IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. _____

IN RE Mary E. GLOVER, *Plaintiff - Petitioner;*

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVIANA,
Respondent,

and

WELLS FARGO HOME MORTGAGE; GOLDMAN SACHS MORTGAGE COMPANY, Mark J. UDREN, UDREN LAW OFFICES, P.C.,
Defendants - Respondents.

PETITION FOR WRIT OF MANDAMUS TO THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Hon. Donetta W. Ambrose, United States District Judge)

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INTRODUCTION

This petition concerns the proper reasons for appointment of a special master and whether a master's fees may be allocated in a manner that deprives a low-income litigant of a judicial forum to obtain redress for statutory wrongs.

In this putative class action, homeowner Mary Glover alleges that mortgage lenders and a debt collector have violated federal and state consumer protection laws and breached their contracts. Although the district court has ruled that Ms. Glover's claims are legally viable, she is now on the verge of being priced out of court because the magistrate judge appointed a special master and required the plaintiff to pay half of the master's costs, which she cannot afford to do. The special master was not appointed for any purpose authorized under the Federal Rules of Civil Procedure, but to resolve routine discovery matters after the magistrate judge became frustrated that the parties were unable to agree among themselves about the scope of their discovery obligations. The magistrate judge ordered that the special master's fees be split equally between Ms. Glover, whose income consists of Social Security benefits totaling less than $10,000 annually, and the defendants, who include the large financial institutions Goldman Sachs and Wells Fargo. Ms. Glover is in no position to pay for the right to pursue her case.

Therefore, Ms. Glover seeks relief from the unorthodox special-master appointment and the cost allocation that would erect an insuperable financial

barrier to pursuing this important lawsuit raising serious questions about the conduct of two of the nation's largest financial institutions. If appointment and allocation orders of the type at issue here were permitted, low-income individuals nationwide would be disabled from enforcing vital federal and state consumer protection laws like the ones at issue in Ms. Glover's case.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this original petition for a writ of mandamus under the All Writs Act. 28 U.S.C. § 1651(a).

STATEMENT OF THE ISSUES

1. Does Rule 53(a) authorize the appointment of a special master to handle routine discovery disputes as a sanction for parties' failure to settle these disputes on their own? *See* Dkt. 384, at 7-9, 15-16 (raising objection); Dkt. 410, at 5 (overruling objection).

2. Does Rule 53, interpreted in light of the constitutional equal protection and due process guarantees, permit a magistrate judge to allocate a special master's fees in such a manner that an impecunious plaintiff will be forced to abandon her case? *See* Dkt. 384, at 5-7, 15-16 (raising objection); Dkt. 410, at 6-7 (overruling objection).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Unrelated issues arising from the same underlying case are pending before this Court in a separate appeal, No. 11-3382, scheduled for oral argument the week of June 25, 2012. The issues raised in that appeal concern the interpretation of two Pennsylvania laws: the Fair Credit Extension Uniformity Act and the Unfair Trade Practices and Consumer Protection Law.

STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of the issues presented not only to this case but also to special-master practice and access to justice for low-income individuals generally, Ms. Glover respectfully requests that the Court hear oral argument.

STATEMENT OF THE CASE AND FACTS

Plaintiff homeowner Mary E. Glover filed a detailed complaint alleging a series of overcharges, misallocations of payments, violations of statutory obligations, and breaches of contract by Defendants in servicing and collecting her mortgage payments and those of other similarly situated homeowners. *See* Dkt. 109, at 1 (amended complaint); *see also id.* at 24-28 (explaining how Defendants' practices may have affected more than 25,000 homeowners).[1] On behalf of the putative class, Ms. Glover asserted claims for breach of contract and related common-law claims, and violations of the federal Fair Debt Collection Practices Act and the Pennsylvania Fair Credit Extension Uniformity Act, Loan Interest Protection Act, and Unfair Trade Practices and Consumer Protection Law. *See id.* at 57-58.

