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## Court Orders Cost-Shifting for Pre-Class Certification Discovery

*Eastern District of Pennsylvania decision offers discovery cost relief for litigants faced with asymmetrical pre-class certification discovery.*

In *Boeynaems v. LA Fitness International, LLC*,<sup>1</sup> a case of first impression, the U.S. District Court for the Eastern District of Pennsylvania ruled that the parties should share discovery costs incurred prior to class certification. The court found that cost allocation between parties was fair and appropriate where the burden of significant discovery expense falls almost entirely on the defendant and is due, in large part, to the plaintiffs' pursuit of class certification. The court further concluded that if the plaintiffs have confidence in their class action, the plaintiffs should have no objection to sharing discovery costs prior to class certification.

### Background

In *Boeynaems*, after signing membership contracts with the defendant health club, the plaintiffs alleged that the defendant breached the contracts and engaged in deception when the plaintiffs attempted to cancel their memberships. The plaintiffs filed a complaint on these grounds and sought class certification of a nationwide class (for claims of breach of contract and unjust enrichment) and state classes (for violations of various states' laws).

After numerous filings by the parties, multiple discovery conferences, and production of voluminous documents, the plaintiffs filed a motion to compel, which was denied as moot after the parties appeared to reach an agreement on various discovery issues. The plaintiffs subsequently submitted a letter to the court reporting that many of the same issues raised in the motion to compel remained unresolved. In response, the defendant detailed the discovery to date and claimed the additional discovery at issue was unduly burdensome. To address the letter and other pending discovery disputes, the court agreed to decide the plaintiffs' motion to compel.

### Economic Aspects and Asymmetry

The court examined instructive case law and considered several factors to evaluate the appropriate scope of discovery in the class action context. In assessing the unique challenges of class action discovery, the court noted that "a class action dramatically changes the strategies and economic considerations of the parties and their counsel." Slip op. at 5. Because of this, many recent decisions have "put significant limits" on the scope of class actions. Similarly, courts may place limits on the scope of discovery in class actions, particularly when the cost of production becomes "a significant factor in the defense of the litigation" because the plaintiffs have little to produce, while the defendants have millions of records. See slip op. at 6.

Due to what the court characterized as "asymmetrical discovery," the court held that it has the power to allocate the costs of discovery among the parties in the interest of fairness. In potential class actions, "[i]f Plaintiffs' counsel has confidence in the merits of the case, they should not object to making an investment in the cost of

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1. *Boeynaems v. LA Fitness Int'l, LLC*, Nos. 10-2326, 11-2644, 2012 WL 3536306 (E.D.Pa. Aug. 16, 2012), available at <http://www.paed.uscourts.gov/documents/opinions/12D0821P.pdf>.

securing documents from Defendant and sharing costs with Defendant.” Slip op. at 8. Thus, because the plaintiffs’ counsel was financially able to make an investment in discovery and securing documents, the court found that cost sharing and allocation between the parties was appropriate.<sup>2</sup>

While the court noted many opinions that address cost-shifting generally, the court found no decisions that specifically addressed cost allocation “as part of a substantial discovery dispute prior to the class certification decision.” Slip op. at 10. Generally, courts addressing cost allocation evaluate the parties’ financial and other resources, along with the accessibility, relevance, and scope of discovery sought and the related burden and expense. The court noted that parties disputing discovery as burdensome must support their claim with sufficiently detailed evidence showing the time, effort, and expense involved, along with an explanation of the burden created by the scope of the requests.

In support of its argument, the defendant estimated that the cost of reviewing 60 months of requested member notes would be approximately \$360,000—“a very elaborate and expensive undertaking” in light of the fact that a sampling of those notes “exhibited only an extremely small proportion with any evidence probative of Plaintiffs’ claims.” Slip op. at 19. Responding to yet another request for electronically stored information (ESI) would have cost the defendant an estimated additional \$219,000. Despite the discovery that the defendant had claimed to have previously provided, the plaintiffs responded that they were entitled to “all responsive internal documents.” The court disagreed with such a “sweeping characterization of a defendant’s obligations in a case of this nature, prior to class action certification.” Slip op. at 20.

Ultimately, the court concluded that, where “(1) class certification is pending, and (2) the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive, that absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek.” The court further clarified that “[w]here the burden of discovery expense is almost entirely on the defendant, principally because the plaintiffs seek class certification, then the plaintiffs should share the costs.” Slip op. at 21.

The court found that the plaintiffs had amassed a large volume of documents, while the defendant had, thus far, paid all the costs of complying with the plaintiffs’ discovery. The court shifted the costs of additional discovery to the plaintiffs, noting that the plaintiffs would need to assess the value of additional discovery. The court held that, if the plaintiffs find that additional discovery is relevant and important to obtaining class certification, the plaintiffs “should pay for that additional discovery from this date forward, at least until the class action determination is made.” Slip op. at 21–22.

## Implications

Defendants in class action disputes often face asymmetrical discovery, where the plaintiffs have few, if any, documents, while the defendants have millions of records. *Boeynaems* may afford litigants faced with pre-class certification discovery a means to obtain relief in the form of cost-shifting.

A party arguing that discovery is asymmetrical and burdensome must be prepared to explain the specific burden in terms of time, money, and process required to produce the requested information. The party claiming undue burden should further detail the extent to which relevant information has already been searched and produced, the likelihood of finding additional relevant information in response to the burdensome requests, and the volume and type of data implicated by those requests. The party may even choose to perform some sampling of potential information in support of its argument.

## Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact

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<sup>2</sup> The court specifically noted that the plaintiffs were represented by a “very successful and well[-]regarded” firm that “has had outstanding successes for many years in prosecuting class actions, winning hundreds of millions of dollars for their clients, and undoubtedly and deservedly, substantial fees for themselves.” Because of this, the court noted that the firm “ha[d] the financial ability to make the investment in discovery.” Slip op. at 8.

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