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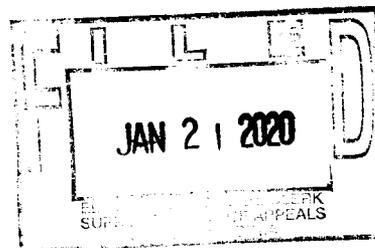
No. 20-0545

**CREDIT CONTROL, LLC**  
**Petitioner**

v.

**THE HONORABLE RONALD WILSON,**  
**Judge of the Circuit Court of Ohio County,**  
**WV**

**Respondent**



**PETITION FOR WRIT OF PROHIBITION**

Melissa Thompson v. Credit Control, LLC  
Circuit Court Ohio County, WV  
Civil Action No. 14-C-213

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## QUESTION PRESENTED

The questions presented are as follows:

1. Whether the Circuit Court abused its discretion in denying Defendant's Motions for Protective Order permitting Plaintiff's counsel to take a second deposition of Defendant's corporate representative?
2. Whether the Circuit Court abused its discretion in denying Defendant's Second Motion for Protective Order and ordering that Defendant's corporate representative must present for deposition in Wheeling, WV, as opposed to Las Vegas, Nevada where the witness resides, for a second deposition?

## STATEMENT OF THE CASE

Plaintiff is a consumer who admits that she owed an outstanding debt on one or more credit cards in and around 2012 and 2013. Defendant attempted to collect the amounts owed on two separate accounts by mail and phone calls placed to Plaintiff. Plaintiff retained attorney Thomas McIntyre and Mr. McIntyre sent Defendant a letter of representation dated December 10, 2013, referring in the opening of the letter to only one of the two accounts Defendant was attempting to collect. After Defendant received the letter, on December 17, 2013, Defendant recorded in the accounts notes associated with the account number McIntyre referenced in his letter that Plaintiff was represented by counsel; and, as a result of this notation, Defendant ceased all collection attempts on that account. However, due to a clerical error, Defendant did not enter the computer code in the system for the other account as Plaintiff having counsel, so collection phone calls continued on that second account. These facts have been established and undisputed in this case since February 2016 when Defendant first answered Plaintiff's first set of written discovery.

Plaintiff's counsel Tom McIntyre filed this lawsuit in July 2014 alleging the Defendant violated the debt collection provisions of the West Virginia Consumer Credit Protection Act by

contacting Plaintiff by phone after Plaintiff provided Defendant written notice that she had retained counsel. The primary claim alleged and, which is crux of the factual and legal issues in the case, is a violation of *West Virginia Code*, 46A-2-128(e) and Defendant's affirmative defense of unintentional conduct pursuant to *West Virginia Code*, 46A-5-101(8).

The Case has had three Scheduling Orders entered, all caused to be entered upon Motion by Plaintiff's counsel. Pursuant to the Second Amended Pre-Trial Conference Order in effect entered September 23, 2019, the case is currently set for trial in July 2020 and discovery was to be concluded on or before October 31, 2019.

An agency representative deposition of Defendant's representative is currently set for January 28, 2020, in Wheeling WV. Defendant has filed two Motions for Protective Order pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure to prevent this deposition as Defendant has previously produced a deponent to testify as to the topic matter in the current Notice; and in addition, Defendant takes the position that while the deposition should not be allowed to be taken; if this Court agrees that the deposition should go forward; Defendant should not be required to produce a deponent, for a second deposition, in Wheeling, WV. The lower Court has denied both of Defendant's Motions; Defendant asserts that the Court has committed clear legal error and abused its discretion in denying Defendant's Motions: said ruling are the subject of this Writ.

To place the issues present in the case in further context, by Order dated April 23, 2018, the trial Court granted partial summary judgment in favor of Plaintiff holding that Defendant had violated *West Virginia Code*, 46A-2-128(e) by communicating with Plaintiff after it received the letter of representation, but also recognizing that there is a material issue of fact as to whether Defendant is liable for this violation pursuant to the affirmative defense of unintentional conduct

asserted by Defendant. The determination of whether Defendant intended to violate 128(e) has been the only remaining factual issue in this case to be determined since the lower Court's 2018 Order.

Plaintiff's counsel McIntyre noticed a deposition of Defendant's agency representative via a Rule 30(b)(7) notice on October 26, 2017; (CC000005-000007) Defendant produced a witness, Anthony Pirotta, a resident of Las Vegas, Nevada, to respond to the topic matter of the notice and Mr. Pirotta was deposed on December 6, 2017. Mr. Pirotta was designed by Defendant to testify to all of the topic matter in Plaintiff's counsel's notice; there was not limitation of the subject matter of the questions and answers by the Undersigned during the deposition. Mr. Pirotta was never instructed not to answer any questions. Plaintiff's counsel McIntyre was not precluded from asking questions on any topic matter contained in the notice or reasonably related thereto. After the deposition, Plaintiff's counsel never contended that Mr. Pirotta was not prepared to answer questions related to the topic matter of the notice nor filed any Motion with the Court seeking to compel any further testimony.

