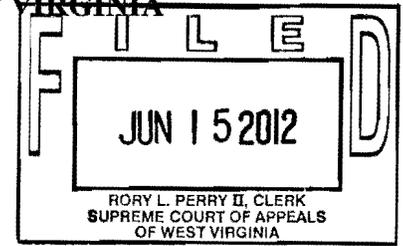


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,



Case No. 12-0699
(Civil Action No. 11-C-131)
(Civil Action No. 11-C-68)

v.

THE HONORABLE DAVID H. SANDERS,
HOWARD G. DEMORY and
CHARLOTTE P. DEMORY; 3rd TIME TRUCKING, LLC,
and ERIC W. CUSTER,

Respondents.

RESPONSE OF HOWARD AND CHARLOTTE DEMORY;
3RD TIME TRUCKING, LLC; and ERIC W. CUSTER
TO MASSACHUSETTS MUTUAL LIFE INSURANCE
COMPANY'S PETITION FOR WRIT OF PROHIBITION

Robert J. Schiavoni (WVSB No. 4365)
David M. Hammer (WVSB No. 5047)
Brad D. Weiss (WVSB No. 11577)
F. Samuel Bryer (WVSB No. 571)
Peter A. Pentony (WVSB No. 7769)
Kimberly S. MacCumbee (*pro hac vice*)
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIESiv-v

I. QUESTION PRESENTED1

II. STATEMENT OF THE CASE1

 A. THE PLEADINGS.....1

 B. MASSMUTUAL’S INITIAL POSITION AS REPRESENTED TO
 THE TRIAL COURT IN OCTOBER 2011.....4

 C. MASSMUTUAL’S REPRESENTATIONS TO THE SUPREME
 COURT ON NOVEMBER 3, 2011.....5

 D. THE TRIAL COURT’S NOVEMBER 4, 2011 DISCOVERY
 ORDER.....6

 E. THE TRIAL COURT’S MAY 24, 2012 ORDER DENYING
 MASSMUTUAL’S MOTION FOR PROTECTIVE ORDER AND
 LIMITING THE DEPOSITION OF ROGER CRANDALL.....9

III. SUMMARY OF ARGUMENT9

IV. ARGUMENT.....10

 A. STANDARD OF REVIEW.....12

 B. MASSMUTUAL DEFIED THIS COURT’S RULING WHEN IT
 PRODUCED A *PRO FORMA* AFFIDAVIT FROM CRANDALL
 THAT AVOIDED THE AREAS OF INQUIRY THAT IT KNEW
 RESPONDENTS WANTED TO PURSUE IN CRANDALL’S
 DEPOSITION.....13

 C. RESPONDENTS PROVED THAT THEY HAVE ALREADY
 ATTEMPTED IN GOOD FAITH LESS INTRUSIVE METHODS
 OF DISCOVERY, BUT THAT THESE ATTEMPTS WERE
 FRUSTRATED BY UNSATISFACTORY, INSUFFICIENT AND
 INADEQUATE TESTIMONY FROM HOME OFFICE OFFICIALS,
 AS WELL AS MASSMUTURAL’S EFFORTS THROUGH
 OBFUSCATION AND MISDIRECTION.....19

1. Testimony of Corporate Officials at MassMutual Consists of “I Don’t Know,” “I Don’t Recall” and “I Don’t Remember”	21
2. MassMutual Withheld Evidence from the Trial Court Relating to Board Minutes Covering the “Risk Issues” identified by Lucido and Presented to the Board, to Crandall, and to the Audit Committee by Lucido, while Now Arguing that Respondents Have Failed to Produce “New” Evidence Since the First Writ Petition.....	26
3. MassMutual’s additional obfuscation and misdirection of discovery with piecemeal document production ONLY AFTER key depositions of corporate officials of MassMutual are taken by Respondents.....	29
D. THIS COURT’S OPINION ON MASSMUTUAL’S PREVIOUS WRIT WAS NOT AN ANNOUNCEMENT THAT A SENIOR CORPORATE OFFICIAL’S DEPOSITION CAN NEVER BE TAKEN AND NOT AN ANNOUNCEMENT THAT THE COURT’S DECISION WAS THE “LAW OF THE CASE”	33
CONCLUSION	36

TABLE OF AUTHORITIES

CASES:

State ex. Rel. Massachusetts Mut. Life Ins. Co. v Sanders, ___ W. Va. ___, 724 S.E.2d 353 (2012) Syl. Pt. 3.....1, 14, 19, 36

Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370, Syl. Pt. 1 (1953).....12

State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12, Syl. Pt. 3 (1996).....12

Hoover, 199 W. Va. 12, Syl Pt. 4.....12

State Farm Mut. Auto. Ins. Co. v Stephens, 188 W. Va. 622, 425 S.E.2d 577, Syl. Pt. 1 (1992).....13, 14

State ex rel. State Farm Mut. Auto. Ins. Co. v Bedell, 226 W. Va. 138, 142-143, 697 S.E.2d 730 (W.Va. 2010).....13

State ex rel. Arrow Concrete Co. v. Hill, 194 W. Va. 239, 244, 460 S.E.2d 54 (1995).....13

State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W. Va. 622, 425.....14

Stonewall Jackson Mem Hosp v. American United Life Ins. Co., 206 W. Va. 458...18

Accord Unum Life Ins Co of America v. Wilson, 2009 U.S. Dist Lexis 10976 (N.D. W.Va. 2009).....18

State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 226 W. Va. 138, 143, 697 S.E.2d 730, 735 (2010).....36

STATE STATUTES and REGULATIONS:

W. Va. Code § 53-1-1 (2008).....12

W. Va. Code § 114 CSR 11B-7.....17

W. Va. Code § 114 CSR 14-6.....17

W. Va. Code § 114 CSR 11B-5.....17

STATE RULES:

Rule 26(b)(1).....14

Rule 30(b)(7).....22, 24

I. QUESTION PRESENTED

Having applied this Court's holding in Syllabus Point 3 of *State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, ___ W. Va. ___, 724 S.E.2d 353 (2012) in ruling upon the scope of discovery, whether the trial court's order denying MassMutual's motion for a protective order is properly the subject of a Writ of Prohibition.

II. STATEMENT OF THE CASE

MassMutual's case summary is deficient containing inaccuracies and omissions.

A. The Pleadings.

Howard and Charlotte Demory v. MassMutual, et al., Case No. 11-C-131,¹ and the related case of 3rd Time Trucking, LLC, et al. v. MassMutual, et al., Case No. 11-C-68,² are two 412i cases in a long-line of 412i cases – all filed in Jefferson County, West Virginia and against the same main defendants: MassMutual, its general agency West Financial Group, LLC, its general agent Alexandria West, its insurance agents Jim Nichols, Larry Logan, George Fisher³, its approved third party administrator West Pension Solutions, LLC, and against the MassMutual branch office in Charles Town, WV, known as Nichols, DeHaven and Associates, CPAs, PLLC (“NDA”). The

¹ In Demory, MassMutual sold an 81 year old couple, already retired, a MassMutual prototype “pension plan” funded by a fixed annuity with a 2024 maturity date and carrying substantial surrender charges lasting for eight years and then “rolled over” the same annuity into a MassMutual IRA. The Demorys now must address, through a tax lawyer, tax and compliance penalties which will be facing them and their estate.

² In 3rd Time Trucking, Mr. Custer paid \$300,000.00 into a 412i MassMutual prototype pension plan which does not exist, for which his MassMutual financial advisor and CPA took tax deductions, and for which Mr. Custer will face tax penalties, compliance and collateral liabilities for funding a fake benefit plan.

³ While a defendant in nine other 412i cases, Mr. Fisher is not a defendant in the Demory lawsuit.

Demorys filed suit in the Circuit Court of Jefferson County on April 26, 2011; Mr. Custer filed on February 24, 2011. Two week trials for each case have been scheduled back to back starting with the Demorys on October 9, 2012. The Demorys are soon to be 87 years old (both having the same birth date) and in poor health.⁴ A long and drawn out discovery and trial schedule were not, and are not, something that the Demorys could sustain. Discovery is best characterized as an enduring and constant challenge to obtain documents and meaningful testimony from MassMutual. MassMutual discovery tactics are manifest throughout this particular facet of the litigation as seen below.

