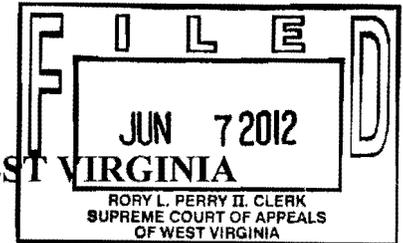


12-0699



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12----

**STATE OF WEST VIRGINIA ex rel. MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY, Petitioner**

vs.

**HONORABLE DAVID H. SANDERS, Judge of the Circuit Court of
Jefferson County; HOWARD G. DEMORY; CHARLOTTE P. DEMORY;
3RD TIME TRUCKING, LLC; and ERIC W. CUSTER, Respondents**

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTION PRESENTED

This is a verified petition for writ of prohibition by petitioner, Massachusetts Mutual Life Insurance Company (“MassMutual”) seeking interlocutory appellate review of an order by respondent, the Honorable David H. Sanders (“Judge Sanders”), entered on May 24, 2012. This Order required Roger Crandall (“Mr. Crandall”), its President, Chief Executive Officer, and Chairman to submit to deposition despite this Court’s holding in Syllabus Point 3, in part, of *State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, ___ W. Va. ___, 724 S.E.2d 353 (2012) (“*MassMutual I*”), that “If the party seeking the deposition cannot show that the official has any unique or personal 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” and Judge Sanders’ own conclusion that “Plaintiffs have failed to prove Roger Crandall has unique or personal knowledge” and “Plaintiffs are not required to wait . . . to prove they engaged in a good faith effort of less intrusive methods of discovery.” Appx. at 11, Order ¶ 27.

In other words, the question presented is whether Mr. Crandall’s deposition can be compelled despite Plaintiffs’ non-compliance with this Court’s decision in *MassMutual I*.

II. STATEMENT OF THE CASE

A. SUMMARY OF ORDER BELOW.

On February 24, 2012, this Court issued its opinion in *MassMutual I*, in which it held in Syllabus Point 3 that:

When a party seeks to depose a high-ranking corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts, the circuit court should first determine whether the party seeking the deposition has demonstrated that the official has any unique or personal

knowledge of discoverable information. If the party seeking the deposition cannot show that the official has any unique or personal 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.** Depending upon the circumstances of the particular case, these methods could include the depositions of lower level corporate employees, **as well as interrogatories and requests for production of documents directed to the corporation.** After making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition makes this showing, the circuit court should modify or vacate the protective order as appropriate. As with any deponent, the circuit court retains discretion to restrict the duration, scope and location of the deposition. If the party seeking the deposition fails to make this showing, the trial court should leave the protective order in place.

(Emphasis supplied). Despite its clarity, upon remand, Plaintiffs made no effort to comply with this Court's opinion, nor does Judge Sanders' decision require such compliance.

Following remand, Plaintiffs neither conducted nor noticed any additional depositions of any lower level MassMutual employees, including those employees Plaintiffs sought to depose prior to *MassMutual I*. Plaintiffs served no additional interrogatories or requests for production.¹ Thus, Plaintiffs not only made no "good faith effort to obtain discovery through less intrusive efforts," they made no effort to seek any alternative discovery. **Instead, Plaintiffs simply re-**

¹ Prior to *MassMutual I*, Plaintiffs served a Second Request for Production of Documents on MassMutual. Of the 50 separately numbered requests, only two requests arguably relate to Mr. Crandall's alleged "knowledge" at all (Requests 17 and 18), *see* Appx. at 731-32, and MassMutual has no responsive, non-privileged documents to these requests. And, although Judge Sanders' Order purports to rely on three documents produced by MassMutual in response to these requests (documents the Plaintiffs did not have when they served the amended deposition notices for Mr. Crandall), *see* Appx. at 5, Order ¶ 11, Mr. Crandall never actually saw these reports and the Plaintiffs acknowledged at oral argument that they had no information demonstrating that Mr. Crandall received the second set of reports. Appx. at 812, at 19:12-14.

noticed Mr. Crandall's deposition just 14 days after this Court returned jurisdiction to the Circuit Court as if *MassMutual I* had never happened.

