No. 14-3006

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SECURITY NATIONAL BANK OF SIOUX CITY, IOWA,
as conservator for J.M.K., a minor,

Plaintiff-Appellee,

v.

JONES DAY and JUNE K. GHEZZI,

Appellants,

v.

ABBOTT LABORATORIES,

Defendant.

On Appeal from the United States District Court for the
Northern District of Iowa, Case No. 5:11-cv-04017-MWB

MOTION OF THE AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(b), the American Association for Justice ("AAJ") respectfully moves for leave to file the accompanying *amicus curiae* Brief in Support of Appellee and Affirmance in the above-captioned matter. Counsel for Appellee Security National Bank of Sioux City, IA, as conservator for J.M.K., a minor, consented to the filing of *amicus curiae*'s brief; however, counsel for Appellants Jones Day and June K. Ghezzi

opposed the filing, rendering it necessary to submit this motion pursuant to Rule 29(b).

AAJ is a national voluntary bar association whose trial-lawyer members primarily represent plaintiffs in civil suits, including personal injury actions, products liability and mass tort cases, consumer and civil-rights lawsuits, and employment-related cases. AAJ was established in 1946 to safeguard consumers' rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety. AAJ members practice in federal and state courts across the country, including all of the courts within the jurisdiction of the Eighth Circuit.

AAJ has an interest in promoting full and fair discovery in civil cases in order to protect and promote access to civil justice. The Federal Rules of Civil Procedure were drafted to assure citizens access to the courts, a fundamental right under our Constitution. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971); *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). The drafters of the Rules embodied that belief in Rule 1, which is intended to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Full and fair discovery of the facts relevant to the claims in issue is necessary to protect the fundamental right of access to the courts.

Because plaintiffs carry the burden of proof, defendants and their counsel often have the incentive to ensure that plaintiffs get as little information as possible throughout the discovery process, but particularly in depositions where plaintiffs have the opportunity to directly question those who have the information necessary to support their case. Obstructionist discovery tactics serve to increase costs, and impede and frustrate the pursuit of justice. When such abusive discovery tactics go unpunished, they perpetuate a system where litigants and their counsel can and do greatly increase the time and cost of litigation for their adversaries without any adverse consequences. Unless these abuses are sanctioned, they will continue, and will simply become the "*de* facto convention," as Appellants put it, of the discovery process. AAJ and its members have an interest in ensuring that such abusive discovery tactics are sanctioned and remedied to ensure full and fair discovery and access to civil justice.

An amicus *curiae* brief submitted by AAJ is desirable because the interests of all interested parties are not well-represented in this appeal. The Plaintiff-Appellee did not participate in the sanction proceedings below, and has not filed a brief in response to the Appellants' brief. Judge Mark W. Bennett and the District Court for the Northern District of Iowa, while arguably the real parties in interest to this appeal, are not parties to it, and the United States has not intervened on their behalf. Thus, there is no party to the appeal that can controvert Appellants'

assertions or present counterargument. While Judge Bennett's order itself addresses many of the arguments raised by Appellants, an *amicus curiae* brief submitted by AAJ will assist the Court by responding to several of the arguments made by Appellants that are not addressed by the lower court's order, and which no other *amicus* has addressed. Specifically, an *amicus curiae* brief by AAJ will address the standard of review to be applied by this Court, the import to be given to Appellants' "Statement of the Case," and Appellants' arguments that the lower court's sanction order violates due process and exceeds the lower court's authority. None of these issues can be resolved by looking to the lower court's thorough opinion. Counsel for AAJ has reviewed the other *amicus* briefs in this case, and focused its brief only on those issues that are relevant to the disposition of the case that have not been addressed by anyone other than Appellants.

For all of the foregoing reasons, AAJ respectfully requests that the Court grant its Motion for Leave to File Amicus Brief Pursuant to Federal Rule of Appellate Procedure 29.

