IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-_____

20-0893

STATE OF WEST VIRGINIA ex rel. PARTNERS TOO, INC., d/b/a STANLEY STEEMER; and STANLEY STEEMER INTERNATIONAL, INC.,

Petitioners,

vs.

HONORABLE CARRIE L. WEBSTER, Judge of the Circuit Court of Kanawha County, West Virginia; and KEN SKILES,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

Ancil G. Ramey (WV Bar No. 3013)
Russell D. Jessee (WV Bar No. 10020)
James E. McDaniel (WV Bar No. 13020)
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Facsimile: (304) 353-8180
ancil.ramey@steptoe-johnson.com
russell.jessee@steptoe-johnson.com
jim.mcdaniel@steptoe-johnson.com
Counsel to Petitioners

W. Stuart Calwell (WV Bar No. 595)
L. Dante' diTrapano (WV Bar No. 6768)
David H. Carriger (WV Bar No. 7140)
Calwell Luce diTrapano
Laws and Arts Center West
500 Randolph Street
Charleston, WV 25302
Telephone: (304) 343-4323
Facsimile: (304) 344-3684
scalwell@calwelllaw.com
dditrapano@cldlaw.com
dcarriger@cldlaw.com

Patrick C. Marshall (*Pro Hac Vice*)
Methvin, Terrell, Yancy, Stephens & Miller, P.C.
2201 Arlington Avenue South
Birmingham, AL 35205
Telephone: (205) 939-0199
Facsimile: (205) 939-0399
pmarshall@mtattorneys.com
Counsel to Respondent Ken Skiles

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I. QUESTION PRESENTED

1. Whether the circuit court abused its discretion by compelling Defendants to respond to class discovery before resolving Defendants' pending dispositive motion on Plaintiff's individual claims in contravention of this Court's holding in *GMS Mine Repair & Maintenance, Inc. v. Miklos*, 238 W. Va. 707, 798 S.E.2d 833 (2017).

II. STATEMENT OF THE CASE

Simply stated, "a class cannot be certified unless the named plaintiffs have a cause of action."[1] Accordingly, this Court has established that, when a trial court decides to address a challenge to the individual claims of a purported class representative, ordering class discovery before resolving that threshold challenge is an abuse of discretion. *GMS Mine Repair*, *supra*.[2]

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[1] *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 296 Ill. Dec. 448, 835 N.E.2d 801, 827 (2005) (internal citations omitted). The Illinois class action rule, 735 ILCS 5/2-801, is similar to Rule 23 of the West Virginia Rules of Civil Procedure in that both consider issues of typicality, commonality, numerosity, and adequacy of representation. *See* W. Va. R. Civ. P. 23(a), in part ("One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.").

[2] As this Court noted in *GMS Mine Repair*, an overwhelming number of courts allow trial courts the discretion to defer class certification pending the court's ruling on a dispositive motion. *See, e.g., U.S. v. Nat'l Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 700 n.5, 95 S. Ct. 2427, 45 L.Ed.2d 486 (1975) (observing that "[t]he District Court [for the District of Columbia] deferred determination of whether [other separately filed actions] could be maintained as class actions under Rule 23 and additionally postponed discovery and other activity pending disposition of the motion to dismiss in this case."); *White v. Coca-Cola Co.*, 542 F.3d 848, 854 (11th Cir. 2008) ("Because the district court was correct to grant summary judgment in favor of Coca-Cola, the district court did not abuse its discretion in denying the motions ... for discovery and class certification. The resolution of the merits of this controversy obviates any issue about these procedures."); *Thompson v. Cty. of Medina, Oh.*, 29 F.3d 238, 241 (6th Cir. 1994) (finding where "neither plaintiffs nor the members of the class were prejudiced by the order of the court's rulings, the district court acted well within its discretion in concluding that it should decide the motion for summary judgment first."); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) ("It has never been doubted that a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action."); *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 368 (D. Minn. 2013) ("To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake.") (citing *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984)); *Hager v. Vertrue, Inc.*, No. 09-11245-GAO, 2011 WL

Nonetheless, the circuit court in this action did just that. After allowing limited discovery before Defendants could renew their pending motion to dismiss as a motion for summary judgment, the circuit court compelled class discovery.

A. PLAINTIFF HAD HIS CARPETS CLEANED AND FILED SUIT WITHIN A MONTH.

In late January 2019, Plaintiff Ken Skiles ("Plaintiff" or "Mr. Skiles") had the local, independent Stanley Steemer franchise clean his carpets.[3] When scheduling the carpet cleaning, Mr. Skiles and Stanley Steemer agreed on the price, which included an $8.00 fuel surcharge as

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4501046, at *1 (D. Mass. Sept. 28, 2011) (noting that at initial scheduling conference court had determined that "discovery should be phased, with the first phase focused on the plaintiffs['] individual claims, rather than issues related to any putative class of plaintiffs" where defendant represented it would be able to defeat plaintiffs' claims on motion for summary judgment after completion of first phase of discovery); *Hill v. Chase Bank, NA*, No. 2:07-CV-82-AS, 2007 WL 4224073, at *5 (N.D. Ind. Nov. 26, 2007) (finding that granting defendant's motion to stay class based discovery until court rules on defendant's motion to dismiss "will encourage the most efficient use of the parties' time and effort[.]"); *Talley v. NCO Fin. Sys., Inc.*, No. 2:06-CV-48-PPS-PRC, 2006 WL 2927596, at *2 (N.D. Ind. Oct. 12, 2006) (addressing defendant's motion to stay issue of class certification until court ruled on defendant's anticipated motion for summary judgment and granting stay on basis that "it is in the interests of judicial economy and efficiency for the Court to rule on the motion for summary judgment prior to the motion for class certification in order to determine whether the claim of the named Plaintiff lacks merit and thus whether the motion for class certification is moot."); *Mallo v. Pub. Health Trust*, 88 F. Supp. 2d 1376 (S.D. Fla. 2000) (granting defendant's motion to stay discovery and class certification pending disposition of defendant's motion to dismiss amended class action complaint); *Mitchell v. Indus. Credit Corp.*, 898 F. Supp. 1518, 1521, 1537 (N.D. Ala. 1995) (noting that it had entered order that "first phase of this case would focus on the claims of the named plaintiffs and that discovery regarding putative class members and class status would be allowed, if appropriate, at a later time[;]" that it had expressed concern at outset of case regarding "the extensive discovery, time and expense that would likely be involved on the class certification issue;" and finding it "reasonable to rule on the motions for summary judgment without deciding on class certification"); *Lawson v. Fleet Bank of Me.*, 807 F. Supp. 136, 138 n.1 (D. Me. 1992) ("[T]he Court believes that its decision to defer action on the class certification motion and to stay discovery until after resolution of the dispositive motions was the more prudent use of judicial resources."); *Nee v. State Indus., Inc.*, 3 N.E.3d 1290, 1296 n.4 (Ohio Ct. App. 2013) (observing that plaintiff's claims were brought on behalf of himself and putative class and that trial court stayed class discovery pending its ruling on summary judgment on plaintiff's individual claims); *Baptist Hosp. of Miami, Inc. v. DeMario*, 683 So.2d 641, 643 (Fla. 3rd Dist. Ct. App. 1996) (finding that "DeMario's counsel [may not] utilize discovery as a device to solicit another class representative or potential class members for legal representation in this cause" and ordering trial court to "stay the discovery in this cause pending its determination of DeMario's standing to serve as the class representative").

