts –

A. Yes.

Q. -- searching for the documents?

A. I do believe that.

Id., pp. 123-124.

The Team Manger's willful indifference to the directives of this Court could not be more evident. The notion that one can satisfy the obligation of "due diligence" while refusing to check a few boxes of documents which are sitting in a nearby cubicle is patently absurd. The affidavit which formed the centerpiece of State Farm's opposition to the initial Motion for Sanctions was thus nothing more than a contrived sham.

3. State Farm's Response

In response to the instant Motion, State Farm will undoubtedly devise some imaginative explanation for why there really is some kernel of truth – when viewed in a certain light and in just the right context – to the December 6, 2007 representation that when the September 2005 and August 2007 discovery responses were prepared, "defendant's counsel contacted all individuals and internal departments that might have responsive documents and instructed them to diligently search their electronic

and paper files for responsive documents.” *Defendant’s Brief Opposing, and Motion to Strike, Plaintiff’s Second Motion to Compel*, p. 8. Perhaps affidavits will be offered from Rogers and Kern in which they will attempt to convey that they had been badgered into furnishing erroneous testimony. Furthermore, the insurer has never been shy about recklessly blaming Plaintiff’s counsel for the discovery disputes and other delays which have dominated this litigation.

But pejorative rhetoric and implausible excuses will not change the fact that State Farm has been relentlessly and defiantly abusing the discovery process over the last four years. One dubious explanation after another has followed in a tireless effort to preclude Plaintiff from fully and completely investigating the claims which have been raised. There was never any truth to the December 6, 2007, representation that State Farm had “produced every document having anything to do with Plaintiff or his insurance claim[,]” as evidenced by the subsequent disclosure of over 15,000 pages of new materials over the course of the next two years.

C. THE PREJUDICIAL IMPACT

State Farm’s strategy is not difficult to discern. While withholding critical information from Plaintiff, the insurer was demanding an immediate exit from the lawsuit on the grounds that he supposedly could not demonstrate genuine issues of material fact upon his claims for relief. *See Defendant’s State Farm Mutual Automobile Insurance Company Motion for Summary Judgment dated September 20, 2006*. Despite the insurers’ refusal to produce thousands of pages of records, Plaintiff was still able to furnish sufficient evidence to justify the denial of the Rule 56 Motion. *See Journal Entry dated March 29, 2007*.

More significantly than that, purposely delaying the search for and release of requested materials enabled a countless number to be lost or destroyed. Rogers acknowledged, as but one example, that she had not been saving her e-mail messages in electronic form. *Exhibit CC, p. 19.* She claimed State Farm had “pretty limited storage capabilities on our computers ***.” *Id.* By 2008, which would have been when she was first asked to search for materials which had been requested over two years earlier in this case, she did not believe she “had any 2007 e-mail still on [her] computer.” *Id., p. 20.* These communications would have been either printed or deleted. *Id., p. 22.* The former head of the Glass Claim Service Department acknowledged that:

Q. *** And so throughout 2005 to 2007, you would have processed those e-mails in your normal fashion: if you thought it was something worth saving for a folder, you would have and if it was worked and completed, you would have deleted it; is that correct?

A. That’s correct.

Q. Did you know this lawsuit was pending during that entire period of time?

A. I did know that the Cullen case was pending, yes.

Id., p. 22.

Despite the pendency of the litigation affecting tens of thousands of Ohio policyholders, there is no convincing reason to believe that State Farm ever issued any “hold orders” or otherwise tried to protect the documents and electronic data which had been requested on July 5, 2005, and June 4, 2007. Ironically, the recent December 9, 2009 disclosures included a “Glass Central and Lynx Services Internal Audit Report” dated April 28, 2004 which had warned that:

A records retention schedule has not been communicated to LYNX Services. Failure to provide a schedule may result in unintended retention or destruction of State Farm information. *** [emphasis added]

Exhibit W, p. CULLENM00075189PROD.

Over the four-year period which followed the opening document requests, incalculable numbers of items were undoubtedly deleted or lost during the course of the insurance conglomerate's daily operations. There is now no telling how seriously State Farm has impaired the case which Plaintiff had been diligently developing. All it takes is for one highly damaging and dispositive document to be discarded, even innocently.