December 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Valerie M. Nannery

Attorney for Amicus Curiae American Association for Justice

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BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national voluntary bar association whose trial-lawyer members primarily represent plaintiffs in civil suits, including personal injury actions, products liability and mass tort cases, consumer and civil-rights lawsuits, and employment-related cases. AAJ was established in 1946 to strengthen the civil justice system, safeguard consumers' rights, promote injury prevention, and foster the disclosure of information critical to public health and safety. AAJ members practice in federal and state courts across the country, including all of the courts within the jurisdiction of the Eighth Circuit. AAJ has an interest in promoting full and fair discovery in civil cases in order to protect and promote access to civil justice. Therefore, AAJ and its members have an interest in ensuring that obstructionist discovery tactics that increase costs, and impede and frustrate the pursuit of justice, are sanctioned.[1] Appellee consented to the filing of this *amicus* brief, but Appellants opposed. AAJ filed a motion pursuant to Federal Rule of Appellate Procedure 29(b) seeking leave to file this *amicus* brief.

[1]No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae*, its members or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In the absence of participation in this appeal by either the Appellee or the real parties in interest in this appeal—the District Court for the Northern District of Iowa and the Honorable Mark W. Bennett—Appellants attempt to relitigate the sanctions issue, incorporating irrelevant information that they know will not be controverted, mischaracterizing and overstating the lower court's order, encouraging this Court to use a more searching standard of review, and claiming that they were denied due process by the lower court. While Judge Bennett's opinion stands as a testament that contradicts Appellants' description of Ms. Ghezzi's conduct, it does not address the new issues raised by Appellants.

This Court reviews discovery sanctions for an abuse of discretion. The Court should disregard extraneous "facts" asserted by Appellants that do not relate to the deposition misconduct in issue or the procedure used in issuing sanctions. Finally, this Court should reject Appellants' claims that they were denied due process or that the lower court exceeded its jurisdictional authority in imposing sanctions.

ARGUMENT

I. APPELLANTS' IRRELEVANT NARRATIVE SHOULD BE DISREGARDED BY THIS COURT.

Significant portions of Appellants' "Statement of the Case" discuss a wide array of "facts" that are irrelevant to the issues on appeal. Instead of focusing solely on the deposition conduct in issue and the lower court's procedure dealing with that

conduct, Appellants spend a substantial amount of effort to reframe the case as one involving an attorney and her law firm as the innocent "target[s]" of a rogue judge's ire, antipathy, and criticisms. *See* Appellants' Br. 8, 11, 12. Appellants' narrative selectively quotes from the record below, and weaves in unrelated communications, including communications about different issues, Appellants' Br. 5-10, 11-12, and communications between the court and other attorneys who were not sanctioned, Appellants' Br. 8-10. Appellants present their narrative as "uncontroverted facts," all the while expecting that no party to the appeal will likely controvert them.[2] Judge Bennett cannot defend against their characterizations of him or the proceedings below. This Court should disregard the bulk of Appellants' lengthy, calculated "Statement of the Case" because much of it is either irrelevant to the issues on appeal, or mischaracterizes the lower court's opinion and order.

First, contrary to the unflattering picture Appellants paint of him, Judge Mark W. Bennett has a reputation as an upstanding judge both within the Northern District

[2] Appellee did not participate in the hearing on the orders to show cause in the district court, and has not submitted a brief in response to Appellants' brief in this appeal. Appellee has waived any argument as to the propriety of the sanctions order in this case. Judge Mark W. Bennett is not a party to this appeal. The United States has not intervened to defend the decision below or to represent the real parties in interest—the United States District Court for the Northern District of Iowa and the Honorable Mark W. Bennett.

of Iowa, and within the Eighth Circuit. Judge Bennett is an experienced[3] and able[4] district court judge whose opinions and analyses have frequently been described by this Court as "thorough"[5] and "well-reasoned."[6] Judge Bennett has been on the bench as a district court judge for more than twenty years, serving for seven of those years as the Chief Judge of the Northern District of Iowa.[7] Prior to taking his seat on the district court, Judge Bennett served as a Magistrate Judge on the District Court

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[3] *United States v. Becker*, 534 F.3d 952, 957 (8th Cir. 2008); *Yates v. Baldwin*, 633 F.3d 669, 672 (8th Cir. 2011); *United States v. Mendez*, 685 F.3d 769, 771 (8th Cir. 2012). *See also United States v. Johnson*, 318 F.3d 821, 827 (8th Cir. 2003) (Bright, C.J., dissenting).

[4] *United States v. Flores*, 336 F.3d 760, 765 (8th Cir. 2003). *See also Johnson*, 318 F.3d at 827 (8th Cir. 2003) (Bright, C.J., dissenting).