The Complaint as filed by the Demorys, and mirrored in the Custer Complaint, details the history of pension plan fraud known by MassMutual to have existed since at least 2004 including the sponsorship of Defendant Larry Logan to market and sell insurance and pension products in the State of West Virginia starting in 2003.⁵ Supp Apx at 845-926. The Complaints further detail the sordid history of serial violations of the West Virginia UTPA and the unfair claims settlement practices sections of the Act with respect to life insurance and annuities to fund MassMutual prototypical 412i pension plans, MassMutual marketing of illicit plans through trusted tax advisor programs such as

⁴ Mr. Demory would say he is doing fine, but this World War II veteran is in visibly declining health and is not ambulatory having been confined to a wheelchair in recent weeks. His trial date now scheduled in October will likely be his last chance to right a wrong.

⁵ At the time of Logan's sponsorship for West Virginia licensure to sell insurance, MassMutual was already aware of Logan's rap sheet which included over twenty complaints. Despite that record, MassMutual promoted Logan to the position of Agency Director of Advanced Sales & Pension Plan Specialist where complaints involving forgery, fraud and misrepresentation continued to mount. [See Complaint ¶¶ 48-52, Supp Apx 859-61]. Logan now claims to reside in Mexico and is being pursued by the Maryland SEC for his role in a Ponzi-type scheme.

in these cases through a Certified Public Accountant, massive and recurring and systemic compliance failures at MassMutual Home Office, regulatory deceit by MassMutual Home Office in failing to accurately and timely report fraud and criminality to various federal and state agencies including the West Virginia Insurance Commission, fraudulent tax filings and forgeries by MassMutual agents known by MassMutual Home Office, fraudulent completion of applications, and in the case of the Demorys the fabrication of a fraudulent annuity contract signed in May of 2011 by MassMutual's President, Chief Executive Officer and Chairman of the Board, Roger Crandall (hereinafter referred to as "Crandall").

MassMutual, of course, has denied the allegations and has defended this and the predecessor cases by avoiding any admission in the pleadings and discovery that it had conducted any investigation of the practices of its agents and General Agent and General Agent, any investigation, research, or analysis regarding the marketing of its 412i program, by claiming that MassMutual Home Office witnesses had no knowledge of problems other than what is contained in suit papers or what they were told by MassMutual "counsel", and further claiming that the agents and General Agent had acted as rogues in the marketing and sales of its 412i plan products. In fact, in verified discovery answers signed by Kenneth Rickson and through the deposition of MassMutual Chief Risk Officer and Corporate Designee Kenneth Rickson, MassMutual has hidden the existence of any Home Office reports, determinations, investigations, analyses or findings with respect to the 412i marketing program in these and predecessor 412i cases. Discovery long sought in these cases, and prior cases, and which the trial court ordered in

this litigation to be produced, reveal the truth of the allegations regarding conduct and knowledge of MassMutual Home Office executives.⁶

B. MassMutual's Initial Position as Represented to the Trial Court in October, 2011.

The underlying motion for protective order and supporting memorandum was first filed by MassMutual on October 3, 2011. MassMutual, while urging the trial court to adopt the Apex doctrine, made several material representations to the trial court about "others" having the discoverable information sought by Respondents [Supp Apx 927-938]:

- MassMutual affirmatively represented that Crandall did not have "any involvement in the subject matter of any of the other lawsuits filed in Jefferson County, West Virginia concerning 412(i) Plans."
- MassMutual identified its Corporate Representative as persons with knowledge about the subject matter of these lawsuits in lieu of Crandall's knowledge and information.
- MassMutual represented to the trial court that Kenneth Rickson (Rickson") would testify as to the issuance of the fraudulent May 2011 annuity contract issued to Mr. Demory, that Rickson "will be prepared to testify" about topics concerning reviews, investigations, determinations regarding the MassMutual sales and marketing practices as well as many "other issues Plaintiffs wish to cover that are included in their Rule 30(b)(7) notice."
- MassMutual represented further that Rickson would testify about internal or external investigations, and audit activities of the West Virginia 412i plans, compliance obligations and activities related to their agents (Nichols, Fisher, Logan and West), reporting obligations to State and

⁶ A deposition of defendant Ms. West completed on June 8, 2012 bears on the truth of the allegations of cover-up by Rickson and others at Home Office. Ms. West testified that, when she emailed concerns about being proactive with the 412i problems, Kenneth Rickson, Chief Risk Officer at MassMutual and board member of the MML Investors Services, LLC (MassMutual's financial services) and MassMutual 30(b)(7) representative, Rickson called West "screaming" at her and demanded that she no longer send any emails, or other communications, regarding 412i problems. [Supp Apx 939-945].

federal authorities, and annuity underwriting and record retention, among others. [Apx 332-95].

- MassMutual identified other witnesses initially to the trial court stating to that Court that “plaintiffs will have the opportunity to ask these witnesses (including MassMutual’s Rule 30(b)(7) representatives) questions concerning the allegations in their Complaint, **making the deposition of Mr. Crandall duplicative and unnecessary...[and] unless and until Plaintiffs have sought answers and discoverable information from these witnesses, they cannot satisfy their burden of establishing less onerous methods of discovery have been exhausted without success.**”

Thereafter, and at great expense, counsel for the Demorys and Mr. Custer travelled to Springfield, Massachusetts on two separate occasions for multiple days to depose the very witnesses identified by MassMutual as possessing knowledge about the subject matter of this litigation as set forth in their Complaints. Those depositions revealed that Crandall’s deposition is far from “duplicative and unnecessary.”

C. MassMutual’s Representations to Supreme Court on November 3, 2011.

On November 3, 2011, MassMutual filed its first Writ of Prohibition seeking to preclude the deposition of Crandall. In its brief to this Court, MassMutual in seeking the adoption of the Apex doctrine, represented that Crandall lacked any personal or unique knowledge about the subject matter of this litigation stating that “Plaintiffs can obtain the information they seek through the deposition of MassMutual employees and MassMutual corporate representatives.” [Supp Apx 933-8]. MassMutual stated further to this Court that “MassMutual’s employees and Corporate Representatives can address any matters of relevance to these cases” and that “there are less onerous discovery procedures to obtain the information sought which are being employed.” *Id.* None of those representations can be supported by the record of MassMutual’s behavior which was presented to the trial court at a two hour long evidentiary hearing held on May 14, 2012.

D. The Trial Court's November 4, 2011 Discovery Order.

The day after MassMutual made the above representations to this Court in its November 3rd Petition, the trial court entered a discovery order requiring MassMutual to produce compliance reports, investigations, analyses, emails and other communications pertaining to Plaintiffs' proof standards to show a pattern and practice of unfair claims settlement practices, and other deceptive trade practices. [Apx 752-4]. From November 11 through 17, 2011 immediately before and during certain depositions taking place in Springfield, Massachusetts, MassMutual produced documents which showed that Crandall had been receiving "Compliance Reports" concerning the MassMutual 412i program, [Apx 119-171] and yet the existence of any such reports, investigations, analyses, or determinations had been denied prior to the trial court's November 4, 2011 discovery order. Respondents provided portions of the post-November 4, 2011 production of discovery by MassMutual to this Court in response to the first Writ Petition, but the trial court itself had not been presented with this evidence as a result of the timing of MassMutual's production.

While MassMutual now tries to diminish the importance of the Compliance Reports, which squarely and undeniably contradict its initial assertion to the trial court that Crandall had "no knowledge of the subject matter of the 412i" cases, Bradley Lucido, MassMutual's Chief Compliance Officer, testified that the "Compliance Reports" referencing the 412i program which he had delivered to Crandall contain only the "**highest level, top risk**" issues to the Company, and pose "**much more systemic risk issues across the organization.**" [Apx 208-9]. A summary of those heavily redacted reports follow:

- Pursuant to the trial court's November 4, 2011 Order adopting and incorporating the trial court's prior orders regarding pattern and practice discovery in previously settled 412i cases involving MassMutual, MassMutual produced almost completely redacted copies of "Compliance Program Reports" prepared by its Chief Compliance Officer, Bradley Lucido.
- The "sales practices concerning Section 412(i) plans" is indicated as a "Significant Compliance Matter" within the Reports. [Apx 151]. The Report has a heading for "Findings" and "Corrective Action Taken." As to "Findings" the Report states that "analysis is underway to address sales practices." *Id.* Such a representation would be at odds with MassMutual's assertion that no investigation, analysis, review or determination was done as to any of the plans; an assertion repeated Chief Risk Officer, Kenneth Rickson, under oath. [Apx 173-197] (Rickson also verified interrogatory answers on behalf of MassMutual.)
- As to "Corrective Action Taken", that description discloses a "team" of undisclosed persons identifying the "lessons learned from the settlement of the Section 412(i) cases." [Apx 151]. However, the most important note entry states that the "team" is to "**ensure adequate compliance controls in the offer/sale of Section 412(i) plans.**" [Apx 128 and 146].
- Pursuant to Lucido's deposition testimony, as Chief Compliance Officer he is required to regularly report all "pertinent" compliance issues" to the Chairman of the Board of Directors, President, and Agency Field Force Supervisor. Specifically, Lucido is required to "discuss and review" "significant compliance problems" with Crandall and with regard to the Lucido's Compliance Program Reports, they were indeed provided to Crandall. Lucido testified:

Q: Do you provide information to Mr. Crandall?