[3] *See* Compl. ¶ 32 & Ex. A (Feb. 19, 2019), A.R. 17, 27. As used herein, "Stanley Steemer" refers to the local, independent franchise, Defendant Partners Too, Inc. d/b/a Stanley Steemer, and "International" refers to the franchisor, Defendant Stanley Steemer International, Inc.

part of the total. Mr. Skiles received e-mail memorializing the agreement, including agreement to the disclosed fuel surcharge.[4] Stanley Steemer cleaned Mr. Skiles's carpets, and Mr. Skiles paid Stanley Steemer. Mr. Skiles received a receipt, which, like the e-mail he received **before** the cleaning, separately listed the $8.00 fuel surcharge as part of the total price.[5] The carpet-cleaning was an unremarkable, everyday exchange of services for an agreed-upon price. At no time—before or after his carpet cleaning—did Mr. Skiles ask any questions or remark about the disclosed fuel surcharge.[6]

Within a month and without complaint, Mr. Skiles filed a purported class action complaint on February 19, 2019.[7] The complaint categorically alleges that the "fuel surcharge bears no relation to any actual or increased fuel cost" and that the fuel surcharge should more accurately have been called an "extra profit fee."[8] Based on these and similar allegations, the Complaint alleges that, "by charging and collecting this fee, [Stanley Steemer has] violated the terms of its contracts between [it] and [its] West Virginia customers."[9]

Mr. Skiles asserts three counts, all related to the same agreement for carpet cleaning: Count One is the primary claim for breach of contract against the franchisee, Stanley Steemer; Count Two is an alternative claim for unjust enrichment against Stanley Steemer; and Count Three is a claim for unjust enrichment against the franchisor, International.[10] Regardless of the multiple

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[4] *See* Pl. Ken Skiles's Resps. & Objs. To Defs.' 1st Req. for Prod., Ex. B (Nov. 1, 2019) (e-mail confirming January 22, 2019 service and listing charges), A.R. 288-91.

[5] Compl., Ex. A, A.R. 27.

[6] Defs.' Opp'n to Pl.'s Mot. To Extend Disc., at 2-3 (Nov. 8, 2019), A.R. 539-40.

[7] *See generally* Compl., A.R. 10-27.

[8] Compl. ¶¶ 4, 6, A.R. 10-11.

[9] Compl. ¶ 3, A.R. 10.

[10] Compl. ¶¶ 47-56, A.R. 21-23. Mr. Skiles asserts no claims other than these three contract and quasi-contract claims. Mr. Skiles does not allege that Stanley Steemer surprised him by adding an

counts, Mr. Skiles's individual damages would be recovery of the single $8.00 fuel surcharge that he claims breached the contract for carpet cleaning.

In summary, Mr. Skiles agreed to the disclosed fuel surcharge and at no time asked Stanley Steemer about it. Mr. Skiles then quickly brought a purported class action, making extreme, categorical allegations, the accuracy of which he admittedly does not and could not know.

B. DEFENDANTS MOVED TO DISMISS PLAINTIFF'S INDIVIDUAL CLAIMS, AND THE CIRCUIT COURT HELD THAT MOTION IN ABEYANCE AND ORDERED LIMITED DISCOVERY.

Defendants moved to dismiss Mr. Skiles's individual claims.[11] Defendants asserted that the Complaint makes clear: (i) the contract for carpet cleaning at an agreed-upon price was performed by both parties and was not breached; (ii) the alternative claim for unjust enrichment against Stanley Steemer is superfluous because the existence of a contract is not disputed; (iii) Plaintiff had no quasi-contractual relationship with International to support an unjust enrichment claim; and (iv) independently, the voluntary payment doctrine bars reopening the completed transaction—that is, the time to dispute the disclosed fuel surcharge was before paying it willingly.[12] Defendants also stated that Plaintiff's class claims should be dismissed if the circuit court dismisses his individual claims.[13] Defendants simultaneously moved to stay all discovery pending a ruling on their motion to dismiss.[14]

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undisclosed $8.00 to its final bill after cleaning his carpets, and the e-mail he produced confirms the pre-cleaning disclosure and lack of surprise. *See supra* n.4.

[11] *See generally* Defs.' Mot. To Dismiss Plf.'s Class Action Compl. (Apr. 22, 2019), [hereinafter "Motion to Dismiss"], A.R. 28-48.

[12] *Id.* at 7-16, A.R. at 36-45.

[13] *See id.* at 16 (quoting *GMS Mine Repair, supra,* at 716, 798 S.E.2d at 842: "[A] class cannot be certified unless the named plaintiffs have a cause of action."), A.R. at 45.

[14] *See generally* Defs.' Mot. To Stay Disc. Pending Resolution of Defs.' Mot. To Dismiss Pl.'s Class Action Compl. (May 16, 2019) [hereinafter "Motion to Stay"], A.R. at 49-55.