[5] *Flores*, 336 F.3d at 765; *United States v. Plooster*, 221 F. App'x 478, 479 (8th Cir. 2007); *United States v. Walker*, 104 F.3d 364 (8th Cir. 1996) (table); *Miller v. Woodharbor Moldng & Millworks, Inc.*, 9 F. App'x 557, 558 (8th Cir. 2001); *United States v. Honken*, 541 F.3d 1146, 1149 (8th Cir. 2008); *Leventhal v. Schaffer*, 365 F. App'x 37, 38 (8th Cir. 2010); *United States v. Piedra*, 170 F. App'x 19 (8th Cir. 2006); *Erdman v. Fed. Land Bank of Omaha*, 149 F.3d 1187 (8th Cir. 1998) (table); *Navin v. United States*, 205 F.3d 1347 (8th Cir. 1999) (table); *Miller v. Wells Dairy Inc.*, 90 F. App'x 193, 194 (8th Cir. 2004); *Sandusky v. Marian Health Ctr.*, 175 F.3d 1025 (8th Cir. 1999) (table).

[6] *Honken*, 541 F.3d at 1149; *Plooster*, 221 F. App'x at 479; *Atwood v. Mapes*, 142 F. App'x 961 (8th Cir. 2005). *See also Walker*, 104 F.3d 364 ("carefully reasoned"); *Flores*, 336 F.3d at 765 ("careful").

[7] United States District Court for the Northern District of Iowa, The Honorable Judge Mark W. Bennett Biography, http://www.iand.uscourts.gov/e-web/home.nsf/0/17a5762715fa4c52862573c90079072c (last visited Nov. 24, 2014).

for the Southern District of Iowa for more than two years.[8] Since taking the bench as a district court judge more than twenty years ago, Judge Bennett has been a respected member of the federal bench, and his decisions have not been frequently reversed by this Court.[9] Judge Bennett's judicial record stands in stark contrast to the representations and characterizations Appellants rehearse in this Court. The Court should disregard this self-serving narrative.

Second, Appellants' narrative overstates and mischaracterizes the opinion and order of the lower court. Judge Bennett's opinion is careful and thorough, and fully explains both the factual and legal bases for his decision. It is, perhaps, the best counterargument to Appellants' Opening Brief. Unlike Appellants' brief, Judge Bennett's opinion does not incorporate extraneous, unrelated events, but focuses on specific conduct of a specific attorney litigating in his court. Judge Bennett's order reveals several substantial problems with Appellants' asserted "facts:"

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[8] *Id.*

[9] The bulk of this Court's reversals involve application of the Sentencing Guidelines, of which Judge Bennett has been quite critical. *See, e.g.*, Judge Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, The Nation, Oct. 24, 2012, *available at* http://www.thenation.com/article/170815/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri#. Judge Bennett was ahead of the curve on sentencing, and his analysis and reasoning were later vindicated by the Supreme Court in *Gall v. United States*, 552 U.S. 38 (2007), and *Spears v. United States*, 555 U.S. 261 (2009). *See Pepper v. United States*, 552 U.S. 1089 (2008) (vacating this Court's reversal of Judge Bennett's sentencing decision).

- **Judge Bennett did not "reach[] his sanctions decision," "state[his] determination to impose sanctions," or "promise[] sanctions" on January 13, 2014. Appellants' Br. 13, 12, 17.**

Based on the specific selection of the record that Appellants quote, after admonishing Ms. Ghezzi for an improper "form" objection and witness coaching *at trial*, Judge Bennett stated "I'm going to file a published opinion saying that's not a proper objection." Appellants' Br. 14-15. Curiously absent from this supposed "tipp[ing of] his hand," Appellants' Br. 14, is any reference to ordering *sanctions* against Ms. Ghezzi or anyone else. Indeed, Judge Bennett did use his opinion to educate future litigants that unspecified "form" objections are improper in his court. Memorandum Opinion and Order Regarding Sanctions, *Security Nat'l Bank of Sioux City, IA v. Abbott Labs.*, No. 5:11-cv-04017-MWB (N.D. Iowa July 28 2014) (hereinafter "*Sanctions Order*"), RA010-018. But Judge Bennett specifically did *not* sanction Ms. Ghezzi for those objections, RA017-018, recognizing that there was a split in authority on that issue, and that the rule in his court was not clearly stated until his order, RA017.

