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Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Building, Room 7-240
One Columbus Circle NE
Washington, DC 20544

Re: Response to Request for Public for Comments on Proposed Rules
Docket ID: USC-RULES-CV-2013-0002

Dear Committee:

Thank you for the opportunity to submit comments on the proposed changes to the Federal Rules of Civil Procedure regarding discovery. Although we believe that some of the proposed rule language can be further refined in some areas, we are strongly in favor of the proposed rules. As attorneys that conduct a significant portion of our litigation practice in the Federal Courts, we are particularly sensitive to the problems which can occur when relatively minor cases become cost prohibitive because of the specter of discovery "gone wild."

Seasoned counsel knows exactly what is needed to prove a case or reach a jury, and typically does not waste his or her time on frivolous endeavors. Likewise, reasonable attorneys recognize and understand what is fairly responsive to discovery requests and endeavor to properly answer appropriate discovery. Communication is essential to moving cases along with a minimum of expense and effort for those involved. Unfortunately, when one party decides to employ "scorched earth" tactics, the goal of ensuring fair and just resolutions in a merit based system becomes secondary to

cost containment and budgetary concerns. Resolution of matters then often turn on discovery leverage and projected expenses rather than the true merits at issue. Discovery should be about the process of an efficient information exchange to assist in settlement of disputes, and not expensive paper battles.

To this end, the proposed rules are an improvement over the existing framework. The proposed Rule 37(e) is comprehensive and demonstrates an intent to tie sanctions for failure to preserve discoverable evidence to conduct that is "willful" or "in bad faith" and causes "substantial prejudice." These changes may help to mitigate a litigant's ESI burden which often results in over preservation. However, the suggested exception in 37(e)(1)(B)(ii) allowing for sanctions if a party is "irreparably deprived" of an opportunity to present or defend claims is likely to generate substantial motion practice as the courts struggle to define exactly what this means. The (B)(ii) exception should be deleted.

The proposed reductions on the number of requests to admit (no more than 25) and both deposition numbers (5) and length (6 hours) will force counsel to be more focused and prevent the proverbial "fishing expedition." Similarly, the reduction in the number of interrogatories (from 25 to 15) will again cause litigants to carefully think about the evidence they need and go about obtaining it in the least intrusive manner. Of course, the parties still remain free to agree on additional discovery when warranted or petition the district court to allow a greater number.

Limitations on the scope of discovery as suggested in revised FRCP 26(b)(1) should also advance the goals of the proposed amendments by supporting proportionality in discovery, improve cooperation amongst counsel, and allow for more focused case management. The limitation of discovery to well pleaded claims and defenses "proportional to the needs of the case" instead of the old "any matter relevant to the subject matter" should help to reduce costs and discovery burdens. Deletion of the "reasonably calculated to lead to the discovery of admissible evidence" phrase should further streamline the discovery process. Finally, the express incorporation of a cost allocation provision in proposed FRCP 26(c) should be a well-received recognition

of a court's authority to impose the costs of responding to burdensome discovery on the requesting party. This provision, too, will force parties to think twice before seeking large amounts of discovery which may prove marginally useful.

Again, we appreciate the opportunity to submit our comments on the proposed changes to the Federal Rules of Civil Procedure, which we strongly support.

Very truly yours,

Kenneth Peters

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