No. 16-3185

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE STATE FARM FIRE AND
CASUALTY COMPANY

On Petition for Writ of Mandamus
from the United States District Court
for the Western District of Missouri, Central Division
Case No. 2:15-CV-04093
Hon. Nanette K. Laughrey, District Judge

AMICUS CURIAE BRIEF OF LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF STATE FARM FIRE AND CASUALTY COMPANY'S PETITION FOR WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Lawyers for Civil Justice states that it has no parent corporation and has issued no stock.

/s/ Patrick Oot
Patrick Oot

Dated: August 1, 2016

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INTEREST OF *AMICUS CURIAE*[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, defense bar organizations and law firms that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ has an unique perspective on the rules amendments having been directly involved in the entire process, including participation in the 2010 Duke Conference, submission of empirical evidence in support of changes to the discovery rules (2010 Large Case Study), numerous submissions, including White Papers and participation in all the hearings and Rules Advisory Committee meetings related to the adoption of the rules amendments.

[1] No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than LCJ or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

LCJ submits this brief because the district court's rulings on two issues of first impression will likely impact jurisprudence beyond this case and this Circuit: (1) the proper scope of discovery under the 2015 FRCP amendments; and (2) the standard of review required by a district court when evaluating a special master's interpretation of the 2015 amendments to Rule 26.

The district court's interpretation of Rule 26 effectively deconstructs five years of rulemaking that culminated in an express mandate in the 2015 FRCP amendments to provide proportional limits on the scope of discovery. The district court, relying on outdated case law, permitted discovery that imposes a multi-million dollar cost burden on Petitioner based on mere speculation about the capabilities of the company's computer systems. The district court also eschewed the phased discovery, sampling, cost allocation, and other methods contemplated by the 2015 FRCP amendments to control discovery costs and protect trade secrets and other private information.

In addition, the district court applied an "abuse of discretion" standard of review to the special master's discovery decisions instead of

"de novo" review. Federal courts must apply de novo review when: (1) a district court's FRCP analysis is inextricably intertwined within the discovery order; (2) the discovery order is entirely divorced from a procedural matter; or (3) the discovery order presents public policy concerns that are in conflict with the goals of the FRCP. This case requires de novo review under any of these criteria.

For these reasons, this Court should grant Petitioner's Writ of Mandamus and reverse the district court's discovery order.

ARGUMENT

I. THE DISTRICT COURT'S DISCOVERY ORDER BELIES BOTH THE LETTER AND SPIRIT OF 2015 FRCP AMENDMENTS THAT WERE INTENDED TO ADDRESS DISPROPORTIONATE DISCOVERY

Important amendments to the FRCP took effect on December 1, 2015. Under Rule 1, district courts are instructed to administer the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; *see also Dietz v. Bouldin*, 136 S. Ct. 1885 (2016). These new rules were the object of much discussion, so much so that they generated upwards of 2,350

comments.[2] A comment representing the views of over 300 companies called the Advisory Committee on Civil Rules' attention to the fact that:

> Federal litigation today is inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases. This stems from costly and inconsistent . . . discovery . . . In many cases, corporate parties over-preserve in order to avoid tactical threats of spoliation sanctions. In other cases, parties must simply settle claims or defenses based on the high costs [of discovery], rather than on the merits of the litigation.[3]

In today's technologically dependent society discovery costs are soaring ever higher – even at federal government agencies.[4] The Advisory Committee saw the importance in cases being decided on the merits of the litigation instead of being forced to settle because of the cost imposed by discovery. The amendments to Rule 26 were intended to fulfill this larger goal in the area of civil discovery by placing "greater emphasis on the need to achieve proportionality." *Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205 (W.D. Va. 2016). In particular, the

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[2] https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002

[3] Robert Levy, *309 Companies in Support of the Proposed Amendments to the Federal Rules*, Comment on the U.S. Courts Proposed Rule: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 14 2014).