Ms. Glover filed her case in Pennsylvania state court on June 9, 2008, and Defendants removed to federal court on July 14, 2008. Dkt. 1, at 1, 2, 12. The most

[1] The record documents cited are appended to the petition, arranged in chronological order, and identified by docket number. Fed. R. App. Pro. 21(a)(2)(C).

recent amended complaint was filed on June 9, 2010. Dkt. 109. After the case survived a series of dispositive motions over the course of nearly three years, discovery began in the late spring of 2011. On May 24, 2011, the magistrate ordered that the Defendants file their answers to the amended complaint by May 31, that Ms. Glover move her class certification sixty days later on July 31, and that the parties complete discovery by the end of 2011. *See* Dkt. 234.

Discovery was, as it is in many cases, contentious. Ms. Glover's discovery efforts took on a degree of urgency in light of the condensed window of time she had been allotted to complete class discovery, analyze the voluminous documents relevant to class certification, complete depositions, and fully brief class certification issues. *See id.* In contrast, Defendants, in possession of many of the documents Ms. Glover would need to support class certification, had an incentive to proceed slowly with discovery. Predictably, the parties' conflicting incentives led to discovery disputes, even about issues one would expect to be uncontroversial.[2] After the class certification deadline was extended for sixty days, both sides filed a series of motions to compel, motions to enforce, and motions to quash. The magistrate judge handled these motions expeditiously, in one instance disposing of fifteen motions at a single conference lasting less than two hours. *See*

[2] For instance, Defendants objected to the use, in discovery requests, of common financial terms such as "mortgage," "note," "debit," and "credit" on the ground that the words were "vague and ambiguous." *See* Dkt. 352, at 2.

Dkt. 322 (order at Sept. 8, 2011, conference); Dkt. 439, at 2 (magistrate's subsequent recitation of procedural history).

With the schedule still compressed, conflict continued.[3] The magistrate judge, however, was no longer willing either to address the motions that the compressed class-certification schedule had made necessary or to relax that schedule. Instead, on October 12, 2011, the magistrate judge issued an order expressing frustration that the "parties continue[d] to inundate the Court with endless discovery motions," noting that the magistrate had previously warned the parties that "the continuation of this outrageous motions practice would result in those discovery matters being referred to a special master," and ordering that the parties confer and select a special master for the referral of all discovery disputes, with the master's fees to be borne 50% by Ms. Glover and 50% by Defendants. Dkt. 364. The order did not suggest that the discovery disputes were of an unusual or technical nature; the only reasons given for the appointment of the master were the parties' "endless discovery motions" and what the magistrate considered "outrageous motions practice." *Id.* The order did not explain why the magistrate

[3] For instance, as of October 2011, Wells Fargo had refused to schedule a single deposition. *See* Dkt. 350.

judge was unable to continue to resolve the discovery disputes, some of which simply asked him to enforce his own prior orders. *See* Dkt. 354, 355.[4]

Pursuant to the magistrate judge's order, the parties jointly proposed Mark A. Willard as the special master, although they also noted Ms. Glover's objection to the appointment of any special master. Dkt. 370. The magistrate judge then appointed Mr. Willard, directed him to resolve a defined group of fourteen outstanding discovery matters, and reiterated that Mr. Willard's fees would be apportioned equally between Ms. Glover and Defendants. Dkt. 373. The magistrate judge subsequently specified a slightly modified list of sixteen discovery matters to be decided by the master, who would also handle all future discovery disputes. Dkt. 408. The specified matters fall into four groups: (1) Plaintiff's motions to compel compliance with discovery obligations or seek relief on account of failures of compliance (Dkt. 328, 350, 351, 352, 353, 356, 357, 372); (2) Defendant Wells

[4] The entire text of the special master order reads:

> AND NOW, this 12th day of October, 2011, after the parties continue to inundate the Court with endless discovery motions, and after they were informed that the continuation of this outrageous motions practice would result in those discovery matters being referred to a special master,
>
> IT IS HEREBY ORDERED that on or before October 17, 2011, the parties confer and see if they can agree on a special master to whom all such matters will be referred; if they fail to do so, the Court will make its own selection of such special master. The master's fees will be borne 50% by the plaintiff and 50% by the defendants.