Once those motions were briefed (and without oral argument), the circuit court held the motion to dismiss in abeyance and granted in part Defendants' motion to stay discovery.[15] The circuit court ordered the parties "to engage in limited discovery for a period of three months on the fuel surcharge issue *only*."[16] After the limited discovery period, "Defendants [could] either renew their motion to dismiss or file a motion for summary judgment, as they deem appropriate."[17] The circuit court concluded that "it is an inefficient use of resources for the parties to delve into the work of identifying the class if there is no basis for Plaintiff's individual claim."[18]

The circuit court also vacated its previous scheduling order, including all deadlines relating to class certification, so the parties had no deadlines other than the deadline to complete the limited discovery within 90 days—that is, by November 13, 2019.[19] The circuit court stated that, not only were the parties to complete written discovery and depositions within 90 days, "but also any objections, discovery motions, and related briefing [were to be] resolved in advance of the Discovery Completion Deadline."[20] The circuit court's order thus did not contemplate extensive, time-consuming, or controversial discovery while Defendants' motion to dismiss remained pending with the opportunity to convert it to a motion for summary judgment.

C. PLAINTIFF SOUGHT UNLIMITED DISCOVERY, AND DEFENDANTS RESPONDED CONSISTENT WITH THE CASE'S PROCEDURAL POSTURE.

Despite the limiting language of the circuit court's August 15, 2019, Order and the guidance of *GMS Mine Repair*, Plaintiff's discovery of Defendants was extensive. Plaintiff

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[15] Order Holding in Abeyance Defs.' Mot. To Dismiss & Granting in Part Defs.' Mot. To Stay Disc. (Aug. 15, 2019) [hereinafter "Aug. 15, 2019, Order"], A.R. at 56-58.

[16] *Id.* at 2, A.R. at 57.

[17] *Id.* at 3, A.R. at 58.

[18] *Id.* at 2, A.R. at 57.

[19] *Id.*, A.R. at 57.

[20] *Id.*, A.R. at 57.

propounded **171** total written discovery requests to the two Defendants.[21] Many requests sought information and documents pertaining to all "West Virginia customers" **for the 10 years before the complaint**.[22] Nonetheless, mindful of the brief time in which the circuit court ordered discovery to be completed, Defendants did not request an extension of time to respond to Plaintiff's overly broad suite of requests. Defendants served responses and objections on September 12, 2019, two months before the close of discovery.[23]

Defendants' objections to the written discovery included an explicit objection to producing class discovery before resolution of their dispositive motion on Plaintiff's individual claims.[24] Defendants stated several objections, such as this one, as "General Objections," because they were generally applicable to many requests. Defendants did this to avoid repetition. The objections, however, were not "general" in the sense that they were overly broad or vague; rather, they were stated with specificity.

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[21] Pl.'s 1st Set of Reqs. for Admiss. to Def. Partners Too, Inc. d/b/a Stanley Steemer, Pl.'s 1st Set of Reqs. for Produc. of Docs. to Def. Partners Too, Inc. d/b/a Stanley Steemer, Pl.'s 1st Set of Interrogs. to Partners Too, Inc. d/b/a Stanley Steemer, Pl.'s 1st Set of Reqs. for Admiss. to Def. Stanley Steemer Int'l, Inc., Pl.'s 1st Set of Reqs. for Produc. of Docs. to Def. Stanley Steemer Int'l, Inc., Pl.'s 1st Set of Interrogs. to Def. Stanley Steemer Int'l, Inc. (Aug. 13, 2019) [hereinafter "Plaintiff's Discovery"], A.R. at 59-120. Plaintiff served his written discovery on August 13, 2019, before entry of the circuit court's order on August 15, 2019. Plaintiff's written discovery to Stanley Steemer comprised 25 requests for admission, 19 interrogatories, and 41 requests for production, and his discovery to International comprised 29 requests for admission, 19 interrogatories, and 38 requests for production.

[22] *See, e.g.*, Pl.'s Interrog. No. 7 to Stanley Steemer ("Describe exactly how the fuel surcharge fee is calculated and assessed for Defendant's West Virginia customers, including any and all formulas, tables, and/or indexes used by Defendant, to include the exact amount of the fuel surcharge Fee for each year from 2009 to the present."), A.R. at 85.

[23] Def. Partners Too, Inc. d/b/a Stanley Steemer's Objs. & Resps. to Pl.'s 1st Set of Reqs. for Admis., Def. Partners Too, Inc. d/b/a Stanley Steemer's Objs. & Resps. to Pl.'s 1st Set of Interrogs., Def. Partners Too, Inc. d/b/a Stanley Steemer's Objs. & Resps. to Pl.'s 1st Set of Reqs. for Produc. of Docs., Def. Stanley Steemer Int'l, Inc.'s Objs. & Resps. to Pl.'s 1st Set of Reqs. for Admis., Def. Stanley Steemer Int'l, Inc.'s Objs. & Resps. to Pl.'s 1st Set of Interrogs., Def. Stanley Steemer Int'l, Inc.'s Objs. & Resps. to Pl.'s 1st Set of Reqs. for Produc. of Docs. (Sept. 12, 2019), A.R. 146-261.

[24] *See, e.g.*, Def. Partners Too, Inc. d/b/a Stanley Steemer's Objs. & Resps. to Pl.'s 1st Set of Reqs. for Admis. at Gen. Obj. No. 4, A.R. 147-48.

In keeping with the circuit court's directive to focus on the fuel surcharge, Defendants' responses fully explained the origin and application of the fuel surcharge. International, the franchisor, explained that it does not require its franchisees to include a fuel surcharge; pricing is left to the discretion of each franchisee.[25] Thus, International had no discovery to give on the fuel surcharge. Stanley Steemer, the franchisee, provided a detailed explanation of its conception and implementation of the fuel surcharge.[26]

In summary:

- Stanley Steemer began applying the fuel surcharge in West Virginia in September 2012, prompted by an overall loss of money and a material increase in the cost of fuel;
- Gasoline prices at this time were more than $3.00 per gallon, and the expense of purchasing fuel for West Virginia jobs accounted for approximately 9% of Stanley Steemer's net revenue;
- To recoup a portion of its increased fuel costs, Stanley Steemer calculated what would be approximately 3%-4% of the total charge for its average residential job and rounded to $8.00 even;
- Stanley Steemer decided to apply this liquidated amount as a fuel surcharge to its customers as a disclosed component of its overall charges;
- As gas prices fluctuated between 2012 and 2019, Stanley Steemer considered adjusting the fuel surcharge, but it ultimately decided that the charge continued to fairly offset a portion of the average cost of fuel for each job, particularly because it had expanded its service area, which resulted in increased fuel costs overall.
- Stanley Steemer also included a retroactive calculation of the specific cost for fuel for Plaintiff's January 2019 service that shows the $8.00 liquidated amount of the fuel surcharge is related to the cost of fuel.[27]

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[25] *See* Def. Stanley Steemer Int'l's Answer to Interrog. No. 4, A.R. 219-20. Because International was not involved with Plaintiff's carpet cleaning by its franchisee, and International had no input into its franchisee's pricing decisions, it had no responsive documents to produce.