However, Plaintiff's counsel again noticed a Rule 30(b) (7) deposition of Defendant 's representative on June 8, 2018. (000001-000003) The notice of deposition contained substantially the same topic matter as the previous October 26, 2017 notice for which Defendant produced Mr. Pirotta to address with only slight changes in the wording of the topic matter. No additional written discovery or depositions had been conducted between the December 2017 date of the first deposition and the date of the second deposition notice. On June 26, 2018, Defendant filed a Motion for Protective Order to prohibit this deposition asserting that the topic matter of the notice was previously addressed by the prior deposition and that the deposition should be prohibited pursuant to Rule 26 of the West Virginia Rules of Civil Procedure.

Plaintiff's counsel responded to the Motion on July 31, 2018 and made a number of arguments as to why Plaintiff believed Defendant had not answered written discovery appropriately, justifying the taking of the second deposition; however, Plaintiff's counsel made no argument in response to Defendant's Motion that the topic matter of the two notices was substantially the same if not identical.

A hearing was set on the Motion for Protective Order on November 19, 2018. At the hearing, the lower Court stated that it was not ready to consider the Motion and no oral argument was presented in support of or in opposition to the Motion; instead, the Court Ordered that before it would rule on the Motion, Defendant was required to treat the deposition notice as an interrogatory request and answer the individual topic matters as if they were questions. On December 19, 2018, the Defendant served on Plaintiff and the Court Defendant's Response to Subject Matter Contained in Plaintiff's June 8, 2018 Notice to Take Video Deposition of Defendant's 30(b)(7) Representatives. This response not only provided appropriate objections to the relevancy of the information related to the subject matter of the Notice but a reference to prior discovery responses, documents and citations to the page number of the transcript of the deposition of Mr. Pirotta that corresponded to the subject matter in the notice; proving that the topic matter had been answered. On January 3, 2019, Plaintiff filed a Reply to the Defendant's Response; that reply withdrew some of the topic matter as relevant and otherwise simply stated that Defendant's objections to the other questions were not appropriate. The Court entered an Order granting in part and denying in part the Motion for Protective Order on February 21, 2019, permitting Plaintiff to take the deposition of Defendant's representative but did limited the topic matter of the Notice at issue.<sup>1</sup> Thereafter, Plaintiff's counsel never reached out to Defendant to

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<sup>1</sup> The Motion also objected to the location of the deposition being conducted in Wheeling, however, before the Court ruled on the Motion, the parties agreed that the deponent would appear in Wheeling for the deposition, so the

request the scheduling of the deposition and did not serve an amended notice of deposition with topic matter consistent with the trial Court's Order.

A pretrial conference was held before the Court with the parties On February 11, 2019 from which the trial Court entered a Pretrial Conference Order on April 9, 2019, establishing a close of discovery on July 31, 2019 and a trial on September 12, 2019. On July 3, 2019, Robert Fitzsimmons filed a notice of appearance in the case as additional counsel for Plaintiff. As a result, Plaintiff's counsel filed a Motion to Amend the Scheduling Order on July 9, 2019, which was granted, resulting in the entry of the current Scheduling Order.<sup>2</sup>

Plaintiff's counsel then served a third Rule 30(b)(7) deposition notice on October 3, 2019, setting the deposition for October 24, 2019 to take place in Wheeling, WV, a week before the end of discovery. Defendant filed a Motion for Protective Order on October 11, 2019, again challenging the taking of the deposition on the grounds that the topic matter of the notice was substantially the same as the original notice and in addition, challenging the stated location of the deposition in Wheeling. The Court denied this Motion in a two paragraph Order, primarily under the mistaken understanding and belief that the case was a contingency fee case for the Plaintiff's counsel; holding that Plaintiff should not have to pay to have her attorney take the deposition at the location of the deponent on that basis alone. Plaintiff's counsel then served a Second Amended Notice of Agency Representative Deposition on December 2, 2019, setting the deposition on January 28, 2020. It is this Notice that the Defendant challenges specifically in this Petition.

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Court was not asked to rule on that portion of the Motion.

<sup>2</sup> One of the reasons Plaintiff's counsel cited in support of the Motion to Continue the Trial was that counsel didn't know that the Court had previously ruled on the Motion for Protective Order in February, 5 months earlier. Defendant filed a Response Objecting to the Continuation of the trial, but the Court granted the Motion without a hearing and before receipt of the Defendant's opposition brief.

Petitioner files this Writ of Prohibition asking the Court to prohibit the second deposition of its agency representative from taking place on January 28, 2020 or, in the alternative, for an Order that the deposition should take place at a location where the witness resides: in Nevada, as opposed to Wheeling, WV.

### **SUMMARY OF ARGUMENT**

Plaintiff's counsel has requested to take an agency representative deposition of a designee of Defendant by the submission of a 30(b)(7) deposition notice that contains both the same, and substantially the same topic matter as the notice that resulted in Defendant's agent Ms. Pirotta being deposed in December 2016. Obviously, a Plaintiff may take a deposition of more than one corporate designee in discovery when the topic matter of the deposition involves different facts or positions and the corporation designates different witnesses to provide testimony binding the company on different lines of inquiry; however, there is no authority under the Rules of Civil Procedure that permits a party to take depositions of witnesses more than once to ask about the same facts. It is Defendant's position that unless there is additional discovery conducted in a case, or different facts that are discovered that would justify permitting a party to depose a witness a second time related to those facts, it is an abuse of discretion for a court to simply permit an attorney to take more than one deposition of a witness just to get a "second bite of the apple."