[4] Patrick Oot, *Comment from Electronic Discovery Institute*, Comment on the U.S. Courts Proposed Rule: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 16 2014).

amendments to Rule 26(b)(1) were a "response to the Federal Rules Advisory Committee's concern that the proportionality principles introduced in 1983 had never been adequately applied by courts." David G. Campbell, Memo Regarding Proposed Amendments to the Federal Rules of Civil Procedure, at 5 (June 14, 2014). The intent was to make "proportionality" unavoidable. *Id.*

A. Rule 26 Defines the Scope of Discovery Neither Liberally Nor Broadly – But *Proportionally*

The district court's May 9, 2016 order characterized the scope of discovery as "liberal" and "broad" instead of *proportional*, contrary to the unambiguous language of Rule 26(b)(1) and 26(g), the supporting Advisory Committee Notes, and Chief Justice Roberts' 2015 Year-End Report on the Federal Judiciary. Rule 26(b)(1) makes explicit that "Parties may obtain discovery… that is relevant to any party's claim or defense *and* proportional to the needs of the case…." Fed. R. Civ. P. 26(b)(1) (emphasis added). The Advisory Committee Notes also recognize that the objective of the amendments "is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." Fed. R. Civ. P. 26(b)(1) advisory

committee's note to 2015 amendments. Chief Justice Roberts has further explained that "Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." 2015 Year-End Report on the Federal Judiciary, at 6.

A key feature of the 2015 FRCP Amendments was to strike Rule 26's provision stating that discovery should be "reasonably calculated to lead to the discovery of admissible evidence" (notwithstanding the trial court's reliance on cases based on this outdated standard). As Judge David Campbell, Chair of the Advisory Committee on Federal Rules of Civil Procedure, has said, "This change is intended to curtail reliance on the 'reasonably calculated' phrase to define the scope of discovery. The phrase was never intended to have that purpose." David G. Campbell, Memo Regarding Proposed Amendments to the Federal Rules of Civil Procedure, at 9 (June 14, 2014).

Similarly, Rule 26(g)(1)(B) requires the parties to certify that discovery is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, *or needlessly increase the cost of litigation*…" Fed. R. Civ. P. 26(g)(1)(B) (emphasis added). Courts are

specifically instructed to reject discovery that is "unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." *Id.* Rule 26(g)(3) requires courts to enforce these needlessness and disproportionality prohibitions with an "appropriate sanction." *See, e.g., St. Paul Reins. Co., Ltd., CNA v. Commercial Fin. Corp.*, 198 F.R.D. 508, 516 (N.D. Iowa 2000) ("Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." Accordingly, a court must impose sanctions against a requesting party that propounds unreasonable requests.). The sanctions mandate of Rule 26(g) adds a proportionality bite to Rule 26(b)(1)'s bark.

B. The District Court Improperly Relied on Outdated FRCP Interpretations That The 2015 FRCP Amendments Supplanted

The 2015 FRCP amendments were promulgated to replace the "liberal" and "broad" discovery rule interpretations that the district court applied in this case. Instead of focusing on proportionality, as required by the 2015 FRCP amendments, the district court's May 9 order mischaracterized the scope of discovery as both "liberal" and

"broad." [Dkt. 176 at 6-7]. The court also grounded its discovery order in numerous pre-amendment cases which endorsed broad discovery, paying mere lip-service to the proportionality analysis currently mandated under Rule 26 but flatly contradicted by these outdated decisions.[5]

The district court's clashing dependency on "reasonably calculated" era concepts of broad and liberal discovery cannot coexist with proportional scope limitations.[6] Liberal and broad discovery might have been the one-rule-fits-all vintage standard in civil litigation before December 1, 2015, but courts must now adhere to the rule of proportional discovery.[7] The district court's rejection of proportional

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[5] *See* [Dkt. 176 at 6-7] (citing *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 898-99 (8th Cir. 1978); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1495 (5th Cir. 1993); *Kamm v. California City Dev. Co.*, 509 F.2d 205, 209 (9th Cir. 1975); *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 845 n.5 (8th Cir. 1977); *Cincinnati Ins. Co. v. Fine Home Managers*, 2010 WL 2990118, *1 (E.D. Mo. July 27, 2010)).

[6] *See Fish v. Kobach*, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) ("In promulgating discovery, the court expects the parties and counsel to *efficiently limit its scope* in accordance with the December 1, 2015 proportionality amendments to Fed. R. Civ. P. 26(b)(1).") (emphasis added).

[7] *See Gilead Sciences v. Merck & Co.*, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) ("No longer is it good enough to hope that the

limitations to discovery fosters unbounded fishing expeditions and discovery settlement leverage that plagued civil litigation before the amendments. *See Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) ("The widespread abuse of discovery. . . has become a prime cause of delay and expense in civil litigation.").

