RECORD NO. 16-1172

CB/KB

In The

United States Court of Appeals

For The Fourth Circuit

THEODORE G. HARTSOCK, JR., as Personal Representative of the Estate of Sarah Mills Hartsock (Estate of Sarah Mills Hartsock),

Plaintiff – Appellee,

v.

GOODYEAR DUNLOP TIRES NORTH AMERICA LTD, a foreign corporation; GOODYEAR TIRE & RUBBER COMPANY, a foreign corporation,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

REDACTED BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-1172 Caption: Theodore G. Hartsock, Jr. v. Goodyear Dunlop Tires North America et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Theodore G. Hartsock, Jr.
(name of party/amicus)

who is Respondent, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Mia Lauren Maness Date: 03/01/16

Counsel for: Respondent

CERTIFICATE OF SERVICE

****

I certify that on March 1, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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March 1, 2016
(date)

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Jurisdictional Statement

This is a products liability survival and wrongful death action arising from a fatal crash on Interstate 26 in Calhoun County, South Carolina caused by the tread and belt separation and blowout of a defective tire designed, manufactured, and marketed by Appellants. The District Court of South Carolina possesses subject matter jurisdiction pursuant to 28 U.S.C. § 1332, based upon the complete diversity of parties and damages alleged to be greater than $75,000. JA 24 – 25, ¶¶ 2 – 5; JA 33 – 34, ¶¶ 2 – 5; JA 45 – 46, ¶¶ 2 – 5.

During the discovery phase of the litigation, the parties filed various motions regarding the production of certain trade secrets relevant to Appellee's theory of the case. Following extensive briefings and arguments, the District Court ordered Appellants to produce some of the requested information, specifically the butyl content of the subject tire's inner liner and the portion of Global Design Manual ("GDM") applicable to the inner liner design specifications. JA 586 – 87. Production of both is subject to the restrictions of the existing strict confidentiality order. JA 57 - 68.

Appellants sought reconsideration of the District Court's Order. Although the District Court declined reconsideration, it granted Appellants' request for certification of the Order for discretionary interlocutory review by this Court. JA

634 – 635. Following Appellants' petition for discretionary review, this Court accepted appellate jurisdiction. 28 U.S.C. §§ 1292(b) & 1294(1).

Statement of Issues on Appeal

The single issue before the Court in this interlocutory appeal is the legal standard to be applied in determining when and under what conditions it will order trade secrets disclosed in products liability litigation based on diversity jurisdiction. Specifically, this Court must determine whether the District Court in this case properly applied the established body of case law within the Fourth Circuit construing Rule 26, FRCP.

Statement of Case

Appellee, Theodore G. Hartsock, Jr., as Personal Representative of the Estate of Sarah Mills Hartsock, filed this survival and wrongful death action against Appellants Goodyear Dunlop Tires North America LTD ("Dunlop") and Goodyear Tire & Rubber Company ("Goodyear") (collectively "Appellants" or "Goodyear") alleging manufacturing, warning, and design defects under causes of action for negligence, strict liability, and breach of express and implied warranties for the death of his wife in a July 6, 2010 crash on Interstate 26 in Calhoun County, South Carolina. JA 24 – 32, ¶¶ 1, 25-40. The Amended Complaint alleges that Appellants designed, manufactured and marketed a defective tire identified as a Goodyear G670RV 295/80R22.5, load range H, manufactured in Buffalo, New

York ("the subject tire"). The subject tire was mounted in the left front steer position of a recreational vehicle ("RV") when it experienced a tread and belt separation and blowout, causing the RV driver to lose control of the vehicle. The RV was traveling east bound, but crossed through the median, crashed through the cable barrier, and struck Mrs. Hartsock's westbound vehicle head-on. *Id.* at ¶ 16. Mrs. Hartsock died at the scene.

Appellee's design and manufacturing defect claims focus on intracarcass pressurization and the effect this had on the integrity and failure of the subject tire:

> Plaintiff's main defect theories are that the design of the G670RV 295/80R22.5 tire, as well as its manufactured condition, allowed inflation pressurized air to migrate from the air chamber into the structure of the tire. The pressurized air in the tire structure and belts caused separations within the tire; interaction of the air with the compounds inside the tire caused those compounds to degrade, leading to separation of the tire plies and blowout. Two factors influence the ability of the air to migrate from the air chamber into the body of the tire; 1) the amount of butyl rubber in the compound of the inner liner, and 2) the thickness of the inner liner. Testimony of Defendants' employees, coupled with Goodyear documents, has established that an inner liner gauge thinner than specified by the governing design specification required a tire to be scrapped ....
>
> Of equal importance to Plaintiff's defect theory is the rubber compound from which the inner liner was manufactured. Seiler testified that the inner liner is the only component of the tire that contains butyl. She also testified, as did Terrance Parsons, that the butyl compounds are resistant to air permeation into the structure of the tire. Whether the butyl content of this inner liner was 100 percent or 10 percent is relevant to the performance of the inner liner and additional design defects in the G670RV295/80R22.5. Insufficient

> butyl content will contribute to intracarcass pressurization and the failure mode of the subject tire.

JA 370-371.

The butyl content of the subject tire's inner liner "is relevant to the proof of his case--it explains in whole or in part the reasons for the tire's failure and the manner in which the subject tire failed." JA 372-373. However, when Appellee attempted to elicit testimony from Appellants' employee witnesses, Denise Seiler and Terrance Parsons, concerning the butyl content of the subject tire's inner liner, JA 229 & 340, Appellants' counsel instructed the witnesses not to answer and moved for protective orders to prevent Appellee from obtaining the information.[1] JA 226-237 & 338-348.