Plaintiff has never articulated a legitimate need to take this second deposition; and so to the extent that this deposition has been permitted by the Court, it is simply because Plaintiff's counsel has convinced the Court that it wants a second chance to question the witness because counsel is not satisfied with the questions and answers given in the first deposition or it has now

been determined by counsel that McIntyre did not ask questions he should have asked; and, the Court has abused its discretion by giving Plaintiff's counsel leeway to conduct whatever discovery counsel wants, even discovery that is duplicative and unnecessary, at the continued expense of the Defendant. The outstanding factual and legal issues in this case have been set since the Court's ruling on Plaintiff's Motion for Partial Summary Judgment in 2018; the sole material issue of fact has not changed since Defendant answered Plaintiff's first set of written discovery identifying its collection activity in the case and the clear explanation as to why it called Plaintiff on the second account after coding the first account as Plaintiff being represented by counsel, in early 2016. Not only would the taking of the second deposition of Mr. Pirotta or any other designated representative result in entirely duplicative questions and answers; the cost, expense and time incurred would be entirely unnecessary and serve no other purpose than to give Plaintiff's new counsel the opportunity to ask the same questions that his co-counsel asked, or could have asked, in the first deposition.

Finally, the general rule with regard to the taking of corporate representative depositions is that the deposition should be taken at the location where the deponent resides; and the general rule is supposed to be followed regardless of the fact that it would mandate that the Plaintiff's attorney has to incur travel costs. If this Court for some reason agrees that Plaintiff does have the right to take this second deposition, this general rule clearly should be applied in this case as Defendant's agent has already attended one deposition in Wheeling; and was available to answer any and all questions germane to the collection activity of Defendant and of Defendant's affirmative defense in this case. All of the equities here support the conclusion that if Defendant has to present a witness a second time to testify to subject matter that was already covered in the first deposition or which could have been covered without objection, then that travel cost should

be born by the Plaintiff's counsel. The trial Court's denial of the Defendant's second Motion for Protective Order on this one ground was clearly an abuse of discretion in that it determined the primary reason why the deposition of the designee should be in Wheeling was because this is a contingency fee case for the Plaintiff. The Court has no knowledge of this being a fact; and, the Complaint clearly asserts that Plaintiff seeks attorney fees and costs pursuant to the discretion of the Court to award Plaintiff her attorney fees if she prevails pursuant to *West Virginia Code*, 46A-5-104. Plaintiff's counsel has never confirmed that this is a contingency fee case in any pleading.

#### **STATEMENT REGARDING ORAL ARGUMENT**

Defendant states that an oral argument is necessary in this case and would request an oral argument on this Petition under Rule 19 of the Rules of Appellate Procedure

#### **ARGUMENT**

The Court should exercise its original jurisdiction here because the Circuit Court committed clear legal error. A Writ of Prohibition "lies only to restrain inferior courts from proceedings 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 writ of error, appeal or certiorari." Syl Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). This Court has further explained that a Writ of Prohibition "lies as a matter of right whenever the inferior court (a) has no jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." *State ex rel. Valley Distributors, Inc. v. Oakley*, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969).

"In determining whether to issue a Writ of Prohibition for cases not involving an absence of jurisdiction, 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; (5) whether the lower tribunal's order raised new and important problems or issues of law of first impression." Syl. Pt. 2, *State of West Virginia ex. rel. Nationwide Mutual Insurance Company v. Marks*, 223 W.Va. 452, 676 S.E.2d 156 (2009) (quoting *State ex rel. Hoover v. Berger*, 199 W.Va. 12; 483 S.E.2d 12 (1996)). Importantly, the *Hoover* court noted that: [t]hese 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. Id. (Emphasis added). Giving substantial weight to the third factor should result in this Court issuing the requested Writ.

As discussed more thoroughly below, the trial Court's Orders denying the Petitioners' Motions for Protective Orders are clearly erroneous as a matter of law. If the Court does not consider the Petition and grant the relief sought, which means that the challenged 30(b)(7) deposition takes place, there is no way for the Defendant to correct the issue on appeal: there is no way that Defendant can seek reimbursement of the costs and expenses incurred in the participation in the deposition by the production of its designee; and it will be continually prejudiced by yet again the trial in this case being moved forward as the discovery cut-off has already passed; this case has been pending since 2014 and Defendant simply desires its day in court.

**A. Questions Presented:**

1. Whether the Circuit Court abused its discretion in denying Defendant's Motion for Protective Order permitting Plaintiff's counsel to take a second deposition of Defendant's corporate representative?