A: Yes. I meet with Mr. Crandall approximately every couple of months.

Q: Have you provided any of the compliance reports that you provide to the Audit Committee to Mr. Crandall?

A: I provide a report that I provide to the Audit Committee, I send it in advance of the meeting to each of the executive management leaders within the company.

Q: That would include Mr. Crandall?

A: Mm-hmm.

* * *

Q: And so have you communicated to the executive team information relating to the 412(i) litigation?

A: I believe that there were references in the 412(i) – regarding the 412(i) matter in my compliance reports post-fall of 2010.

* * *

Q: ...Earlier you had testified that you have met with Mr. Crandall and the executive team with regard to issues relating to the 412(i) matters; is that correct?

* * *

A: No. I meet periodically with Mr. Crandall to discuss compliance issues, generally. I provide a copy of my compliance report to all of the members of the executive team.

Q: And in some of those compliance reports, it discusses the 412(i) matters; is that an accurate statement, sir?

A: Yes.

* * *

Q: And to whom does this document, this February 2011 Compliance Program Report, go to?

A: This is a document that is provided to the Audit Committee of the MassMutual Board of Directors. It is also the document that we referred to earlier, that is distributed to the executive management team of MassMutual, in advance of those Audit Committee meetings.

Q: Do you know whether or not Mr. Crandall receives a copy of this exhibit?

A: It is sent to him.

[Apx 202-6].

- Crandall has made repeated public and regulatory assurances over the past three calendar years claiming MassMutual’s “internal controls”, [231-2] were sound and that no material or immaterial fraud has been revealed. Those representations are squarely at odds with the Lucido Compliance Program Report and subsequent discovery. [Apx 237-267].

E. The Trial Court’s May 24, 2012 Order Denying MassMutual’s Motion for Protective Order and Limiting the Deposition of Roger Crandall.

The trial court, after receiving full briefing and hearing two hours of argument and presentation of evidence, followed this Court’s roadmap on applying the Apex doctrine set forth in Syllabus Point 3 of its February 24, 2012 Opinion, *State ex. Rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, ___ W. Va. ___, 724 S.E.2d 353 (2012), and ultimately held that while MassMutual failed to produce a meaningful affidavit from Crandall, Respondents failed to prove unique or personal knowledge of Crandall. However, also following this Court’s roadmap, the trial court held that Respondents “have in good faith sought less intrusive methods of discovery and proved it to be unsatisfactory, insufficient, or inadequate.” [Apx 11]. Further following this Court’s roadmap, the trial court, considering the circumstances of these cases and a rapidly approaching trial date, the representations made by MassMutual as to the “less intrusive means”, and the frustration in obtaining meaningful discovery from those “less intrusive means”, exercised its discretion and restricted the duration, scope and location of Crandall’s deposition so as to balance the Respondents’ need for discovery with any inconvenience to Crandall and with the clear intention of avoiding further unreasonable waste of time and resources. [Apx 10-13]. It is this well-reasoned discovery order by the trial court – with substantial findings of fact and conclusions of law applying the roadmap set forth by this Court – which MassMutual now challenges as the subject of a Writ of Prohibition.

III. SUMMARY OF ARGUMENT

MassMutual is challenging a trial court’s discretion in denying its motion for a protective order. That order flows from years of 412i litigation, the presentation of

substantial briefing prior to and following MassMutual's most recent motion for a protective order to preclude the deposition of Roger Crandall, a substantial and well developed record of MassMutual's obstructionist conduct undermining the "less intrusive means" of discovery, the filing of a less than credible affidavit by Roger Crandall, and two hours of evidentiary hearing at which the trial judge not only was presented exhibits and documentary evidence, but saw and heard the pertinent video depositions of the very witnesses identified by MassMutual as persons having knowledge and information such that Crandall's deposition would be duplicative. In response to this presentation and argument, MassMutual's primary arguments to the trial court were that they were "sandbagged" and that this Court had already ruled that Crandall's deposition could not go forward as the "law of the case." The trial court's order should stand.

IV. ARGUMENT

In its ruling on Petitioner MassMutual's previous petition for a writ, this Court clarified West Virginia law concerning the Apex doctrine, and it established a roadmap to follow for a company wishing to invoke that doctrine to protect a senior official -- in this case the CEO -- from providing testimony. While feigning compliance with that roadmap, MassMutual has actually flouted the ruling of this Court.

1. MassMutual produced a *pro forma* affidavit from the CEO, Roger Crandall, despite this Court's clear direction that a meaningful affidavit is a condition precedent to an attempted invocation of the doctrine. Crandall's affidavit addressed matters not in issue while tip-toeing around the issues Crandall knew, or should have known, from prior related lawsuits, settlements and proceedings,

which are the issues constituting a pattern and practice of misconduct at Home Office about which Respondents wish to depose him.

2. MassMutual has frustrated Respondents' efforts to use less intrusive methods of discovery proving those methods to be unsatisfactory, insufficient and inadequate, and because of MassMutual's obfuscation and misdirection, the deposition of Crandall is the most efficient and effective method for Respondents to do discovery about the issues on which they wish to depose Crandall and about which his affidavit fails to address.
3. The trial court found that Respondents have already attempted less intrusive discovery methods that have proved unsatisfactory, insufficient and inadequate because such lower level corporate officials, including that of the Vice President, Regional Vice President and Regional Agency Supervisor, as well as MassMutual corporate designate deposition, proved unable to answer basic questions regarding the 412i plans in Jefferson County, West Virginia and MassMutual's knowledge of these problems and failure to affirmatively correct the defects. As a result of the inadequate *pro forma* affidavit of Crandall and the unsatisfactory, insufficient and inadequate nature of the less intrusive methods of discovery, as well as MassMutual's tactics and misleading arguments made to this Court, MassMutual has provided this Court with no basis for casting aside the trial court's factual findings and its application of the law to those findings.

For the following reasons, Respondents pray that this Court will deny the petition for a writ filed by MassMutual as part of its continuing campaign to frustrate Respondents' efforts at discovery.

A. Standard of Review.

West Virginia Code § 53-1-1 (2008) provides that a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has [no] jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Thus, [p]rohibition lies only to restrain inferior courts from proceeding [] in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari. *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370, Syl. Pt.1 (1953); *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12, Syl. Pt. 3 (1996).

To aid in this consideration, this Court has previously established a general test for determining whether a lower tribunal has exceeded its legitimate powers:

[i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent [143] disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Hoover, 199 W. Va. 12, Syl Pt. 4.

As to discovery orders in particular, this Court has previously held that “[a] writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.” *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577, Syl. Pt. 1 (1992); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 142-143, 697 S.E.2d 730 (2010). This Court has also previously held that:

We are mindful that a writ of prohibition is rarely granted as a means to resolve discovery disputes: “‘A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.’ Syllabus Point 1, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992).” Syl. pt. 1, *State ex rel. Erickson v. Hill*, 191 W. Va. 320, 445 S.E.2d 503 (1994). See also *Nutter v. Maynard*, 183 W. Va. 247, 250, 395 S.E.2d 491, 494 (1990) (“Review of discovery matters is not generally appropriate through extraordinary remedies[.]”); 63A Am. Jur. 2d Prohibition § 62 at 194 (1984) (“Ordinarily, a petition for a writ of prohibition to set aside a discovery order will be denied[.]” (footnote omitted)).

State ex rel. Arrow Concrete Co. v. Hill, 194 W. Va. 239, 244, 460 S.E.2d 54 (1995).

B. MassMutual Defied this Court’s Ruling When it Produced a *Pro Forma* Affidavit from Crandall that Avoided the Areas of Inquiry which It Knew Respondents Wanted to Pursue in Crandall’s Deposition.

A meaningful and credible affidavit is a condition precedent to a legitimate request for application of the Apex doctrine. The affidavit of Crandall did not even make the attempt at feigning substance. Rather, the affidavit avoids key areas of inquiry for which Crandall either has, or should have knowledge of “‘lessons learned’ from the settlement of Section 412(i) cases,” and MassMutual’s actions as a result of those “‘lessons learned.’” [Cf Apx 73-5 with Apx 119-171 and 237-67]. As such MassMutual

failed to satisfy the condition precedent even to commence an inquiry as to whether the Apex doctrine should be invoked.