- **Judge Bennett did not sanction Ms. Ghezzi simply for the "number" of objections she made. Appellants' Br. 20.**

Ms. Ghezzi was sanctioned for "excessive *and unnecessary* interruptions." RA030. Judge Bennett specifically found that "nearly all" of the almost 500

objections across the two depositions were "unnecessary and unwarranted." RA030. Judge Bennett also specifically found that Ms. Ghezzi impeded, delayed, and frustrated the fair examination of witnesses by interposing many unnecessary comments, clarifications, and objections. RA030. The fact that neither deposition took the entire seven hours permitted by Federal Rule of Civil Procedure 30 is irrelevant to whether Ms. Ghezzi's conduct "unreasonably prolonged" the depositions. Those depositions would undoubtedly have taken even less time in the absence of hundreds of "excessive and unnecessary" interruptions and objections, saving time and resources for the witnesses, the parties, and all counsel, and advancing the "just, speedy, and inexpensive" determination of the merits. Fed. R. Civ. P. 1.

- **Judge Bennett did not impose a "worldwide sanction," sanction Jones Day, or "direct the training of Jones Day lawyers." Appellants' Br. 3, 20, 22.**

The lower court imposed a sanction on one attorney who works for Jones Day, Ms. Ghezzi, who appeared in the lower court. RA032-033. Although the sanctions order directs that, after Ms. Ghezzi writes and produces an explanatory video, and after the video is approved by the district judge, she must notify certain lawyers at her law firm about the video via email and provide them with access to the video, RA032-033, the order does not impose any sanction on Jones Day at all. It does not

mandate that anyone at Jones Day, in any of its many offices around the world, watch the video. It does not mandate the use of Jones Day's resources to write, produce, disseminate, display, or screen the video. The court's order requires that Ms. Ghezzi affirm that she received no assistance in creating the video's content. RA033. It does not require anything of Jones Day at all. It does not implicate Jones Day's rights as an entity, worldwide or locally. The sanctions order is directed to Ms. Ghezzi alone. It is arguable that Jones Day is not even a proper party to this appeal.

- **Judge Bennett did not "fail[] to address counsel's extensive submission explaining the good-faith bases for objections." Appellants' Br. 18.**

The lower court did address Ms. Ghezzi's submission to the court in response to the order and supplemental order to show cause. *See* RA009, RA012 n.12, RA017 n.13, RA029. The lower court's order addressed her arguments and assertions head-on, demonstrating that he considered them, as well as her arguments at the telephonic hearing, before filing his opinion and ordering the sanction.

Appellants' entire 22-page narrative is an effort to relitigate the sanctions order anew before this Court with irrelevant evidence, and without a true adversary to present contradicting facts or counterarguments. Appellants' narrative appears to be closely related to their argument that this Court should review the order below *de novo*. As demonstrated below, the proper standard of review is an abuse of discretion

standard. Appellants' attempt to present irrelevant "facts" to make their case to this Court under a *de novo* standard of review should be rejected.

II. THE PROPER STANDARD OF REVIEW OF THE DISTRICT COURT'S DECISION IS AN ABUSE OF DISCRETION STANDARD.

Appellants misstate the applicable standard of review. *See* Appellants' Br. 28-30. A district court judge's decision to impose discovery sanctions is reviewed for an abuse of discretion. *Craig v. St. Anthony's Med. Ctr.*, 384 F. App'x 531, 532 (8th Cir. 2010); *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 898 (8th Cir. 2009); *Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1105 (8th Cir. 2004). "This standard 'applies to the decision to impose a sanction, the nature of the sanction imposed, and the factual basis for the court's decision.'" *Int'l Bhd. of Elec. Workers*, 380 F.3d at 1105 (quoting *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019 (8th Cir. 1999)).

While the Court in *Sentis Group* did note that the district court's discretion narrows as the severity of the sanction increases, 559 F.3d at 898 (*cited in* Appellants' Br. 29), the Court there was dealing with one of the most severe sanctions available to a district judge—dismissal. This Court "more closely scrutinize[s] dismissal imposed as a discovery sanction because 'the opportunity to be heard is a litigant's most precious right and should sparingly be denied.'" *Id.* at 899 (quoting *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000), and *Chrysler Corp.*, 186 F.3d at 1020).