Dkt. 364.

Fargo's motions to compel compliance with discovery obligations (Dkt. 360, 391); (3) Plaintiff's motions to enforce prior discovery orders of the court (Dkt. 354, 355); and (4) motions for miscellaneous relief ancillary to the discovery process.[5]

Ms. Glover filed objections with the district court asserting that the appointment of the special master was flawed on a variety of grounds, including but not limited to the impropriety of the appointment under Rule 53 and the unfairness of allocating fees equally between an indigent plaintiff and a group of defendants that includes two large financial institutions. Dkt. 384, at 5-9, 15-16; *see also* Dkt. 410, at 3 (summarizing objections). Since 2008, Ms. Glover's only source of income has been Social Security Disability benefits of less than $10,000 per year. Dkt. 417. In her objections, Ms. Glover took the position that the appointment of a special master to handle disputes related specifically to electronically stored information would be appropriate if such issues remained pending *after* the extant discovery motions were adjudicated, and *if* the appointment complied with Rule 53 and allocated costs so as not to put the Plaintiff out of court. Dkt. 384, at 16, 20-23.

Although the district court concluded that the magistrate judge's appointment order "should be amended to include the more detailed requirements

[5] This final category includes four motions: Defendent Udren's motion to quash a subpoena (Dkt. 336); Defendant Wells Fargo's motion to enforce a third party subpoena (Dkt. 362); a sealed motion (Dkt. 377); and Ms. Glover's motion for a stay of class proceedings pending resolution of the discovery motions (Dkt. 394).

set forth in Rule 53(b)," the court overruled Ms. Glovers' objections and held that the appointment order "substantially complies with Rule 53." *See* Dkt. 410, at 5-8.

Because Ms. Glover cannot pay the special master's fees, she sought further review of the special master order in several ways. First, pursuant to *In re Westinghouse Securities Litigation*, 90 F.3d 696, 702, 705 (3d Cir. 1996), she asked that the court enter a final judgment so she could appeal. *See* Dkt. 412. Second, following this Court's preference, *see Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 991 F.2d 1080, 1083 n.4 (3d Cir. 1993), she sought certification for interlocutory appeal under 28 U.S.C. § 1292(b). *See* Dkt. 429. The district court denied both motions. *See* Dkt. 421; Dkt. 456. Therefore, as a last resort, Plaintiff now seeks a writ of mandamus from this Court.

SUMMARY OF ARGUMENT

Rule 53 authorizes the appointment of a special master in extraordinary circumstances, as when a case requires particularly technical or managerial tasks like the interpretation of a patent or the monitoring of a consent decree. The rule does not authorize the appointment of a special master to resolve routine discovery disputes or the use of a special master as a tool to punish parties who ask the court to rule on discovery motions instead of compromising their positions regarding what discovery must be produced. Because the magistrate judge lacked authority

under Rule 53 and this Court's precedent to appoint a special master in the circumstances presented here, the appointment must be set aside.

An independent flaw in the appointment is the allocation of the special master's costs. Rule 53 requires that the allocation reflect, among other factors, fairness and the parties' respective capacities to pay, and that the allocation protect the parties from unnecessary expense. These concerns are particularly salient in light of the constitutional equal protection and due process guarantees that prohibit pricing impecunious parties out of court. Because the allocation of costs in this case failed to account for the plaintiff's limited means and has the effect of preventing her from continuing to pursue her case, Rule 53—interpreted (as it must be) to avoid an unconstitutional application—prohibits the cost allocation imposed in the appointment order.

To enforce Rule 53's strict limitations on the uses of special masters and to protect impecunious parties from being unfairly put out of court by the appointment of a special master, a writ of mandamus should issue.