In this Court's adoption of the Apex doctrine, it required first that the high ranking corporate executive affirm under oath his denial of "any knowledge of relevant facts." *State ex. rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, Syl pt 3. To ensure that the affidavit accurately address that which is relevant within the subject matter of this litigation, the Court reminded the parties "discovery sought should be relevant in the sense that it is reasonably calculated to lead to the discovery of admissible evidence." *Id.* at p. 8 (citing *State Farm Mu. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)) ('The question of the relevancy of the information sought through discovery essentially involves a determination of how substantively the information requested bears on the issues to be tried... However, under Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, discovery is not limited only to admissible evidence, but applies to information reasonably calculated to lead to the discovery of admissible evidence.')

Crandall failed to submit to the trial court a meaningful affidavit denying his knowledge of the deceptive trade "**practices**" (as the term is used in MassMutual's own Court Ordered produced documents which Crandall received) in which his company engaged. Indeed, Crandall avoided the issue entirely leaving unaddressed the first requirement of this Court's decision to produce an affidavit denying "any relevant" knowledge of the subject matter of the litigation. Crandall's attempt at ignoring by omission his actual knowledge does not operate as a denial, but rather as an admission.

For example, in Crandall's affidavit, he never denied knowledge of relevant facts regarding key allegations in the Complaints. The following excerpted allegations in the

Demory Complaint, which are substantially mirrored in the Custer and 3rd Time Trucking Complaint are as follows:

Paragraph 45 of the Complaint in pertinent part states:

Hazelwood, and Kenneth Rickson, Corporate Officer and Director and at times Risk Officer and Vice President of MassMutual Financial Group... were or should have been familiar with the fraudulent sales of 412i plans and products...to other local Jefferson County families, including but not limited to the Lloyds, Kables, McDonalds, Asams, Kilroys, Vanderhooks, Houghs, and Williams.

Paragraph 53 states in pertinent part:

...MassMutual possesses actual knowledge of problems existing in several 412i plans and other “investments” many involving elderly clients, and rather than report the problems caused by West, WFG, WPS, and Logan and Nichols, chose to cover up the problems, failed to inform persons affected by the conduct of MassMutual agents and statutory employees....

Paragraph 62 states in full:

Roger Crandall, current Chairman, President and CEO of MassMutual, serves on MassMutual’s Corporate Governance Committee which has oversight for, among other things, the following:

- Reviewing and overseeing corporate systems, internal controls, corporate policies and corporate compliance programs;
- Reviewing legal, regulatory and compliance issues, including material litigation;
- Developing and overseeing a policy for interaction between the Board and management, including the role, authority and reporting lines of the Company’s internal audit and compliance departments;
- Ensuring processes are in place for maintaining the integrity of the Company, the integrity of the financial

statements, the integrity of compliance with law and ethics, and the integrity of relationships with stakeholders and other constituents.

Paragraph 132 states in full:

In lieu of affirmatively undertaking an effort to contact businesses and employers and persons and families who have been sold MassMutual products and services concerning the MassMutual Defined Benefit Prototype Plan and Trust through any or all of the other Defendants herein, MassMutual has chosen to take a “wait and see” litigation approach thereby exacerbating the harm caused to these businesses, employers, families and persons, further thereby abrogating its obligation to be vigilant, proactive and public in its commitment to fighting fraud and other bad conduct.

Paragraph 150 states in full:

MassMutual has the duty to notify, inform and advise those who purchased insurance and/or annuity products used to fund the MassMutual Defined Benefit Prototype Plan and Trust of either the improper activities of its agents and employees in the sale of such products and plans, **and/or any findings as a result of audits, compliance checks, reviews and/or investigations, or of problems with the plan and products themselves.** [Bold face added].

Paragraph 187 states in full:

These misrepresentations were done with such frequency that the conduct was not only a general business practice to convince the Plaintiffs to purchase and maintain an inappropriate annuity contract to fund a 412i plan, but to convince other West Virginia residents to purchase similar inappropriate insurance and annuity products for the purpose of funding 412i plans.

This Court provided further guidance, dependent on a presumed event of a valid affidavit filed by the executive denying any relevant knowledge to the subject matter of the litigation, stating that if the official lacks any unique or superior knowledge of

discoverable information, “the circuit court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods.” Put aside that Crandall’s affidavit fails to address the gravamen of this litigation, and that more notoriously Crandall is in possession of previously undisclosed Compliance Program Reports regarding the 412i cases as “**systemic risk issues across the organization**” and which are “**highest level top risk**” issues to the Company, and that he certified in Sarbanes-Oxley certifications contrary to those reports about the non-existence of fraud within his company, Respondents have nonetheless attempted to obtain this discovery through written requests and depositions, but to no avail.

While Crandall’s *pro forma* affidavit attempted to minimize his signature on the Demory annuity contract as a matter of course for MassMutual, his affidavit fails to address the significance of a fraudulent annuity contract produced during litigation with his electronic signature, which constitutes yet another Unfair Trade Practices Act violation. Also, in answers to requests for admissions concerning the Crandall issued May 12, 2011 Contract Schedule, MassMutual in essence denied that the contract schedule constituted the actual contract without the annuity application. [Apx 301-4]. The deposition of Kelly Parsons on November 29, 2011, disclosed the existence of at least three separate versions of the applications concerning this annuity contract, with two versions of the application having been produced by MassMutual, the other by the West defendants. [Apx 306-330]. None of the applications matched the Contract Schedule first issued by Crandall in May, 2011 for a purported 2005 annuity.

The applications reveal that Mrs. Demory was a joint owner of the annuity and that the Contract Schedule purportedly issued to Mr. Demory without a joint owner cannot operate as a part of the “contract” standing alone because there exists no corresponding annuity application. In other words, MassMutual created an annuity document after the filing of this lawsuit in violation of West Virginia law. See 114 CSR 11B-7 (records must be kept for ten years in a manner which accurately reproduces the actual document); 114 CSR 14-6 (every insurer must promptly investigate claims without delay); 114 CSR 11B-5 (in an annuity transaction, MassMutual had a duty to obtain information to determine the suitability of the Crandall issued Contract Schedule); *see also Stonewall Jackson Mem Hosp v. American United Life Ins Co*, 206 W.Va. 458; *accord Unum Life Ins Co of America v. Wilson*, 2009 U.S. Dist Lexis 100976 (N.D. W.Va. 2009). Crandall offers no explanation in his affidavit, and neither does Rickson nor any other MassMutual witness, for how the May 12, 2011 contract schedule was caused to be issued, how the Plaintiffs’ annuities were “hot listed”.

Indeed, what is most revealing about Crandall’s affidavit is one simple sentence – “Any second hand knowledge that I have is solely as a result of communications to me from counsel after my deposition was noticed in the above-captioned matters.” [Apx. at 73-5, Crandall’s Affidavit at ¶ 10]. As the trial court found, Crandall’s affidavit is intrinsically not credible. The affidavit fails to even address the obvious: Crandall’s first hand knowledge of the information presented to him in Lucido’s multiple compliance reports. [Apx at 11, ¶ 25 of the Order]. Indeed, Crandall’s affidavit is clearly at odds with the Lucido Compliance Reports and Lucido’s sworn testimony that those reports were provided to Crandall in the regular course of MassMutual’s business and meetings

with the Audit Committee and in executive session five times a year and with Crandall every couple of months. [Apx 201-2]. Crandall's evasive, internally and extrinsically compromised, and *pro forma* affidavit, alone, provides justification for the trial court's denial of MassMutual's motion for protective order and an order allowing the limited inquiry into what Crandall knew and did not know about the compliance issues and Home Office practices concerning the MassMutual 412i program and serves as a basis for the trial court's particular finding that Crandall's affidavit is not credible.

C. Respondents Proved that They Have Already Attempted in Good Faith Less Intrusive Methods of Discovery, But that These Attempts were Frustrated by Unsatisfactory, Insufficient and Inadequate Testimony from Home Office Officials, as well as MassMutual's Discovery Conduct Through Obfuscation and Misdirection.

This Court held in its adoption of the Apex doctrine, that if the trial court determined that unique or personal knowledge of discoverable information by the corporate official has not been established by the party seeking the deposition, the party seeking the deposition, after a good faith effort to obtain the discovery through less intrusive methods has been made, may return to the trial court and show a "**reasonable indication** that the official's deposition is calculated to lead to the discovery of admissible evidence" and "that the less intrusive methods of discovery are **unsatisfactory, insufficient or inadequate.**" *State ex. Rel. Massachusetts Mut. Life Ins. Co. v. Sanders* at page 20. (Emphasis added). Respondents did just that and the trial court agreed holding:

...although Plaintiffs have failed to prove Roger Crandall has unique or personal knowledge of the issue outlined above, Plaintiffs have in good faith sought less intrusive methods of discovery and proved it to be unsatisfactory, insufficient or inadequate. Further, Plaintiffs proved that

deposing Roger Crandall in the areas outlined above will lead them to relevant and discovery evidence.