Rule 30(a) of the *West Virginia Rules of Civil Procedure* states that a party may take the testimony of any person, including a party, by deposition. The rule clearly does not state that a party may be deposed more than once and cannot be interpreted as same. Rule 26(b) establishes the scope of written discovery and depositions, and states specifically that the Court SHALL limit the use of discovery if (A) the discovery is unreasonably cumulative or duplicative; (B) the party in discovery has had ample opportunity to obtain the information sought or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case . . . and the importance of the issues at stake. Here, the trial Court abused its discretion in denying Defendant's Motions for Protective Order after a consideration of each of these three factors as it was required to prevent duplicative discovery and the needs of the case CLEARLY do not support any argument that a second deposition of Defendant's corporate designee to be deposed about its attempted collection efforts against Plaintiff. The topic matter of the current notice of deposition is the same or substantially the same as that contained in the notice under which Mr. Pirotta was deposed; Plaintiff has now had five years to engage in whatever discovery was necessary to understand the factual basis for Defendant's affirmative defense; an affirmative defense that has been explained numerous times in written discovery; pleadings; motions; and, Mr. Pirotta's deposition. It is entirely, unduly burdensome for Defendant to be required to prepare Mr. Pirotta or another witness for deposition a second time; fly that witness to Wheeling, WV for a deposition in a case wherein Defendant has previously produced a deponent who has

already been questioned about the facts supporting its affirmative defense; and when the facts supporting that affirmative defense are not complex: that a clerical person with Defendant read a letter of representation by McIntyre, caused one of two accounts of Plaintiff to be coded on Defendant's computer system as the consumer being represented as counsel which, in turn, caused calls on one account to stop but not on the other. Tellingly, Plaintiff's counsel has previously argued in support of its Motion for Summary Judgment that, based upon Mr. Pirotta's deposition testimony, there are no material issues of fact and that she was entitled to summary judgment on the case. Even Plaintiff's counsel have taken the position that they don't need any additional discovery to support their claims in the case.

Plaintiff's deposition notice that resulted in the December 2016 deposition and Plaintiff's current deposition notice, along with Mr. Pirotta's deposition transcript are a part of the Appendix to this Writ. In the first notice there were 18 topic matters listed, related to the defendant's communication with Plaintiff; all collection notes related to Plaintiff; policies and procedures related to debt collection of Defendant; Defendant's policies, procedures and protocols related to its receipt of mail; etc. (000006-000007) The current notice of deposition contains 7 topic matters summarized here, in general, and discussed below (000001-000002):

- (a) Details of Plaintiff's accounts held by Defendant;
- (b) How and why calls were initiated to Plaintiff; and who made the calls;
- (c) Who called Plaintiff after December 13, 2013 and why;
- (d) Defendant's policies and procedures applicable to the collection of Plaintiff's accounts;
- (e) Defendant's procedure for handling a letter of representation of a consumer;
- (f) Policies and procedures related to Defendant's compliance with WV law;
- (g) All other matters permitted by the court to be addressed in Order denying Motion for Protective Order.

Defendant has both produced documents and responses in discovery and/or Mr. Pirotta has already provided testimony covering each and every topic matter identified above. Defendant

has produced its complete account notes on the two accounts it collected in its first discovery responses; it has clearly explained and identified the factual basis for its asserted affirmative defenses; it has produced copies of its internal, written policies and procedures related to collection activities; Plaintiff had all of this material, most of which for years, before Mr. Pirotta was deposed in December 2016. Plaintiff's counsel McIntyre had every opportunity to meaningfully prepare for the deposition of Mr. Pirotta before it was taken and to ask whatever questions he wanted during the deposition. The topic matter in the current notice will be compared to the topic matter and testimony given relative to the first notice at this time which clearly shows that the topic matter seeks discovery that is cumulative and duplicative.

I. (a) Details of Plaintiff's accounts held by Defendant:

Topic Matter (a) is certainly covered by the more general topic matters (j) and (k) contained in the first notice. Further, in early 2016, Defendant produced the entirety of its account notes in response to Plaintiff's written discovery; these account notes identify all this information to be covered in this topic matter. (000109-000121) In Defendant's answers to Plaintiff's interrogatories, the account numbers and account balances were provided along with a detailed account of all collection activities taken on both accounts; (000097-000109) Plaintiff and Plaintiff's counsel are clearly aware that Defendant has not attempted to collect on either of the accounts since it last called Plaintiff on May 27, 2014. This portion of the request is odd as the easiest way to determine the status of the collection activity on the account for Plaintiff's counsel would seem to be for them to ask their own client: "has Credit Control attempted to collect any debt from you since May 27, 2014, when and how?" Further, on the Account Information document that Plaintiff has had since Defendant's discovery responses were served in February 2016, the service date and listing date for both accounts was provided. Finally,

Pirotta testified to this exact information in his first deposition starting at pages 000176-000177 when he answered questions as to the dates that the two accounts were placed with Credit Control by indicating that the information is contained in the account notes previously provided; that the accounts came from JH Portfolio Debt Equities. Defendant gave Plaintiff's counsel the account numbers; date that the accounts were placed with it and the status of the account as far back as February 2016; and Plaintiff's counsel was free to ask Mr. Pirotta any questions he wanted about this information, which he did. The only possible area of inquiry in this second deposition would be to ask the deponent to further explain the account notes produced over two years ago; again, questions that Mr. McIntire had every ability to ask in the previous deposition of Pirotta in December 2016; but more importantly, questions that were already contained in the subject matter in the first Notice at (j) "all collection notes and/or collection logs related to Ms. Thompson." To the extent that McIntyre did not ask Pirotta questions related to these notes in the first deposition, that is Plaintiff's problem; Mr. Fitzsimmons should be prevented from re-taking the deposition to ask the same questions simply because the Plaintiff's side is now unhappy with the deposition questions of McIntyre in 2016.