After receiving the deposition notices, MassMutual moved again for a protective order prohibiting Mr. Crandall's deposition and followed this Court's directions in *MassMutual I* by attaching an affidavit from Mr. Crandall denying he has any knowledge, at all, relating to the Plaintiffs or their dispute with MassMutual. Appx. at 14. Plaintiffs then went back to Judge Sanders—making the same arguments already rejected by this Court—and argued that all this Court's opinion in *MassMutual I* required were some findings and conclusions. Appx. at 81. In response, Judge Sanders denied MassMutual's motion for protective order based upon the same arguments already rejected by this Court even though his Order, substantially prepared by Plaintiffs, concedes that "Plaintiffs have failed to prove Roger Crandall has unique or personal knowledge" and "Plaintiffs are not required to wait . . . to prove they engaged in a good faith effort of less intrusive methods of discovery." Appx. at 11, Order ¶ 27.

The rationale for Judge Sanders' decision completely eviscerates this Court's holding in *MassMutual I* and can be summarized as follows:

First, "Plaintiffs' lawsuits are the tenth and eleventh of a series of 412i litigation." Appx. 2, Order ¶ 2.

Second, "Plaintiffs . . . have alleged . . . MassMutual . . . failed to affirmatively correct these defective 412i plans for the Plaintiffs." *Id.*, Order ¶ 3.

Third, "Upon the above-captioned cases returning to this Court, Plaintiffs noticed the deposition of Mr. Crandall as a fact witness." Appx. at 3, Order ¶ 7.

Fourth, “Compliance Program Reports [referencing other, settled lawsuits involving 412i plans] were provided to Crandall as a part of regular business at MassMutual.” Appx. at 8, Order ¶ 15.

Fifth, “Plaintiffs argue and the Court agrees that Mr. Crandall possesses information leading to the discovery of admissible evidence regarding his actions taken in response to the reports . . . or lack of any actions taken or whether Mr. Crandall simply ignored his reports.” *Id.*

Sixth, “Plaintiffs argued that the Supreme Court merely held it could not affirm this Court because this Court did not make the necessary findings of fact or conclusions of law.” Appx. at 9, Order ¶ 19.

Seventh, “This Court holds that requiring Plaintiffs to exhaust the entire arsenal of discovery tools is too burdensome when compared with a brief deposition of the CEO.” Appx. at 10, Order ¶ 22.

Finally, “the Court HOLDS that **although Plaintiffs have failed to prove Roger Crandall has unique or personal knowledge of the issue outlined above . . . Plaintiffs are not required to wait . . . to prove they engaged in a good faith effort of less intrusive methods of discovery.**” Appx. at 11, Order ¶ 27 (emphasis supplied).²

In light of Plaintiffs’ and the Circuit Court’s disregard of this Court’s directives in *MassMutual I*, MassMutual again asks this Court for a writ of prohibition to prevent the deposition of Roger Crandall because he lacks any unique or personal knowledge of the Plaintiffs’ claims; because Plaintiffs have not exhausted less-intrusive methods of discovery; and

² Inconsistently, the Order also states, “Plaintiffs have in good faith sought less intrusive methods of discovery and proved it to be unsatisfactory, insufficient or inadequate,” Appx. at 11, Order ¶ 27, but Plaintiffs sought **no** discovery upon remand by this Court, but rather almost immediately noticed Mr. Crandall’s deposition within 14 days of entry of this Court’s mandate. Appx. at 57.

because the deposition of Mr. Crandall is not sought for the purpose of discovering admissible evidence.

B. BRIEF PROCEDURAL AND FACTUAL BACKGROUND.

On March 22, 2012, this Court entered a mandate granting the writ of prohibition prayed for by MassMutual to prevent the deposition of Mr. Crandall. The granting of the writ of prohibition preventing the deposition of Mr. Crandall occurred after (1) this Court issued a rule to show cause on November 22, 2011 as to why the writ of prohibition should not be granted, (2) this Court held oral argument on the rule to show cause on January 25, 2012, and (3) this Court filed a unanimous 22-page opinion on February 24, 2012, concluding that Mr. Crandall not be required to submit to depositions.

Importantly, one of Plaintiffs' primary arguments to the Supreme Court in *MassMutual I* was based on the compliance reports prepared by Brad Lucido, the Chief Compliance Officer of MassMutual, and Mr. Lucido's deposition testimony regarding the same. The reports, prepared in February through June of 2011, contain a line item referencing the formation of a team to identify "lessons learned" from the settlement of prior cases also involving 412i retirement plans. Appx. at 128. According to Plaintiffs, these compliance reports necessarily establish that Mr. Crandall had personal knowledge of other 412i cases and required Mr. Crandall to submit to a deposition, even though the reports nowhere mention Mr. Custer, the Demorys, or the lawsuits brought by these particular Plaintiffs.³

³ In fact, the reports also do not mention any "misconduct" by MassMutual, *see* Appx. at 11, Order ¶ 25, or any investigation into the other lawsuits. 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—in other words, the very reaction that a responsible company should have in response to a lawsuit.