[Apx 11].

Contrary to the misrepresentations made by MassMutual, Respondents pursued and exhausted the less intrusive methods of discovery as expressly prescribed by MassMutual, including depositions of corporate officials specifically identified and offered by MassMutual, as well as written requests for discovery. In fact, from October 27, 2011 through November 22, 2011, when this Court awarded MassMutual a Rule 20 stay pursuant to MassMutual's first writ of prohibition seeking the adoption of the Apex doctrine, Respondents traveled to Springfield, Massachusetts and took the depositions of six (6) corporate officials of MassMutual up to the vice president level – several of whom MassMutual assured the trial court and this Court were individuals with knowledge such that, according to MassMutual, would render Crandall's deposition unnecessary.

Those depositions included: 1) Kenneth Rickson, Vice President and Field Risk Officer, deposed individually and as a corporate designate selected by MassMutual to testify on behalf of the corporation over segments of a three day period on October 27, November 14 and 17, 2011; 2) Joshua Hazlewood, Vice President, Chief Underwriter for pension plan sales and Head of Business and Estate Planning, deposed individually and as a corporate designate selected by MassMutual to testify on behalf of the corporation on November 15, 2011; 3) Cindy Andrade, Vice President and Head of Regulatory Compliance for MassMutual's Compliance Department within U.S. Insurance Group, deposed on October 28, 2011; 4) Bradley Lucido, Chief Compliance Officer, deposed on November 17, 2011; 5) Edward Youmell, Regional Vice President, deposed on

November 16, 2011; and 6) David Hardy, Regional Agency Supervisor, deposed on November 18, 2011.

Additionally, from the filing of this lawsuit, throughout November, 2011, Respondents sought written discovery from MassMutual. This too proved unsatisfactory, insufficient and inadequate as MassMutual responded categorically to almost every request with improper boilerplate objections and untimely and piecemeal document production. Such written discovery to MassMutual include 1) First Sets of Interrogatories, Requests for Production of Documents and Requests for Admission served on March 9, 2011; 2) Second Requests for Admissions served on May 26, 2011; and 3) Second Requests for Production of Documents served on November 18, 2011.⁷ However, the trial court, hearing evidence of the such unsatisfactory, insufficient and inadequate discovery, agreed and with its discretion, ordered the deposition of Crandall for a restricted two hour duration, limited scope and for a location convenient for Crandall, but also reasonable for Respondents.

1. Testimony of corporate officials at MassMutual consists of “I Don’t Know,” “I Don’t Recall” and “I Don’t Remember.”

Other than Lucido, the MassMutual deponents claimed not to be aware of any investigation, review, report or findings regarding the 412i sales practices in Jefferson County, West Virginia or the conduct of their agents marketing the 412i plans, let alone the internal reviews found in the Lucido reports. MassMutual denied the existence of such findings. Given that Lucido characterized the 412i problems as **“highest level top**

⁷ Discovery and discovery motion practice has been slowed by multiple stays including MassMutual’s attempt, after the West Defendants petitioned for bankruptcy, to remove these cases to federal court and transfer to Virginia. MassMutual argued that the Demorys could commute daily from Charles Town, West Virginia to their trial in Alexandria, Virginia.

risk” to the Company, and pose “**much more systemic risk issues across the organization**”, the purported lack of knowledge about these reports by the Chief **Risk**⁸ Officer Kenneth Rickson, Edward Youmell, Regional Vice President, and Cindy Andrade, Vice President and Head of Regulatory Compliance for MassMutual’s Compliance Department within U.S. Insurance Group, is remarkable. Thus believing the memory failures and complete lack of knowledge about 412i problems of the MassMutual witnesses, the audience for the report about the risk issues associated with the 412i program appears to have been limited exclusively to Crandall, the Board of Directors, and the Audit Committee, making Crandall’s deposition all the more important, and *de facto* unique.

Rickson denied any knowledge of investigations into fraud in the sale of 412i plans to the Respondents. That question was repeated for each and several other West Virginia 412i plans, with the same repeated answer to specific topics identified within the Rule 30(b)(7) Notice of Deposition -- “I do not know.” When asked how Rickson could answer and verify interrogatory answers in Custer and Demory without having reviewed their “account activity log”⁹, Rickson testified that his sworn answers on behalf of

⁸ Given Rickson’s title and status as a corporate officer, Chief **Risk** Officer, it defies credibility that he could claim no knowledge of the risks identified in various compliance reports, including Lucido’s and Kerley’s reports, discussed *infra*.

⁹ The account activity log maintains the full slate of activities related to the sale and service of product including all communications for a particular customer. It is required to be maintained by operation of law. The disregard for this source of information by Rickson in answering discovery was willful and was counseled by MassMutual attorneys.

MassMutual to the interrogatories were based solely on information provided to him by MassMutual's counsel, Mr. Thorton and Mr. Crowther.¹⁰ [Apx 176-8].

When asked specifically about the "Demory Farms" Annuity Contract, and despite representations by MassMutual attorneys to the trial court and to this Court, Rickson could not explain how the Contract Schedule was issued wrongly to Howard Demory by Crandall on May 12, 2011. MassMutual represented to the trial court that it had "designated Ken Rickson to testify as to this subject matter and will be prepared to explain this issue." However, Rickson testified as follows in response to a question about the May 12, 2011 Contract Scheduled issued under Crandall's signature to Mr. Demory: "I'm not an expert on how we administer annuity contracts. I could only guess that there was some sort of modification made to the contract." [Apx 436-7]. Guessing counts for nothing. MassMutual's designated company spokesman and verifier of interrogatory answers could not explain even the date on the Contract Schedule, a fundamental issue regarding MassMutual's fraudulent conduct in the issuance of an Annuity to a fake employer for a fake pension plan to a couple in their 80s.¹¹ And yet, MassMutual assured the trial court that "there is no need for Plaintiffs to depose Mr. Crandall on these subjects."

Yet again referring to MassMutual's representations to the trial court and this Court that Rickson, as the designated corporate representative, would "be prepared to testify" and, thus, "there is no need for Plaintiffs to depose Mr. Crandall on these

¹⁰ Mr. Crowther is in house counsel at MassMutual.

¹¹ Given Mr. Rickson's style of preparation for depositions which is to rely only on what he is told or shown by MassMutual counsel, it is a fair inference to conclude that counsel is engaging in a discovery run-around. Mr. Hazelwood, the other corporate designee, prepared in much the same way, *infra*.

subjects,” Rickson as the Corporate Representative testified a total of 151 times with variations of “not sure”, “don’t know”, “don’t recall” on specific and “noticed” topics (and on topics for which he verified MassMutual answers to interrogatories) rendering his several hours of deposition testimony virtually useless as a discovery tool on the issues of investigations, hot lists, annuity contracts, pattern and practice, compliance reports, 412i program, sales and marketing practices, agency supervision, Home Office practices, or much else.

In his capacity as the person who answered interrogatories under oath in this instant action, and in the predecessor 412i cases, Rickson was directed not to answer essential questions such as which documents he reviewed or sources of information upon which he relied in answering discovery, and in preparing for his deposition. In a candid moment, MassMutual’s counsel summarily explained their discovery strategy and further explained Rickson’s profound lack of knowledge on his assigned 30(b)(7) topics while at the same time instructing the Corporate Designee not to answer questions about document he had reviewed---which were only the documents provided by Counsel [Apx 173-197]:

MR. THORNTON: I just want to counsel the witness that not to disclose any information learned from attorneys representing MassMutual or outside counsel representing MassMutual. **If you can answer without disclosing any information, go ahead.** But if that information is protected by attorney/client privilege, then we’re going to object and I’m going to instruct you not to answer.

And still further referencing MassMutual’s representations to the trial court and this Court of “others” having knowledge of facts such that Crandall’s deposition was redundant, it identified Ed Youmell, a Regional Vice President, and David Hardy,

Regional Agency Supervisor, as persons with knowledge. However, Ed Youmell, in addition to testifying 174 times that he “didn’t know” or didn’t recall,” did testify that he was not curious about any findings regarding the 412i sales practices and that Rickson directed him not to make any inquiries into such practices.¹² [Apx 439-53].

