COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	COURT USE ONLY
DISTRICT COURT, WELD COUNTY, COLORADO Hon. Elizabeth Strobel Case No. 2011CV222	
In Re: **Plaintiff:** DCP MIDSTREAM, LP, a Delaware limited partnership. **v.** **Defendants:** ANADARKO PETROLEUM CORPORATION a Delaware corporation, KERR-MCGEE OIL & GAS ONSHORE LP, a Delaware limited partnership, and KERR-MCGEE GATHERING LLC, a Delaware limited liability company.	
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AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF APPELLANTS-DEFENDANTS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all the requirements of C.A.R. 28 and C.A.R. 32. Specifically, the undersigned counsel certifies that:

This brief complies with C.A.R. 32(g).

It contains 3,185 words.

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ISSUES PRESENTED

(1) Whether, consistent with Rule 26(b)(1), a party may "hunt" for information in discovery to support new claims that are not pled.

(2) Whether a trial court may overrule objections to discovery requests raised under Rule 34(b) on the ground that the objecting party failed to seek a protective order under Rule 26(c).

(3) Whether a trial court may grant a motion to compel the production of documents under Rule 37 without addressing Rule 34(b) objections.

(4) Whether a trial court may order a party to produce *all* oil and gas title opinions the party asserts are privileged without *in camera* review because the party seeking discovery and the trial court hypothesize that some of those title opinions might not be privileged.

STATEMENT OF INTEREST

Amici are organizations which represent companies that are named as civil defendants in Colorado. Because *amici*'s members are frequently involved in litigation, *amici* have a unique understanding of modern civil discovery in the age of increasingly massive document productions involving electronically stored information. *Amici* can assist the Court in understanding the problems that arise

when a trial court fails to follow the rules of procedure and fails to manage discovery in a thoughtful manner.

The Colorado Rules of Civil Procedure are modeled after the Federal Rules. *Amici*'s knowledge of how discovery has been, and should be, managed in civil litigation around the country will assist the Court to understand the problems that the Court's guidance can help resolve, and to understand the consequences that the Court's ruling may have.

The language in the Colorado Rules, Federal Rules, and the rules of many other states, is virtually identical. This Court's ruling on Anadarko's Petition will not only affect discovery in Colorado, but could have a ripple effect on discovery management and rules interpretation in many other jurisdictions in which *amici*'s members are involved.

Amici file this brief to address the first three issues presented for review because these issues frequently arise in civil litigation generally and impact *amici*'s broad cross-section of members. *Amici* do not intend to brief the fourth issue presented, which relates to oil and gas title opinions, but we do support Anadarko's position that such opinions should not be ordered produced without the trial court evaluating the objector's claims of privilege or conducting an *in camera* review.

STATEMENT OF THE FACTS

Amici adopt Appellants-Defendants' Statement of the Facts.

INTRODUCTION

It is widely acknowledged that "[o]ur discovery system is broken" and the civil justice system "is in serious need of repair." American College of Trial Lawyers Task Force on Discovery & Institute for the Advancement of the American Legal System, Final Report, at 2, 9 (Mar. 11, 2000) [hereinafter ACTL/IAALS Report]. "In many jurisdictions, today's system takes too long and costs too much." *Id.* at 2. The explosion of electronic discovery has only served to worsen the problem, threatening "the just, speedy, and inexpensive determination of every action." C.R.C.P.1(a).

There is little or no Colorado precedent on the issues presented. Guidance from this Court would be useful to assist trial courts and litigants, as the issues arise frequently in civil cases. *Amici* strongly encourage the Court to take this opportunity to clarify Colorado law and inject common sense into interpretations of the Colorado Rules of Civil Procedure.

First, this Court should instruct trial courts to act as "gatekeepers" with respect to managing the discovery of paper and electronic documents. The Court should emphasize the need for "cooperation" in lawyer-managed discovery, and

the need for "early, hands-on case management" by trial courts and "proportionality," particularly in "subject matter" discovery (which is only available upon a finding of "good cause" by the trial court).

Second, the Court should clarify that a party that is the target of discovery may, instead of producing, choose either to move for a protective order under C.R.C.P. 26(c) or to serve timely written objections under C.R.C.P. 34(b). The objector should not be required to do both.