In *MassMutual I*, however, this Court determined that Judge Sanders' conclusion that Mr. Crandall was a "fact" witness was "unsupported by the record," *MassMutual I* at ___, 724 S.E.2d at 358, which record included Mr. Lucido's compliance reports.

On April 6, 2012, just **14 days** after this Court issued its mandate prohibiting the deposition of Mr. Crandall, Plaintiffs served amended notices of deposition calling for Mr. Crandall's deposition for April 30, 2012. Appx. at 57. Prior to serving the new deposition notices, Plaintiffs did **not** (1) take any additional depositions, (2) serve new document requests, interrogatories, or requests for admission, or (3) notice the depositions of any other fact witnesses, including any lower level MassMutual employees Plaintiffs previously noticed.⁴

After attempts to resolve the discovery dispute informally were unsuccessful, *see* Appx. at 67, MassMutual filed a motion for protective order asking the Court to prevent the deposition of Mr. Crandall because he lacked unique or personal knowledge of discoverable information that would make him a fact witness in these cases. In accordance with this Court's directive in *MassMutual I*, MassMutual included an affidavit signed by Mr. Crandall in which he disclaims any personal knowledge of the Plaintiffs, their purchase of insurance products from MassMutual, or their customer relationship with MassMutual. Appx. at 74, at ¶¶ 6-9. Mr. Crandall also offers that he lacks any personal knowledge of the facts concerning any dispute between either Mr. Custer and MassMutual or the Demorys and MassMutual, and that any second-hand knowledge he has was obtained through discussions with counsel **after** his deposition was noticed in these cases. *Id.* at ¶ 10.

⁴ Plaintiffs served MassMutual with a second set of requests for production prior to the first appeal, and MassMutual served its responses and supplemental document production after the automatic stay was lifted—but 13 days **after** Plaintiffs served amended notices for Mr. Crandall's deposition. Therefore, Plaintiffs did not rely on MassMutual's supplemental production in seeking to take Mr. Crandall's deposition following remand to Jefferson County.

On May 14, 2012, the Circuit Court conducted a hearing on MassMutual’s motion for protective order. Appx. at 798. During that argument, Plaintiffs’ counsel informed the Court that the effect of *MassMutual I* was solely to ask Judge Sanders to make a record supporting his original order. See Appx. at 804-827, at 8:20-22, 10:8-21, 11:12-13, 35:24–36:7 (“The Supreme Court of Appeals simply wants a record”); see also Appx. at 9, Order ¶ 19 (“Plaintiffs argued that the Supreme Court merely held it could not affirm this Court because this Court did not make the necessary findings of fact or conclusions of law.”).

By Order dated May 24, 2012, the Circuit Court denied MassMutual’s motion for protective order. Appx. at 1. The Circuit Court cited the existence of other, settled litigation involving 412i retirement plans, and the Lucido compliance reports referencing the other litigation, in support of its Order. The Court limited the “initial” deposition to two hours to certain unidentified “topics outlined above” and required that the deposition take place within 60 days from the date of the Order. Appx. at 12, Order ¶ 29.

Significantly, however, the Court agreed with both MassMutual and this Court that neither the Lucido compliance reports nor the underlying reports used by Mr. Lucido in drafting the Lucido reports demonstrated that Mr. Crandall had unique or personal factual knowledge of the cases. Appx. at 11, Order ¶ 27 (“Based on the above, the Court HOLDS that . . . Plaintiffs have failed to prove Roger Crandall has unique or personal knowledge of the issue outlined above”). The Court also acknowledged that the Plaintiffs had not proven they had exhausted their efforts to obtain the same discovery through less intrusive means. Appx. at 10, Order ¶ 22. In other words, notwithstanding the clear guidance of this Court in *MassMutual I*, the Circuit Court ordered the deposition of Mr. Crandall because only Mr. Crandall could answer

the question of his “knowledge or action taken” in response to the Lucido compliance reports. Appx. at 11, Order ¶ 25.