The consequences of State Farm's refusal to secure the Glass Claims Services Department's records and data when the April 2005 document request was first received will strike particularly hard upon the class certification dispute. Less than a month after the most recent disclosure of new documents, State Farm served its Memorandum in Opposition to Plaintiff's Motion for Class Certification on February 2, 2010. The operations of the Glass Claims Services Department were addressed at length in an effort to establish that there could not have possibly been anything amiss. *Id., pp. 15-18.*

Notably, Rogers' sworn statement was submitted as Exhibit 2 in the insurer's Appendix. Exhibit 1 was an affidavit from Bischoff, who was one of Rogers' subordinates. *Exhibit CC, p. 29.* State Farm's twenty page "Statement of Facts" was based almost entirely upon the largely unsubstantiated claims of these two managers. *Memorandum in Opposition to Motion for Class Certification, pp. 7-27.* Their highly suspect testimony was cited repeatedly in an effort to create the illusion that the claims

handling practices were so varied and evolving that a manageable class could never possibly be identified. *Id.* Because Rogers was not even asked to search the Glass Claims Services Departmental files for discoverable records and data for over two and half years following the initial round of formal discovery requests, Plaintiff's ability to refute theirs and others' questionable claims has been seriously compromised.

D. THE NEW SANCTIONS WARRANTED

Given the irreparable harm which has been wrought, nothing will be gained by ordering State Farm to again bear the costs of depositions which need to be re-taken and the additional discovery which needs to be conducted. While such sanctions would be alarming to most conscientious litigants, that is not the case with a determined insurer which measures its earnings and assets in the billions of dollars. As was recognized in the sanctions Order of June 27, 2009, "this case is, by far, the oldest case on the court's docket." *Exhibit T.* Forcing Plaintiff to proceed with even more discovery and impelling the re-deposition of a dozen witnesses will only create further delays.

At this point, a sufficiently forceful message can only be sent through an order which goes well beyond that which has been imposed thus far. Because State Farm's four-year delay in producing requested records and deliberate efforts to mislead the Court have undoubtedly had their intended impact upon Plaintiff's ability to establish the appropriateness of classwide relief, the insurer should be precluded from contesting those issues. Permitting a defense to continue upon the questions of class certification and liability would serve only to reward these disreputable tactics and encourage others to attempt similar misconduct.

It is safe to assume that if State Farm and its team of attorneys had felt even a modicum of confidence in their ability to successfully contest class certification and liability, the materials and data which Plaintiff had requested early in the litigation would have been furnished long ago. In addition, there would have been no need to mislead the Court about departments having been “diligently search[ed]” and Plaintiff having been provided with “every document having anything to do with [him] or his insurance claim.” *Defendant’s Brief Opposing, and Motion to Strike, Plaintiff’s Second Motion to Compel dated December 6, 2007*, pp. 6-8. Precluding a litigant who has willfully violated discovery rules from wasting time pursuing flawed defenses is hardly an excessive or inappropriate sanction. Once it becomes likely that probative evidence has been lost or destroyed, that is the only method for ensuring that the disobedient party does not profit from its undisputable wrongdoing.

E. CUYAHOGA COUNTY PRECEDENT

Barring a defendant from contesting liability and asserting affirmative defenses has previously been recognized by this Court as an appropriate sanction in extreme circumstances. In *Maurer v. DaimlerChrysler Corp.*, Cuyahoga C.P. Case No. 512979, an automobile manufacturer had failed to disclose the existence of certain aftermarket parts while responding to the plaintiff’s discovery requests in a product liability lawsuit. *Exhibit FF*, pp. 3-4. Fortunately for the plaintiffs, one of their experts happened upon the parts while browsing through a store. *Id.* Judge Peter Corrigan conducted a hearing on the matter, during which the manufacturer insisted that the plaintiffs’ discovery requests had not been sufficiently precise and any oversight was purely innocent. *Id.*, pp. 6-7.