II. (b) How and why calls were initiated to Plaintiff; and who made the calls:

In all candor, Plaintiff knows how and why Defendant called Plaintiff; Defendant is a debt collector and it called Plaintiff to collect debt. These are hardly disputed facts and it should not be necessary for Defendant to incur the cost and expenses of producing a second corporate designee in Wheeling to testify to these facts readily admitted in the case. Further, this topic matter coincides with topic matters (a) description of the calls placed by Defendant; (b) method of calls; (c) recording system and protocol for each call; (d) method the calls were initiated and terminated; (f) Defendant's and its employees' communication to Plaintiff; and (g) how calls

were made to Plaintiff and the decision to initiate the calls. So, this topic matter in the current notice was covered by the first notice and the Pirotta deposition.

Pirotta testified at page 000182 of his deposition (and at other parts of the deposition) that the phone calls were made in-house by Credit Control and not by a third-party; therefore, the “how” part of this question has been answered via deposition testimony. He further stated on that same page that the calls were made to collect a debt; therefore, the “why” topic matter was answered. The only testimony that was not provided was related to the identity of the employees who made the calls, and this is simply because Pirotta was never asked those questions. Mr. Pirotta testified the callers were identified on the account notes on page 000179 of the transcript. What seems abundantly clear is that Mr. Fitzsimmons now wants a second chance to ask the same questions his co-counsel failed to ask but could have asked or which were asked, hoping to get different answers; as grounds to take the unnecessary deposition. It is not Defendant’s fault if Plaintiff’s counsel did not ask its designee questions covered by the topic matter of the first notice to which the witness was offered to discuss, and a corporate defendant should not be required to keep producing a designee to provide testimony over and over again, until the Plaintiff’s counsel gets answers he likes/wants; or to permit a counsel to “tag-team” the defendant.

The first part of this question is obvious, known by Plaintiff and undisputed; Credit Control is a debt collector that was attempting to collect debt from Plaintiff that she admits she owed. Further, as to why the phone calls were made to Plaintiff after Defendant received the December 13, 2013 letter; that has been answered many times in discovery as well as Mr. Pirotta’s deposition testimony at pages 0000188-0000189): the letter of McIntire only referenced one of the two accounts Credit Control was attempting to collect and Credit Control’s employee

who reviewed the letter notated in the computer system that Plaintiff was represented by counsel relative to that account referenced by the specific account number in the letter but not the other; this fact is neither disputed nor contradicted and was the subject of questioning of Pirotta during the first deposition. The “how” and “why” information has been provided to Plaintiff. The identity of the persons who made the calls and their employment status are irrelevant as it is now too late in discovery to depose these persons and, the evidence is simply that the calls were made on the other account because that account was not flagged as attorney representation. Further, these persons have nothing to offer to explain the material facts of the case that has not already been explained. Defendant’s position which was explained in 2016 in its discovery and consistently after that in briefing and Mr. Pirotta’s deposition, is that the collectors who called on the second account did without knowing about the existence of the McIntyre letter because reference to that representation was not noted on that second account. The one remaining issue in the case is that simple.

III. (c) Who called Plaintiff after December 13, 2013 and why?

This topic matter clearly would be encompassed by (b); the account notes and discovery responses provided by Defendant long ago; and again, was addressed with Mr. Pirotta in his first deposition.

IV. (d) Defendant’s policies and procedures applicable to the collection of Plaintiff’s accounts;

This subject matter is substantially the same subject matter as (m) in the first notice other than the fact that the topic matter in the first notice is actually broader than that contained in the first notice which related to “any person” as opposed to only Plaintiff: clearly, Plaintiff would be one of “any person”. In addition, these written policies have been produced in discovery and

again, Mr. Pirotta was asked questions about same in his deposition; in fact, these policies were attached as exhibits to the Pirotta transcript. (000189) If Plaintiff's counsel now wants to ask more questions about the policies that were provided before the last deposition, that should not result in Defendant's agent being required to fly from Law Vegas to West Virginia and stay two days away from work and family simply because Plaintiff's counsel now believe that the first deposition was not as thorough as they would have liked. More importantly however, the issue for trial here is very narrow, Plaintiff's counsel contends that Defendant is liable for calling Plaintiff to collect a debt after McIntyre sent Defendant a letter of representation. Defendant has stated in pleadings, discovery and in Pirotta's deposition the explanation for the collection on the one account that was not coded as the consumer being represented; clearly, it is Defendant's policy that it doesn't call consumers represented by counsel and it complied with that policy once the one account was properly coded on the computer. The remaining triable issue is whether Defendant intentionally called Plaintiff on the second account after it knew she was represented by counsel; further questioning about its general collection policies and procedures does nothing to garner evidence to allow a jury to determine whether Defendant's violation of Section 128(e) was intentional or not.

V. (e) Defendant's procedure for handling a letter of representation of a consumer

Subsection (e) relates to the protocol for how letters from lawyers are handled by Credit Control; again, Pirotta was asked questions related to this topic matter in his first deposition. The answer is simply that the letter is reviewed and the computer account for the consumer is coded to indicate that the consumer has counsel; it is that simple. Mr. Pirotta testified to this topic matter at pages (000189, 000193) in his deposition. Further, this topic matter would also fall within a number of the other topic matters generally contained in the first notice. Defendant

has already produced a designee who answered questions related to this topic matter and should not be required to do it again.