[26] *See* Def. Partners Too, Inc.'s Answer to Interrog. No. 4 (providing three-page explanation of fuel surcharge), A.R. 164-67.

[27] *See id.*

Stanley Steemer's full explanation ran nearly three pages, double-spaced.

Because the fuel surcharge was applied in the same liquidated amount since it began, Stanley Steemer's explanation of the surcharge's implementation in 2012 explains how the fuel surcharge came to be included in the price quoted to Mr. Skiles (and charged to Mr. Skiles after he agreed to the quoted price) in January 2019. In response to Plaintiff's document requests, Stanley Steemer produced the one extant, contemporaneous document relating to the implementation of the fuel surcharge (an e-mail that is consistent with its explanation summarized above), and Stanley Steemer produced all documents relating to its carpet cleaning services for Mr. Skiles, including documents relating to prior service calls that were not alleged in the Complaint.

Plaintiff also sought extensive Rule 30(b)(7) depositions **with 41 topics for each Defendant**.[28] Of the 41 topics for each Defendant, only one was limited to Plaintiff; the other topics sought testimony applicable to the purported class.[29] Plaintiff ignored Defendants' offer to have their representative witnesses deposed on a subset of the 41 topics in October 2019. Instead, Plaintiff sought to force corporate representative depositions only on November 1, 2019, when Plaintiff unilaterally filed five deposition notices.[30] This was less than two weeks before the close of discovery on November 13, 2019.

Plaintiff sought to take the five depositions without consulting with Defendants about witness or counsel availability. On such short notice, Defendants nonetheless provided four

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[28] Video Dep. Notice of Def. Stanley Steemer Int'l, Inc., Video Dep. Notice of Def. Partners Too, Inc. d/b/a Stanley Steemer (Aug. 30, 2019), A.R. 121-45.

[29] *See id.* ¶ 15, A.R. 127, 140.

[30] Video Dep. Notice of Ryan Jankowski, Video Dep. Notice of Randy Retort, Video Dep. Notice of Ryan Mount, Video Dep. Notice of Jason Fender, Video Dep. Notice of Andrew Olive (Nov. 1, 2019), A.R. 562-76.

witnesses, two of which—Ryan Mount, Vice President of the franchisee, Stanley Steemer, and Ryan Jankowski, Vice President of Legal Affairs and Chief Administrative Officer of the franchisor, International—testified simultaneously as fact witnesses and Rule 30(b)(7) witnesses.[31]

In contrast to Plaintiff's class-oriented discovery, Defendants' discovery of Plaintiff was limited to that needed for their motion for summary judgment. Defendants deposed Plaintiff Skiles for 3.5 hours total, including breaks.[32] Defendants limited questioning to Plaintiff's individual claims and reserved the right to conduct further deposition on class issues should the case continue.[33] Defendants propounded three document requests and no interrogatories or requests for admission. One of the requests for production of documents relating to the January 2019 cleaning netted two documents (the scheduling e-mail to Mr. Skiles from Stanley Steemer and a copy of his

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[31] Despite Plaintiff's lack of consultation with Defendants regarding availability, Defendants scheduled the depositions of all requested witnesses, except Jason Fender, who had no availability before November 13, 2019. Mr. Mount and Mr. Jankowski traveled to Charleston from outside West Virginia to accommodate Plaintiff. And while Defendants objected to many of Plaintiff's 41 class-related and overly broad 30(b)(7) topics, Plaintiff's questioning of Mr. Mount and Mr. Jankowski was not limited, because Plaintiff simultaneously deposed them as fact witnesses.

[32] Defendants were able to depose Plaintiff only after a successful motion to compel. After Plaintiff twice refused to appear for duly noticed depositions, Defendants were forced to move to compel his appearance before the end of the limited discovery period. Defs.' Mot. To Compel Pl.'s Dep. & Mot. for Sanctions (Sept. 19, 2019), A.R. 262-75. The circuit court promptly granted Defendants' motion and rejected Plaintiff's argument that he could place improper conditions on his appearance in contravention of W. Va. R. Civ. P. 26(d). Order Granting Defs.' Mot. To Compel & Holding in Abeyance Defs.' Mot. for Sanctions (Sept. 30, 2019), A.R. 276-78.

Significantly, once Defendants were able to depose Plaintiff, Plaintiff admitted that he had no basis for the allegations in his Complaint about the fuel surcharge other than what he had been told by his attorneys. He also had not reviewed the Complaint before it was filed in February 2019; rather, the first time he saw the Complaint was in preparation for his September 2019 deposition. Defs.' Opp'n to Pl.'s Mot. to Extend, at 2 (Nov. 8, 2019), A.R. 539.

[33] 3rd Am. Notice of Video Dep. of Pl. Ken Skiles (Sept. 30, 2019), A.R. 279-81.

receipt).[34] Plaintiff produced nothing in response to the other two requests for documents relating to Plaintiff's research of Defendants and retention of counsel, objecting completely.[35]

D. PLAINTIFF RECEIVED FULL RESPONSES ABOUT THE FUEL SURCHARGE AND HIS INDIVIDUAL CLAIMS BUT MOVED TO COMPEL ADDITIONAL DISCOVERY.

Plaintiff received a complete explanation of how Stanley Steemer conceived of and implemented its fuel surcharge in 2012. Stanley Steemer provided a detailed description of its business decision in a verified interrogatory answer, and it produced the only related document that remains extant. Stanley Steemer has no more information or documents to provide about how it conceived of and implemented the fuel surcharge.