Judge Corrigan nevertheless concluded that the manufacturer's conduct could not be condoned and the plaintiffs' case had suffered. *Exhibit FF, pp. 7-9*. The Court held that the manufacturer was "precluded from disclaiming liability or asserting its affirmative defense that it did not manufacture the aftermarket parts installed on [plaintiffs'] vehicle." *Id., p. 9*. Judge Corrigan offered the following in justifying his decision:

'What is truth?' is the core question posed by every lawsuit. *** Lawsuits are not activities to generate fees, games to be won, or theater to entertain. Lawsuits are searches for the truth of who did what and who is to be accountable for the consequences. Given the complexities of human affairs, the truth cannot always be found, but the fair search for it is why courts, lawyers and lawsuits exist. ***

When the truth is concealed or deliberately distorted, the reaction must be outrage. Anything less accepts dishonesty and by accepting it encourages it. That is why 'courts have never been inclined to condone or regard those who choose to perjure themselves. Nor should they, since the pernicious effects of perjury are evident to all. Upon disclosure, perjury should be condemned by the courts and the guilty party dealt with accordingly, ***. Unless the price for dishonesty is unbearable, the temptation to it 'would be not a little increased.' *** It tears at the very fabric of the legal system and at the objective of the rule of law, which is to keep peace in the community by fairly resolving the disputes endemic to communal life. Reverence for the truth is an essential component of fairness. If the public ever comes to believe that the courts do not abhor dishonesty, they will not accept the courts' decision as fair and will not be willing to submit their disputes to them. [citations omitted, emphasis added]

Id., p. 8, quoting Traxler v. Ford Motor Co. (1998), 227 Mich. App. 276, 576 N.W. 2d 398.

This compelling wisdom applies with equal force here. There is no meaningful distinction between a defendant who fails to produce key evidence and one that slowly

gathers and releases selected information while much is being lost and destroyed. Furthermore, the fact that State Farm falsely misrepresented that departmental searches had been "diligently" conducted when responses were furnished in 2005 and 2007 is an additional aggravating factor which had not been present in *Maurer. Defendant's Brief Opposing, and Motion to Strike, Plaintiff's Second Motion to Compel* dated December 6, 2007, p. 8. The logic of this Court's prior precedent should be followed.

CONCLUSION

For the foregoing reasons, this Court should issue an order imposing further sanctions against Defendant, State Farm Mutual Automobile Insurance Company, and directing that the insurer (1) is prohibited from contesting either class certification or liability upon the claims set forth in the Class Action Complaint, (2) is barred from pursuing any affirmative defenses, and (3) must reimburse Plaintiffs for the fees and expenses necessitated by the discovery abuses. A special spoliation instruction should also be furnished in the event that a jury trial becomes necessary upon any of the remaining issues.

Respectfully submitted,



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I hereby certify that a copy of the foregoing **Motion** was served via regular U.S.

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FILED
IN THE COURT OF COMMON PLEAS
2010 MAY 12 1 44 PM
CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN, <i>et al.</i>)	CASE NO. 555183
GERALD E. FUERST)	
Plaintiff, CLERK OF COURTS)	JUDGE DAVID T. MATIA
CUYAHOGA COUNTY)	
vs.)	<u>PLAINTIFF'S REPLY IN</u>
)	<u>SUPPORT OF SECOND</u>
STATE FARM MUTUAL)	<u>MOTION FOR DISCOVERY</u>
AUTOMOBILE INSURANCE)	<u>SANCTIONS</u>
COMPANY)	
Defendant.)	

REPLY

Plaintiff, Michael E. Cullen, individually and on behalf of the class he seeks to represent, hereby submits his Reply in support of the Second Motion for Discovery Sanctions dated February 18, 2010. No attempt will be made herein to rehash the positions which were previously developed in that Motion. This Reply will be limited instead to addressing new circumstances which have recently developed and offering a brief response to a few imaginative arguments which had not been anticipated.

I. THE "GOOD FAITH" PRODUCTION

Defendant, State Farm Mutual Automobile Insurance Company, has assured this Court that the 2,229 pages of Glass Claims Services reports, memoranda, e-mail messages, and other internal records which were furnished in December 2009 and January 2010 are only "arguably" relevant and were produced as soon as their "existence" was discovered. *Memorandum of State Farm Mutual Automobile Insurance Company in Opposition to Plaintiff's Second Motion for Sanctions filed April 30, 2010 ("Defendant's Memorandum")*, p. 1. The insurer has represented that: "Nothing is materially new in these documents." *Id.*, p. 2. This is, of course, pure

nonsense. Many of those materials had pertained directly to a number of important matters which were in dispute, particularly with regard to whether a class can be manageably maintained and appropriate relief calculated for each class member. Over and over, defense counsel insisted during the hearing on April 14, 2010 that Plaintiff lacked the proof necessary to fulfill the Rule 23 requirements. While Plaintiff strongly disagrees with those rhetorical assertions, no litigant should ever be allowed to profit from an "absence of proof" until its discovery obligations have been fulfilled.