STANDARD OF REVIEW

To obtain a writ of mandamus, "the petitioner [must] demonstrate[] that it lacks adequate alternative means to obtain the relief sought and that the petitioner's right to the issuance of a writ is clear and undisputable." *Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 991 F.2d 1080, 1082 (3d Cir. 1993) (citation

omitted). This Court has held that a mandamus proceeding is the appropriate vehicle for challenging the appointment of a special master. *Id*. at 1083 (explaining that, following the Supreme Court's practice, mandamus has become "an accepted means to challenge a district court's order referring matters to a special master under Rule 53" and proceeding to merits of Rule 53 challenge). In the context of a special master, the Supreme Court has explained that "mandamus should issue to prevent [an] action … so palpably improper as to place it beyond the scope of the rule invoked." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (citation omitted). For the reasons that follow, that standard is satisfied here.

ARGUMENT

In this case, the appointment of the special master is invalid both because it was beyond the authority of the magistrate judge under Rule 53(a) and because the magistrate judge did not equitably allocate the master's fees as required by Rule 53(g). Either of these failings justifies the requested writ of mandamus.[6]

[6] Ms. Glover's position in the district court that a special master whose costs were fairly allocated would be appropriate at a later point in the case to resolve certain technical disputes, presents no obstacle to her raising objections to the quite different appointment that the magistrate judge made and the district court affirmed. *See In re United States*, 816 F.2d 1083, 1085, 1091 (6th Cir. 1987) (invalidating appointment of special master even though objecting party indicated it would have consented to master's appointment for different purposes).

I. The Special Master Was Appointed For A Purpose Not Authorized By Rule 53(a).

Rule 53 strictly cabins the reasons for which a special master may be appointed. Specifically, Rule 53 provides that "[u]nless a statute provides otherwise, a court may appoint a master *only* to" do three specific types of tasks. Fed. R. Civ. Pro. 53(a)(1) (emphasis added). These tasks are: (A) "duties consented to by the parties"; (B) "hold[ing] trial proceedings and mak[ing] or recommend[ing] findings of fact on issues to be decided without a jury"; and (C) "address[ing] pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." *Id*.

The record is clear that the special master in this case was appointed for a very different reason: to coerce the parties into settling their discovery disputes and punish them for not doing so. As the magistrate judge explained in his order appointing the special master, because the "parties continue[d] to inundate the Court with endless discovery motions," the magistrate judge was making good on his previous threat that "the continuation of this outrageous motions practice would result in those discovery matters being referred to a special master." Dkt. 364.

The magistrate judge did not suggest and the record does not indicate that the appointment of the special master was necessary because the discovery process involved tasks beyond the competency or capacity of the magistrate judge. *Cf.* Fed. R. Civ. Pro. 53(a)(1)(C) (authorizing the appointment of a master to "address

pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district"). Rather, the special master was appointed to handle sixteen routine discovery motions, including the types of motions to quash, to compel, and to enforce discovery orders that characterize everyday discovery practice. Less than six weeks before appointing a master, the magistrate judge himself conducted a discovery conference at which he disposed of fifteen such discovery motions in less than two hours. *See* Dkt. 322; Dkt. 439, at 2. Thus, the special master's appointment was born not of judicial necessity but rather the magistrate judge's acknowledged "frustration." Dkt. 439 (magistrate's report and recommendation to deny motion to certify interlocutory appeal), at 2 n.1.

As the Supreme Court has explained, the purpose of a special master is "to aid judges in the performance of specific judicial duties … and not to displace the court." *La Buy*, 352 U.S. at 256 (citation and internal quotation marks omitted). Docket congestion, complexity of issues, and the time-consuming nature of a case are not factors that justify appointment of a special master to perform judicial functions. *See id.* at 259. The advisory committee notes to Rule 53 make clear that the current version of the rule maintains the long tradition, carried over from prior versions, that "appointment of a master must be the exception and not the rule." Fed. R. Civ. Pro. 53 Advis. Comm. Notes Regarding 2003 Amdts.; *see also id.*,

Subdiv. (a)(1), Pretrial and Post-trial Masters ("A pretrial master should be appointed only when the need is clear."); *see generally Prudential*, 991 F.2d at 1083-84 (noting the long history of the "exceptional circumstances" condition for the appointment of a special master).