While this Court has more stringent requirements when dismissal is used as a sanction for discovery abuses, *see Bergstrom v. Frascone*, 744 F.3d 571, 576 (8th Cir. 2014), Appellants cite no authority for the proposition that less severe sanctions are subject to the same scrutiny. The sanction in this case was imposed on a single attorney for discovery abuses, and was imposed after trial on the merits. The sanction here does not implicate the "strong policy favoring a trial on the merits and against depriving a party of his day in court." *Id.* (internal quotation and citation omitted). Therefore, there is no reason for this Court to depart from an abuse-of-discretion standard of review.

The out-of-circuit authorities cited by the Appellants are inapposite. *Enmon v. Prospect Capital Corp.*, 675 F.3d 138 (2d Cir. 2012), involved sanctions imposed on a law firm as a result of the firm's conduct opposing arbitration. There, the court followed Second Circuit precedent that simply has no parallel in the Eighth Circuit. *Compare id.* at 143 (noting the requirements in the Second Circuit for a district court to impose sanctions pursuant to its inherent power) *with Bass v. Gen. Motors Corp.*, 150 F.3d 842, 851 (8th Cir. 1998) (standard of review for sanctions imposed under court's inherent authority reviewed for abuse of discretion). *See also Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir. 1993) (declining to require a finding of "bad faith" for "every possible disciplinary exercise of the court's inherent power"). Likewise, *Hollon v. Merck & Co.*, No. 12-4348-CV, 2014 WL 5314609, at *1 (2d

Cir. Oct. 20, 2014), and *Wilson v. Citigroup, N.A.*, 702 F.3d 720, 724 (2d Cir. 2012), followed Second Circuit precedent that is inapplicable here, and that do not have analogues in the precedents of this Court.

There is good reason to adhere to this Court's abuse-of-discretion standard of review when a district court judge orders discovery sanctions. "[I]t is the district court judge who must administer (and endure) the discovery process." *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1320 (10th Cir 2011). The district court judge is in the best position to manage discovery and enforce the discovery rules. Moreover, the district court is in the best position to assess the facts underlying its own sanctions order, as district court judges deal with discovery on a more regular basis than circuit courts do. The question for this Court is not whether it would, as an original matter, impose the sanctions that the district court ordered; it is whether the district court abused its discretion in so doing. *See, e.g.*, *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 642 (1976); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1213 (8th Cir. 1981).

Finally, it is completely irrelevant to the standard of review that the district court judge "was not even assigned to the case until nine months after the depositions were taken," Appellants' Br. 28-29, or that "the sanctions imposed were based on a typed transcript of two depositions taken a full sixteen months before the court first suggested the possibility of sanctions." Appellants' Br. 28. Because discovery takes

place outside of the courtroom, district court judges regularly make discovery sanctions determinations based on the written word, whether it is a transcript, a motion, or a written discovery request or response. The fact that the district court judge waited until *after* the trial to decide the issue, and that he provided Appellants with ample opportunity to brief and argue the issues demonstrate that he was careful to not impede the parties' rights to trial, as well as the Appellants' rights to due process. The timing of the depositions and the timing of the district court's sanction order here do not in any way support Appellants' assertion that this Court "owes little or no deference to the underlying decision." Appellants' Br. 28. This Court should only examine whether the district court judge abused his discretion in imposing sanctions, and it should disregard Appellants' assertions that some other, more searching standard of review should apply.

III. THE SANCTION ORDERED BY THE DISTRICT COURT DOES NOT VIOLATE DUE PROCESS OR EXCEED THE JURISDICTIONAL AUTHORITY OF THE DISTRICT COURT.

While it was within Judge Bennett's discretion to order sanctions against Ms. Ghezzi, and AAJ agrees with the *amici* that have argued that the lower court had the authority to impose sanctions *sua sponte*,[10] AAJ takes no position on the specific

[10] *See* Brief of Stephen D. Susman & Thomas M. Melsheimer as *Amicus Curiae* in Support of the Honorable Mark W. Bennett's Memorandum Opinion and Order Regarding Sanctions 9-12. *See generally* Brief of The American Board of Trial Advocates as *Amicus Curiae*. AAJ believes the lower court's order and the *amicus*

sanction imposed in this case. However, in the absence of legal arguments from the Appellee or from Judge Bennett himself (or the United States representing the District Court as the Real Party in Interest), *Amicus* AAJ disputes Appellants' arguments regarding the jurisdictional reach of the district court's sanctions order and the process that was due under the Constitution. Appellants' assertions are nigh frivolous, and should be rejected by this Court.