Nothing could be more contrary to the Apex rule or this Court’s opinion in *MassMutual I*. In fact, under the Circuit Court of Jefferson County’s reasoning, there can be virtually no circumstance when a CEO would **not** be deposed. Therefore, MassMutual again respectfully requests that this Court issue a rule to show cause why this second order compelling Mr. Crandall’s deposition should not be prohibited.

III. SUMMARY OF ARGUMENT

This Court issued an opinion in *MassMutual I* which adopted a well-established framework for securing the deposition of high-ranking corporate officials requiring (a) a trial court’s initial decision regarding “whether the party seeking the deposition has demonstrated that the official has any unique or personal knowledge of discoverable information;” (b) “the party seeking the deposition to attempt to obtain the discovery through less intrusive methods” if the party is unable to establish the existence of “unique or personal knowledge of discoverable information; and (c) only “[a]fter making a good faith effort to obtain the discovery through less intrusive method,” including “depositions of lower level corporate employees, as well as interrogatories and requests for production of documents directed to the corporation” may the high-ranking corporate official’s deposition be compelled if “(1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate.” Syl. pt. 3, *MassMutual I*. Here, none of this was done after this Court’s remand.

First, as Judge Sanders' Order acknowledges, Plaintiffs have not demonstrated that Mr. Crandall has any unique or personal knowledge and, indeed, his affidavit indicates to the contrary.

Second, as Judge Sanders' Order acknowledges, Plaintiffs did not exhaust less intrusive methods, including interrogatories, to determine if Mr. Crandall had read the reports referenced therein or had noticed any reference to other 412i cases in those reports.

Finally, unless every plaintiff in every case is permitted to take the deposition of every high-ranking corporate official to see what that official knew or did not know about other, settled litigation, there is no reasonable likelihood, based upon the evidence thus far developed by Plaintiffs, that Mr. Crandall's deposition will lead to the discovery of admissible evidence or that less intrusive methods of discovery are unsatisfactory, insufficient, or inadequate.

IV. STATEMENT REGARDING ORAL ARGUMENT

Because it is clear that Plaintiffs and the trial court have failed to comply with Syllabus Point 3 of *MassMutual I*, MassMutual does not request oral argument, but entry of an order remanding the case with directions that the Circuit Court grant MassMutual's motion for protective order preventing the deposition of Mr. Crandall because Plaintiffs have failed to satisfy the requirements of the Apex rule adopted by this Court.

V. ARGUMENT

A. A WRIT OF PROHIBITION IS APPROPRIATE WHERE A TRIAL COURT FAILS TO COMPLY WITH THIS COURT'S DECISION UPON REMAND.

This Court has identified five factors to determine whether to grant a writ of prohibition:

In 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 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.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Applying these criteria, this Court has issued writs of prohibition where trial courts have failed to comply with this Court's directives upon remand.

In Syllabus Points 3, 4, and 5 of *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003) ("*Frazier & Oxley II*"), this Court held:

3. Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

4. A circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed de novo.

5. When a circuit court fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate.

In this case, Judge Sanders has failed to implement either the letter or the spirit of this Court's mandate by compelling Mr. Crandall's deposition (1) "although Plaintiffs have failed to prove Roger Crandall has any unique or personal knowledge" and (2) without "requiring Plaintiffs to exhaust the entire arsenal of discovery tools [as it] is too burdensome when compared with a brief deposition of the CEO." Appx. at 10-11, Order ¶¶ 22, 27. Consequently,

as in *Frazier & Oxley II*, a writ of prohibition is an appropriate means of enforcing compliance with this Court's mandate in *MassMutual I*.

B. THE CIRCUIT COURT'S ORDER COMPELLING THE DEPOSITION OF MASSMUTUAL'S PRESIDENT, CHIEF EXECUTIVE OFFICER, AND CHAIRMAN, IS CONTRARY TO THIS COURT'S DECISION IN MASSMUTUAL I.

1. The Circuit Court's Order Compelling Mr. Crandall's Deposition is Based Upon Arguments Already Rejected by this Court in *MassMutual I*.

