

**eDISCOVERY
UPDATE**



By Mark Cowing and
Rebecca Schwartz, SHB Partners

Mark Cowing
mcowing@shb.com
(816) 559-2275



Rebecca Schwartz
rschwartz@shb.com
(816) 559-2235



Mark is a member of the SHB eDiscovery, Data & Document Management (eD3) Practice, which has been at the forefront of document management and discovery for more than 25 years. Several discovery strategies that the firm pioneered are now industry standards. Becky's current practice focuses on the defense of complex and class action litigation in state and federal courts across the United States. SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation.

**COURT ORDERS CLASS ACTION PLAINTIFFS TO
SHARE DEFENDANT'S DISCOVERY COSTS**

A federal district court in Pennsylvania has given defendants in putative class actions new authority for requiring plaintiffs to share discovery costs. See [*Boey-naems v. LA Fitness International, LLC, No. 2-10-cv-2326-MMB*](#), 2012 WL 3536306 (E.D. Pa. Aug. 16, 2012). Specifically, District Judge Michael Baylson ruled that when class action plaintiffs request "very extensive discovery, compliance with which will be very expensive," plaintiffs typically should share defendant's discovery costs – at least until plaintiffs' certification motion has been filed and decided.

"If the plaintiffs have confidence in their contention that the Court should certify the class, then the plaintiffs should have no objection to making an investment," Judge Baylson said. "The Court is firmly of the view that discovery burdens should not force either party to succumb to a settlement that is based on the cost of litigation rather than the merits of the case." 2012 WL 3536306, at *10.

The case involves five named plaintiffs who allege breach of contract and unfair trade practices related to attempts to cancel their fitness club memberships. The parties were before the Court on plaintiffs' motion to compel production of documents and electronically stored information ("ESI"). An example of the parties' disagreements involved defendant's internal communications. Defendant claimed that large numbers of internal memoranda had already been provided, while plaintiffs held fast to their demand that "all responsive internal documents" be identified and produced. The Court compared the parties' discovery dialogue to "a Verdian opera scene where a tenor and a bass boast of their qualities to compete to win over the fair princess." 2012 WL 3636306, at *2.

Recognizing that discovery in the case was "asymmetrical," the Court contrasted the "very few documents" in plaintiffs' possession – e.g., their membership contract and related correspondence – with the millions of potentially discoverable items in defendant LA Fitness's possession. "The Court does not in any way suggest that counsel is acting otherwise than in the interests of their clients, but economic motivation and fairness are relevant factors in determining cost shifting of disputed discovery burdens," Judge Baylson said. 2012 WL 336306, at *4.

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"Plaintiffs have already amassed, mostly at Defendant's expense, a very large set of documents that may be probative as to the class action issue," the Court wrote. "If Plaintiffs conclude that additional discovery is not only relevant, but important to proving that a class should be certified, then Plaintiffs should pay for that additional discovery from this date forward, at least until the class certification is made." 2012 WL 3536306, at *10.

The Court established a protocol by which the plaintiffs would list discovery that they still request, being "specific as to what searching of ESI, or hard documents, is required." Defendant's response will include its internal costs for providing this information, including "the appropriately allocated salaries of individuals employed by Defendant who participate in supplying the information which Plaintiffs request, including managers, in-house counsel, paralegals, computer technicians and others involved in the retrieval and production of Defendant's ESI." 2012 WL 3536306, at *11. Plaintiffs will then be required to advise whether they are willing to make the necessary payment. Judge Baylson concluded the timeline by saying that "[t]he Court reserves the right to make an allocation of these costs depending upon the outcome of the class action motion and/or the merits of the case." *Id.*

To guide the process, Judge Baylson itemized the categories of information that he considered to be relevant and irrelevant (i.e., "inside and outside the fence") while certification remains pending. Citing the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2451 (2011), Judge Baylson noted that "the most relevant discovery at this stage of the case is that which will illuminate the extent to which Defendant's membership cancellation policies and practices are set and followed nationally; Plaintiffs must show either that individual managers have no discretion or that there is a common mode of exercising discretion that pervades the entire company." 2012 WL 3536306, at *11 (internal quotation marks omitted).

SHB's Suggestions for Defense Counsel

In light of *Boeynaems* and our experience in document discovery and complex litigation, SHB suggests:

1. From the outset, maintain a record of the volume, cost, and custodians of documents and ESI reviewed for responsiveness and produced to opposing counsel.
2. In responses to plaintiffs' requests for production, take care to (a) describe what defendant is willing to produce without objection; (b) specify the parts of plaintiffs' requests that are irrelevant to the claims and defenses in the case; and (c) explain how individual requests are overly broad and unduly burdensome.
3. Be alert for opportunities where defendant may be able to offer to produce only examples of certain types of documents "sufficient to show" notice or some other specific fact. This can reduce costs associated with the production of repetitive documents such as articles and monthly reports.

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4. Proactively seek agreement on the custodians and sources from which collection and production will be made. Emphasize the value of first producing from a core group of custodians (usually no more than three to five) and defendant's willingness to meet and confer about reasonable requests to search additional sources *after* plaintiffs have reviewed the initial production.
5. Don't jump the gun on defendant's cost-shifting motion. It will be stronger once a threshold volume of information has been produced and plaintiffs' requests begin to appear more onerous.
6. Consider these suggestions not only in class actions but in all cases in which a client is asked to produce documents and ESI in large volumes.



OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
Philadelphia, Pennsylvania
+1-215-278-2555
San Francisco, California
+1-415-544-1900
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB understands that effective litigation support merges cutting-edge technology with time-tested litigation strategies and management techniques to deliver the most cost-effective and efficient solutions to document discovery, e-discovery and litigation support challenges. SHB has partnered with *Fortune* 50, 100 and 500 clients to develop proactive solutions for electronic document retention and high-volume discovery in complex litigation.