The district court also failed to control requests that needlessly increase litigation costs under Rule 26(g). The district court ordered that *regardless* of the cost or burden and *regardless* of the need for individualized review, Petitioner was required to answer detailed interrogatories for each of the approximately 145,000 members in the putative class. [Dkt 136 at 6].

This Court should find that the district court's failure to follow the letter and intent of the 2015 FRCP amendments, and instead follow outdated case law expressly repudiated by the 2015 amendments was an abuse of discretion.[8]

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information sought might lead to the discovery of admissible evidence.").

[8] *See In re Apple, Inc.*, 602 F.3d 909, 911 (8th Cir. 2010) ("[A] clear error of law or clear error of judgment leading to a patently erroneous result may constitute a clear abuse of discretion.").

II. PHASED DISCOVERY, SAMPLING, AND COST ALLOCATION ARE APPROPRIATE TOOLS TO SATISFY PROPORTIONATE DISCOVERY RULES UNDER THE 2015 FRCP AMENDMENTS

Another factor compounding the district court's abuse of discretion was its failure to consider the appropriate tools to meet discovery requirements that avoid unduly burdensome and disproportionate discovery. The 2015 FRCP amendments "include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case." David G. Campbell, *New Rules, New Opportunities*, 99 Judicature 19, 20 (2015). Among the offerings, phased discovery and cost allocation are becoming more prevalent and potentially necessary to satisfy the 2015 FRCP amendments.

Courts "should consider [phased] discovery to focus on those issues with the greatest likelihood to resolve the case, and the biggest bang for the buck at the outset, with more discovery, later, as the case deserves." Laurence Pulgram, *The Top 7 Takeaways from the 2015 Federal Rules Amendment,* Around the ABA (Nov. 24, 2015). Federal courts have ordered "phased discovery" in a variety of circumstances. *See, e.g., Wide Voice, LLC v. Sprint Commc'ns Co.*, 2016 WL 155031, at *2 (D. Nev. Jan. 12, 2016) (court ordered phased discovery to prioritize one of five

claims in the case and bar discovery related to the other claims); *Steuben Foods, Inc. v. Oystar Grp.*, 2015 WL 9275748, at *2 (W.D.N.Y. Dec. 21, 2015) (court ordered phased discovery to identify equitable number of custodians whose emails would be searched).

In this case, the district court stated in its May 9 order that this Court has never permitted "phased, sampled, or delayed" discovery. [Dkt. 176 at 11]. This assertion, similar to the district court's reliance on broad and liberal discovery interpretations, was grounded in pre-2015 FRCP amendment case law.[9] Rather than consider phased discovery tools like Petitioner's proposed sample of 400 cases to analyze common evidence (if any) amongst the putative class , the district court instead relied upon its superficial "knowledge" of computers to order unduely burdensome discovery.[10] The court concluded that even if complex data sorting would need to be done for each of the nearly 145,000 proposed class claims, "data sorting is what computers do in

[9] *See* [Dkt. 176 at 11] (citing *Admiral Theatre*, 585 F.2d 877 at 898-99; *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995).

[10] Phased discovery is not total discovery. While district courts must consider appropriate tools to satisfy proportional discovery, no amount of proportional discovery will cure a class certified in error in violation of FRCP 23.

much higher levels in very short amounts of time." [Dkt. 176 at 8]. This assumption ignored the expense (almost $10 million) and practical burdens of preforming any type of analysis on upwards of 145,000 separate claims. Consideration of these factors is essential to Rule 26's proportionality standard.

The estimated monetary cost of compliance and number of hours required to answer interrogatories also warranted consideration by the district court of other tool to avoid disproportionate discovery—sampling (which Petitioner has proposed) or "cost allocation." Under the amended Rule 26, courts "may, for good cause, issue an order to protect a party or person from… undue… expense, including… allocation of expenses, for the disclosure or discovery[.]" Fed. R. Civ. P. 26(c)(1)(B). Rule 26(c)(1)(B) was amended "to include an express recognition of protective orders that allocate expenses for disclosure or discovery." Fed. R. Civ. P. 26(c)(1)(B) advisory committee's note to 2015 amendments. Cost allocation is a mechanism to achieve proportionality by using well-accepted economic incentives to ensure that the information requested is important to the requesting party's claims and

defenses. Similar to phased discovery, federal courts have ordered sampling or cost-allocation, in a variety of circumstances.[11]

The district court's failure to deploy tools such as phased discovery, sampling, or cost-allocation to avoid disproportionate discovery is exactly what the 2015 FRCP amendments were designed to prevent. This Court should find that such failure – in a case that clearly presents a need for *some* burden-reducing discovery tool – constitutes an abuse of discretion.