There is no dispute that the release of the 2,229 pages of new materials still did not complete the insurer's responses to document requests which had been served in 2005 and 2007. At approximately 5:00 P.M. on Friday, April 9, 2010 State Farm delivered approximately 170 new e-mails with attachments to Plaintiff's counsel. *Appendix to Exhibits in Support of Memorandum in Opposition filed April 30, 2010 ("Defendant's Appendix") Tab 7.* The Second Motion for Discovery Sanctions had been filed approximately two months earlier and the class certification hearing was just a few days away.

Included therewith was a "GCS Project Team – Monthly Status Meeting" report which reflected that certain State Farm representatives would be "making a visit with LYNX Services in Ft. Myers on Nov. 13-15 to attend and observe the LYNX CSR training class." *Exhibit A, p. CULLENM00076976PROD.* "They will also be sitting with LYNX CSR's to observe phone calls and have solicited the group for other items to review." *Id.* These disclosures significantly undermined State Farm's attempts during the class certification proceedings to portray LYNX as merely an "independent third party administrator" which was solely responsible for its own misrepresentations to policyholders. See *Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification dated February 2, 2010, pp. 12-13.*

State Farm had also made it a point to advise this Court while opposing class certification that the “training materials were created by LYNX.” *Id.*, p. 15, *fn. 11*. The April 9, 2010 disclosures included an e-mail message from Robert Bischoff (“Bischoff”) to Wendy Rogers (“Rogers”) with a copy to Melissa Kern (“Kern”) dated July 24, 2006 which revealed that: “We will be receiving details from LYNX on changes to their training.” *Exhibit B*, p. *CULLENM00077499PROD*. A “confidential” check-list which was also produced appears to confirm that Kern was 100% finished with the tasks of securing “all LYNX word tracks[,]” “all LYNX business rules[,]” and “LYNX training methods[,]” *Exhibit C*, p. *CULLENM00076955PROD*. Team Manager Kern had previously testified during her deposition, while Plaintiff’s counsel was unaware of these records, that State Farm had never required LYNX to change its training material. *Deposition of Melissa Kern taken November 11, 2009, pp. 19-21, copy appended hereto as Exhibit H*.

The availability of the “cash out” benefit was also a major point of contention during the class action proceedings, as State Farm had argued that:

Plaintiff’s contention that policyholders were entitled to payment for replacement of their damaged windshields, even if they agreed to a repair and even if they had no intention of actually replacing the windshield, finds no support anywhere in this language or elsewhere in the policy.

Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Class Certification dated February 2, 2010, p. 33. But the April 9, 2010 disclosures included a memorandum dated January 20, 2006 which mentions scripting changes to address the situation when the “[p]olicyholder wants cash-out[.]” *Exhibit D*, p. *CULLENM00076962PROD*. An exchange of e-mails which had been sent to Rogers also revealed a substantial discussion in March 2008 with regard to “cash

settlements[.]” *Exhibit E, p. CULLENM00077392PROD*. Before these materials were disclosed, the department head had denied during her deposition that she had been aware of any cash-out procedures. *Deposition of Wendy S. Rogers taken December 11, 2009, pp. 154-155, pertinent portions appended hereto as Exhibit G*. The following exchanged had taken place:

Q. *** Are you aware of procedures in writing at State Farm that provide for payment directly to the insured and it's called cash-out?

A. No.

Id., p. 155.

It is now evident that highly relevant records likely still exist which have yet to be divulged. After the class certification hearing was concluded, defense counsel issued a letter on April 26, 2010 disclosing that the insurer had yet to search the e-mail messages sent and received by “46 individuals who were or are assigned to the Glass Claims Services unit between November 15, 2005 and May 1, 2008, or who worked with Glass Claims Services in connection with glass-only Ohio claims during that time period ***.” *Defendant’s Appendix, Tab 8, p. 2*. With a ruling upon class certification expected at any moment, State Farm had apparently decided that the time was right to proceed with the eventual disclosure of this potentially relevant information. Rather than produce the e-mails immediately in a digital form which Plaintiff could search, State Farm proposed that the parties discuss “Boolean word” terms. *Id., pp. 2-3*. This tactic ensures that nothing will have to be disclosed any time soon, as negotiations over the search terms would take weeks to complete and the court’s involvement would undoubtedly be required to resolve the objections which are sure to arise.