A. The District Court Fully Complied With Due Process Requirements by Providing Notice and an Opportunity To Be Heard.

Due process requires notice and an opportunity to be heard. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). Due process is satisfied if the sanctioned party has a real and full opportunity to explain its questionable conduct before sanctions are imposed. *Chrysler Corp.*, 186 F.3d at 1023. The notice required is notice that the court is considering sanctions. *See Harlan*, 982 F.2d at 1261-62. "To provide notice when acting *sua sponte*, the court should issue an order for parties or counsel to show cause why sanctions should not be imposed, specifying the alleged misconduct." Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 10.155. The district court fully complied with these requirements.

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curiae briefs address this issue well, and will not attempt to repeat those arguments here.

In early January 2014, Judge Bennett issued a written order to show cause "why sanctions pursuant to Federal Rule of Civil Procedure 30(d)(2) should not be imposed for the deposition conduct of lawyer June Ghezzi, of Jones Day, for making numerous objections that lacked a good faith basis in law or fact and which 'impede[d], delay[ed], or frustrate[d] the fair examination of the deponent' in each deposition in which Ms. Ghezzi defended" in the underlying case. Order to Show Cause at 1, *Security Nat'l Bank of Sioux City, IA v. Abbott Labs.*, No. 5:11-cv-04017-MWB (N.D. Iowa Jan. 8, 2014), ECF No. 160. Judge Bennett specifically reserved the issue of sanctions until after trial on the merits of the underlying matter, assuaging any burden on Ms. Ghezzi during trial, RA006, and protecting the due process rights of her client.

A couple of weeks later, on the same day that judgment in the underlying matter was filed, Judge Bennett filed a more specific supplemental order to show cause why Ms. Ghezzi should not be sanctioned under Fed. R. Civ. P. 30(d)(2) "for her conduct and objections made while defending depositions" in the underlying matter. He articulated three specific concerns: "form" objections, witness coaching, and excessive interruptions, and ordered Ms. Ghezzi to provide the good-faith basis for each of the identified problems in two separate depositions. Supplemental Order to Show Cause at 1-4, *Security Nat'l Bank of Sioux City, IA v. Abbott Labs.*, No. 5:11-cv-04017-MWB (N.D. Iowa Jan. 21, 2014), ECF No. 176. The supplemental

order to show cause stated that the court would have a hearing "to address what, if any, sanctions [the court] should impose." *Id.* at 4.

Although the court ordered a response within 30 days, Ms. Ghezzi was granted a 60-day extension to file her response. RA006. The lower court had almost three months after Ms. Ghezzi filed her response to consider her written submission because she asked for a delayed date for her hearing. RA006. Ms. Ghezzi submitted an additional brief more than a week before the hearing. RA006. At the hearing, almost six months after the supplemental order to show cause was entered, Judge Bennett suggested that he could also impose sanctions pursuant to his inherent authority, Appellants' Br. 16, and requested Ms. Ghezzi to send him an email suggesting an appropriate sanction, should he decide to impose one, RA006. Ms. Ghezzi did not suggest a sanction, and instead urged the court to not impose sanctions. RA006.

More than six months after entering his Supplemental Order to Show Cause, and eleven days after the hearing, Judge Bennett entered his Memorandum Opinion and Order Regarding Sanctions. The court's opinion thoroughly describes the legal authority for sanctions, and Ms. Ghezzi's objectionable deposition conduct. Judge Bennett made clear that it was "the repeated nature of Counsel's obstructionist deposition conduct that warrants sanctions here." RA033.

The process described above fully complied with the requirements of due process. Ms. Ghezzi was provided notice that the court was considering sanctions, the legal basis for the contemplated sanctions, and the specific conduct with which the court was concerned. Judge Bennett made Ms. Ghezzi aware of the issues that needed to be addressed, and provided her a full and fair opportunity to adequately defend herself against the imposition of sanctions. She filed two written submissions and had a hearing. She was even given the opportunity to suggest an appropriate sanction. Ms. Ghezzi received all the process that was due.