Because the fuel surcharge has been $8.00 since implementation, Stanley Steemer's explanation of the origin of the fuel surcharge provides class discovery to explain how and why the fuel surcharge was part of the price quoted to—and accepted by—Mr. Skiles. Stanley Steemer acknowledged that it had to provide class discovery in this circumstance. Stanley Steemer did not limit its description of the fuel surcharge; providing class discovery was necessary to provide a complete explanation about Plaintiff's individual transaction. Moreover, Defendants' responses and objections to 171 written requests and putting up four witnesses, two of whom were simultaneously deposed as Rule 30(b)(7) representatives, is more than proportional discovery for an $8.00 breach of contract claim.

Nonetheless, Plaintiff moved to compel additional discovery relating to all Defendants' customers.[36] Plaintiff's motion asserted that *GMS Mine Repair* is inapplicable, because "the Court has neither bifurcated discovery in this matter nor elected to defer ruling on class certification

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[34] *See supra* n.4, A.R. 282-91.

[35] *See id.* at 2-3, A.R. 283-84. Although Plaintiff asserted attorney-client privilege and work product objections, Plaintiff produced no privilege log.

[36] Pl.'s Mot. To Compel (Oct. 8, 2019), A.R. 292-503.

pending a decision on any motion for summary judgment."[37] Plaintiff also asserted that because he had "alleged that the fuel surcharge is not calculated or charged to recover Defendants' actual fuel costs in breach of the parties' contract," Defendants' internal accounting information is "directly relevant to *Plaintiff's allegations*."[38] Plaintiff repeatedly asserted that he is entitled to additional discovery pertaining to "any customer" and the entire time period the fuel surcharge was implemented, because "[s]uch information and documents are relevant and discoverable under Rules 26 and 34 of the West Virginia Rules of Civil Procedure."[39]

Defendants responded to Plaintiff's motion to compel within three days, again mindful of the brief time for discovery to be completed.[40] Defendants explained that this case has been procedurally similar to *GMS Mine Repair*—that is, the circuit court had, indeed, bifurcated discovery and deferred class certification by ordering limited discovery after which Defendants could move for summary judgment.[41] Defendants explained that, because Plaintiff does not currently represent all customers, discovery relating to all customers "is irrelevant . . . and thus impermissible in advance of a ruling on Defendant's forthcoming dispositive motion."[42]

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[37] *Id.* at 7, A.R. 298. Plaintiff also asserted that he "is **not** seeking open-ended class discovery at this time," *id.* (emphasis in original), but never explains what class discovery he is not seeking. It is difficult to conceive of additional class discovery that Plaintiff could propound beyond his 171 written requests and 41 Rule 30(b)(7) topics.

[38] *Id.* at 13 (emphasis added), A.R. 304; *id.* at 16 ("This information is clearly relevant to Plaintiff's claims regarding the fuel surcharge – particularly that the fuel surcharge is not used to recover or offset Defendants' actual fuel costs but is instead used to improperly increase Defendants' profits at its customers' expense."), A.R. 307; *see also* Mar. 2, 2020 Hr'g Tr. at 43 (Plaintiff's counsel stating that "we need the financial statements to confirm, in fact, whether that fuel surcharge actually recovers their fuel costs"), A.R. 618.

[39] Pl.'s Mot. To Compel at 9-17, A.R. 300-08; *see also, e.g.*, March 2, 2020 Hearing Tr. at 41 (asserting that Plaintiff is entitled to "[a]ny disclosures they made to their *customers* regarding . . . this fuel surcharge and . . . how it's calculated") (emphasis added), A.R. 616.

[40] Defs.' Resp. to Pl.'s Mot. To Compel (Oct. 11, 2019), A.R. 504-29.

[41] *Id.* at 5-7, A.R. 508-10.

[42] *Id.* at 7, A.R. 510.

Defendants also responded that their discovery responses are not insufficient simply because they "[do] not align with the extreme allegations of Plaintiff's complaint that he apparently made without research or investigation."[43]

Plaintiff did not obtain a hearing date or otherwise pursue his motion to compel, and so Plaintiff moved on November 1, 2019, to extend the discovery period.[44] Plaintiff's motion acknowledged that Stanley Steemer provided an interrogatory answer explaining how and why it implemented the $8.00 fuel surcharge, and Plaintiff acknowledged that International answered "that [it] does not require its franchisees to include a fuel surcharge and that it leaves pricing to the discretion of each franchisee."[45] Plaintiff, however, characterized these *verified* interrogatory answers as "unsubstantiated statements" and said that he "[had] not received any documents to independently confirm or deny" the statements.[46]

Defendants again promptly responded on November 8, 2019.[47] Defendants stated that Stanley Steemer's verified answers fully explain the fuel surcharge, that International's verified answers establish its lack of involvement with any price-setting, and that their witnesses, who were to be deposed within days, would confirm these verified answers.[48] "Anything more is asking Defendants to prove a negative, which is not their obligation. Nothing more about the fuel surcharge exists to be discovered."[49]

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[43] *Id.* at 4, A.R. 507.

[44] Pl.'s Mot. To Extend Disc. (Nov. 1, 2019), A.R. 530-37.

[45] *Id.* at 4-5, A.R. 533-34.

[46] *Id.* at 5, A.R. 534.

[47] Defs.' Opp'n to Pl.'s Mot. To Extend Disc. (Nov. 8, 2019), A.R. 538-61.

[48] *Id.* at 4, A.R. 541.

[49] *Id.*, A.R. 541. Defendants also pointed out that Mr. Skiles had testified that further discovery would be immaterial to him, because "I don't think anything's going to satisfy my curiosity [about the fuel

E. THE CIRCUIT COURT GRANTED PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND RE-OPENED DISCOVERY.

After briefing and a hearing,[50] the circuit court granted Plaintiff's motions and entered the order from which Defendants appeal. At the hearing on March 2, 2020, the circuit court did not conduct a request-by-request review of the numerous discovery requests for which Plaintiff sought to compel supplemental responses,[51] nor did it analyze Defendants' objection to providing class discovery under *GMS Mine Repair*. It instead heard general arguments on the nature of the dispute and directed Plaintiff to submit a proposed order granting his motion to compel.[52]

Plaintiff submitted his proposal shortly thereafter, outlining all the class discovery that he sought to obtain from Defendants before a ruling on the viability of his individual claim. The circuit court entered that order with minor revisions on October 30, 2020 (the "Order"), granting Plaintiff's motions in their entirety.[53] The Order directs Defendants to provide **all** the disputed information and documents, including wide-ranging class discovery "from the inception of the fuel surcharge in 2012 to the present . . . not limited to the fuel surcharge charged to Plaintiff."[54]

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surcharge]." *Id.* at 2, A.R. 539. Mr. Skiles also conceded that that "a business is allowed to set its prices however it wants." *Id.* at 4, A.R. 541.