One of Appellee's theories in this case is that the inner liner of the tire was too thin, from both a design and manufacturing perspective, allowing highly pressurized inflation air to pass from the air chamber of the tire into the structure and steel belt package, forcing the layers apart and causing separations. JA 80 – 82. Koerner, a current Goodyear employee and designer of the subject tire, JA 159 –

[1] Appellants (Appeal 16:1172, Dkt 17 at pg. 8) falsely claim that "numerous previously deposed witnesses had similarly refused on this basis, without challenge from Plaintiff's counsel." In fact, none of the prior witnesses who had been instructed by Appellants' counsel not answer a question had been asked about the butyl content for the subject tire's inner liner; the basis for instructing those witnesses not to answer was unrelated to the trade secrets at issue in this Appeal.

160, acknowledged this form of tire failure, called intracarcass pressurization, is a known problem. JA 1000 – 1002.

The GDM contains reference standards used to design tires, including the subject tire. JA 988 – 991 & 1006 – 1007. Koerner confirmed that Goodyear's GDM contains an entire section regarding the appropriate dimensions and materials for tire inner liners. JA 988 – 989. [redacted] JA 992 & 1003 – 1005. Instead, for the subject tire's inner liner thickness he adopted the historic standard used at the Dunlop plant in Buffalo, New York, the source of which is unknown and even though this plant had never before manufactured this size or type of tire.[2] JA 985 – 987 & 1003 – 1005. One of Appellee's experts, Richard McSwain, PhD, P.E., has determined that the inner liner gauge of the subject tire is thinner than that permitted by the design specifications actually used at the Buffalo plant. JA 200, 1030 - 1032 & 1048 – 1079. However, the inner liner design specifications at the Buffalo plant likely do not comply with the potentially more stringent specifications set forth in

[2] Nine of the ten tires in the G670 line were manufactured in Goodyear plants. Only the subject tire was manufactured in a Dunlop plant in Buffalo, NY. Koerner, a career Goodyear employee, confirmed that the Buffalo plant was acquired by Goodyear when it purchased Dunlop in late 1999, and his knowledge of that plant is restricted to the period since the 1999 acquisition. JA 986 – 987.

Goodyear's Global Design Manual ("GDM"), which Koerner [redacted] JA 1005. Appellee expects that the GDM specifies a thicker inner liner for the subject tire than the one actually used, because other tires in the G670 line have thicker inner liners although they are designed to carry lesser loads.

Whether the GDM specifications were met cannot be determined absent production of the relevant sections from the manual. The design specifications used for the subject tire inner liner likely do not comply with the requirements of the GDM, and the GDM specifications will provide a feasible alternative design if the inner liner gauge specification used in the manufacture of the G670RV 295/80R22.5 is less than called for by the GDM. It appears that Appellants are resisting production of the GDM because they know their designer made a fatal mistake which rendered the design of the subject tire defective: instead of following the GDM inner liner gauge specifications, the designer instead "used what was already in the existing Buffalo plant." JA 1003 – 1005. Further, the designer acknowledged that the [redacted] JA 1005. Once the GDM is produced this issue will be definitively settled. Because Appellants refused to produce the GDM, Appellee moved to compel production. JA 79 – 83.

Judge Duffy referred the motions to compel and for protective orders to Magistrate Judge Mary Gordon Baker. She conducted a hearing on August 31,

2015, JA 844 – 929 & 636 – 717, requested supplemental briefing on the trade secrets issue, JA 422 – 433 & 462 – 69, and held an additional telephone hearing on September 21, 2015 before issuing her Order. JA 542 – 555.

At the August 31, 2015 hearing, Appellants claimed the information requested is unnecessary to Appellee's design defect theory, essentially arguing that Appellee already had enough evidence to prove his case. Appellants asserted that the butyl content of the inner liner cannot be reverse engineered, and although Appellants' witnesses disagree that knowledge of the butyl content is necessary to a defect determination, Appellants agreed with the Magistrate that the butyl content is not irrelevant. JA 910 & 698. As to the GDM, Appellants maintained it is not relevant because there is no testimony that it was used in the design of the subject tire. JA 874 - 880 & 664 - 669.

In their supplemental brief, JA 462 – 469, Appellants raised, for the first time, concerns about Appellee's expert, Dennis Carlson, despite the fact that they were on notice of Carlson's involvement in the case as of July 2013, when he shipped tires involved in this case to Goodyear. JA 404 & 547. Thereafter, the Magistrate scheduled a telephone hearing on September 21, 2015. The Magistrate expressed frustration over Goodyear's attack on Carlson at such a late date, following the full hearing on the matter just three weeks before on August 31. JA 543. During the telephone hearing, Carlson's long involvement in the case was

noted, as was the fact that he has signed the confidentiality order and accessed all confidential documents produced by Appellants throughout the litigation. At no prior time had Appellants raised any objections concerning Carlson. JA 547 & 552. Also of note was the age of the majority of the orders relied upon by Appellants in the attack on Carlson. JA 550. These mostly date back to the mid-1990s and early 2000s. There is a lack of information regarding the background and circumstances attendant to the most recent of the orders provided to the Court. JA 550 – 551.

At the conclusion of the telephone hearing, the Magistrate gave Appellants the opportunity to suggest additions to the existing confidentiality order to provide further assurances that Appellants' trade secrets will be preserved, JA 551 – 554. They insisted that no language could be added to the existing confidentiality order to further protect the requested trade secrets from possible disclosure beyond those involved in the litigation. JA 557 – 558.

The Magistrate rejected Appellants' assertions and concluded that the inner liner butyl content and GDM are relevant and necessary to Appellee's case. Magistrate Baker's analysis of the trade secret issue applied the well-settled law in the Fourth Circuit flowing from *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985). She noted Appellee's defect theories, including that the condition of the tire as manufactured allowed inflation pressurized air to migrate through the structure of the tire, causing degradation of

the structure of the tire, which led to tread separation and blowout, JA 562, and that the amount of butyl rubber in the inner liner and the thickness of the inner liner contribute to this failure mode. *Id.* The Magistrate concluded "it is difficult to imagine what more Plaintiff should be required to present in order to establish relevance and necessity." JA 564.