David Hardy, Regional Agency Supervisor, testified 117 times with variations of “don’t know” or “don’t recall” while recent, post-deposition, document productions indicate otherwise.

Joshua Hazelwood, Chief Underwriter for pension plan sales, and Head of Business and Estate Planning (and possessing an LLM in Taxation), and who was identified as the 30(b)(7) Corporate designee on the subject of the Custer and Demory MassMutual prototypical pension plans provided the following testimony on the subject matter for which he was designated [Supp Apx 955-961 -- video played at the hearing]:

Q. Are you familiar with the facts of the Demory case?

A. I’ve been provided some facts by counsel.

Q. And I don’t want to ask you what counsel has discussed with you. Have you formed an opinion as to whether or not the Demorys 412(i) plan was properly established?

A. No

Q. And why haven’t you formed an opinion?

A. I – the only knowledge I’ve gained is from counsel. And counsel hasn’t given me enough -- **I haven’t reviewed detailed information on the Demorys situation, in general.**

¹² This is consistent with West’s testimony, *infra* at fn 6, who received a call from Rickson “screaming” at her not to send emails about 412i plans.

The same line of questioning was presented about Mr. Custer's "412i plan" and when Hazelwood was asked about the facts he had been given, MassMutual counsel objected: "I'm going to object and instruct the witness not to answer to extent that the information was provided to him by counsel." Hazelwood, like Rickson, then admitted that all the information on which he could rely about the Custer and Demory 412i plans, in his capacity as the Corporate Representative on this subject matter, came from counsel: "All of the information on that case came from counsel." *Id.*

Perhaps more insightful is the judicial admission of MassMutual's counsel to the trial court after claiming that MassMutual did not have fair notice and opportunity to respond to Respondents' arguments regarding the unsatisfactory, insufficient and inadequate less intrusive methods of discovery already exhausted. MassMutual counsel admitted to the trial court that "many witness answers were, 'I don't know,' many witness answers were, 'I am sorry, I can't tell you.'" [Apx 802]. In light of MassMutual's admission, the trial court correctly ruled that MassMutual "had a fair amount of notice and opportunity to fully respond to all of Plaintiffs' arguments because Defendants did reply thereto with its memorandum, which contained a subheading "IV. Plaintiffs Have Failed to Exhaust Less Intrusive Means of Discovery." [Apx 504].

2. MassMutual Withheld Evidence from the Trial Court Relating to Board Minutes Covering the "Risk Issues" identified by Lucido and Presented to the Board, to Crandall, and to the Audit Committee by Lucido, while Now Arguing that Respondents Have Failed to Produce "New" Evidence Since the First Writ Petition.

As presented to the trial court during the May 14, 2012 hearing, in Respondents' Second Requests for Production of Documents, Respondents sought production of "board minutes or transcribed records or discussions or consideration by the Board of Directors

or Audit Committee referring, referencing and regarding...’Compliance Program Reports’ or ‘Best Practices Recommendation Progress Report’ that was previously produced by MassMutual, as well as ‘lessons learned’ from the ‘settlement of Section 412(i) cases’” as specifically referenced in the Compliance Program Reports. [Supp Apx 968-70, Request Nos. 17 & 18]. MassMutual responded to both document requests with the same boilerplate objection:

Objection. MassMutual objects to this Request because it is overly broad and seeks documents that are not relevant to the claims or defenses at issue in the litigation nor reasonably calculated to lead to the discovery of admissible evidence. To the extent there are any such documents, MassMutual reserved the right to object to the production of those documents to the extent protected by the attorney-client privilege, the attorney work product doctrine, or other applicable privilege.

Id.

MassMutual’s responses are astonishing not only for the improper boilerplate objections, but also for the absolute stretch of logic required to make these objections. The requests specifically referenced documents already produced by MassMutual. Obviously, the fact that MassMutual already produced the documents demonstrates that MassMutual recognized that the documents and the content produced were relevant to the claims and defenses at issue in the litigation and reasonably calculated to lead to the discovery of admissible evidence or else it would not have produced the documents in the first place. To suddenly assert that discussions by and between the Board of Directors and the Audit Committee, and by and between and among Lucido and Crandall of these same documents and their content are “not relevant to the claims or defenses at issue in

the litigation nor reasonably calculated to lead to the discovery of admissible evidence” was wholly without merit.¹³

While withholding evidence and heavily redacting documents even when produced pursuant to a Protective Order, MassMutual argues that Respondents presented no new evidence at the May 14, 2012 hearing (while arguing too, rather inconsistently, that Respondents were “sandbagging”). However, on June 8, 2012, and only after the trial court’s ruling permitting a limited deposition of Crandall, MassMutual, in what has become a predictable pattern, produced a single minute of a December 7, 2010 Audit Committee meeting [Supp App 962-7], albeit once again heavily redacted again despite a Protective Order, in response to Request Nos. 17 & 18 of Respondents’ Second Requests for Production of Documents. The cited reason for the redactions by MassMutual’s counsel this time, as opposed to earlier when it claimed the minutes to be irrelevant: attorney-client privilege and attorney work product doctrine.

It is clear from the very few unredacted portions of this singular board minute **that Lucido and Crandall were in attendance** (an event Lucido conveniently did not recall during his deposition). Again MassMutual attempts to take advantage of its discovery misconduct in its briefing before this Court. MassMutual actually argues [Petition at 15-7], that Respondents’ counsel attempted to “trick Mr. Lucido into admitting that he had specific discussions with the CEO, [and] Mr. Lucido denied it.” Of course that is again a viable argument to this Court and to the trial court when MassMutual withholds documents until after argument, but it is certainly not candid or

¹³ Respondents believe that MassMutual has not produced all responsive documents to this request, and certainly have not produced the audio minutes. Respondents are preparing to address this issue with the trial court.

fair argument. And of course, Mr. Lucido can make such denials about discussions with Crandall when documents evidencing the contrary were produced to the Respondents until long after his deposition last November.

It is also clear that, according to this minute, in attendance “by invitation” of MassMutual were multiple members of its “independent auditor, KPMG, LLP.”¹⁴ However, the document itself shows that MassMutual has obviously waived any purported privilege, not only by its conduct of failing to actually assert the privilege and include the privilege on a privilege log when first responding to Request Nos. 17 & 18 and claiming it to be irrelevant, but also by including “independent auditors” in the very meeting of discussions that it now wishes to keep from Respondents under the guise of privilege. MassMutual withheld production of this one board minute until after the most recent round of briefing and argument to the trial court on MassMutual’s motion for protective order to prevent the deposition of Crandall. MassMutual’s calculating piecemeal production of discovery was an obvious effort to hide this information from Respondents so that this information could not be presented to the trial court by Respondents to discredit Crandall’s *pro forma* affidavit.

3. MassMutual’s additional obfuscation and misdirection of discovery with piecemeal document production ONLY AFTER key depositions of corporate officials of MassMutual are taken by Respondents.

MassMutual’s argument that Respondents have done little additional work on discovery since the first Writ is deceptive, and inaccurate. As with the request for board meeting minutes, those instances in which Respondents have attempted less intrusive methods of discovery with depositions of corporate officials, Respondents have found

¹⁴ KPMG, LLP also is identified as the independent auditor on Crandall’s Sarbanes-Oxley Report.

themselves in a catch-22 as a result of MassMutual's discovery games. Whether after depositions of corporate officials or after substantial briefing on the various motions or writs of prohibition to prevent Crandall's deposition, MassMutual has conveniently supplemented its document production to Respondents with documents that would no doubt have been used in past depositions of Messrs. Rickson, Youmell, Hazelwood, Lucido and Hardy, as well as in argument and briefing to the trial court.

By way of example, on April 20, 2012, and long after the passing of the above-referenced depositions, MassMutual produced emails showing that Hardy actually knew or should have known many details regarding the customer complaints surrounding the sale of defective 412i plans. [Compliance Software emails, Apx 455-82]. Also within that April 20, 2012 by MassMutual, were letters from a MassMutual third party administrator to various customers with defective 412i plans (who herebefore had never been identified in discovery by MassMutual), which were copied to Hazlewood at MassMutual and of course, produced only after Hazlewood's deposition in his individual and corporate designate capacity. [Supp Apx 971-7].