Failing to find any Eighth Circuit authority for their argument that due process requires the district court to provide "particularized notice" to an attorney of the specific discovery sanction contemplated by the court, Appellants rely heavily on Third Circuit cases that are inapplicable here.[11] Appellants cite *In re Tutu Wells*

[11] Appellants cite this Court's decision in *Isaacson v. Manty*, 721 F.3d 533, 539 (8th Cir. 2013) for the proposition that this Court approves the Third Circuit authority that requires "particularized notice" of the *sanction* being considered. Appellants' Br. 51-52. That is not a fair reading of *Isaacson* or the Third Circuit case it cited, *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215 (3d Cir. 1995). The Court in *Isaacson* cited *Fellheimer* in support of the proposition that a reviewing court "may consider alternative grounds for the imposition of []sanctions" when a lower court cites incorrect authority as the basis for contempt sanctions, "so long as the court could have sanctioned the same conduct under another source of authority, the court's findings are adequate to meet the applicable standard, and the contemnor's due process rights are protected." 721 F.3d at 539. The due process question in *Fellheimer* concerned whether, given that the lower court cited the wrong legal authority for sanctions, the sanctioned party had received "particularized notice" of "*exactly which conduct was alleged to be sanctionable*"

Contamination Litigation, 120 F.3d 368, 372 (3d Cir. 1997), in support of their argument that Judge Bennett violated their due process rights by "fail[ing] to afford particularized notice of the form of sanctions [he] was contemplating prior to imposing its unprecedented [] order." Appellants' Br. 29-30; *see also* Appellants' Br. 51. Yet Appellants neglect to share that the due process question in that case was "The Process Due Prior to Suspending an Attorney." 120 F.3d at 379.

The district court in *In re Tutu Wells Contamination* suspended three attorneys from the bar of that court as sanctions for discovery abuses. The Third Circuit held that due process required the court to notify the attorneys that suspension was a possible sanction because suspension from law practice implicates an attorney's very ability to earn a living. The court noted that "[a]ny suspension from practice, even in a jurisdiction in which an attorney does not regularly practice, would leave an indelible and deleterious imprint on the attorney's career, reputation, and future opportunities." 120 F.3d 368, 381 n.10. The court found that the attorneys "likely would have presented evidence concerning their professional careers, their contributions to the legal profession and the community, their character, and the like," if they had been on notice that they faced possible suspension. *1*20 F.3d 381.

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and that the party "faced allegations of having acted in subjective bad faith." *Fellheimer*, 57 F.3d at 1225-27 (emphasis added). The question was not whether the sanctioned party received "particularized notice" of the precise sanction to be imposed. That has never been a requirement in the Eighth Circuit.

The court held that their opportunity to be heard was less than meaningful because they were not given an opportunity to fully defend against suspension. *Id.* The sanction ordered here is not even analogous to suspension from the practice of law at issue in *In re Tutu Wells Contamination*.

In re Prudential is similar in that the Third Circuit there was dealing with a sanction that would impact an attorney's ability to practice his trade. The lower court ordered the attorney to attach the sanctions recommendation to all future *pro hac vice* motions in the District Court for the District of New Jersey. The Third Circuit found that such a sanction raised similar concerns as suspension from practice, and "*those concerns* ought to inform the particularity of notice that must be given to allow [counsel] to properly defend against such a sanction." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 193 (3d Cir. 2002) (emphasis added). The sanction ordered in this case does not raise those concerns.

The sanction ordered by Judge Bennett in no way implicates Ms. Ghezzi's ability to practice law anywhere. The sanction ordered by Judge Bennett does not "leave an indelible and deleterious imprint" on Ms. Ghezzi's "career, reputation, or future opportunities." Indeed, the lower court specifically and purposefully left Ms. Ghezzi's name and the name of her law firm out of its sanctions order. RA004, RA032. She is not required to appear in the explanatory video, nor is she required to make the video publicly available or available to anyone outside of her own law

firm. RA032-033. The explanatory video need not state that Ms. Ghezzi herself was sanctioned. RA032.

More importantly, Appellants do not argue that "particularized notice" of the specific sanction ultimately ordered would have changed Ms. Ghezzi's arguments in the lower court in any way. Appellants contend *only* that the notice provided by the court was inadequate. Appellants' Br. 50, 53.[12] Appellants do not assert that there was no opportunity for a full, fair, or meaningful hearing. Indeed, they quibble with the notice that was provided without in any way demonstrating that they were harmed by the lack of notice of the precise sanction ultimately ordered by the district court. Appellants do not maintain that Ms. Ghezzi would have utilized her opportunity to be heard to raise different matters than those she raised below had she known of the precise consequences. Requiring notice of the "probable consequences" makes sense if it is reasonably clear that such notice would have