Magistrate Baker ultimately concluded that, while Appellants raised the possibility of injury due to disclosure of trade secrets, including disclosure to Carlson, Appellee demonstrated an actual need for the relevant information which outweighed the potential injury to Appellants. JA 567 – 568. She ordered, *inter alia*, the disclosure of the butyl content of the subject tire's inner liner and the portions of the GDM applicable to the inner liner, subject to the existing confidentiality order. JA 575.

Dissatisfied with the Magistrate's ruling, Appellants objected to the Order as it pertained to the relevant portions of the GDM and to the butyl content of the subject tire's inner line. JA 576 – 584. Appellants claimed that analysis for production of trade secrets should be governed by the South Carolina Trade Secrets Act ("SCTSA"), S.C. Code Ann. § 39-8-10 *et seq.*, and the formulation of the balancing test for disclosure set forth in *Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154 (S.C. 2009), rather than Rule 26(c), FRCP, and the federal common law interpreting Rule 26(c). Appellants alleged that the federal and state standards

are contradictory and that they are entitled to the allegedly "heightened" protection of the SCTSA. JA 579 – 582 & n.3.

The District Court disagreed, finding "nothing clearly erroneous or contrary to law in Magistrate Judge Baker's thorough and well-reasoned order," JA 586, overruled Appellants' objections and adopted the Magistrate's Order as its own. JA 587.

Still dissatisfied, Appellants filed a Motion for Reconsideration of the November 30, 2015 Order Overruling Defendants' Objections to Magistrate Judge Baker's October 22, 2015 Order Denying Defendants' Motion for Protective Order. JA 593 – 606. The District Court denied the motion and ordered production of the inner liner butyl content and the portion of the GDM applicable to the inner line specifications (subject to the restrictions of the existing confidentiality order), but certified its Order for discretionary interlocutory review by this Court. JA 634 – 635. This Court granted Appellants leave to appeal on February 18. No. 16-141, Dkt. No. 9. This Court reviews *de novo* questions of law, *Meekins v. United Transp. Union*, 946 F.2d 1054 (4th Cir. 1991); however, this Court affords district courts wide latitude in controlling discovery and will not overturn their rulings absent a showing of clear abuse of discretion. *Ardrey v. United Parcel Service*, 798 F.2d 679 (4th Cir. 1986).

Summary of the Argument

The District Court properly applied the established body of case law within the Fourth Circuit construing Federal Rule 26 regarding the production of trade secrets. The South Carolina Trade Secrets Act does not control the District Court's determination of whether Appellants should disclose the requested confidential information because long standing authority establishes that the federal rules apply in all cases pending in federal court – despite a directly contradictory state law or rules of procedure. The only law applicable to the issue before the Court derives from the Federal Rules of Civil Procedure and federal common law. Moreover, the SCTSA and federal rule are not, in fact, contradictory. South Carolina has specifically held the provisions of South Carolina's Act to be complementary and not contradictory to the balancing test found in South Carolina's adoption of Rule 26(c) which mirrors the Federal Rule. Just as the federal district courts have, South Carolina has adopted a balancing test that incorporates a "relevant and necessary standard." Appellants' assertion that Rule 501, FRE, requires this Court to apply South Carolina's formulation of the balancing test is unavailing. South Carolina's Trade Secrets Act does not include creation of a trade secrets privilege and there is no federal trade secret privilege. The District Court properly applied the federal common law's formulation of the balancing test to order the requested materials produced. However, regardless of which body of law applies, the District Court

correctly concluded Appellee's need for disclosure of the protected information outweighs the potential harm to Appellants. As it does with all discovery matters, this Court should afford the District Court wide latitude in controlling discovery in this matter and should not overturn its well-reasoned decision.

Argument

I. THE DISTRICT COURT PROPERLY APPLIED THE ESTABLISHED BODY OF CASE LAW WITHIN THE FOURTH CIRCUIT CONSTRUING FEDERAL RULE 26 REGARDING THE PRODUCTION OF TRADE SECRETS.

A. The District Court correctly applied the well-established standard set forth in *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985), and its progeny.

Within the Fourth Circuit, district courts have routinely and consistently applied Rule 26(c), FRCP, as construed by *Coca-Cola Bottling Co.* to evaluate requests for the production of trade secrets even in those cases where jurisdiction is founded upon diversity. *Mustang Innovation. LLC v. Sonoco Prods. Co.*, 2015 U.S. Dist. LEXIS 96551 (D.S.C. 2015). *See also Sensormatic Elecs. Corp. v. Tag Co. LLC*, 2008 U.S. Dist. LEXIS 5312 (D.S.C. 2008) (patent infringement and misappropriation of trade secrets claim applying federal common law and not the SCTSA standards); *Pechiney Plastic Pkg., Inc. v. Curwood, Inc.* (*Ex parte Sealed Air Corp.*), 220 F.R.D. 452 (D.S.C. 2004) (ruling on a motion to quash a subpoena to a third-party competitor in a patent infringement action pending in the United

States District Court for the Eastern District of Wisconsin, Green Bay Division but applying the *Coca-Cola Bottling Co.* balancing test).

Here, the Magistrate applied the *Coca-Cola Bottling Co.* standard which derives from Rule 26(c)(1)(G), FRCP, undertaking a thorough analysis of its application to the specific facts of this case. JA 559 – 575. She summarized the controlling law correctly, JA 562 – 564:

> The party resisting the discovery must demonstrate to the Court that the information being sought is a trade secret and that its disclosure might be harmful. Once shown, the burden shifts to the party that seeks the discovery to establish the relevance of the trade secret to the lawsuit and that it is necessary to the action. If relevance and necessity are established, then the Court "must balance the need for the information against the injury that would ensue if disclosure is ordered."