Perhaps most disingenuous of MassMutual, in its April 20, 2012 production, it produced the MassMutual U.S. Insurance Group Compliance Program Reports. The U.S. Insurance Group Compliance Program Reports for now consist of three reports from November 1, 2010 through April 30, 2011, with significant indication that there exists yet still more underlying reports, investigations, analyses, assessments and/or determinations going back farther in time and leading to the few unredacted conclusions found in this production. [U.S.I.G. Compliance Program Reports, Apx 237-67]. According to Lucido's deposition testimony [Apx 211-2], these U.S.I.G. Compliance Reports were the

basis of his Compliance Program Reports, which in turn were provided to Crandall, and are summarized as follows:

- The U.S. Insurance Group's Compliance Program Reports identify as a "Risk" the following -- "**Inadequate supervisory capacity (both in field offices and within Home Office),**" and as a "**Significant Compliance Matter**" -- "**Improper sales and Home Office practices involving 412i plans.**" (Emphasis added). Despite that internal finding, MassMutual denied allegations in the Complaints addressing its failure to adequately supervise and monitor the conduct of its agents, agency and General Agent. Moreover, despite the implication of Home Office failures leading to this risk assessment, Rickson, the Corporate Designee and Chief Risk Officer,¹⁵ and the person who verified written discovery answers, knew nothing. The report goes on to describe the 412i sales activities as "high risk."
- At the conclusion of the U.S.I.G. Consumer Program Reports there are certifications signed by Michael L. Kerley, Senior Vice President and Chief Compliance Officer. Mr. Kerley was never identified by MassMutual as a person having knowledge of the allegations, claims and defenses of these or the prior 412i cases. The certification states in pertinent part:

[T]his Compliance Program Report discloses any significant compliance matters... [that] are otherwise still outstanding including significant violations of applicable laws, regulations, policies or ethical standards or other significant compliance deficiencies or control weaknesses.
- Mr. Kerley continued his "Certification" with the following: "The compliance and ethics program supporting the entities listed in Section I [redacted by MassMutual counsel], including applicable compliance policies and procedures, monitoring and testing, risk assessments, self assessments, and compliance training is reasonably designed to prevent, detect and correct violations of applicable laws, regulations, policies or ethical standards." In other words, according to Mr. Kerley, the various compliance and fraud detection systems at MassMutual are certified to have captured the activities involving the 412i complaints which had been taking place since 2004. MassMutual has not produced the underlying assessments used to complete this report by Mr. Kerley. **Indeed, MassMutual has denied the existence of such assessments.**
- Similarly, the March, 2011 Compliance Program Report identifies, as a "Key Compliance and Ethics Risk", "**failure to honor contractual commitments to**

¹⁵ It is simply impossible to believe that the 412i "Risk" assessment as stated in the report was unknown to the Risk Officer and Corporate Designee Ken Rickson.

our policy owners.” This Compliance Program Report is best understood in contrast with how the Plaintiffs were actually treated by MassMutual. The Demorys’ and Mr. Custer’s annuity contracts were placed on a “Contract Hot List”. [Apx 272-299]. When the Demorys called the MassMutual Annuity Call Center on January 27, 2010 seeking assistance, according to the Activity Logs they were denied information, and their Annuity Contract appears thereafter on a “Contract Hot List.” [Apx 276-83]. Likewise, when Mr. Custer called on March 8, 2010, the same MassMutual Annuity Call Center, he too was denied information and had been previously “hot listed” on August 25, 2009. [Apx 287-298].

Indeed, the U.S.I.G. Compliance Program Reports show that the problems with 412i sales practices were known to exist at “Home Office” (as alleged in the Complaints) making Vice President’s Youmell’s, and Chief Risk Officer Rickson’s, “I don’t know” and “I don’t care” testimony not credible. Additionally, Respondents should have had these reports at the time they deposed Rickson, Hardy, Andrade, Hazelwood, Youmell, and most especially Lucido because he had relied upon the U.S.I.G. Reports in his own Compliance Reports provided to the Board, Crandall and the Audit Committee.

In fact, the post deposition production of the Kerley reports (again relied upon by Lucido) undermine MassMutual’s argument to this Court that the Lucido reports “do not mention any ‘misconduct’ by MassMutual....All the reports do is serve as notice to the Board of Directors that MassMutual had settled certain pieces of litigation and was reviewing ways to prevent similar lawsuits in the future....” [Petition at p 5, fn 3]. While MassMutual conveniently now “verifiably” argues what purportedly is stated in the unshared redactions of the Lucido reports and is to be found in the yet to be produced Board minutes and presumably to be found the singular unredacted (and not produced) version of the Audit Committee minute, MassMutual’s argument to this Court, its characterization of the evidence in light of the other additional details of misconduct found in the Kerley reports, is simply not true to the actual record. Thus, like the trial

court, this Court is presented with argument by MassMutual which can only be made possible by its discovery misconduct.

The unsatisfactory, insufficient and inadequate nature of the less intrusive methods of discovery, as well as MassMutual's tactics and misdirecting and obfuscation of discovery, were recognized by the trial court in granting a limited deposition of Crandall, and its dissembling in its writ about its cooperation and the Respondents' failure to show a need for Crandall's deposition provide no basis for disturbing the trial court's factual findings on a discovery order.

D. This Court's Opinion on MassMutual's Previous Writ Was Not an Announcement that a Senior Corporate Official's Deposition Can Never be Taken and Not an Announcement that the Court's Decision was the "Law of the Case."

In MassMutual's first writ of prohibition to this Court, it sought the adoption of the Apex doctrine. This Court did just that and in doing so, carefully prescribed the path to a successful invocation of the Apex doctrine. Having received exactly what it requested, as it turned out, MassMutual was incapable of meeting the very standard it sought. MassMutual failed to meet the condition precedent of filing a meaningful affidavit from Crandall which addressed the issues about which Respondents choose to depose him, and which have been alleged in the Complaints. The trial court found that MassMutual did not follow the path established by this Court when it submitted a *pro forma* affidavit from Crandall that "tip-toed around the key areas of inquiry" regarding "lessons learned" about the problems with the 412(i) cases, and MassMutual has provided no basis on which to disturb the trial court's findings.

The basis for the latest motion for protective order was stated by MassMutual's counsel at the hearing primarily as the Supreme Court's decision constituted a "law of the

case” precluding the deposition of Crandall. [Apx 801, see also at 492]. That position was at odds with MassMutual having presented an affidavit by Crandall in support of its motion for protective order for had MassMutual truly held the view that this Court had decided the matter with finality as the “law of the case”, then there would have been no need for the affidavit.

The Respondents through responsive pleadings and at the hearing presented a substantial record, now before this Court, of the discovery deficiencies, deposition testimony (including video portions of the relevant testimony as viewed by the trial court), and MassMutual’s material misrepresentations substantially as outlined above. That record was not presented to the trial court before now given that its first Order had been entered on October 27, 2011 and, thus, prior to the formation of this substantial record. The trial court’s order shows a profound understanding of MassMutual’s tactics. The trial court made factual findings, though not at all challenged other than as “sandbagging” during the hearing, are not now shown to be in error, but simply mischaracterized in this MassMutual Writ Petition. Indeed, and as the trial court correctly found and as can be seen by this Court, MassMutual can point to nothing in the record regarding what was done about compliance issues sent directly to Crandall, the Board of Directors, and the Audit Committee, which according to the clear testimony of Lucido constituted **“highest level top risk”** issues to the Company, and pose **“much more systemic risk issues across the organization.”** As such, the trial court correctly held that Crandall’s affidavit failed to address the core issues raised by the evidence, and that the other means of discovery as prescribed by MassMutual failed to disclose the company’s response to “high level top risk” issues involving the 412i plans. The trial

court further found that the Crandall affidavit, besides lacking in any substance by narrowing the subject matter as to whether Crandall actually sold the annuity products, is intrinsically suspect, lacking credibility, when Crandall states under oath that the “second hand knowledge that I have is solely as a result of communications to me from counsel....” [Apx 75]. The Compliance Reports disagree with Mr. Crandall, and that, together with the balance of this record, as the trial court expressly found, “casts doubts on Roger Crandall’s affidavit.”

Finally, the trial court’s Order evinces a fundamental understanding of the record before it. The trial court noted that the plaintiffs failed to prove that the Compliance Reports presented by Lucido to Crandall, the Board of Directors and to the Audit Committee rose to a level of special and unique knowledge¹⁶ especially given that they are largely redacted of all content and that the underlying reports had not been produced. The trial court, then carefully regarding this Court’s opinion, sought to determine through briefing and a two hour evidentiary hearing whether the “less intrusive means of discovery”, as MassMutual repeatedly stated as the standard to be followed by the trial court, was productive. Thus, given that the second step was not proven (i.e. special and unique knowledge), the Respondents had already undertaken aggressive discovery to obtain evidence through other “lesser intrusive means.”