Third, the Court should hold that a trial court must address a party's written objections before ruling on a motion to compel.

The trial court failed to do any of these things.

For these reasons, this Court should provide the direction suggested above and remand for further proceedings in the District Court.

ARGUMENT

I. RULE 26(B)(1) DOES NOT PERMIT "HUNTING" FOR INFORMATION IN DISCOVERY TO SUPPORT UNPLED CLAIMS

The discovery request approved by the District Court to allow Plaintiff/Respondent DCP Midstream, LP ("DCP") to "hunt" for information to support unpled claims is not allowed under the Colorado Rules of Civil Procedure – or under the federal or any state's rules for that matter. *See, e.g., General Steel Corp v. Chumley*, 2011 U.S. Dist. LEXIS 63803, *9 (D. Colo. June 15, 2011)

("Courts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply.")

C.R.C.P. 26(b)(1) limits discovery to unprivileged information that is relevant to the claims or defenses alleged unless the trial court finds good cause to expand discovery to matters relevant to the subject matter involved in the action. C.R.C.P. 26(b)(1) states in relevant part:

> Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.

By definition, a "hunt" for information to support unpled claims cannot relate to the "claim or defense" at issue. *Id.* Furthermore, a party's desire to "hunt" for more claims is not "good cause" for a trial court to allow broader discovery; the movant should be required to assert "specific facts" that justify discovery beyond the claims alleged or defenses asserted. *Surles v. Air France*, 2001 WL 1142231, *2 (S.D.N.Y. Sept. 27, 2001); *see also Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1238 (10th Cir.), *cert. denied*, 531 U.S. 926 (2000).

This Court should take the opportunity to define a trial court's responsibilities in managing the scope of discovery under Rule 26(b)(1). Prominent themes to be emphasized are "cooperation" in lawyer-managed

discovery,[1] and the need for both "early, hands-on case management" by trial courts and "proportionality," particularly with respect to "subject matter" discovery. Trial courts should be instructed to act as "gatekeepers" with respect to managing the discovery of paper and electronic documents.

C.R.C.P. 26(b)(1) "is patterned after the December, 2000 amendment to the corresponding federal rule." C.R.C.P. 26 advisory committee's note (2002 amendment). The federal rule makes a distinction between "claims and defenses" discovery, which is lawyer-managed, and "subject matter" discovery, which is only available upon a finding of "good cause" by the trial court. The differentiation "is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. . . ." Fed. R. Civ. P. 26(b)(1) advisory committee's note (2000 amendment).

"[I]nvolvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery." *Id.; see also* Corina Gerety, *Trial Bench Views: IAALS Report on Findings From a National Survey on Civil Procedure*, 32 Pace L. Rev. 301, 302 (2012) ("Majorities of state and federal

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[1] *See generally* Ronald J. Hedges, *The Sedona Conference Points the Way Toward Control of the Costs and Burden of E-Discovery*, 59 Fed. Law. 46 (2012) (discussing *The Sedona Conference Cooperation Proclamation*, at https://thesedonaconference.org/judicial_resources).

trial judges agree that early judicial intervention in a case helps to narrow the issues and limit discovery."). As a Maryland federal magistrate judge has explained, "Active and informed case management takes time, and time is the most precious and scarce judicial resource. Often, however, the investment of a few hours can avoid hundreds of hours, and thousands or millions of dollars, of the litigants'--and the courts'--time and money." Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules be Changed to Reduce Costs and Burden, or Can Significant Improvements be Achieved Within the Existing Rules?*, 12 Sedona Conf. J. 47, 50 (2011). Here, the District Court abdicated its gatekeeping role.

Furthermore, discovery should be reasonably proportional to the needs of the case. As explained, when Federal Rule of Civil Procedure 26(b)(1) was amended in 2000 to distinguish between lawyer-managed discovery of material relevant to the parties' "claims or defenses" and court-managed discovery of "subject matter involved in the litigation," the hope was to provide a stimulus to more active involvement in discovery by judges who had been holding aloof. As this case illustrates, however, problems persist in enough cases that more is needed to control excessive discovery. The geometric growth in potentially discoverable information generated by electronic storage adds still more concerns.