JA 563, *citing In re Pechiney Plastic Packaging, Inc.*, 220 F.R.D. at 452 (*quoting and citing Coca-Cola Bottling*, 107 F.R.D. at 292). Further she explained:

> The level of necessity that must be shown is that the information must be necessary for the movant to prepare its case for trial, which includes proving its theories and rebutting its opponent's theories.

Id. citing Coca-Cola Bottling of Shreveport, 107 F.R.D. at 293 (citations omitted). In assessing injury, the "relevant injury ... is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order." *Id.* "[I]t is presumed that disclosure to a party who is not in competition with the holder of the trade secret will be less harmful than disclosure to a competitor." *Id.* (citations omitted). If the party is able to establish

relevance and necessity as well as potential harm, then the Court "must balance the need for the information against the injury that would ensue if disclosure is ordered." *Id. citing Coca-Cola Bottling*, 107 F.R.D. at 292. This analysis was adopted in full by the District Court. JA 586-587.

B. The South Carolina Trade Secrets Act ("SCTSA"), S.C. Code Ann. § 39-8-10 *et seq.*, and *Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154 (S.C. 2009), do not control the District Court's determination of whether Appellants should disclose the requested confidential information.

Because this is a diversity case, the "general rule" is that federal courts apply state substantive law and federal procedural law. *Cisson v. C.R. Bard, Inc.* (*In re C.R. Bard, Inc.*), 810 F.3d 913 (4th Cir. 2016) (*citing Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 109 (4th Cir. 1995)). The issue before this Court is a discovery dispute governed by Rule 26(c), FRCP, as correctly noted by Appellants in their initial protective order motions. JA 226 – 227, 234 – 235, 338 – 339 & 346 – 347. Long standing authority establishes that the Federal Rules apply in all cases pending in federal court – despite a directly contradictory state law or rule of procedure – so long as the rule at issue neither (1) "exceed(s) the congressional mandate embodied in the Rules Enabling Act" nor (2) "transgress[es] constitutional bounds." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965). Neither situation exists here, and the only law applicable to the issue before the Court

derives from the Federal Rules of Civil Procedure and federal common law. Moreover, the SCTSA and federal rule are not, in fact, contradictory.

While Appellants assert that S.C. Code Ann. § 39-8-110(B) provides a slightly more stringent standard for the production of trade secrets than the federal rule the South Carolina Supreme Court has essentially adopted the same balancing test derived from Rule 26, FRCP, as the federal district courts have been applying under *Coca-Cola Bottling Co. Laffitte*, 674 S.E.2d at 162-3 & n. 10. In adopting the balancing test, the *Laffitte* court specifically held the provisions of South Carolina's Act to be **complementary** and **not contradictory** to the balancing test found in South Carolina's adoption of Rule 26(c) which mirrors the Federal Rule. *Laffitte*, at 162.

Like the *Coca-Cola Bottling Co.* standard, *Laffitte* adopted a "balancing test" that incorporates a "relevant and necessary standard." *Laffitte*, 674 S.E.2d at 162 & n.11. The party opposing discovery must show that the information sought is a trade secret and that disclosure will be harmful. If trade secret status is established, the burden shifts to the party seeking discovery to show that the information is relevant and necessary to bring the matter to trial. If both parties satisfy their burden, the court must weigh the potential harm of disclosure against the need for the information in reaching a decision. *Id.* at 475, 674 S.E.2d at 162. This methodology is identical to the *Coca-Cola Bottling Co.* standard applied

throughout the district courts in the Fourth Circuit and by the District Court below. It reflects the long-standing judicial philosophy of serving justice by balancing the interests of business against the needs of litigants to access information necessary to prove their causes of action:

> It is true that the result may be to compel the defendant to disclose [trade secrets], and that that may damage the defendant...That is, however, an inevitable incident to any inquiry in such a case; unless the defendant may be made to answer, the plaintiff is deprived of its right to learn whether the defendant has done it a wrong.

Coca-Cola Bottling Co., 107 F.R.D. at 293-94.

Because of the comparability of the South Carolina and federal formulations of the balancing test, there is no need to find that the federal common law and South Carolina Act contradict each other, or for this Court to engage in an *Erie* doctrine analysis. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Appellants are certainly not losing any substantial protection or right which might have been afforded to them in a state court forum as the tests are equivalent. Both seek to balance the competing interests of the parties.

Moreover, as explained by Judge G. Ross Anderson in *Griego v. Ford Motor Co.*, 19 F. Supp. 2d 531 (D.S.C. 1998), the SCTSA does not apply in a federal products liability action because it "is not based on misappropriation of a trade secret or protection against such a misappropriation." *Accord Sturdivant v. Cont'l*

Tire the Americas, LLC, 2015 U.S. Dist. LEXIS 6489 (D.S.C. 2015). The Act specifically provides:

> **Any and all other civil remedies** that are not based upon misappropriation of a trade secret or upon protection against misappropriation of a trade secret **are governed by the rules of procedure, rules of evidence, regulations, and the common law applicable to the** administrative law tribunal or **court where the action is filed.**

S.C. Code Ann. § 39-8-110(C) (emphasis added). While the SCTSA substantively defines what a trade secret is in South Carolina, the procedural question of the discoverability of a trade secret continues to be governed by Federal Rules and common law because the action was filed in the federal court. In this case, the plain language of the SCTSA demands that the question before the federal District Court in this case be determined by the federal rules and the federal common law. Therefore, there is no need for the Court to enter into an *Erie* Doctrine analysis.

Laffitte stands for the proposition that in South Carolina courts the standard for trade secret protection founded on the SCTSA applies in all South Carolina cases **because** that standard does not contravene or contradict the South Carolina Rules of Civil Procedure. The *Laffitte* court specifically found that the SCTSA "is consistent with Rule 26 [SCRCP] in that both provide for reasonable restrictions on the discovery of trade secrets." *Laffitte*, 674 S.E.2d at 162. It complements, but does not supplant the Rule. *Laffitte* says nothing about the applicability of S.C. Code Ann. § 39-8-110(C) to cases in federal court nor does it purport to declare its

formulation of the balancing test to apply to courts outside the South Carolina state court system.