VI. (f) Policies and procedures related to Defendant's compliance with the WV law

This topic matter relates to policies and procedures regarding Defendant's training and compliance with the West Virginia Consumer Credit Protection Act; Defendant has stated that it has no such policies or procedures related specifically to the WV Statute, but general policies and procedures related to debt collection have been produced and Pirotta was asked about this topic matter in his first deposition as identified above. This topic matter would also fall within (m) from the first notice. Given the Court's ruling on Plaintiff's Motion for Partial Summary Judgment; the issues remaining in the case; and the fact that Pirotta has already testified regarding Defendant's policies and procedures related to debt collection, this topic matter brings nothing new into play factually and Defendant has already stated that it has no such policy to be questioned about. More importantly, Defendant does not dispute the argument that it is not permitted to contact a consumer who is represented by counsel to attempt to collect debt; we also know that it followed the law with regard to one of the two Plaintiffs accounts; and, the only reason it did not follow the law as to the second account was because of a clerical error; regardless of what its internal, collection policies state about contacting a represented consumer, the sole issue is whether it intentionally violated the law; not whether it complied with a policy requiring compliance with the law.

VII. (g) All other matters permitted by the court to be addressed in Order denying Motion for Protective Order

This is not an appropriate subject matter to be contained in a 30(b)(7) notice as Rule 30

requires the notice to list the topic matter with “reasonable particularity”. In any event, Defendant also believes that the topic matter the court held McIntyre was permitted to ask Defendant’s designee has been covered. It would not be appropriate to require Defendant to produce a second designee for deposition in Wheeling to subject him to a deposition solely in response to this subsection of the notice.

Further, after Defendant filed its Motion for protective order responding to Plaintiff’s counsel’s June 8, 2018 deposition notice, before the Court ruled on the Motion, Defendant was required to treat the notice as an interrogatory request and answer each of the topic matter in the notice with a written response of information. This response is also part of the appendix. In that response, Defendant identified the material produced in discovery and the deposition testimony of Pirotta that had been given which was combined as a response to the topic matter of the notice. (000123-000130) So, Plaintiff’s counsel wants to take a second deposition of Defendant’s designee to ask the same questions covered by the first agency representative deposition, after they have already received written responses to the topic matter. This is all the more reason why this Court should find that the trial Court has abused its discretion in permitting Plaintiff to re-take the deposition of Defendant’s corporate representative on the same subject matter covered in the first deposition and that the Court’s prior Orders are in error as a matter of law as clearly it did not follow the mandates of Rule 26.

When one looks at the February 21, 2019 Order of the Court denying the Motion for Protective Order, it is clear that the trial Court did not consider Defendant’s arguments and presentation of discovery already produced to determine if the scope of the second deposition was duplicative of the first. The trial Court’s analysis of topic matter number 1 does NOT cite to the fact that the factual information has already been provided although Defendant’s answers

clearly provided the factual information related to the account notes, etc. (000010) The Court stated “the information sought is readily available to the Defendant”; while this is obviously true, the information was also already provided to Plaintiff and Mr. Pirotta was questions regarding same.

Regarding the next topic matter, the Court stated that debt collection activity before the date of the letter of representation “is unanswered”; while this is not accurate as Defendant produced the account notes for all collection efforts; certainly, there could have been no violation of Section 128(e) before Defendant received the letter of representation. (000011)

With regard to topic matter 3; again, the Court did not consider the fact that this information was not only provided by McIntyre had every opportunity to ask questions related to this topic matter. (000011)

For topic matter number 4, the trial court concluded that Defendant’s objection was misplaced because if Plaintiff’s counsel was permitted to go on a fishing expedition in a second deposition, perhaps the scope of the case would change. Not only is this an abuse of discretion, the lower Court’s assessment of the actual topic matter doesn’t support its position as the topic matter limits the inquiry into policies and protocols to the “subject of this litigation”. (000011) The subject of this litigation is an alleged violation of Section 128(e). The Court’s position that the scope of the litigation should be determined at the conclusion of discovery is exactly why the Defendant’s objection is a valid one; the scope of discovery in any civil litigation must be tied to the allegations and defenses asserted in the pleadings.

For topic matters 6; again, the trial Court clearly did not consider the topic matter that was addressed in the prior notice or the deposition testimony of Pirotta; and acted as if that discovery had not taken place. (000012) What seems to be the logical conclusion here is that

the trial Court ruled on Defendant's Motion as if no discovery had previously been conducted in the case and as if a parties' attorney has the right to re-depose any witness he wants simply to ask questions on any topic matter, regardless of whether the topic matter was the subject of the prior deposition or the questions were or were not asked.

Finally, with regard to topic matter 9, the trial Court held that Defendant had to produce a second designee to provide testimony about written policies that were not in place at the time of the collection activity at issue; while the policies that were in effect had been discussed in the Pirotta deposition and even attached as exhibits. (000013) Certainly, Defendant should not be required to produce a witness to testify about corporate policies that were no in effect at the time of the alleged violation of the law.