In *Prudential*, this Court (applying a prior version of Rule 53) issued a writ of mandamus setting aside a special-master appointment; many of the flaws with the appointment order in that case are also present here. There, as here, the lower court appointed a master for "tasks … normally conducted by a district court with, perhaps, the assistance of a magistrate judge." *Prudential*, 991 F.2d at 1085. There, as here, the court "merely appears to have substituted a master for the magistrate judge," although the court "has neither given … specific reasons for appointing a special master" nor indicated "any particular, unique, special or exceptional circumstances with which a magistrate judge could not deal effectively." *Id.* There, as here, the court justified the appointment of a master in part because of "the number of the motions and the breadth of documents accompanying the motions." *Id.* at 1087. The Court in *Prudential* also expressed a concern, equally relevant to this case, that a special master, however skilled, would be an inefficient substitute for the magistrate judge who has already been handling discovery issues. *See id.*

The appointment of a special master *by a magistrate judge* to handle pre-trial matters is particularly problematic, since *Prudential* considered the "current

availability of magistrate judges to whom Congress has specifically authorized the referral of pre-trial matters" as an additional reason that the appointment of special masters should be "disfavor[ed]." *Id.* (discussing 28 U.S.C. § 636(b)(1)). In sum, *Prudential* refutes the proposition that difficulties in or frustration with regular motion practice or other tasks ordinarily handled by district or magistrate judges justifies the appointment of a special master. *See also Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 441 (3d Cir. 2005) (rejecting appointment of a master to perform an "equitable allocation" of responsibility for pollution under federal environmental law because such a calculation was "a quintessentially judicial endeavor"); *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097 (3d Cir. 1987) (finding that "this case does not even remotely meet the showing of exceptional circumstances" for appointment of a master because the matter that had been referred to the master involved, at most, a purely legal question and a "relatively simple factual question").

In re United States, 816 F.2d 1083 (6th Cir. 1987), highlights the inconsistency between Rule 53 and use of a special master as a coercive tactic. In that case, a district court had used the threat of appointing a special master to coerce the parties toward settlement. The Sixth Circuit recounted the procedural history of that case as follows:

> In April and May of 1985, "a continuously more frustrated Court learned that the settlement abyss between the parties seemed to be

> widening rather than narrowing." In its order of June 24, 1985, the court determined that there would be "one last effort to avoid the extraordinarily expensive, time-consuming, and burdensome litigation which may well be inevitable." Accordingly, the court ordered the parties to submit a joint stipulated agreement in the form of a proposed case management order by July 12, 1985. The court warned that if no proposed case management order was submitted by that date, the court would "hear reasons that a special master should not be appointed."

Id. at 1085. When the parties could not agree on a case management order, the court appointed a special master. *Id.* Holding that the appointment was improper, the Sixth Circuit explained that none of the district court's stated justifications—docket congestion; complexity of issues; the possibility of a long trial; the involvement of more than 250 parties; and the public interest in speedy resolution of Superfund cases—could sustain the appointment. *See id.* at 1088-89, 1091.

The appointment of a special master in this case stands on even weaker footing. Here, there is no allegation that docket congestion, multiplicity of parties, or any other factor makes this an "exceptional case" justifying the appointment of a special master. Like *In re United States*, this case involves an appointment designed to punish the parties for their inability to settle their disputes, and here, this reason appears to be the only justification for the appointment. *See* Dkt. 364 & 439. This reason plainly is not authorized by Rule 53.

Finally, the appointment of a master in this case violates Rule 53's admonition that courts "must protect against unreasonable expense or delay." Fed.