C. There is no trade secret "privilege."

Appellants argue entitlement to a trade secret "privilege" which must be construed under state law pursuant to Rule 501, FRE. This is unavailing.

Appellants suggest that Rule 501 is intended to create a trade secret "privilege" because the 1974 Advisory Comm. Notes to Pub. L. No. 93-595, § 1, 88 Stat. 1926, 1933 (Jan. 2, 1975) (adopting Fed. R. Evid. 501) note an earlier rule version that listed trade secrets as a federal privilege. To the contrary, the rule that was adopted contains no reference to a so-called trade secrets "privilege" and a federal trade secret privilege has never been adopted.

There is no true trade secret "privilege" barring discovery of trade secrets. 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2043 (2010). Rather trade secrets are generally protected by procedural rules such as Rule 26(c), FRCP, to provide increased protection for commercially valuable property while still meeting the significant needs of litigants who require access to confidential information to prove their claims. Those procedural rules provide Appellants protection but do not create a new substantive right analogous to the attorney-client privilege, the spousal privilege,

the doctor-patient privilege, and other generally accepted "privileges" which fall under the umbrella of Rule 501, FRE.

Federal common law clearly states "[t]here is no absolute privilege to protect trade secrets from disclosure during the discovery process." *In re Pechiney Plastic Packaging, Inc. v. Curwood, Inc.*, 220 F.R.D. 452, 452 (D.S.C. 2004) (*citing Dunlap Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1185 (D.S.C. 1974)). As the *Coca-Cola* court further explained:

> The balance between the need for information and the need for protection against the injury caused by disclosure is tilted in favor of disclosure once relevance and necessity have been shown. As the Supreme Court has recognized, "orders forbidding any disclosure of trade secrets or confidential commercial information are rare." . . . A survey of the relevant case law reveals that discovery is virtually always ordered once the movant has established that the secret information is relevant and necessary.

Coca-Cola Bottling, 107 F.R.D. at 293 (citations omitted). Again, this test derives from Rule 26(c)(1)(G), FRCP, which provides in pertinent part:

> The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> ****
>
> (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way....

This section of Rule 26 was added in 1970. The *Advisory Committee Notes, 1970 Amendment*, explained:

> The new reference to trade secrets and other confidential commercial information reflects existing law. **The courts have not given trade secrets automatic and complete immunity against disclosure,** but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. *See, e.g. Covey Oil Co. v Continental Oil Co.*, 340 F2d 993 (10th Cir 1965); *Julius M. Ames Co. v Bostitch, Inc.*, 235 F Supp 856 (SD NY 1964).

(Emphasis added).

Further, South Carolina's adoption of the Trade Secrets Act does not include creation of a trade secrets privilege. The word "privilege" appears only once in the statute, but that appearance is not in the definition of "trade secret." S.C. Code Ann. § 39-8-20(5). Instead it appears in the section entitled "Preservation of secrecy during discovery proceedings of civil actions; substantial need defined":

> (C) Direct access to computer databases containing trade secret information, so-called "real time" discovery, shall not be ordered by the court unless the court finds that the proponent of the discovery cannot obtain this information by any other means and provided that the information sought is not subject to any privilege.

S.C. Code Ann. § 39-8-60(C). A clear distinction is drawn in this sub-section between trade secrets and privileged information. As explained in *State v. Good*, 417 S.E.2d 643 (S.C. Ct. App. 1992), a legislative declaration of a policy against privileges from testifying or producing evidence, even by implication, should be considered in determining the existence of a privilege and only in extreme cases should courts recognize instances of privilege where they have not been created by

a statute or constitutional provision. *Id. citing* 81 Am. Jur. 2d Witnesses § 141, at 182 (1976) (as "exceptions to the demand for every man's evidence," privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."). Had South Carolina's Legislature intended to create a state law trade secret privilege, it could have when it first adopted a form of the Uniform Trade Secrets Act in 1992 or when it replaced the 1992 statutes with the SCTSA in 1997. *See, e.g.*, S.C. Code Ann. § 24-24-290 (information received by probation agents privileged). Other states have elected to codify such a privilege but South Carolina has not. *See, e.g.*, Fla. Stat. § 90.506; Cal. Evid. Code § 1060; K.S.A. § 60-432. A trade secret privilege does not exist in South Carolina and Rule 501, FRE, is not triggered.

The cases cited by Appellants in their Opening Brief (Appeal 16:1172, Dkt 17 at pgs. 19 – 20) all stand for the general proposition that under Rule 501, FRE, "in a civil case, state law governs **privilege** regarding a claim or defense for which state law supplies the rule of decision." *Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014) (*citing* Rule 501, FRE) (emphasis added). This is a true statement of law when a **privilege** is asserted, however, it has no bearing where, as here, the issue is controlled by a rule of procedure and there is no actual "trade secret privilege" available to Appellants under federal or state law.

Appellants' assertions regarding case law from around the country contain gross mischaracterizations of the state of the law in general and, sometimes, fundamentally misstate the holdings of their cited cases. (Appeal 16:1172, Dkt 17 at pgs. 20-23). *Wilcox*, *Herbert*, *Ashcraft*, and *Hottle*, are all inapposite because they deal with standard privileges or evidentiary issues and *do not* discuss or involve trade secret production at all. *Wilcox v. Arpaio* (application of a mediation/settlement privilege); *Herbert v. Lando*, 441 U.S. 153, 182 (1979) (first amendment editorial privilege); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 286 (4th Cir. 2000) (first amendment reporter's privilege applying a federal formulation of the test applicable to that issue). In *Hottle*, 47 F.3d at 110, this Court explained that, as procedural rules, the Federal Rules of Evidence control over conflicting state evidentiary rules in diversity cases and only where a state evidentiary rule is "bound-up" with substantive state policy will it control over the federal rule. *Id.* *Hottle* dealt with Virginia's long-standing policy of not permitting a party's internal rules from being offered to prove the standard of care. The case at hand deals with the balancing test to be applied by federal courts when weighing Appellants' property rights (trade secrets having a monetary value to Appellants) against the right of Appellee to have access to information necessary to prove his case. There is nothing in South Carolina's substantive state policy that contradicts

federal law and so it cannot control the federal court's application of federal procedural law.