The trial Court's requirement that Defendant initially treat the topic matter in the second 30(b)(7) noticed basically caused added controversy and confusion to the Court's assessment of the Motion for Protective Order; what is apparent is the Court considered the "answers" to these topic matter in a vacuum and did not consider the fact that the topic matter had previously been addressed in discovery or could have been addressed in the prior deposition. The trial Court made no effort to determine whether the subject matter of the second notice was consistent with the scope of discovery under rule 26 as it appears to have analyzed these answers without the context of the prior deposition.

Further, Plaintiff's counsel's request to take this second deposition of Defendant's agent has not been necessitated by any conduct of Defendant and it is not based upon the presentation or discovery of additional evidence in the case since the first deposition. In fact, in Plaintiff's counsel's previous response to the Defendant's Motion for Protective Order there was no compelling or credible argument that Mr. Pirotta was not able to answer questions that he was

asked about any topic matter contained within the notice. While Plaintiff's counsel have asserted a number of red-herrings associated with Defendant's failure to supplement its first 2016 discovery responses to assert the factual basis for a bona fide error defense that Defendant has consistently explained it does not rely on in this case; this issue was fully addressed and mooted long before the deposition notice at issue was served.

Here is just one example for this Court of the incredible arguments that Plaintiff's counsel has continually asserted to the Court to support the request to take this second deposition. Defendant's answer to the Complaint filed in February 2015 contained an affirmative defense that stated: "Any violation(s) was not intentional and/or resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error." In Plaintiff's first set of discovery, at interrogatory number 7, Plaintiff asked Defendant to answer a number of questions if it asserted the affirmative defense of bona fide error of fact. Defendant's response to this question was: "At this time, Defendant does not assert said defense but reserves the right to do so as investigation and discovery continues. Defendant will supplement if necessary." (000101) No Motion to Compel related to this answer was filed. Plaintiff took the deposit of Mr. Pirotta in December 2016 and never asked the witness whether Defendant asserted the bona fide error of fact defense or the factual basis for any such claim; however; as discussed above, Mr. Pirotta clearly testified to the factual basis of Defendant's unintentional affirmative defense. Then, the parties filed cross motions for summary judgment; in the Defendant's motion and response it was clearly argued that Defendant was entitled to judgment because it did not intend to violation Section 128(e); at no time in the written submissions did the Undersigned ever state that it was relying upon the bona fide error defense. Further, under the first Scheduling Order, the Undersigned filed a Pretrial Memo on October 13,

2017, and in that pleading it stated that Defendant was asserting it was not liable for Plaintiff's allegations of wrongdoing because Defendant did not intentionally violate the CCPA; there was no mention of the bona fide error defense in that submission. (000168) Next, the lower Court entered its Order on the Plaintiff's Motion for Partial Summary Judgment and incredibly stated that "In opposition to the plaintiff's motion the defendant argues that the acts of its agents were unintentional or the result of a mistake or bona fide error. In support of its argument the defendant relies upon W.Va. Code 46A-5-101(8) that state the following: . . ." (000018) The Court then went on to cite Defendant's answer to Plaintiff interrogatory number 7 cited above, and determined that "defendant never supplemented its answer to this interrogatory as required by the Rules of Civil Procedure . . ." (000019) Ultimately, the Court continued the trial based upon this incredible argument of Plaintiff's counsel and flawed analysis of Defendant's pleadings. So, on the same day that the Court entered his Order, Defendant filed a supplemental answer to Plaintiff's interrogatory number 7 which stated as follows (000092-000093):

Defendant does not contend that the affirmative of defense of a bona fide error of fact, notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error is applicable to the facts of this case. Defendant DOES contend that any violation of the West Virginia Consumer Credit and Protection Act alleges in this case was unintentional. Therefore, Defendant cannot answer subparts a. through g. of this interrogatory. Defendant relies upon the following facts to assert its position (sp) that the alleged violation was unintentional:

Defendant received the December 13, 2012 letter of representation of counsel and made a clerical error after receipt and analysis of same with regard to one of the two accounts it was collecting from Plaintiff at the time; account ending in #9023895 was documented indicating that Plaintiff had counsel and was not to be contacted thereafter; however, the second account ending in #10773710 was not noted as Plaintiff having counsel; therefore, Defendant's agents continued to call on said account. Defendant asserts that its agents did not form the requisite intent to violate West Virginia Code, 46A-2-128(e) in calling Plaintiff regarding account ending in number #10773710 because the Defendant's clerk failed to document this account with the information that Plaintiff had counsel although she did document the other account ending in #9023895 that Plaintiff was represented by counsel which resulted in collection activity on that account

ceasing. Defendant's agent intended to honor the request in the December 13, 2012 letter of representation of counsel but made a mistake in not doing so.