Since Plaintiff has not served any new discovery requests since June 4, 2007, it is evident that these latest efforts are way, way overdue. Undoubtedly, State Farm’s

hope is that class certification will be denied, and the trial court proceedings effectively concluded, before any new, potentially damaging, evidence has to be produced.

State Farm's timing is hardly coincidental. Since the class certification briefing is now closed and the hearing was concluded several weeks ago, no meaningful opportunity will exist for Plaintiff to introduce any new evidence to the Court. And since the discovery deadline lapsed long ago, Plaintiff will be precluded from conducting any further inquiries or deposing any witnesses in response to the new information that is revealed. State Farm's astonishing refusal to fully and promptly comply with the discovery obligations which have been owed thus seriously threatens to impair Plaintiff's ability to establish both the appropriateness of class certification and the merits of the claims for relief.

II. THE PURPORTED HOLD ORDER

Much ado has been made over the "litigation hold order" which was supposedly in place even before the instant lawsuit was filed in February 2005. *Defendant's Memorandum, p. 5*. This Court has been assured that once this litigation was commenced "that hold order was expanded to encompass all identifiable records from 1990 to the present for the State of Ohio." *Id., p. 5*. (citation omitted). Accordingly, all parties can rest assured that "any e-mails that Wendy Rogers deleted from her personal computer that were sent or received by her after November 15, 2006, were **not** deleted from the servers on which e-mails have been archived, and are preserved." *Id., p. 10* (emphasis original). Presumably, State Farm has thus been "holding" the potentially relevant records and data for the last five years but releasing the evidence only gradually and after important depositions have been completed and court filings have been submitted.

The February 2005 “hold” order had been touted while State Farm was opposing Plaintiff’s first request for sanctions last year. *Memorandum of State Farm Mutual Automobile Insurance Company in Opposition to Plaintiff’s Motion for Sanctions dated June 2, 2009, p. 18*. At that time, the insurer vowed that “extensive and thorough” searches had been conducted by the Litigation Support Unit of the corporate legal department to identify all requested items. *Id., pp. 2, 8-9, 11-13*. State Farm had no choice but to acknowledge, however, that these supposedly exhaustive efforts had “missed” roughly 13,000 pages of materials, which were produced after the second motion to compel was granted. *Id., pp. 23 & 25*. State Farm nevertheless confidentially pledged nearly a year ago that:

Contrary to plaintiff’s contentions, it is plain that the circumstances surrounding State Farm’s recent supplemental production of documents and its production of documents last summer do not evince indifference on the part of State Farm to its discovery obligations or other fault. State Farm engaged in good faith, non-negligent, and extensive efforts to comply with the Court’s order and has now fully complied. [emphasis added, citations omitted]

Id., p. 34.

There was, of course, no truth to the “now fully complied” representation of June 2, 2009. Had this Court taken State Farm at its word and denied the First Motion for Sanctions, Plaintiff undoubtedly never would have received the thousands of pages of additional materials which started trickling out in late 2009. There is thus absolutely no reason to believe that the Litigation Support Unit has “now fully complied” with the discovery requests which were served in 2005 and 2007 despite the existence of the supposed “hold order.”

The 2005 “hold order” presumably was a surprise to Rogers, who was charged with overseeing the Glass Claims Services Department at the time. She had testified

during her deposition of December 11, 2009, that she had been deleting e-mails that she thought were unimportant. *Exhibit G, p. 22*. She fully understood that this class action lawsuit was underway. *Id.* Even though the “expanded” hold order had purportedly been in place, she had never been asked to look for any records or advised of any document retention policies. *Id., pp. 17-18, 21-22 & 26*.

State Farm’s promises that all of the e-mails “that were sent or received by [Rogers] after November 15, 2006” are still available somewhere is practically meaningless. *Defendants’ Motion, p. 10*. As the insurer is well aware, Rogers was responsible for the Glass Claims Services Department from March/April 2005 through December 2007. *Exhibit G, p. 8 & 11*. Nearly twenty months of e-mails may well be gone for good, notwithstanding the “expanded” hold order which apparently had never been disclosed to the department director.