[12] *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338 (8th Cir. 1975), thus, is inapposite. The question in that case had nothing to do with the adequacy of the notice provided. The court there specifically held that the witness received sufficient notice. 526 F.2d at 1342. In that case, this Court held that the district court could not hold an *unrepresented* non-party witness in contempt without providing him a reasonable opportunity to be heard in his own defense or to give reasons for his initial non-compliance with a subpoena duces tecum. *Id.* Here, Ms. Ghezzi, an attorney herself with decades of experience, was given a full and fair opportunity to be heard in her own defense and to give her reasons for her deposition behavior. Appellants do not argue that there was not a full, fair, and meaningful opportunity to defend against sanctions.

changed the evidence presented, the arguments made, or the hearing that Ms. Ghezzi received, but none of that is apparent here, and Appellants do not even argue that such notice would have made a difference.

The district court fully complied with due process. The district judge provided notice that he was considering sanctions and specified the conduct with which he was concerned. Ms. Ghezzi had ample opportunity to "respond to the court's concerns in an intelligent manner." *In re Tutu Wells Contamination*, 120 F.3d at 379 (internal quotation & citation omitted). The district judge did not impose the most severe sanction available to him, he did not impose a sanction that would affect the course of the litigation or the ability of Ms. Ghezzi's client to present its case, and he did not impose a sanction that implicates Ms. Ghezzi's ability and opportunities to practice law. In the end, the district judge decided upon a narrowly tailored solution which sanctioned the individual responsible, attempted to deter similar behavior by future litigants, and preserved as far as possible the rights of all parties. Appellants received all the process that was due.

B. The District Court Was Well Within Its Authority to Sanction an Attorney Who Appeared Before It.

Appellants acknowledge that the court has the authority to manage its bar and discipline attorneys that appear before it, like Ms. Ghezzi did. Appellants' Br. 53 (citing *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 931 (8th Cir. 2014)). Moreover, Civil Rule 30 itself gives the court authority to "impose an

appropriate sanction . . . on a person who impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30. Yet Appellants argue that the district court's order "must be reversed because it far exceeds the district court's authority," Appellants' Br. 53, because it "dictate[s] the conduct of Jones Day lawyers practicing in other state and federal courts," Appellants' Br. 26. Appellants' argument stems from a misinterpretation of the lower court's order.

The district court's order requires specific conduct of Ms. Ghezzi, who willingly submitted to the jurisdiction of the court by appearing before it. RA032-033. The court was well within its authority to sanction Ms. Ghezzi. The district court's order did not "seek[] to dictate the conduct of Jones Day lawyers practicing in other state and federal courts," Appellants Br. 26, or "require[] Jones Day lawyers . . . to be educated about its view of deposition procedures," Appellants' Br. 55. Rather, the lower court ordered Ms. Ghezzi to write and produce a video explaining the court's decision to the attorneys at her firm who litigate, and explaining how they can comply with the court's order in future depositions. RA032-033. The order does not compel anyone to watch the explanatory video. The district court's order does not "require[] *Jones Day* to disseminate the training video" to anyone. *See* Appellants' Br. 55 (emphasis added). *Ms. Ghezzi* is required to notify certain attorneys at her firm of the video and provide them access to the video. RA032-033.

The court's order does not compel any of the attorneys who receive notice of and access to the video to actually watch it.

The lower court's order does not compel or require anything of anyone outside of the court's jurisdiction, including Jones Day and its thousands of attorneys. It is arguable that Jones Day is not even a proper party to this appeal. Appellants' argument that the court exceeded its authority in ordering a novel sanction is baseless and the Court should reject it.

CONCLUSION

AAJ agrees with other *amici* that have argued that the district court had the authority to impose sanctions *sua sponte*,[13] and that the fair administration of justice requires district court judges to order sanctions when they are warranted.[14] For those reasons, and for the reasons asserted above, this Court should affirm the district court's Memorandum Opinion and Order Regarding Sanctions.

[13] *See* Brief of Stephen D. Susman and Thomas M. Melsheimer as *Amicus Curiae* in Support of the Honorable Mark W. Bennett's Memorandum Opinion and Order Regarding Sanctions 9-12. *See generally* Brief of The American Board of Trial Advocates as *Amicus Curiae*.

[14] *See* Brief of *Amicus Curiae* on Behalf of Iowa Association for Justice 14-23.

Date: December 10, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 5,629 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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December 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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