Most troubling of Appellants' assertions about the state of the law nation-wide is their sweeping assertion that *only* the District of South Carolina applies the standard Rule 26(c) balancing test. (Appeal 16:1172, Dkt 17 at pg. 22). Nothing could be further from the truth. In fact, the District Court's analysis and application of the federal common law to this case is entirely consistent with all of the other federal courts sitting in diversity jurisdiction in states **without** codified trade secret privileges. Because Appellants have not provided necessary facts to evaluate the relevance of their cited cases, Appellee addresses each below.

Appellants cite *Pasadena Oil & Gas Wyo. LLC v. Mont. Oil Props.*, 320 Fed. Appx. 675, 676 (9th Cir. 2009), for the proposition that "state privilege law generally applies to state claims brought in federal court pursuant to diversity jurisdiction, Fed. R. Evid. 501," and claim that the court then applied Montana state law to a trade secrets issue in a federal diversity case. In reality, the Ninth Circuit did **exactly** what Appellee asserts this Circuit should do: it evaluated Montana's **procedural** rule protecting trade secrets to discover that, like South Carolina's rule, Montana's rule is worded identically to the corresponding federal rule, *id. citing* Mont. R. Civ. P. 26(c)(7) and Fed. R. Civ. P. 26(c)(1)(G), and then applied the **federal** common law to conclude:

> **Under federal law, there is no absolute privilege for trade secrets; instead, courts weigh the claim to privacy against the need for disclosure in each case**, and district courts can enter protective orders allowing discovery but limiting the use of the discovered documents. *Fed. Open Market Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362, 99 S. Ct. 2800, 61 L. Ed. 2d 587 (1979); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992).

(Emphasis added). The Ninth Circuit, in fact, applied the **federal** standard to balance the plaintiff's need for relevant information against that defendant's property rights/need for privacy of its contracts in a diversity action involving trade secrets.

A number of the cases cited arise from states that have codified trade secret privileges. In *McKellips v. Kumho Tire Co.*, 305 F.R.D. 655, 662 (D. Kan. 2015), a Kansas district court correctly explained that there is no federal discovery privilege for trade secrets but "state law governs privileges in civil diversity cases." What Appellants fail to share with this Court is that Kansas has a **codified privilege** for trade secrets:

> Kansas recognizes a trade secret privilege, which is embodied in K.S.A. 60-432: The owner of a trade secret has a privilege, which may be claimed by the owner or his or her agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Id. Similarly, the case cited by Appellants from the Eastern District of California is also inapposite and unavailing: California has a codified "qualified trade secret privilege" as expressly set forth in Cal. Evid. Code § 1060. *Upjohn Co. v. Hygieia*

Biological Labs., 151 F.R.D. 355, 358 (E.D. Cal. 1993). Also, Section 90.506 of the Florida Statutes provides an evidentiary privilege protecting trade secrets. *Auto Owners Ins. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 203 (M.D. Fla. 1990). The District of Massachusetts case cited by Appellants, *Moloney v. United States*, 204 F.R.D. 16, 21 (D. Mass 2001), concerns a series of privileges not related to trade secrets and only mentions in passing that is it possible for a state to have an actual trade secrets "privilege" which might apply in a diversity case. South Carolina has no such privilege and, as discussed above, applies the balancing test flowing from identical federal and state rules.

Had Appellants made a good faith attempt to accurately represent the state of federal case law as it pertains to the discovery of trade secrets, they would have had to acknowledge and explain to this Court that federal courts, when confronted with diversity cases arising from states without specifically codified trade secret "privileges," apply Rule 26(c), FRCP, and the **federal** common law to determine whether discovery will be required. *See e.g.*, *Doan v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 41072 (E.D. Mich. 2008); *RyCon Specialty Foods, Inc. v. Wellshire Farms, Inc.*, 2011 U.S. Dist. LEXIS 37840 (M.D. Pa. 2011); *Burke v. Ability Ins. Co.*, 2013 U.S. Dist. LEXIS 30487 (D.S.D. 2013) (looking to the South Dakota Uniform Trade Secrets Act, codified at SDCL 37-29-1, for the definition of a "trade secret" but applying the balancing test from federal common law to resolve

the motion for a protective order); *Pochat v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 100389 (D.S.D. 2008); *Innovative Biodefense, Inc. v. VSP Techs.*, 2013 U.S. Dist. LEXIS 95429 (S.D.N.Y. 2013) ("New York has no comparable statutory provisions to the California UTSA. Moreover, with respect to discovery regarding trade secrets, the Federal Rules of Civil Procedure, which generally govern the scope and timing of discovery in diversity actions, do not provide a privilege for trade secrets and similar confidential information."); *Chembio Diagnostic Sys., Inc. v. Saliva Diagnostic Sys., Inc.*, 236 F.R.D. 129, 136 (E.D.N.Y. 2006); *Sheets v. Caliber Home Loans, Inc.*, 2015 U.S. Dist. LEXIS 160616 (N.D. W. Va. 2015) (applying West Virginia law to define trade secrets but applying the federal common law's balancing test from Rule 26(c), FRCP); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (applying Rule 26(c) to resolve a trade secret issue in diversity case); *Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004) (using Nebraska law to define a trade secret but applying Federal Rule 26(c) on the question of production); *Smith v. BIC Corp.*, 869 F.2d 194 (3d Cir. 1989) (applying Pennsylvania law to define a trade secret but using Federal Rule 26(c) to resolve issues concerning the issuance of a protective order); *Forst v. Smithkline Beecham Corp.*, 602 F. Supp. 2d 960 (E.D. Wis. 2009) (applying Wisconsin law to define a trade secret but applying Rule 26(c), FRCP, and federal common law to the overall determination of