Rogers’ importance to the class certification proceedings cannot be doubted. Her carefully worded affidavit was included with, and repeatedly cited in, the Memorandum in Opposition to Class Certification of February 2, 2010. The only witness who appears to have been referenced more often is Bischoff, and he was her subordinate. *Exhibit G, p. 29*. Had State Farm believed that certification could be legitimately defeated, there would have been no need to effectively preclude Plaintiffs from fully exploring all of the e-mail messages and other communications which purportedly have been on “hold” since February 2005.

III. COMPLIANCE WITH ACCEPTED DISCOVERY STANDARDS

Appended hereto as Exhibit F is a copy of the Supplemental Affidavit of Electronic Discovery Expert Donald Wochna, Esq. He has thoroughly reviewed the materials which were submitted with the Memorandum in Opposition and has concluded, as he did previously, that the insurer has been proceeding in extreme bad

faith. The implausible excuses which have been offered by State Farm do not change the fact that contemporary discovery standards have been violated in a manner that will preclude Plaintiffs from thoroughly investigating the issues pertaining to both the appropriateness of class certification and the merits of their claims for relief.

Plaintiff's discovery expert has also reviewed the 65 paragraph affidavit of Timothy M. Opsitnick, Esq. which has been offered in State Farm's defense. Wochna has thoroughly debunked the nonsensical and unfounded assertions which have been devised by the former Jones Day lawyer. Wochna's supplemental affidavit is thus deserving of careful consideration. In the end, there is not a kernel of truth to the tired promises that the insurer has substantially complied with the duties of disclosure which have been owed throughout this protracted litigation.

IV. VALIDITY OF PRIOR DISCOVERY ORDERS

State Farm still appears to be under the impression that there was no need to comply with this Court's discovery orders because they were simply too vague and imprecise. *Defendant's Memorandum, pp. 45-46*. In a passage which has been copied from the insurer's prior Memorandum in Opposition to the First Motion for Sanctions (p. 10), State Farm has complained that:

Plaintiff's motion to compel did not describe specific categories or subject matter topics of discovery sought via his motion, nor did the entry granting that motion. The Court granted plaintiff's motion on April 24, 2008 without opinion, in an entry stating that 'Plaintiff's motion to compel discovery filed 11/19/2007 is granted.' ***

Defendant's Memorandum, p. 45. State Farm has warned that: "Ohio courts routinely refuse to sanction noncompliance with a court order that is vague and ambiguous." *Id.* Only one relatively obscure decision from the Seventh District has been cited as an example of this so-called "routine" practice. *Id.*

Despite its brevity, the order of April 24, 2008 could not have been more clear. State Farm had failed to substantiate any of the numerous objections which had been lodged in response to the straightforward discovery requests, and none had been found to possess merit. The insurer had refused to answer a single inquiry directly without lodging some sort of protest or reservation. The interminable objections were all overruled and responses were expected to Plaintiff's discovery requests, all of which were indeed sufficiently "categorized."

State Farm has further represented that: "At a May 1, 2008 status conference, the Court was clear that it had not intended to order production of everything covered by plaintiff's class discovery requests, and had directed the parties to narrow the scope of what plaintiff was seeking." *Defendant's Memorandum, p. 45*. Plaintiffs' counsel have no recollection of this Court ever retreating from the unequivocal order of April 24, 2008. There were no journal entries issued to such effect. And the parties certainly never did reach any agreements to "narrow" the scope of that which was being sought. The requests which were served in 2005 and 2007 remained unchanged yet now, nearly three years later, State Farm still has not fully complied by its own acknowledgment. *Defendant's Memorandum, pp. 12-13*. Tendering full and complete responses should have been relatively simple if it is indeed true that "State Farm issued a litigation hold order in February 2005, preserving all relevant documents and data." *Id., p. 6*.

Any doubts which may have conceivably existed following the May 1, 2008 status conference should have been eliminated when the second order compelling discovery was issued on July 27, 2009. That ruling explained, in detail, precisely what was expected and admonished State Farm that:

*** The court further notes that plaintiff's motions to compel discovery were previously granted on 4/25/06 and 4/25/08. Recently, approximately 13,000 discoverable documents were turned over to plaintiff after the discovery-off. The court finds that defendant was without sufficient justification for this impediment. It is apparent that this discovery infraction shall further delay this case. ***

The supposed "ambiguity" of the April 24, 2008 ruling hardly excuses the long overdue production of even more highly-relevant materials which began late in 2009 and does not appear to be abating.