R. Civ. Pro. 53(a)(3). An appointment in these circumstances replaces the familiar two-tier discovery system (in which a magistrate judge, familiar with the parties and the issues, rules on discovery disputes, subject to the oversight of the district court) with a three-tier system (in which a special master, new to the case, rules on discovery disputes in the first instance, subject to review by the magistrate, subject to further review by the district court). In short, substituting a special master for a magistrate judge as the primary adjudicator of common discovery disputes adds an unnecessary layer of reviewing bureaucracy and trades a judicial officer for a private lawyer. *Cf. La Buy*, 352 U.S. at 259 (suggesting that "a temporary substitute appointed on an ad hoc basis" was unlikely to be as effective as a judicial officer at standard adjudicatory tasks); *In re United States*, 816 F.2d at 1088 (noting that reference to a master "may well actually increase the length of time necessary to resolve the issues," in part because of the added layer of review). Such a trade-off contravenes Rule 53's command to protect against "unreasonable expense or delay."

Mediating between opposing litigants can be a trying task, and the magistrate judge's "frustration," Dkt. 439 at 2 n.1, with the process may be understandable. But the fact that discovery negotiations were, to quote the magistrate judge, "not collegial" and that the parties were unable to resolve their disputes "courteously," *id.* at 2 & n.1, hardly makes this case extraordinary, as

parties are often at odds concerning their discovery obligations and must rely on the court to resolve their disagreements. The discovery rules explicitly contemplate judicial resolution of such disputes, no matter how acrimonious, in the ordinary course of discovery management. *See* Fed. R. Civ. Pro. 37. Rule 53 does not authorize passing off the adjudicative tasks of discovery to a private attorney when a magistrate judge is frustrated with particularly hard-fought disputes.

Nor do the rules render a magistrate judge powerless in the face of "inundat[ion] … with endless discovery motions" or "outrageous motions practice." Dkt. 364. Magistrate judges may make quick work of discovery motions—just as the magistrate judge did here at a discovery hearing held six weeks before he appointed the master. In fact, resolving some of the motions ultimately referred to the special master here would have required nothing more than for the magistrate judge to set a date certain for compliance with his own orders. *See* Dkt. 354, 355 (seeking enforcement of prior discovery orders). To deal with extreme cases, the discovery rules allow magistrate judges, after notice and a hearing, to sanction lawyers for discovery demands and responses that are frivolous, made for an improper purpose, or unreasonable. *See* Fed. R. Civ. Pro. 26(g)(1)(B), 26(g)(3), 37(b)(2). But the appointment of a special master to escalate litigation costs for the parties is not among the sanctions authorized in the discovery rules. Here, the magistrate eschewed the substantial discovery

management powers the rules afford him and instead used a special master as a coercive tool and discovery sanction.

Because the magistrate judge's appointment of a special master in this case was not authorized by Rule 53 and is at odds with this Court's holdings, a writ of mandamus should issue directing the district court to vacate the special master's appointment.

II. The Appointment Failed To Comply With The Requirements Of Rule 53 Regarding Allocation Of The Special Master's Costs.

A separate and independent flaw in the appointment of the special master was the allocation of the master's costs equally between an indigent plaintiff and the large financial institutions on the opposing side. Rule 53 provides safeguards for both the fairness and efficiency of proceedings involving a special master: "In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay." Fed. R. Civ. Pro. 53(a)(3). The Rule also contains a more specific protection for the parties regarding the allocation of the master's costs: "The court must allocate payment among the parties after considering the nature and amount of the controversy, *the parties' means*, and the extent to which any party is more responsible than other parties for the reference to a master." Fed. R. Civ. Pro. 53(g)(3) (emphasis added).

Although a party's means to pay is not the only relevant consideration, a magistrate judge should not be permitted to allocate costs in such a way as to force a plaintiff to abandon her case entirely because she cannot afford to pay for a private adjudicator. Such an order transforms the appointment of a special master from a procedural device to facilitate the resolution of a case, to a judicial bludgeon that abruptly ends a case, solely because of a party's wealth. It reduces to a nullity Rule 53's charge to consider "the parties' means" in allocating costs. It turns our presumptively open courts into a pay-to-play system in which a party can be compelled to pay for her own adjudicator as a precondition to obtaining relief. Finally, it contravenes the Rule's more general charge to "consider the fairness of imposing the likely expenses on the parties and … protect against unreasonable expense." Fed. R. Civ. Pro. 53(a)(3).