A reasonable person would assume that this supplemental discovery response would lay to rest the question of whether Defendant relied on the bona fide error of fact defense as an affirmative defense to Plaintiff's alleged violation of Section 128(e), to the extent that there was ever any question at that time. However, incredibly, in Plaintiff's subsequent July 31, 2018 Response to Defendant's Motion for Protective Order, counsel again at page 4 in the first paragraph of his argument section, in support for the argument that this second deposition of Defendant's agency representative is needed; asserted the same erroneous argument that Defendant had failed to comply with the rules of civil procedure by supplementing its discovery responses with the factual basis for an affirmative defense that it had made clear many times it was not asserting. (000136) The conclusion of Plaintiff's counsel's Response to Defendant's Motion was that because the Court continued the trial on the basis of the fact that it felt Defendant had not supplemented its discovery responses, and the Court didn't limit the scope of discovery; that Plaintiff was then justified in engaging in whatever discovery counsel wanted. This is not a persuasive argument under these facts and this procedural history. Plaintiff's counsel's subsequent notices of 30(b)(7) depositions not only came after Defendant clearly made it known it **did not** assert the bona fide error of fact affirmative defense, but the topic matter of the notice(s) **did not** contain a topic matter related to that affirmative defense. What is noticeably missing from Plaintiff's counsel's continued arguments to the Court that this deposition should take place, is any actual statement of what facts exist that Plaintiff really needs to discover beyond that which has already been provided through written discovery and Mr. Pirotta's deposition. Plaintiff's counsel has never once

identified the questions they need answers to that have not already been asked and answered by Defendant or which have not already been found by the lower Court as established facts. The reason for this is because they can't because there are not such facts.

Because this second deposition requested is being conducted to give deference to Plaintiff's counsel to obtain information they believe they need, Defendant should not be the party that is greater inconvenienced by the cost and expenses of the deposition. The truth of the matter is that Plaintiff's counsel has argued, based upon the admissions of Pirotta in his first deposition, that Plaintiff is entitled to summary judgment as to the affirmative defense of unintentional violation of the CCPA asserted by Defendant; Plaintiff's counsel has never taken the position in any dispositive motion that they needed to engage in additional discovery to support their claims; this fact in and of itself belies any argument that this second deposition of Pirotta is actually necessary. The trial Court committed clear error when it denied Defendant's Motion for Protective Order and refused to prevent the deposition on the basis of the scope of discovery under Rule 26 as being duplicative; unnecessary and unjustified; and, on the basis of cost and expense to the Defendant.

2. Whether the Circuit Court abused its discretion in denying Defendant's Second Motion for Protective Order and ordering that Defendant's corporate representative must present for deposition in Wheeling, WV, as opposed to Las Vegas, Nevada where the witness resides, for a second deposition?

Defendant contends that the trial Court has abused its discretion twice in ruling on Defendant's Motions for Protective Order; the first error is ruling that the deposition may be taken; the second clear error is in holding that the deposition has to be taken in Wheeling, WV, because the case is a "contingency fee" case for the Plaintiff. (000015) Not only is the court

wrong that corporate representative depositions must be held in the county where the case is pending in every case that involves a contingency fee; the Court also failed to consider the fact that Plaintiff contends this case is a “fee shifting” case and not a contingency fee case. In Plaintiff’s response to the Defendant’s Motion for Protective Order, it was **never** stated this was a “contingency fee” case; apparently the court has just assumed this fact and then erroneously based its entire ruling on this assumption. Defendant strongly asserts that the facts of this case; the procedural history, and the applicable law supports a finding that if this second deposition is required to take place, it should take place in Las Vegas where the deponent resides. The argument as to why agency representative depositions should generally be taken at the location of the residence was adequately set forth in Defendant’s Motion for Protective Order that is part of the Appendix with this Petition. It was an abuse of the discretion of the trial Court to consider those factors set forth in Defendant’s Motion and then simply disregard the facts of this case as applied to those factors and then hold that the deposition must take place in Wheeling because Plaintiff’s counsel took this case on a contingency fee basis. Defendant would refer this Court to the argument and case law contained in its original Motion. (000023-000026)

### **CONCLUSION**

The trial Court has abused its discretion and committed error as a matter of law in denying two Motions for Protective Order filed by Defendant requesting that the Court prevent Plaintiff’s counsel from taking a second 30(b)(7) deposition of a corporate designee of Defendant that seeks to cover the same subject matter and documents that were previously the subject of a prior deposition of Defendant’s representative in December 2016, in direct conflict with the Rule 26 that establishes the scope of discovery. Plaintiff’s request to take this deposition a second time will result in nothing more than duplicative testimony; testimony

regarding facts that are not probative of the one remaining issue in this case which is limited to the affirmative defense of unintentional conduct of Defendant in association with a previous ruling of the trial Court that Defendant has violated *West Virginia Code 46A-2-128(e)*; and Defendant should not be required to incur the cost of this second deposition that would be nothing more than a continued deposition of the same witness by Plaintiff's new counsel, asking the same questions as previous counsel. Finally, in the alternative, if this Court does find that the deposition should be permitted; the location of the deposition should be the location of the county of residence of the corporate designee and not Wheeling, West Virginia based upon the fact that the Defendant has already produced a representative for deposition in Wheeling once before and the topic matter of the current notice of deposition is the same or substantially the same as the prior notice.

VERIFICATION

I, Albert C. Dunn, Jr. on behalf of the Petitioner Credit Control, LLC, after first being duly sworn upon oath, state that I have read the foregoing Petition for Writ of Prohibition, and that all facts and allegations contained therein are true and correct to the best of my knowledge and belief.

*[Handwritten Signature]*

Albert C. Dunn, Jr. (WV Bar No. 5670)

STATE OF West Virginia  
COUNTY OF Kanawha, to-wit:

Taken, subscribed and sworn to before me, the undersigned Notary Public, this date, January 21, 2020.

My commission expires: August 10, 2021.

*[Handwritten Signature]*

Notary Public