[50] Although the 90-day limited discovery period closed on November 13, 2019, by which time all disputes were to be resolved, Plaintiff did not obtain a hearing date for his motions and have them heard until March 2, 2020.

[51] The circuit court indicated that it had not "gone through every single one of them." Mar. 2, 2020 Hr'g Tr. at 60:11-12, A.R. 635.

[52] The circuit court further directed Plaintiff to include in the proposed order "whatever that case law [Defendants are] saying" because it thought "there [was] going to be a writ filed." *Id.* at 69:2-3, 22, A.R. 644. The case law that Defendants relied upon in briefing and at the hearing was this Court's decision in *GMS Mine Repair*.

[53] *See generally* Order on Pl.'s Mot. To Compel & Pl.'s Mot. To Extend Disc. (Oct. 30, 2020), [hereinafter the "Order"], A.R. 1-9.

[54] Order at 1-2, A.R. 1-2.

The Order states without analysis that this class discovery "is directly relevant to Plaintiff's allegations"—which Plaintiff made without any investigation and thus without any basis—and that the class discovery does not constitute "open-ended" class discovery.[55] The Order also discounts this Court's guidance in *GMS Mine Repair* because, purportedly, Plaintiff does not seek "open-ended class discovery" and "no potentially dispositive issue of statutory construction related to Plaintiff's individual claim exists."[56] In fact, the only class discovery that Plaintiff does not seek, and the only class discovery that the Order does not require Defendants to produce at this stage, is merely "the scope and membership of the purported class."[57] And a dispositive issue of *contract* construction exists in Defendants' pending motion to dismiss.

Although the only conduct currently at issue is an $8.00 fuel surcharge that Plaintiff paid Stanley Steemer in January 2019, the Order requires Defendants to produce information and documents about the fuel surcharge spanning almost a decade since its inception. The Order incorrectly reasons that the broad class discovery it directs somehow "overlap[s]" with individual discovery.[58] For example, the Order requires Defendants to produce the following purely class discovery:

- "[F]orm documents, letters or communications sent to customers in West Virginia regarding the fuel surcharge Fee . . . from January 2012 to the present."
- "[P]rofit and loss statements (and/or financial statements) . . . from January 2012 to the present."

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[55] *Id.* at 2-3, A.R. 2-3.

[56] *Id.* at 4, A.R. 4.

[57] *Id.*

[58] *Id.* In doing so, the Order summarily rejects, among other things, Defendants' objections to providing unfettered access to years of its business records based on Plaintiff's uninformed allegations, *id.* at 5, A.R. 5, although Plaintiff already has the fullest explanation of the fuel surcharge that can be provided.

- "[D]ocuments referring or relating to the fuel surcharge Fee from Defendant's website" without limitation "as to time period."

- "[D]ocuments referring or relating to any decision to implement, increase, or change the amount or character of the fuel surcharge Fee . . . from January 2012 to the present."

- "[D]ocuments referring or relating to the revenue stream and/or revenue flow" for the fuel surcharge "from 2012 to the present."

- "[D]ocuments referring or relating to Defendant's cost of fuel" and "internal fuel costs used for internal budgeting purposes, from 2012 to the present."

- "[A]ll electronic communications . . . which reference, mention, or concern the fuel surcharge Fee from January 2012 to the present."[59]

The Order also requires Defendants to answer interrogatories that are facially unrelated to Plaintiff and his claim to recover $8.00 paid in January 2019. Instead, the discovery relates directly to the purported class that Plaintiff seeks to represent:

- "Defendants are ordered to identify in detail each cost which is considered and/or used in the calculation of the fuel surcharge Fee, to include the weight provided to each cost at any given time from the inception of the fuel surcharge to the present."

- "Defendants are ordered to identify the total amount of monies received for payment or charging of the fuel surcharge Fee in West Virginia for each year, from January 2012 to the present, including a separate annual listing of revenues for the fuel surcharge Fee for each year."

- "Defendants are ordered to explain in detail the revenue stream and/or where the revenue from the fuel surcharge flows . . . for each year from 2012 to the present."

- "Defendants are ordered to identify or list the price per gallon of fuel used for internal budgeting or estimating purposes for every time such a budgeting or estimating process was completed . . . from January 2012 to the present."[60]

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[59] *Id.* at 6-8, A.R. 6-8. Without explanation or justification, the Order requires Defendants to produce electronic communications in native format with metadata. *Id.*

[60] *Id.* at 8-9, A.R. 8-9.

Finally, the Order requires Defendants to make available for deposition *another* apex fact witness—Jason Fender, one of the owners and vice presidents of Stanley Steemer—as well as the four witnesses Plaintiff already deposed in November 2019.

* * *

Accordingly, Defendants request that this Court vacate the circuit court's order compelling further discovery from Defendants and order the circuit court to allow Defendants to move for summary judgment on Plaintiff's individual claims, which must be resolved before anything further occurs in the case.

III. SUMMARY OF THE ARGUMENT

This Court held in *GMS Mine Repair* that, "[w]hen a circuit court elects to defer ruling on the issue of class certification pending its decision on a motion for summary judgment, class discovery should be stayed until such time as the circuit court decides the motion, unless the non-moving party has demonstrated that significant prejudice will result from a discovery stay."[61] This is because "a class cannot be certified unless the named plaintiffs have a cause of action."[62]

In this case, the circuit court's original August 15, 2019, Order is in full accord with *GMS Mine Repair*. The circuit court ordered limited discovery—with Defendants' motion to dismiss still pending—after which Defendants would move for summary judgment on Plaintiff's individual claims. The circuit court vacated its scheduling order, so the parties' only deadline was the November 13, 2019 deadline to complete limited discovery.

Plaintiff nonetheless pursued extensive discovery from Defendants that was predominantly class discovery. Defendants responded to discovery pertinent to Plaintiff's individual claims and,

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[61] Syl. pt. 4, in part, 238 W. Va. 707, 798 S.E.2d 833.