In this and other consumer cases, an allocation that forces a low-income party out of court undermines the fee-shifting provisions that Congress and the State of Pennsylvania have enacted to provide incentives to attract counsel so that plaintiffs are able to bring such claims in the first place. *See, e.g.*, 15 U.S.C. § 1692k(a)(3) (attorneys fees under Fair Debt Collection Practices Act); 73 Pa. Stat. Ann. § 201-9.2(a) (attorneys fees under state consumer protection law); *see generally Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (explaining that a fee-shifting provision reflects a legislative judgment that the

claim at issue vindicates a "policy … of the highest priority" (citation and internal quotation marks omitted)). The legislative goal of facilitating such claims would be defeated if low-income claimants, at first aided in obtaining counsel by fee-shifting provisions, could subsequently be deterred from maintaining a case by the unanticipated costs associated with the appointment of a special master. Low-income plaintiffs would have great difficulty retaining counsel, who would face the risk that a court might unexpectedly require parties to pay tens of thousands of dollars to a private adjudicator in order to continue to pursue their claims in an Article III forum. The prospect of such costs would likely deter prospective counsel, who may be in the position to advance ordinary expenses in a consumer case, but who are less likely to be able to cover unforeseen and uncapped fees associated with the work of a special master, particularly in light of the possibility that such costs would not be recoverable. *See* 28 U.S.C. § 1920; *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987).

The magistrate assumed that Ms. Glover's counsel would pick up the bill in this case, *see* Dkt. 439, at 11 n.3, but only the wealthiest of litigants, such as the large financial institutions who are among the defendants in this case, could assume an open-ended payment obligation whose ultimate size depends in part on the actions (or inaction) of the litigant's opponent. Although plaintiffs' counsel often advance litigation expenses, planning at the outset of a case to pay discrete

and predictable expenses is entirely different from taking on, in the midst of litigation, an unforeseen and indeterminate cost that opposing parties, because of their relative wealth, have every incentive to drive up. If the imposition of special masters into routine discovery practice were permitted, many plaintiffs' counsel would be forced to withdraw from their cases, and in the future, plaintiffs like Ms. Glover would be unable to find counsel in the first place. Thus, whether the issue is Ms. Glover's own finances or her ability to retain counsel who can advance potentially unlimited expenses, the effect of the cost allocation here is the same: to prevent Ms. Glover from proceeding with her case.

Even if Rule 53 did not contain explicit provision for consideration of fairness, unreasonable expense, or the parties' means, an order that shuts an impecunious party out of court raises serious constitutional concerns. Under the rule of constitutional avoidance, *see, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381 (2005), this Court should interpret Rule 53 to prohibit such a result.

The Supreme Court has long abjured "discrimination against the indigent" in setting the terms of access to justice, and has pointedly admonished that "there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has." *Douglas v. California*, 372 U.S. 353, 355 (1963) (citation and internal quotation marks omitted). This concern, which reflects an

amalgam of equal protection and due process concerns, *see, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996), extends to civil proceedings as well as criminal.

For instance, the Supreme Court held unconstitutional a state court requirement that a parent pay over $2,000 in record-preparation fees to appeal a judgment stripping her of her parental rights. *Id.* at 106-07. The Court struck down a set of state laws and procedures denying a divorce decree where a couple could not pay costs amounting to approximately $60. *Boddie v. Connecticut*, 401 U.S. 371, 372-74 (1971). And the Court held that a state had to cover the $250-500 cost for blood grouping tests sought by an indigent defendant to enable him to contest a paternity suit that sought to render him responsible for child support payments. *Little v. Streater*, 452 U.S. 1, 14 n.10, 16-17 (1981). Likewise, outside the family-law context, this Court has held that the judicial system may not be closed to the indigent. *See Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898, 899-900, 907-08 (3d Cir. 1980) (in two-tier court system, in which action could be heard by a justice of the peace but losing party normally would have the option to seek de novo superior court trial as of right, losing party's access to superior court in civil debt action could not be conditioned on the posting of a surety bond).