A 2009 joint report by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System at the University of Denver supports trial judges taking a more active role early in discovery and stresses proportionality. *See* ACTL/IAALS Report, *supra*. As this Court knows, IAALS Executive Director Rebecca Love Kourlis previously served for almost twenty years as a Colorado Supreme Court Justice and trial court judge.

The ACTL Task Force and IAALS surveyed almost 1,500 Fellows of the ACTL. On average, the respondents had practiced law for thirty-eight years. The survey covered lawyers who represent plaintiffs exclusively, lawyers who represent defendants exclusively, and some who represent both groups. "[F]or the most part, there was no substantial difference between the responses of those who represent primarily plaintiffs and those who represent primarily defendants, at least with respect to differences relating to the action recommended in th[e] report." *Id.* at 2. One of the "major themes" that emerged from the survey was that "Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial." *Id.* The survey also "revealed widely-held opinions that there are serious problems in the civil justice system generally." *Id.*

The ACTL/IAALS Report offers a series of recommendations. With respect to discovery, the report states: "**Proportionality should be the most important principle applied to all discovery**." *Id.* at 7 (emphasis in original). The report further recommends: "**Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness**." *Id.* at 8 (emphasis in original). The report explains:

> The current rules permit discovery of all documents and information relevant to a claim or defense of any party. As a result, it is not uncommon to see discovery requests that begin with the words "all documents relating or referring to. . . ." Such requests are far too broad and are subject to abuse. They should not be permitted.
>
> Especially when combined with notice pleading, discovery is very expensive and time consuming and easily permits substantial abuse. We recommend changing the scope of discovery so as to allow only such limited discovery as will enable a party to prove or disprove a claim or defense or to impeach a witness.

Id. The ACTL/IAALS Report also recommends: "**Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens**." *Id.* at 14 (emphasis in original). The ACTL Task Force and IAALS developed this recommendation after survey respondents indicated "that electronic discovery is a nightmare and a morass." *Id.* According to the Report, "These Principles require

early judicial involvement so that the burden or electronic discovery is limited by *principles of proportionality*." *Id.* (emphasis added).

Additional support to apply the concept of proportionality in discovery is found in Colorado Pilot Project Rule 1.3 (adopted eff. Jan. 1. 2012) ("At all times, the court and the parties shall address the action in ways designed to assure that the process and the costs are proportionate to the needs of the case. The proportionality factors include, for example and without limitation: amount in controversy, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery or electronically stored information. This proportionality rule shall shape the process of the case in order to achieve a just, timely, efficient and cost effective administration of justice."), and *The Sedona Principles for Electronic Document Production* (The Sedona Conf. 2d ed. 2007) (Principle 2: " When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard" and "require consideration of the technological feasibility and realistic cost of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy."); *see also The Sedona Canada Principles Addressing Electronic Discovery* (2008) ("Principle 2: In any

proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information."). The English Civil Practice rules were recently amended to add the word "proportional" as well. *See* HM Courts and Tribunals Service, Practice Direction 31B – Disclosure of Electronic Documents (updated Apr. 1, 2012) ("The purpose of this Practice Direction is to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in *a proportionate and cost-effective manner*.") (emphasis added).

Commentators have pointed out that:

> The strength of the proportionality standard is that it is able to maintain the rules drafters' fundamental vision of wide-ranging discovery, the costs of which are borne primarily by the producing party, while recognizing that such a vision is subject to abuse and must be carefully supervised to avoid becoming a device for unnecessarily burdening or coercing the party against whom discovery is sought. The proportionality standard guards against such abuses . . . by subjecting potentially burdensome requests to a searching, individualized analysis of their costs and benefits in the particular litigation within which they are made.

Charles Yablon & Nick landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 Cardozo L. Rev. 719, 730 (2012).