The only rationale in Judge Sanders' Order denying MassMutual's motion for protective order should seem familiar. That is because Plaintiffs relied on this identical argument in their briefing urging this Court to allow Mr. Crandall's deposition in *MassMutual I*:

The Compliance Program reports, heavily redacted (as with most of the troubling MassMutual documents), are prepared by Bradley Lucido, the MassMutual Chief Compliance Officer, who in turn is required to regularly report all "pertinent" compliance issues" to the Chairman of the Board of Directors, President, and Agency Filed Force Supervisor. [Supp. App., Ex. 19, at #000529]. Specifically, Mr. Lucido is required to "discuss and reviews" "significant compliance problems" with Mr. Crandall. *Id.* While MassMutual has not produced the Compliance Program Reports for the periods of time when MassMutual knew of the misconduct by Logan, West and Nichols, the production of the February, 2011 Compliance Report alone shows that Mr. Crandall does have direct, unique, and critical knowledge concerning the 412i scandal. [Supp. Appx., Ex. 20, at #000559].

Appx. at 623-624.⁵

⁵ Attached to Plaintiffs' response to this Court (as Exhibit 20) was the same discovery material referenced in Judge Sanders' Order. Plaintiffs later supplemented the record before this Court with the portions of Mr. Lucido's deposition transcript referenced in Judge Sanders' Order, attached as Exhibit 20A to Plaintiffs' response. Appx. at 646. Thus, the very same evidence and the very same arguments made by Plaintiffs before this Court were merely presented to Judge Sanders and, without more, Judge Sanders has compelled Mr. Crandall's deposition.

In other words, according to Plaintiffs, as long as there is evidence that a high-ranking corporate official may have “second-hand knowledge” of other settled litigation because those cases were referenced, no matter how briefly, in any corporate report, Plaintiffs are permitted to take the deposition of each and every person that received the report, even if Plaintiffs have not utilized alternative means, such as an interrogatory, to determine whether any of those high-ranking corporate officials actually read the report or a passage in the report referencing, not Plaintiffs’ cases, but other lawsuits.

Of course, this is a ridiculous rationale because it is common for a company to prepare reports regarding pending or concluded litigation, or for a company’s financial reports to reference pending or concluded litigation, all of which are obviously made available to high-ranking corporate officials. No court has ever held that these references alone, however, expose every high-ranking corporate official, including chief executive officers, to deposition in order to be asked not about their “unique or personal knowledge” concerning the lawsuits at issue but about their “second-hand knowledge” in the form of such questions as: “Did you read the reports?,” “Did you read the part of the reports referencing the issue?,” “If not, why not?,” “Don’t you care about what goes on in your company?,” “If so, why didn’t you prevent the issue from happening again?”

It is plain that Plaintiffs in this case want to make such inquiry and it is just as plain that it is not permitted under the Apex rule generally or as adopted by this Court in *MassMutual I*. First, because this Court correctly has required that high-ranking officials be deposed only when they have “personal or unique” knowledge, not “second-hand knowledge.” Second, because this Court correctly has required the exhaustion of less-intrusive forms of discovery before a high-ranking official’s deposition may be compelled.

2. Allegations of Knowledge Regarding Second-Hand Information Within a High-Ranking Official's Ordinary Scope of Corporate Responsibilities Are Insufficient to Satisfy the Apex Rule Which Limits Those Depositions to Where "Personal or Unique" Information Is Involved.

Because of the potential for abuse, the burden is on the party seeking the deposition to show that the high-ranking official sought to be deposed in fact possesses unique knowledge of the case. *See EchoStar Satellite, LLC v. Splash Media Partners LLC*, No. 07-cv-02611, 2009 U.S. Dist. LEXIS 43555, at *5 (D. Colo. May 11, 2009) ("Where a party seeks to depose a high level executive typically removed from the daily subjects of the matter in litigation, the party seeking discovery must first demonstrate that the proposed deponent has unique personal knowledge of the matters in issue.") (emphasis supplied, internal citations omitted); *Chick-Fil-A, Inc. v. CFT Dev., LLC*, No. 5:07-cv-501, 2009 U.S. Dist. LEXIS 34496, at *4 (M.D. Fla. Apr. 3, 2009) (under the apex rule, "the party seeking the deposition of a CEO [must] show that the executive has unique or superior knowledge of discoverable information") (emphasis supplied); *Porter v. Eli Lilly & Co.*, No. 1:06-cv-1297, 2007 U.S. Dist. LEXIS 40282, at *7-8 (N.D. Ga. June 1, 2007) (upholding protective order prohibiting deposition of CEO where plaintiff failed to show that executive has personal knowledge and that the plaintiff had no other means of obtaining the information).⁶