Although the fees associated with some types of civil proceedings have been upheld against constitutional challenge, decisions of this kind have addressed discrete and relatively small filing fees reasonably linked to the government's

administrative costs associated with running the judicial proceedings themselves. *See, e.g.*, *Ortwein v. Schwab,* 410 U.S. 656, 656-58, 660-61 (1973) (per curiam) (upholding $25 filing fee to obtain judicial review of denial of welfare benefits); *United States v. Kras*, 409 U.S. 434, 435-36, 448-50 (1973) (upholding $50 filing fee as prerequisite to discharge in bankruptcy). Here, by contrast, the magistrate has ordered a low-income party to pay what may well total tens of thousands of dollars to retain a private adjudicator. Thus, the question is not whether ordinary court fees can be required, but whether courts have the power to force litigants to hire private adjudicators to resolve routine discovery disputes, at costs that are orders of magnitude higher than ordinary filing fees.

When assessing the constitutional concerns implicated by the denial of access to justice on the basis of indigency, the Supreme Court "inspect[s] the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other." *M.L.B.*, 519 U.S. at 120-21. Under this balancing approach, forcing Ms. Glover out of court because of the magistrate's "frustration" with the parties' discovery conduct is of dubious constitutionality. Ms. Glover's has a property interest in her claims, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), and a concomitant interest in accessing the courts to rectify the alleged wrongs that nearly cost her her home. Moreover, there is a strong public interest in these proceedings, which if certified

as a class action could make many more individuals whole and deter unscrupulous practices by financial institutions.

By contrast, the government has virtually no interest in making Ms. Glover pay exorbitant and uncapped costs just to stay in court. As explained in Part I, the appointment of a special master in this case was made for purposes unauthorized by Rule 53. The only conceivable government interest here is the avoidance of obstructionism in the discovery process. But that interest is easily accommodated by the magistrate judge's existing case-management authority. The magistrate judge could have decided the discovery motions before it or sanctioned lawyers for any frivolous motions or wrongful behavior. In the balancing calculus of equal protection and due process, there is no government interest at all to counterbalance the unfairness of stripping Ms. Glover of her ability to litigate.

In accordance with the Rule 53 factors and to avoid creating a constitutional problem as applied, this Court should set aside the magistrate's appointment of the special master because of the appointment order's impermissible allocation of costs.

CONCLUSION

This Court should issue the requested writ of mandamus ordering that the special master's appointment be vacated.

Dated: May 24, 2012

Respectfully submitted,

/s/ Scott Michelman

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CERTIFICATION OF BAR MEMBERSHIP

I certify that Scott Michelman, Michael P. Malakoff and Adina H. Rosenbaum, counsel for Petitioner, are members of the Bar of this Court.

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on May 24, 2012, I caused this petition to be served by overnight mail on the following counsel for respondents, as follows:

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I certify that on May 24, 2012, I caused this petition to be served by overnight mail on the trial judge as respondent, in accordance with Fed. R. App. Pro. 21(a)(1), as follows:

Donetta W. Ambrose, Senior District Judge
U.S. District Court for the Western District of Pennsylvania
P.O. Box 1805
Pittsburgh, PA 15230

I certify that on May 24, 2012, in accordance with Fed. R. App. Pro. 21(a)(1) & 21(d), I filed the original and three copies of this petition, along with the prescribed filing fee, by overnight mail with the Clerk of the Court, as follows:

Office of the Clerk
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Room 21400, U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

/s/ Michael P. Malakoff

INDEX OF ATTACHED RECORD DOCUMENTS