II. RULE 34(B) ALLOWS A PARTY TO OBJECT TO DISCOVERY WITHOUT SEEKING A RULE 26(C) PROTECTIVE ORDER

This Court should have no difficulty interpreting the Colorado rules to address this issue. C.R.C.P. 34 requires only a response or objections. Here, written objections were made. There is no support for the District Court's conclusion that a party responding to discovery must take a "belt and suspenders" approach and file a Rule 26(c) protective order on top of making written objections to discovery under Rule 34(b).

C.R.C.P. 34(b) provides in pertinent part:

> The party upon whom the request is served shall serve a written response within 35 days after the service of the request. . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, *unless the request is objected to, in which event the reasons for objection shall be stated.* (Emphasis added).

The Rule thus anticipates production or inspection unless the "*unless the request is objected to . . . and the reasons . . . stated.*" *Id.* (emphasis added). In that situation, "[t]he party submitting the request may move for an order pursuant to

C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested." *Id.*

Nowhere does Rule 34 require a protective order to be filed to preserve one's timely made objections. *Cf. Williams v. District Court*, 866 P.2d 908, 909-10 (Colo. 1993). The only time Rule 34 requires that a party file a protective order is when that party serves no response at all to discovery. *See* C.R.C.P. 37(d) (Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection).

The Federal Rules operate the same way. As explained in *Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1362 (Fed. Cir.), *cert. denied sub nom. Hyde Athletic Indus., Inc. v. Badalamenti*, 498 U.S. 851 (1990):

> The plain terms of the rules of civil procedure show that a party served with a document request has four options:
>
> (1) respond to the document request by agreeing to produce documents as requested (Fed. R. Civ. P. 34(b));
>
> (2) respond to the document request by objecting (Fed. R. Civ. P. 34(b));
>
> (3) move for a protective order (Fed. R. Civ. P. 26(c) and 37(d)); or
>
> (4) ignore the request [subject to sanctions].

This Court should clarify that a party that is the target of discovery may, instead of producing, choose either to move for a protective order under C.R.C.P. 26(c) or to serve timely written objections under C.R.C.P. 34(b). The objector

should not be required to do both. As stated in C.R.C.P. 1(a), the Colorado Rules of Civil Procedure "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." It would not be just, speedy, or inexpensive to require parties served with discovery to produce or lodge objections under both Rule 34(b) and 26(c).

III. A TRIAL COURT MUST ADDRESS A PARTY'S RULE 34(B) OBJECTIONS BEFORE ORDERING PRODUCTION

The Colorado Rules of Civil Procedure must be held to require a trial court to address a party's written objections before ruling on a motion to compel. To hold otherwise would raise due process concerns and violate the mandate in C.R.C.P.1(a) that the Colorado Rules are to be interpreted to be "just." *Id.* Requiring trial courts to make specific findings, at least with respect to categories of objections or documents, is also consistent with achieving greater hands-on management of discovery by trial courts.

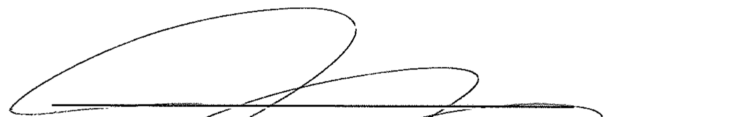
As noted in Anadarko's brief, this Court's decision in *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981), is instructive. In *Sherman*, a medical malpractice plaintiff sought to compel the defendant hospital to produce certain records that the hospital claimed were privileged. After a hearing, the trial court by written order denied the motion but "d[id] not reflect the reasons for [its] ruling." *Id.* at 380. This Court considered each of the theories under which the

hospital asserted privilege and provided guidance about their application. This Court then remanded to the trial court, holding "that court should make appropriate findings of fact and conclusions of law and should rule on [defendant's] objections on the basis of the criteria herein set forth." *Id.* at 384. If a trial court must specifically address a party's Rule 34 objections when deciding a motion to compel, the trial court should likewise be required to do the same in response to written objections with respect to discovery that relates to proprietary, confidential, or privileged information, as here. *See, e.g., Christian Echoes Nat'l Ministry, Inc. v. United States*, 404 F.2d 1066, 1068 (10th Cir. 1968).

CONCLUSION

For these reasons, the Court should provide the direction suggested above and remand for further proceedings in the District Court.

Respectfully submitted,



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