Consequently, because "unique or personal knowledge" is required, a party cannot force an Apex deposition by simply alleging that the individual possesses information regarding the structure of the corporation, the corporate decision making process, or those decisions ultimately

⁶ In rejecting plaintiffs' arguments as to why the deposition of the CEO was necessary, the *Porter* court stated, "[T]his argument reveals Plaintiff's counsel's strategy of attempting to bootstrap any allegation raised in the complaint or any memo served in discovery to justify a deposition of Lilly's Chief Executive Officer. Interestingly, this is precisely what the concept of 'apex' depositions is designed to protect against . . ." 2007 U.S. Dist. LEXIS 40282, at *8 (emphasis supplied).

made at the highest levels of the corporation. See *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL No. 2004, 2009 U.S. Dist. LEXIS 111149, at *3 (M.D. Ga. Dec 1, 2009) (“Where an executive’s only connection with the matter is the fact that he is the defendant corporation’s CEO, with no direct involvement in or knowledge of the issues giving rise to the action, a deposition of the executive may not be appropriate.”); *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 177 (Tex. 2000) (“Allowing apex depositions merely because a high-level corporate official possesses apex-level knowledge would eviscerate the very guidelines established in *Crown Central*. Such evidence is too general to arguably show the official’s knowledge is unique or superior.”); *In re El Paso Healthcare Sys.*, 969 S.W.2d 68, 74 (Tex. App. 1998) (“A generalized claim that a corporate president has ultimate responsibility for all corporate decisions or has knowledge of corporate policy is insufficient to establish that the corporate president has unique or superior personal knowledge of discoverable information.”); *AMR Corp. v. Enlow*, 926 S.W.2d 640 (Tex. App. 1996) (“Testimony that a corporate executive possesses knowledge of company policies does not, by itself, satisfy the first *Crown Central* test because it does not show that the executive has unique or superior knowledge of discoverable information.”).

Plaintiffs’ own response to MassMutual’s initial motion for a protective order clearly illustrates that they have no good faith basis for asserting Mr. Crandall’s personal and unique knowledge in these cases: “[W]hile MassMutual wants to take the position that Mr. Crandall is a high-level executive with no ‘first-hand knowledge regarding the facts at issue in this case’, it is exactly the reason that Plaintiffs would depose Mr. Crandall. Assuming MassMutual chose its words deliberately, then at the very least, **Mr. Crandall has second-hand knowledge** . . . That

would make Mr. Crandall . . . uniquely knowledgeable as to how he discovered the facts . . .” Appx. at 713 (emphasis supplied).

Likewise, when this case was pending in this Court, plaintiffs reiterated their argument, now accepted by Judge Sanders, that second-hand knowledge is sufficient:

Mr. Lucido’s testimony establishes that Mr. Crandall was informed by Mr. Lucido of the 412i litigation as a “systemic” issue. Thus, Exhibit 20A establishes the context of the current Exhibit 20, and makes of record communications to Mr. Crandall of the 412i litigation as a “systemic” issue. Exhibit 20A appears in the attached Revised Supplementation as Bates No. 00842 through 000878.

Appx. at 648.

As MassMutual noted in its response to Plaintiffs’ motion to supplement the record, they blatantly mischaracterize Mr. Lucido’s testimony. Mr. Lucido testified that the section of his report labeled “Compliance Risks and Areas of Focus” included “key compliance risks and areas of focus . . . [at] the highest level, top risks across the entire organization. It would not have gotten to the granularity of a concern of a specific customer and the file review related to that.” Appx. 208-209, at 153:15–154:11. It is that section of the report only that “focuses on more systemic risk issues across the organization.” Appx. at 154:5-11.

There is no mention of the *Demory*, *3rd Time Trucking*, or 412i litigation specifically in the “Compliance Risks and Areas of Focus” section of the report testified about by Mr. Lucido. Instead, the 412i litigation is generally referenced in the “Key Initiatives” section of the report. According to Mr. Lucido, that section “is a sampling of the top compliance initiatives, projects that are underway across the entire compliance organization.” Appx. at 154:20-155:3, 156:10-19.

Although Plaintiffs argued to this Court that Mr. Lucido’s deposition testimony supports their request to take the CEO’s deposition—as if Mr. Lucido testified that the CEO had some personal or unique knowledge regarding their cases—here is his actual testimony:

Q. Does Mr. Crandall serve on the Audit Committee?

A. I don't know if he's an actual member. . . .

Q. Have you ever met with Mr. Crandall in person to talk about the 412(i) matters?

A. Not specifically related to the Rule 412(i) matters, no.

Q. Okay. Have you met with Mr. Crandall to talk about the conduct relating to the 412(i) matters but not the 412(i) matters?