discoverability); *Blundon v. Goodyear Dunlop Tires N. Am. LTD.*, 2012 U.S. Dist. LEXIS 161236 (W.D.N.Y. 2012) (applying Rule 26(c)(1)(G), FRCP, to a discovery issue involving a products liability case against Goodyear being heard pursuant to the federal court's diversity jurisdiction); *Uniroyal Chem. Co. v. Syngenta Crop Prot.*, 224 F.R.D. 53 (D. Conn. 2004) (applying state law to resolve questions of attorney-client privilege but Rule 26(c), FRCP, and the federal common law to the production of trade secrets issues in a diversity case). In sum, the state of federal case law is that, when they are confronted with diversity cases arising from states without specifically codified trade secrets "privileges," federal courts apply Rule 26(c), FRCP, and the **federal** common law, just as the District Court in this case did.

II. REGARDLESS OF WHICH BODY OF LAW APPLIES, THE DISTRICT COURT CORRECTLY RULED THAT APPELLEE'S NEED FOR DISCLOSURE OF THE PROTECTED INFORMATION OUTWEIGHS THE POTENTIAL HARM TO APPELLANTS.

Applying federal common law, the lower court correctly ordered the disclosure of the subject tire's inner liner butyl content and portions of the Global Design Manual applicable to inner liner design specifications. As explained above, and as correctly and clearly articulated by the District Court, once the party resisting discovery demonstrates to the court that the information being sought is a trade secret and that its disclosure might be harmful, the burden shifts to the party

that seeks discovery to establish the relevance of the trade secret to the lawsuit and that discovery is necessary to the action. *In re Pechiney Plastic Packaging, Inc.*, 220 F.R.D. at 452 (*citing Coca-Cola Bottling*, 107 F.R.D. at 292).

A. The District Court correctly applied the *Coca-Cola Bottling* standard to the facts of this case.

Appellee's theory of design and manufacturing defect liability is detailed above at pgs. 3 – 6. Appellee's expert has testified that his lack of knowledge concerning the butyl content of the inner liner has an adverse impact on his ability to formulate opinions in this case. JA 1197 – 1202. When asked about alternative designs for the subject tire, he explained that without the butyl content of the inner liner, he is hampered both in identifying an alternative design and in zeroing in on the defect in the subject tire which caused this fatal crash. JA 1186 – 1191. When asked to identify other tires in the G670 line that are not defective and could serve as alternative designs, Carlson could not do so because he does not know their butyl content either. JA 1192 – 1196. He explained in detail how the missing information about the butyl content has hampered his investigation and limits his opinions. JA 1197 – 1202.

Appellants' refusal to produce the portions of their GDM applicable to the subject tire's inner liner is detailed above at pgs. 6 – 7. In brief summary, Appellee has established that the inner liner is thinner than the Buffalo plant specifications the Goodyear employee testified he used for the subject tire. Additionally, there is

a strong probability that, as designed and manufactured, the inner liner is of a thinner gauge than specified by the GDM. This information is important to Appellee's ability to prove his case in terms of both design and manufacturing defects.

Ultimately, the District Court agreed that these matters go to the heart of the case both on Appellee's design defect theory and Appellants' defenses, concluding "it is difficult to imagine what more Plaintiff should be required to present in order to establish relevance and necessity." JA 564 & 586 – 587.

Having established relevance and necessity, the District Court balanced "the need for the information against the injury that would ensue if disclosure is ordered." *In re Pechiney Plastic Packaging, Inc.*, 220 F.R.D. at 452 (*citing Coca-Cola Bottling*, 107 F.R.D. at 292). The injury that is assessed "is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order." *Coca-Cola Bottling*, 107 F.R.D. at 293 (citations omitted). "[I]t is presumed that disclosure to a party who is not in competition with the holder of the trade secret will be less harmful than disclosure to a competitor." *Id.* (citations omitted).

At the eleventh hour Appellants raised complaints about Appellee's expert characterizing him as having a "history of failing to respect the intellectual property rights of tire companies." JA 463. They assert this as additional support

for their argument that their trade secrets are at risk if they are produced in this case.

Appellants have known about Carlson's involvement in this case since June 2013, JA 404, nearly two months before the confidentiality order was entered. JA 57 – 68. They were provided with Carlson's expert report on July 2, 2015, JA 815 – 843 & 418 - 421, and he was deposed on September 2, 2015. JA 1185 & 608. Between June 2013 and September 2015 Carlson was provided with and viewed all of Appellants' documents produced under the confidentiality order. JA 552. Not until September 15, 2015 did Appellants raise any concerns about his access to their confidential materials, and even then only to the two items in issue. JA 462 – 469 & 544 – 553.

After making an exhaustive review of Appellants' submissions, which included materials from cases mostly more than ten years old, Magistrate Baker offered Appellants a chance to suggest additional language to strengthen the existing confidentiality order or to have a hearing with Carlson to remind him of his obligations. JA 550 – 555. Appellants rejected those options. JA 557 – 558.

It is particularly perplexing that Appellants did not offer any additions to the existing confidentiality order or concede that it provides sufficient protection as entered. They have argued in dozens of cases that similar standard, "general form" protective orders have been necessary to protect their interests while still allowing

plaintiffs to bring their cases. In *Blundon v. Goodyear Dunlop Tires N. Am. LTD.*, 2012 U.S. Dist. LEXIS 161236 (W.D.N.Y. 2012) (applying Fed. R. Civ. P. 26(c)(1)(G), at Goodyear's request, to a discovery issue involving a products liability case against Goodyear being heard pursuant to the federal court's diversity jurisdiction), Appellants asserted they had offered and had approved "general form" protective orders

> in no less than 34 other cases, including cases in seven federal district courts. . . . and that the entry of an appropriate protective order will aid in the efficient administration of the present litigation.