[62] *Id.* at 714, 798 S.E.2d at 840 (quotation and citation omitted).

in doing so, provided a full explanation of the fuel surcharge applicable to the purported class. Still, Defendants objected to providing additional class discovery at this time, citing *GMS Mine Repair*. Plaintiff, ignoring this Court's three-year-old decision, moved to compel.

Rather than hold Plaintiff to its August 15, 2019, Order and allow Defendants to move for summary judgment, the circuit court granted Plaintiff's motion to compel. In reversing course and compelling Defendants to produce class discovery before resolving their challenge to Plaintiff's individual claims, the circuit court substantially abused its discretion in precisely the same manner as the circuit court in *GMS Mine Repair*.

Accordingly, the result here should be the same. This Court should prohibit further discovery of Defendants before the circuit court resolves their motion for summary judgment on Plaintiff's individual claims.

IV. STATEMENT REGARDING ORAL ARGUMENT

Because this Court's *GMS Mine Repair* decision controls in the nearly identical circumstances of this case, oral argument is not necessary. But should the Court wish to hear from the parties, oral argument under Rule 19(a) of the *West Virginia Rules of Appellate Procedure* would be appropriate, because this case involves "an unsustainable exercise of discretion where the law governing that discretion is settled."

V. ARGUMENT

A. ISSUANCE OF A WRIT OF PROHIBITION IS APPROPRIATE WHEN, AS HERE, A CIRCUIT COURT HAS SUBSTANTIALLY ABUSED ITS DISCRETION THROUGH A DISCOVERY ORDER.

"A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders."[63] As this Court found in *GMS*

[63] Syl. pt. 1, *GMS Mine Repair & Maint., Inc. v. Miklos*, 238 W. Va. 707, 798 S.E.2d 833 (2017) (quoting Syl. pt. 1, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)). "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when

Mine Repair, the assignment of error here, which similarly involves "whether a threshold legal issue should be resolved prior to conducting class discovery," may be "entertain[ed] . . . under [its] original jurisdiction in prohibition."[64] And as this Court did in *GMS Mine Repair*, it has repeatedly granted writs of prohibition to correct abuses of discretion by trial courts during discovery.[65]

B. *GMS MINE REPAIR* HOLDS THAT, ABSENT SIGNIFICANT PREJUDICE, CLASS DISCOVERY IS PROHIBITED BEFORE RESOLUTION OF A DISPOSITIVE MOTION ON A PLAINTIFF'S INDIVIDUAL CLAIMS.

In *GMS Mine Repair*, this Court considered "whether class discovery should proceed when a defendant files or intends to file a motion for summary judgment on the purported class representative plaintiff's individual claim."[66] In considering that question, this Court affirmed that "a class cannot be certified unless the named plaintiffs have a cause of action."[67] After a fulsome survey of pertinent law, this Court observed:

> While limited discovery directed to a purported class representative may be necessary for summary judgment purposes, it would be counterintuitive to allow class discovery to proceed where a court has elected to defer ruling on class certification until it first decides a motion for summary judgment. **Indeed, as a general proposition, allowing class discovery to proceed once a court has elected to first address a dispositive motion would be illogical and contrary to the very purpose for deferring class certification in the first instance.**[68]

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the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1; *see also* Syl. pt. 1, in part, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (noting that purpose of writ of prohibition is "to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers").

[64] 238 W. Va. at 711, 798 S.E.2d at 837.

[65] *See, e.g.*, *State ex rel. Erickson v. Hill*, 191 W. Va. 320, 326, 445 S.E.2d 503, 509 (1994) ("[W]e find the circuit court's discovery order is oppressive and burdensome on its face."); *State ex rel. Potomac Trucking & Excavating, Inc. v. Courrier*, No. 16-0183, 2016 WL 5851925, at *6 (W. Va. Oct. 6, 2016) (mem. dec.) ("[T]he circuit court exceeded its authority and legitimate powers as it acted outside the scope of West Virginia Rule of Civil Procedure 34.").

[66] 238 W. Va. at 713, 798 S.E.2d at 839.

[67] *Id.* at 714, 798 S.E.2d at 840 (quotation and citation omitted).

[68] *Id.* at 719, 798 S.E.2d at 845 (emphasis added) (citation omitted).

Accordingly, this Court held that,

> [w]hen a circuit court elects to defer ruling on the issue of class certification pending its decision on a motion for summary judgment, class discovery should be stayed until such time as the circuit court decides the motion, unless the non-moving party has demonstrated that significant prejudice will result from a discovery stay.[69]

Because the plaintiff in *GMS Mine Repair* had not demonstrated that it would be significantly prejudiced by a stay of class discovery, the circuit court "substantially abused its discretion in refusing to stay class discovery pending a ruling on the threshold legal issue of statutory construction that bears on the viability of the respondent's individual claim."[70] "Critically, [a] class action does not allow the class representative to avoid being confronted with the weaknesses in [his] own case."[71]

C. THIS CASE IS IDENTICAL TO *GMS MINE REPAIR*, AND THE RESULT SHOULD BE THE SAME.

1. This case is procedurally identical to *GMS Mine Repair*.

In *GMS Mine Repair*, the circuit court refused to stay class discovery pending an opportunity for the defendant to move for summary judgment on the plaintiff's individual claims, and the defendant sought relief from that ruling.[72] This Court reversed and issued two new syllabus points establishing that (i) a circuit court, for efficiency, may defer ruling on class certification until deciding a summary judgment motion on a plaintiff's individual claims, and (ii) when a circuit court takes this route, "class discovery should be stayed until such time as the circuit court decides the motion," absent a demonstration of "significant prejudice."[73]

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[69] Syl. pt. 4, in part, *id.*

[70] *Id.* at 719, 798 S.E.2d at 845.

[71] *Id.* (quotation and citation omitted).

[72] *Id.* at 710-11, 798 S.E.2d at 836-37.