A. I would – I had no meeting with Mr. Crandall specifically related to 412(i). As I said, I meet with Mr. Crandall every couple months to generally discuss compliance matters within the company.

Appx. at 589-590, at 37:19-21, 38:20 – 39:8.

This is not testimony by Mr. Lucido that Mr. Crandall had personal and unique information about either Plaintiffs' cases or even the 412i litigation; rather, it was testimony to the contrary. In fact, even when Plaintiffs' counsel attempted to trick Mr. Lucido into admitting that he had specific discussions with the CEO, Mr. Lucido denied it:

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

MR. THORNTON: Objection. Mischaracterizes his testimony completely.

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

Q. Have you discussed with Mr. Crandall, on a one-to-one basis, either face-to-face or over the telephone, any of the underlying facts related to what was contained in your compliance report as it relates to the 412(i) matters?

A. I don't recall any specific discussions regarding the 412(i) matters with Mr. Crandall. . . .

Appx. at 205, at 52:1-22.

Q. Okay. 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 Audit Committee meetings.

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

A. It is sent to him.

Q. It is sent to him. Whether he reads it may be a different issue. Do you know if he's read the document?

A. I don't know.

Appx. at 206-207, at 140:19 – 141:10.

Again, this supports MassMutual's position that Mr. Crandall has no personal or unique knowledge regarding Plaintiffs' cases—a conclusion also reached by Judge Sanders. Plaintiffs' contention that a high-ranking official has personal and unique knowledge warranting his or her deposition whenever he or she has received a report on the general subject matter of a compliance initiative, but without any specifics, even if there is no evidence the high-ranking official ever read or discussed the general report, speaks for itself.

Of course, the logical extension of this circular argument is that all high-ranking officers, whether in the private or public sector, would always be subject to deposition not because they have any personal or unique knowledge regarding the subject matter of the litigation, but because they subsequently learned of the subject matter after a lawsuit was settled.

This argument has been rejected by every other court; was rejected by this Court in *MassMutual I*; and should have been rejected by Judge Sanders.

3. Inconvenience is an Insufficient Reason to Alleviate a Party's Responsibility to Exhaust Less-Intrusive Discovery Alternatives to the Deposition of a High-Ranking Official.

In *Arnold Agency v. West Virginia Lottery Com'n*, 206 W. Va. 583, 526 S.E.2d 814 (1999), plaintiff sought to depose former Governor Gaston Caperton in its suit against the Lottery Commission for breach of contract and fraud in the award of an advertising contract to another marketing company. Referring to Syllabus Point 14 of the Court's decision in *State ex rel. Paige v. Canady*, 189 W. Va. 650, 434 S.E.2d 10 (1993), in which this Court determined that the Tax Commissioner should not be deposed, the Court pronounced the following rule:

When determining whether to allow the deposition of a highly placed public official, the trial court should weigh the necessity to depose or examine an executive official against, among other factors, (1) the substantiality of the case in which the deposition is requested; (2) the degree to which the witness has first-hand knowledge or direct involvement; (3) the probable length of the deposition and the effect on government business if the official must attend the deposition; and (4) whether less onerous discovery procedures provide the information sought.

Syl. Pt. 14, *Arnold Agency*, 206 W. Va. 583, 526 S.E.2d 814.

This Court concluded that “the submission of interrogatories by the plaintiffs is the appropriate manner in which to initially proceed to determine whether these [high-ranking government officials] have any [relevant] knowledge” *Alexander v. FBI*, 186 F.R.D. 1, 5 (D.D.C. 1998). Because of the availability of less burdensome means of initial discovery in the present case, we see no reason to conclude that the circuit court abused its discretion in entering the protective order.” 206 W. Va. at 600, 526 S.E.2d at 831.

As this Court wisely observed in *Paige*, plaintiffs may be entitled to depose a high-ranking officer, but only after plaintiffs start at the bottom of the organization chart with their

discovery and that discovery produces evidence that the high-ranking officer had personal and unique knowledge of the subject matter of the litigation.⁷

Here, Plaintiffs did not make any effort to comply with this Court's directives in *MassMutual I*. Indeed, Judge Sanders' order expressly states:

21. Defendants responded Plaintiffs did not meet even this lower standard because 1) they are misrepresenting the amount of discovery made available to them; 2) they failed to depose a number of other witnesses; 3) they failed to send interrogatories eliciting information from Roger Crandall; and 4) Plaintiffs asked the wrong questions to solicit unsatisfactory responses.