III. THIS COURT SHOULD CLARIFY THE STANDARD OF REVIEW WHEN THE INTERPRETATION OF THE FRCP PROVIDES A BASIS FOR A DISCOVERY ORDER

A. The District Court Erred in Failing to Conduct *De Novo* Review of the Special Master's Interpretation

The district court's decision to review the Special Master's discovery order for an abuse of discretion, which is the standard applied to purely procedural rulings, runs counter to this Court's FRCP

[11] *See, e.g., Knauf Insulation, LLC v. Johns Manville Corp.*, 2015 WL 7089725, at *3 (S.D. Ind. Nov. 13, 2015) (ordering plaintiff to bear costs of responding to discovery request from 38 email custodians if search did not yield at least 500 relevant documents); *Navajo Nation Human Rights Comm'n v. San Juan Cnty.*, 2016 WL 3079740, at *4 (D. Utah May 31, 2016) (ordering plaintiffs to bear cost of expedited document discovery because information was available from other less expensive sources, such as previously provided e-mail responses).

interpretations. *See U.S. ex rel. Kraxberger v. Kansas City Power & Light Co.*, 756 F.3d 1075, 1082 (8th Cir. 2014) (citing *Kuelbs v. Hill*, 615 F.3d 1037, 1041 (8th Cir. 2010)). A district court is required to review a special master's discovery order *de novo* when: (1) an interpretation of the FRCP is inextricably intertwined with the discovery order; (2) the discovery order is divorced from procedural matters; or (3) the discovery order presents public policy concerns that are in conflict with the goals of the FRCP. *Cf. Kraxberger*, 756 F.3d at 1082; *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 399-400 (8th Cir. 1987); *Wilmington Trust v. AEP Generating*, 2016 WL 860693, at *3 (S.D. Ohio Mar. 7, 2016).

Special master *procedural* orders receive abuse of discretion review. Conversely, special master orders *interpreting* the FRCP are reviewed by the court *de novo*. *See Kraxberger*, 756 F.3d at 1082. The record in this case demonstrates that the Special Master's rulings interpreting the FRCP fail a procedural test because the rules interpretations are inextricably intertwined with the discovery order. In Special Master Order No. 4, the special master "concludes" his findings based on an analysis of Rule 26(b)(1); an interpretation that cannot be viewed as purely procedural in nature. [Dkt. 117 pp 2-3].

The district court's reliance on a single unreported procedural order-focused case was clearly erroneous. Relying on *In re Hardieplank Fiber Cement Siding Litig.*, 2014 WL 5654318 (D. Minn. Jan. 28, 2014), the district court deployed an abuse of discretion review – yet unlike Special Master Ruling No. 4, the order in *Hardieplank* passes a procedural order test. [Dkt. 176 at 6]. The *In re Hardieplank* procedural order contained only a list of production mandates to the defendant and lacked analysis or interpretation of the FRCP. Special Master Case Mgmt. Order No. 3 – Plaintiff's Motion to Compel, *In re Hardieplank*, 2014 WL 5654318.

Here, the district court reviewed the Special Master's analysis in deciding whether the information sought by the plaintiffs was within the scope of discovery under newly effected amendments to a Rule of Civil Procedure. The district's court's weak support (outside the Eighth Circuit) does not lend credence to its decision to review the case for abuse of discretion.

CONCLUSION

For the reasons above, this Court should grant Petitioner's Writ of Mandamus and reverse the district court's discovery order.

Respectfully submitted,

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Dated: August 1, 2016

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook font for text and footnotes.

/s/ Patrick Oot
Patrick Oot

Dated: August 1, 2016

CERTIFICATE OF SERVICE

I certify that on this 1st day of August, 2016, I caused the foregoing brief to be served via electronic notice to all parties as provided by the CM/ECF system.

/s/ Patrick Oot
Patrick Oot

Dated: August 1, 2016