V. THE TELXON SANCTIONS ORDER

The instant action is remarkably similar to that which arose in another class action lawsuit, *In re Telxon Corp. Sec. Lit.* (July 16, 2004) U.S. Dist. Ct. N.D., Ohio, Case No. 1:01CV1078, 2004 W.L 3192729, copy appended hereto as Exhibit I. Following several years of discovery efforts, a third-party defendant, PricewaterhouseCopper, L.L.P ("PwC"), had provided repeated assurances that all requested documents located in its various databases had been produced. *Id.*, *6. When the plaintiffs and third-party plaintiff, Telxon Corporation ("Telxon"), discovered sections missing from exhibits, PwC claimed that a "printing error" was to blame. *Id.*, *7. After producing more documents which had previously been requested, PwC again promised that its disclosures were complete. *Id.*, *9. Still more materials followed but the third-party defendant "assured the court that the parties had not been prejudiced by any errors in the production of PwC's documents." *Id.*, *9. PwC continued to produce requested records and data only after Telxon was able to determine that they were missing. *Id.*, *11-14. Once the electronic database was furnished and reviewed, Telxon claimed that numerous documents and items had been modified or lost over the years while the lawsuit had been pending. *Id.*, *16-19.

The District Court was unimpressed with PwC's protests that its discovery had been conducted in "good faith" even if absolute perfection had not been achieved. The Magistrate Judge reasoned that:

Once again, PwC would have the court set an abysmally low standard for "good faith". PwC assured plaintiffs, Telxon, and this court again and again that it had produced all relevant documents, and again and again that assurance proved worthless. ***

Id., *24. Yet the Court was able to identify numerous instances in which PwC, by its own admission, had failed to undertake any inquiry at all for documents and data which had been sought. *Id.*, at * 24-25. In response to the suggestion that a court order requiring disclosures had been ambiguous, the opinion continued:

If PwC had been uncertain as to what the court was requiring it to produce, it had only to ask for clarification to resolve the problem. Instead, PwC argued interminably regarding the meaning of the court's order, dribbled relevant documents out in productions scattered over months, delayed its responses, and had still failed to comply with any reasonable interpretation of the court's order nearly a year later. *** [footnotes omitted]

Id., *32. The Court was equally unimpressed with PwC's observations that the requested materials were eventually produced "voluntarily," since the disclosures were furnished only once the third-party defendant was "[f]aced with the reality of reckless bad faith behavior on its part[.]" *Id.*, *33.

In considering the appropriate sanction to be imposed, the Court explained that:

Finally, the magistrate judge has considered, but cannot recommend, any lesser sanction than the entry of default judgment against PwC. Lesser sanctions would result in "unwinding" over three years of litigation. This would require the re-taking of many depositions and the taking of new depositions, the conduct of additional expert analyses and the production of new reports, and the propounding of new interrogatories. ***

Telxon, 2004 W.L 3192729 * 35. The Court concluded that:

Because PwC's conduct has made it impossible to try this case with any confidence in the justice of the outcome, PwC should bear the burden created by its conduct. For this reason the magistrate judge recommends that the court grant Telxon's and plaintiffs' motions and enter default judgment against PwC and in favor of Telxon and plaintiffs.

Id., *35. Not long thereafter, the class action lawsuit was settled by agreement of the parties.

The parallels between the instant action and the *Telxon* proceedings are unmistakable. In both instances, a litigant stubbornly refused to cooperate with the opponent's discovery efforts and produced the requested materials and information slowly over time and only when absolutely necessary. In the meantime, an immediate termination of the proceedings was demanded through Rule 56. Unless such disreputable practices are to become the norm, a forceful and unequivocal message must be sent that the Civil Rules must be respected and noncompliance will not be rewarded.

CONCLUSION

For the foregoing reasons, this Court should issue an order imposing further sanctions against Defendant, State Farm Mutual Automobile Insurance Company, and directing that the insurer (1) is prohibited from contesting either class certification or liability upon the claims set forth in the Class Action Complaint, (2) is barred from pursuing any affirmative defenses, and (3) must reimburse Plaintiffs for the fees and expenses necessitated by the discovery abuses. A special spoliation instruction should also be furnished in the event that a jury trial becomes necessary upon any of the remaining issues.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion** was served via e-mail
(without exhibits) and regular U.S. Mail on this 12th day of May, 2010 upon:

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