22. This Court holds that requiring Plaintiffs to exhaust the entire arsenal of discovery tools is too burdensome when compared with a brief deposition of the CEO. Plaintiffs have already spent a substantial amount of time and effort attempting less intrusive means and requiring more effort would be unreasonable under the circumstances.

Appx. at 9-10, Order ¶¶ 21-22.

In other words, propounding interrogatories to discern Mr. Crandall's knowledge of Mr. Lucido's reports, if any, is "too burdensome," which Judge Sanders excused as follows:

The **initial** deposition must not take longer than approximately **TWO HOURS**. The **initial** time limitation is based in part on statements made by Plaintiffs' counsel in oral argument on Defendant's motion. Plaintiffs' counsel responded to the Court's question of why Crandall was not sent interrogatories:

We don't have to take much of his time. We don't want lawyer answers to these important questions. It wouldn't be fair. That is a compromise which is really hurtful to our case. What did Mr. Crandall do when he learned of the systemic risk issues of his company by the compliance melt down associated

⁷ See also *Chick-Fil-A, Inc.*, 2009 U.S. Dist. LEXIS 34496, at *9-10 ("[W]hile the Defendants contend that [defendant] has sought information from other witnesses, they fail to point to any specific issues where [plaintiff] witnesses were questioned and stated that [plaintiff's CEO], and not the deponent, would be the individual with unique or superior knowledge regarding the particular subject.").

with these 412i plans? We can accomplish that very briefly, Your Honor. If he doesn't know, we'll be done. I suspect he does know.

Appx. at 12, Order ¶ 29(a) (emphasis supplied).

If this were the test, of course, then every party requesting the deposition of a high-ranking official would be automatically entitled to one **initially** even without any evidence that the high-ranking official was aware of the subject matter of the questioning, and in the face of the high-ranking official's affidavit denying any personal or unique knowledge regarding the subject matter of the litigation, in order to determine whether **the high-ranking official knows or does not know** about that subject matter.

Plainly, this Court adopted a test in *MassMutual I* requiring Plaintiffs to exhaust less-intrusive forms of discovery, including interrogatories, to discover what unique and personal knowledge, if any, is held by Mr. Crandall. Just as plainly, Judge Sanders has not required Plaintiffs to do so.

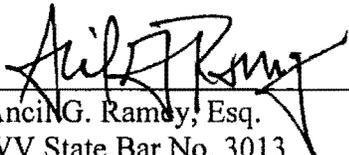
VI. CONCLUSION

Petitioner, Massachusetts Mutual Life Insurance Company, respectfully requests that this Court issue a rule to show cause why the Circuit Court's order entered on May 24, 2012, compelling Roger Crandall, its President, Chief Executive Officer, and Chairman to submit to deposition without requiring Plaintiffs to comply with this Court's holding in Syllabus Point 3 of *MassMutual I* should not be subject to a writ of prohibition.

**MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY**

By Counsel

Dated: June 7, 2012

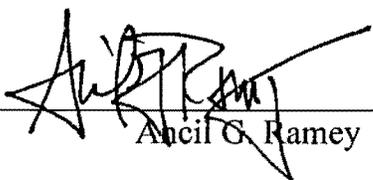


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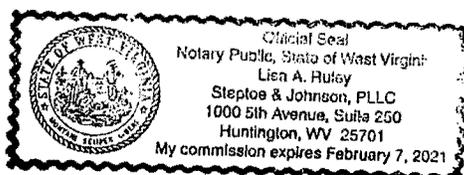
STATE OF WEST VIRGINIA,
COUNTY OF CABELL, TO-WIT:

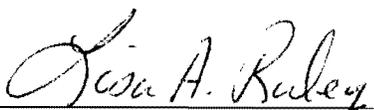
I, Ancil G. Ramey, being first duly sworn, state that I have read the foregoing VERIFIED PEITION FOR WRIT OF PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.


Ancil G. Ramey

Taken, subscribed and sworn to before me this 7th day of June, 2012.

My commission expires: February 7, 2021




Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2012, I served the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION by electronic mail and by depositing a true copy thereof in the United States mail, postage prepaid, as follows:

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