UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 14-4829

MARY E. **GLOVER**, individually and on behalf of other similarly situated current and former homeowners in Pennsylvania,

Plaintiff - Appellant

v.

WELLS FARGO HOME MORTGAGE; **GOLDMAN SACHS MORTGAGE COMPANY**; MARK J. **UDREN**; and **THE UDREN LAW OFFICES, P.C.**,

Defendants - Appellees.

On appeal from the U.S. District Court for the Western District of Pennsylvania
(Hon. Donetta W. Ambrose, United States District Judge)

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND AARP SUPPORTING APPELLANT AND URGING REVERSAL

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April 8, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 & 29(c)(1), amici curiae Public Citizen, Inc., and AARP state that neither has a parent corporation and that there is no publicly held corporation that owns 10% or more of either Public Citizen, Inc., or AARP.

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Public Citizen, Inc., a non-profit advocacy organization with approximately 300,000 members and supporters nationwide, appears before Congress, administrative agencies, and the courts to advocate for consumer protections, health and safety regulations, access to the courts, and open government. Since its founding forty-four years ago, Public Citizen has been a strong advocate for broad access to the civil justice system, and for proper application of federal procedural requirements. The magistrate judge's appointment of a special master and allocation of costs in this case implicate both these issues. For this reason, Public Citizen represented appellant Mary Glover in a prior stage of this case, when she sought a writ of mandamus challenging the appointment of a special master, and Public Citizen now submits this amicus brief on that one issue to explain how the appointment undermines the important limits of Rule 53 and unfairly disadvantages a litigant based on her lack of means.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. Home ownership plays a vital role in American life and the economy, making the foreclosure crisis economically and

emotionally disastrous for families and entire communities. In the years leading up to the recent financial crisis, many older Americans put their homes on the line to secure mortgages that later proved to be unsustainable and, in some cases, designed to fail. Abusive residential mortgage servicing practices that emerged as the foreclosure crisis heated up compounded the unscrupulous and predatory mortgage origination practices, forcing even more homeowners into foreclosure. The practice of charging inflated or prohibited fees makes it harder for homeowners to save their homes from foreclosure. In light of the importance of homeownership in fulfilling the American dream and the waves of harm that foreclosures cause, legislatures have enacted numerous special protections to prevent abusive practices that drive people into foreclosure. AARP supports laws that offer protection from such abuses, and access to courts to ensure there is recourse for violations of the law. AARP submits this brief on the special master issue in support of this latter interest: access to courts for all no matter their wealth.

Amici are contemporaneously filing a motion seeking leave to file this brief. Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of the brief. No person, other than amici curiae, their members, and their counsel, contributed money that was intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Rule 53 authorizes the appointment of a special master in extraordinary circumstances, such as when a case requires particularly technical or managerial tasks like the interpretation of a patent or the monitoring of a consent decree. Here, the magistrate judge appointed a special master for very different reasons, not authorized by Rule 53: the magistrate used the special master as a tool to coerce the parties into settling their discovery disputes and to punish them when they were unable to do so, and then assigned the special master routine tasks that could easily have been performed by the magistrate judge himself. Because these uses of a special master are well beyond the narrow confines of Rule 53, the appointment was invalid.

An independent flaw in the appointment is the allocation of the special master's costs. Rule 53 requires that the allocation reflect, among other things, fairness and the parties' respective capacities to pay, and that the allocation protect the parties from unnecessary expense. These concerns are particularly important because the Equal Protection and Due Process Clauses prohibit pricing impecunious parties out of court. Here, the magistrate judge ordered that the special master's fees be split equally between a plaintiff of limited means and large financial institutions. Because the allocation of costs in this case failed to account for the plaintiff's limited means and effectively prevented her from pursuing her

case, Rule 53 — interpreted (as it must be) to avoid an unconstitutional application — prohibits the cost allocation imposed in the appointment order.

If appointment and allocation orders of the type at issue were permitted, low-income individuals nationwide could be disabled from enforcing vital federal and state consumer protection laws. Enforcing Rule 53's limitations on the uses of special masters will protect impecunious parties from being unfairly put out of court by the appointment of a special master.

ARGUMENT

In this case, the appointment of the special master was 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). Each of these failings independently renders the special master's appointment invalid.

I. The Special Master's Appointment Was Made For An Impermissible Purpose And Accordingly Violated Rule 53.

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 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. *See* A1370-71 (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 all discovery disputes be referred to a master, with the master's fees to be borne 50% by Glover and 50% by Defendants).

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 v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (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 Ins. Co. of Am. v. U.S. Gypsum Co.*, 991 F.2d 1080, 1083-84 (3d Cir. 1993) (discussing the long history of treating the appointment of a special master as exceptional).

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." 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 had 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: *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.