¹⁶ The trial court made an interesting point through this finding as to the challenges faced in both defining and determining what may be special or unique. And while as Plaintiffs below, it was argued that the fact alone, that Crandall received these Compliance Reports identifying practices associated with the 412i program as a significant risk to the company, showed the reports to be special and unique, that without more was insufficient proof even if that proof has been withheld by MassMutual until after the hearing.

CONCLUSION

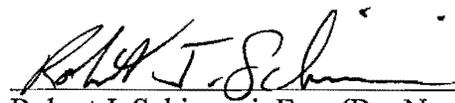
When MassMutual represented to the trial court in its filings that the deposition of Crandall would be “duplicative and unnecessary”, it was simply untrue. MassMutual represented to the lower court that “unless and until Plaintiffs have sought answers and discoverable information **from these witnesses** [Lucido, Hazelwood, Rickson, Youmell, Hardy] they cannot satisfy their burden of establishing less onerous methods of discovery have been exhausted without success.” Well before the issuance of the Supreme Court’s opinion, Respondents had already sought discovery from those identified by MassMutual as having knowledge about the subject matter of this litigation, and instead of answers, they have found contradictions and denials about the reports now in Crandall’s possession; instead of clarity, they found delay and obfuscation and objections and instructions not to answer; instead of Crandall knowing nothing, Crandall is in possession of Compliance Reports given directly to him concerning the “412i cases in West Virginia”; instead of an understanding as to how an annuity could be issued under Crandall’s name six years after it was sold, they found a cover-up and testimony by the person identified by MassMutual as having knowledge, actually having no knowledge. MassMutual is seeking the imprimatur of this Court to approve a tactic of minimizing discovery of “less intrusive means”, and then return to the trial court to obtain a ruling that the decision of this Court acted as the “law of the case” such that the trial court would not look at the evidence presented. That tactic has failed.

Pursuant to this Court, regarding discovery orders, “[a] writ of prohibition is available to correct a clear legal error resulting from a trial court’s **substantial abuse of its discretion** in regard to discovery orders.” *State ex. Rel. Massachusetts Mut. Life Ins.*

Co. v. Sanders, ____ W. Va. ____, 724 S.E.2d 353 (2012) (quoting *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 143, 697 S.E.2d 730, 735 (2010)). The substantial record is devoid of any evidence that acts as a substitute for Crandall's deposition. The impoverished mischaracterizations by MassMutual that the trial court's "rationale completely eviscerates" [Petition at 3] this Court's opinion, or that the trial court used a "ridiculous rationale" [Petition at 12] are simply inappropriate at any time but especially in view of MassMutual's discovery conduct and argument herein. With trial a mere four months away and forthcoming discovery and related motions, and other discovery to be completed, the Court rightfully acknowledged the time constraints in allowing MassMutual's conduct to continue ceaselessly. MassMutual should not now benefit from its misconduct.

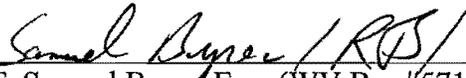
Wherefore, Respondents respectfully request that the Petition for Writ of Prohibition be denied allowing the Demorys and Mr. Custer to proceed to trial expeditiously.

Respectfully submitted,


Robert J. Schiavoni, Esq. (Bar No. 4365)
David M. Hammer, Esq. (Bar No. 5047)
HAMMER, FERRETTI & SCHIAVONI
408 West King Street
Martinsburg, West Virginia 25401
(304) 264-8505 (office)
(304) 264-8506 (facsimile)


Brad D. Weiss, Esq. (WV Bar #11577)
Kimberly S. MacCumbee, Esq. (*pro hac vice*)
Rachelle E. Hill, Esq. (*pro hac vice*)

Charapp & Weiss, LLP
8300 Greensboro Drive, Suite 200
McLean, Virginia 22102
(703) 564-0220 (office)
(703) 564-0221 (facsimile)
*Counsel for Plaintiffs Howard & Charlotte Demory
and
Plaintiffs Eric Custer and 3rd Time Trucking, LLC*



F. Samuel Byrer, Esq. (WV Bar #571)
Peter A. Pentony, Esq. (WV Bar #7769)
LAW OFFICE OF F. SAMUEL BYRER, PLLC
202 West Liberty Street
P.O. Box 597
Charles Town, West Virginia 25414
(304) 724-7228 (office)
(304) 724-7278 (facsimile)

Counsel for Plaintiffs Howard & Charlotte Demory

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,

Case No. 12-0699
(Civil Action No. 11-C-131)
(Civil Action No. 11-C-68)

v.

THE HONORABLE DAVID H. SANDERS,
HOWARD G. DEMORY and
CHARLOTTE P. DEMORY; 3rd TIME TRUCKING, LLC,
and ERIC W. CUSTER,

Respondants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and accurate copies of "Response of Howard and Charlotte Demory; 3rd Time Trucking, LLC, and Eric W. Custer to Massachusetts Mutual Life Insurance Company's Petition for Writ of Prohibition' were served this 15th day of June 2012, via email, to the following individuals:

William P. Thornton, Jr., Esq.
Julie E. Ravis, Esq.
Jeffrey D. Bukowski, Esq.
Stevens & Lee, P.C.
111 North Sixth Street
P.O. Box 679
Reading, Pennsylvania 19603
Counsel for Defendant Massachusetts Mutual Life Ins. Co.

Lucien G. Lewin, Esq.
Steptoe & Johnson PLLC
1250 Edwin Miller Blvd., Suite 300
P.O. Box 2629
Martinsburg, WV 25402-2629
Counsel for Defendant Massachusetts Mutual Life Ins. Co.

William E. Galeota, Esq.
Steptoe & Johnson, PLLC

United Center
1085 Van Voorhis Road, Suite 400
Morgantown, West Virginia 26507
Counsel for Defendant Massachusetts Mutual Life Ins. Co.

Robert J. D'Anniballe, Jr., Esq.
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
333 Penco Rd.
Weirton, West Virginia 26062
*Counsel for Defendants Alexandria P. West, West Financial Group, LLP and
West Financial Group Pension Solutions, LLP*

Robert C. James, Esq.
Flaherty Sensabaugh Bonasso, PLLC
1225 Market Street
P.O. Box 6465
Wheeling, West Virginia 26003
*Counsel for Defendants L. James Nichols and Kelly M. Parsons
(in their capacities as former insurance agents)*

Paul D. Krepps, Esq.
James A. McGovern, Esq.
Marshall, Dennehey, Warner, Coleman & Goggin
U.S. Steel Tower, Suite 2900
600 Grant Street
Pittsburgh, Pennsylvania 15219
*Counsel for Defendants L. James Nichols and Kelly M. Parsons
(in their capacities as former insurance agents)*

Joseph W. Selep, Esq.
Sharon Z. Hall, Esq.
Zimmer Kunz, PLLC
600 Grant St. Suite 3300
Pittsburgh, PA 15219
*Counsel for Defendants L. James Nichols, Julie DeHaven, Kelly M. Parsons & Nichols,
DeHaven & Associates, CPAs, PLLC*

Thomas Sweeney, Esq.
Lisa L. Lilly, Esq.
MacCorkle, Lavender & Sweeney, PLLC
P.O. Box 3283
Charleston, West Virginia 25332
Counsel for Defendant H. Lawrence Logan, CLU, ChFC

Kevin A. Nelson, Esq.
J. Todd Bergstrom, Esq.

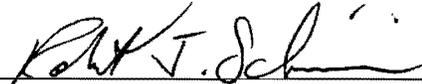
Huddleston Bolen, LLP
707 Virginia Street East, Suite 1300
P.O. Box 3786
Charleston, West Virginia 25337-3786
Counsel for Defendant Marie Ann Chio

Shadonna E. Hale, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
500 East Pratt Street, Suite 600
Baltimore, Maryland 21202
Counsel for Defendant George F. Fisher

Audrey K. Bentz, Esq.
Janik L.L.P.
9200 South Hills Boulevard
Suite 300
Cleveland, Ohio 44147
Counsel for Defendant Steven W. Dorman, CLU, ChFC

Ancil G. Ramey, Esq.
1000 Fifth Avenue, Suite 250
P.O. Box 2195
Huntington, WV 25722-2195
Counsel for Defendant Massachusetts Mutual Life Ins. Co.

The Honorable David H. Sanders
Jefferson County Courthouse
100 East Washington Street
Charles Town, WV 25414



Robert J. Schiavoni, Esq. (WV Bar # 4365)
David M. Hammer, Esq. (WV Bar #5047)
Brad D. Weiss, Esq. (WV Bar #11577)
F. Samuel Bryer, Esq. (WV Bar #571)
Peter A. Pentony, Esq. (WV Bar #7769)
Kimberly S. MacCumbee, Esq.(pro hac vice)