Blundon, C/A 1:11-cv-00990-WMS-HBS, DE 25-24 at pg. 4 & DE 25-9 through DE 25-23. In that case, Appellants correctly explained:

> While GDTNA recognizes that litigation inevitably involves the production of confidential and proprietary information and materials to opposing counsel and their experts, such production should not serve to detrimentally harm GDTNA's business interests. **This position is even more apparent when the use of a protective order can prevent unnecessary, irreparable harm to the parties, while in no way compromising or otherwise impeding their ability to prosecute and defend their positions in the present case.**

Blundon, DE 25-24 at pg. 8 (emphasis added). Appellants fail to articulate why their own reasoning does not apply to the case at hand, and they offer no explanation as to why their property interests are not protected by the existing confidentiality order.

Magistrate Baker ultimately concluded that Appellants' submissions and concerns amounted to, at most, a showing of the **possibility** of injury from

disclosure. However, she properly concluded, and Judge Duffy agreed, that Appellee has demonstrated an actual need for the relevant information which outweighs the potential injury to Appellants, JA 567 – 569, ordering disclosure. JA 575. This Court should agree with the analysis of the District Court and Appellants' own arguments made in the *Blundon* case, and affirm the District Court in all respects.

B. Even if this Court were to rule that South Carolina law controls the question of production applying state law, the District Court correctly ordered Appellants to produce the information.

In *Laffitte*, after explaining that the SCTSA standard complements and does not contradict or replace the South Carolina Rules of Civil of Procedure, the South Carolina Supreme Court held that the balancing test for discovery of trade secrets under Rule 26(c), SCRCP, governs discovery of trade secret information. *Laffitte*, 674 S.E.2d at 162-63.

In South Carolina trade secret information must be "relevant not only to the general subject matter of the litigation, but also relevant specifically to the issues involved in the litigation." *Laffitte*, at 163 (*citing Dunlap Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1185 (D.S.C. 1974)). As explained in the Statement of the Case and § II(A) above, Appellee's specific claims of design and manufacturing defect liability in this case are premised on the theory that the design of the subject tire, as well as its manufactured condition, allowed inflation

pressurized air to migrate from the air chamber into the structure of the tire ultimately causing the tread and belt separation and blowout. JA 370 – 371. This is far more than a generalized theory of product liability. It is detailed and specific to the facts of this case and the information requested is essential to the proof of Appellee's case.

> For the trade secret information to be deemed "necessary," we hold that the party seeking the information "cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat."

Laffitte, 674 S.E.2d at 163 (*citing In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733 (Tex. 2003)). The Court explained:

> "Implicit in this is the notion that suitable substitutes must be completely lacking." In other words, the trial court must evaluate whether there are reasonable alternatives available to the party seeking the discovery of the information, and ultimately, the trial court must require the discovery of a trade secret only when "the issues cannot be fairly adjudicated unless the information is available."

Id. (citations omitted).

Analyzing all the facts discussed above, and having a far more detailed explanation from Appellee's expert than the *Laffitte* court had from plaintiff's expert, it is improbable that the District Court would have reached a different conclusion under the *Laffitte* standard if it had agreed that it applies to this case.

Typically, this Court affords district courts wide latitude in controlling discovery and will not overturn their rulings absent a showing of abuse of discretion. *Ardrey v. United Parcel Service*, 798 F.2d 679 (4th Cir. 1986); *Rabb v. Amatex Corp.*, 769 F.2d 996, 999 (4th Cir. 1985); *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904, 907 (4th Cir. 1978); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d 1065, 1071 (9th Cir. 1982), *aff'd in part and rev'd in part*, 466 U.S. 435, 104 S. Ct. 1883 (1984). The same latitude and standard of review are afforded to the denial or granting of a motion to compel discovery, *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 1995 (4th Cir. 1995); *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988); *Larouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986), cert. denied, 479 U.S. 818, 107 S. Ct. 79 (1986), and rulings on protective orders entered pursuant to Fed. R. Civ. P. 26(c). *Cook Grp., Inc. v. C.R. Bard, Inc. (In re Wilson)*, 149 F.3d 249 (4th Cir. 1998) (ruling on a trade secret issue); *M & M Med. Supplies & Svc. Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1992) (en banc), cert. denied, 508 U.S. 972, 113 S. Ct. 2962 (1993). The latitude given the district court extends as well to the manner in which it orders the course and scope of discovery. *Ardrey* (*citing Eggleston v. Chicago Journeymen Plumbers Etc.*, 657 F.2d 890, 902 (7th Cir. 1981), cert. denied, 455 U.S. 1017, 102 S. Ct. 1710 (1982)); *Sanders v. Shell Oil Co.*, 678 F.2d 614, 618

(5th Cir. 1982). Although it is "unusual to find an abuse of discretion in discovery matters," *Sanders*, 678 F.2d at 618, a district court may not, through discovery restrictions, prevent a plaintiff from pursuing a theory or entire cause of action. *Ardrey* (*citing Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985)); *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983). Here, the District Court clearly did not abuse its discretion and this Court should affirm in all respects.

Conclusion

Having reviewed the enormous volume of material submitted by the parties, the District Court was in the best position to assess the facts and rule on the Motion to Compel and the Motions for a Protective Order. It correctly applied Rule 26(c), FRCP, and the federal common law. Appellee respectfully submits this Court should affirm the District Court is all respects.

Request for Oral Argument

Appellee respectfully requests that this Court grant oral argument in this matter.

Respectfully submitted,

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Dated: May 2, 2016

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I hereby certify that on this 2nd day of May, 2016, I caused this Redacted Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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