In re United States, 816 F.2d 1083 (6th Cir. 1987), is to similar effect, and it also highlights the inconsistency between Rule 53 and use of a special master as a coercive tactic. There, 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 than the one *In re United States* rejected. Here, the magistrate judge did not suggest that docket congestion, multiplicity of parties, or any other factor made this an "exceptional case" justifying the appointment of a special master. The magistrate judge also did not suggest that the appointment of the special master was necessary because the discovery process involved a type or quantity of tasks beyond the 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 routine discovery motions, including the types of motions that characterize everyday discovery practice and that the magistrate judge himself had previously resolved expeditiously. *See* A1310-11, A90-91 (orders of Sept. 8, 2011 disposing of fifteen motions at a single discovery conference). Thus, the special master's appointment was born not of judicial necessity but rather the magistrate judge's acknowledged "frustration." A1580 n.1 (magistrate's report and recommendation to deny motion to certify interlocutory appeal). 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* A1370, A1580-81. Rule 53 therefore did not authorize the appointment.

Relatedly, the appointment of a master in this case violated 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. *See 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," A1580 n.1, with the process may have been 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.*, hardly makes this case extraordinary. The discovery rules explicitly contemplate judicial resolution of discovery disputes, no matter how acrimonious, in the ordinary course of case management. *See* Fed. R. Civ. Pro. 37. Rule 53 does not authorize judges to pass off the adjudicative tasks of discovery to a private attorney when the judge is frustrated with hard-fought disputes.

Judges are not powerless in the face of "endless discovery motions" or "outrageous motions practice." A1370. To deal with extreme cases, the discovery rules allow 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.

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, the appointment was invalid.

II. The Appointment Contravenes Rule 53's Requirements Regarding Cost Allocation And Raises Constitutional Problems.

An independent flaw in the appointment of the special master was the allocation of the master's costs equally between a low-income plaintiff and the large financial institutions on the opposing side.

A. Rule 53 requires a court, when appointing a master, to protect the rights of impecunious parties.

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 render a plaintiff unable to pursue her case 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 effectively determines the case's outcome, based not on the merits but on one 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).

Here, the magistrate judge recognized that the plaintiff could not afford the costs of a special master but assumed that her counsel would pick up the bill. *See* A1589 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 of the litigant's opponent. Although plaintiffs' counsel sometimes advance litigation expenses, planning at the outset of a case to pay predictable expenses is entirely different from taking on, in the midst of litigation, the hourly rate of a private lawyer whose hours the opposing parties, because of their relative wealth, have incentive to drive up. Moreover, even parties who prevail in the litigation cannot recover the costs associated with a special master. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987); 28 U.S.C. § 1920. Thus, if the

imposition of special masters into routine discovery practice were permitted, many parties would be unable to afford to pursue their cases.

Indeed, in this and other consumer cases, an allocation that cripples a low-income party's ability to litigate 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 for prevailing Fair Debt Collection Practices Act plaintiffs); 73 Pa. Stat. Ann. § 201-9.2(a) (attorneys fees for prevailing plaintiffs 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 thoroughly litigating a case by the unanticipated costs associated with the appointment of a special master. Thus, whether the issue is a plaintiff's own lack of resources or her inability to retain counsel who can advance potentially unlimited expenses, the effect of the cost allocation of the type made here is the same: to prevent a plaintiff from obtaining the discovery necessary to litigate her case.

B. The appointment of a master whose costs effectively price a party out of court raises serious constitutional concerns.

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). More broadly, 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 ordered a low-income party to pay what surely would have been 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, undermining a plaintiff's ability to pursue her case because of the magistrate's "frustration" with the parties' discovery conduct is of dubious constitutionality. A plaintiff 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 alleged wrongs.

By contrast, the government has no interest in making a plaintiff pay hourly fees to a private adjudicator for an uncapped number of hours as a condition of pursuing her case. The only conceivable government interest, the avoidance of obstructionism in the discovery process, is easily accommodated by the judges' existing case-management authority. Here, for instance, 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 to counterbalance the unfairness of effectively pricing a plaintiff out of court.

In accordance with the Rule 53 factors and to avoid an unconstitutional application of the rule, *see, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381 (2005), 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 hold the appointment of the special master invalid and accordingly reverse.

April 8, 2015

Respectfully submitted,

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I certify that Scott Michelman and Adina H. Rosenbaum, counsel for amici curiae, are members of the Bar of this Court.

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on April 8, 2015, I caused this brief to be served on all parties to this appeal, via CM/ECF, pursuant to Third Circuit Rule 25.1(b) and L.A.R. Misc. 113.4, because counsel for all parties are Filings Users who will be served electronically by the Notice of Docket Activity:

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I certify that the electronic and hard copies of this brief are identical.

/s/ Scott Michelman

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,896 words, excluding those parts of the brief excluded by Fed. R. App. Pro. 32(a)(7)(B)(iii).

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