[73] Syl. pts. 3 & 4, *id.*

By its August 15, 2019, Order in this case, the circuit court initially hewed to *GMS Mine Repair*. The circuit court (i) held Defendants' motion to dismiss in abeyance; (ii) granted in part Defendants' motion to stay discovery and ordered limited discovery to be fully completed in 90 days; (iii) ordered that Defendants could renew their motion to dismiss or move for summary judgment after limited discovery; and (iv) deferred ruling on class certification by vacating its original scheduling order.[74]

The circuit court stated that "it is the Court's opinion that it is an inefficient use of resources for the parties to delve into the work of identifying the class if there is no basis for Plaintiff's individual claim."[75] The circuit court's August 15, 2019, Order thus mirrors the statement in *GMS Mine Repair* that "[w]hile limited discovery directed to a purported class representative may be necessary for summary judgment purposes, it would be counterintuitive to allow class discovery

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[74] Aug. 15, 2019, Order, A.R. 56-58. Just as a stay of discovery is appropriate pending a motion for summary judgment in class action cases, the same principle applies to motions to dismiss. *See Raykovitz v. Elec. Builders, Inc.*, No. CV 119-137, 2019 WL 7341602, at *1 (S.D. Ga. Dec. 30, 2019) ("when balancing the costs and burdens to the parties, the Court concludes all discovery should be stayed pending resolution of Defendant's motion to dismiss, and discovery regarding the putative class members should be stayed pending resolution of Plaintiff's motion for conditional certification"); *Gill-Samuel v. Nova Biomedical Corp.*, No. 13-62591-CIV, 2014 WL 11762719, at *1 (S.D. Fla. Feb. 18, 2014) ("The Court's ruling on whether to strike Plaintiff's class-action allegations or dismiss the Complaint in its entirety can have significant ramifications on the scope of any factual discovery between the parties. And discovery is not required for the Court to rule on the purely legal questions addressed by the Motion to Dismiss and Motion to Strike. Accordingly, it is ORDERED and ADJUDGED that Defendant's Motion to Stay Discovery [ECF No. 18] is GRANTED."); *J&G Invs., LLC v. Fineline Properties, Inc.*, No. 5:06 CV 2461, 2007 WL 928642, at *5 (N.D. Ohio Mar. 27, 2007) ("It makes sense to stay discovery in a class action pending resolution of motions to dismiss which might resolve the entire case."); *see also* W. Ackerman, *Strategies to Consider: Defending Class Actions on Coverage Issues*, 53 No. 5 DRI For Def. 41 (May 2011) ("If a proposed class action is litigated in a federal court, a defense attorney has a good chance of obtaining a stay of discovery pending a ruling on a motion to dismiss. The U.S. Supreme Court's decisions modifying the standard for a Fed. R. Civ. P. 12(b)(6) motion strongly suggest that a court should stay discovery while adjudicating a motion to dismiss in a class action.").

[75] Oct. 30, 2020, Order at 2, A.R. 57.

to proceed where a court has elected to defer ruling on class certification until it first decides a motion for summary judgment."[76]

Plaintiff here sought and obtained extensive discovery from Defendants. During the 90-day discovery period, Plaintiff obtained responses and objections to 171 written discovery requests, including full answers from both Defendants about the fuel surcharge. Plaintiff also deposed four witnesses, including two apex witnesses as both fact witnesses and corporate representatives.

In an attempt to extend the fishing expedition that he had been on from the beginning, Plaintiff moved to compel even more discovery from Defendants.[77] In his motion to compel, Plaintiff complained that he has not received discovery pertaining to all Defendants' "West Virginia customers" since 2009. For example, Plaintiff sought discovery of:

- "[A]ll form letters or communications sent to *customers*" and "a sample copy of each document . . . directed to *any customer/potential customer*;"[78] and
- Such broad categories as:
    - "each cost which is considered and/or used in the calculation of the fuel surcharge Fee, to include the weight provided to each cost *at any given time from 10 years prior to the filing of this complaint*;"
    - the name, address, and telephone number of "individuals whose job duties had anything to do with the creation, implementation, or decision to charge the fuel surcharge fee" during the "*10 years prior to the filing of this complaint*;" and

[76] 238 W. Va. at 719, 798 S.E.2d at 845 (citation omitted).

[77] *See* Pl.'s Mot. To Compel, A.R. 292-503. Plaintiff, however, did not abide by the circuit court's order that discovery was to be conducted expeditiously so that "any objections, discovery motions, and related briefing can be resolved" before the end of 90 days. Plaintiff did not obtain a hearing date or other court action on its motion to compel or motion for extension by November 13, 2019.

[78] *Id.* at 9-10 (emphases added), A.R. 300-01.

- "the price per gallon of fuel used for internal budgeting or estimating purposes . . . from *10 years prior to the filing of this complaint through the present.*"[79]

Such discovery is, by definition, class discovery, which *GMS Mine Repair* holds is impermissible in this case's current procedural posture.

2. Plaintiff presented nothing to overcome the holding of *GMS Mine Repair.*

Plaintiff's repeated justification for seeking broad class discovery is that "[s]uch information and documents are relevant and discoverable under Rules 26 and 34 of the *West Virginia Rules of Civil Procedure.*"[80] By arguing for mere discoverability, Plaintiff ignored the limitations arising from the procedural posture of this case and the circuit court's August 15, 2019, Order that "limited discovery" be completed in 90 days. Plaintiff never argued for, much less demonstrated, the applicability of the "significant prejudice" exception to the *GMS Mine Repair* bar to class discovery.

Plaintiff also never specified what additional discovery he would need to defend the summary judgment arguments that are fully previewed in Defendants' motion to dismiss. Discovery of Defendants' dealings with other customers has no bearing on the specific circumstances of Plaintiff agreeing to and paying a quoted price to have his carpets cleaned. Plaintiff's individual circumstances are the focus of Defendants' pending motion to dismiss and will continue to be the focus of the forthcoming motion for summary judgment. Plaintiff never explained what was "limited" about the discovery he seeks, and it plainly goes beyond appropriate discovery in this breach of contract case. It is difficult, if not impossible, to conceive of a litigation

[79] *Id.* at 15-17 (emphases added), A.R. 306-08.

[80] *Id.* at 9-17, A.R. 300-08.

scenario in which a customer's contract claim for $8.00 would entitle the customer to delve into a business's internal accounting and discover profit margins.

In sum, Plaintiff never made an argument for additional discovery that is pertinent to the procedural posture of this case—that is, an argument in conformance with *GMS Mine Repair* and the circuit court's August 15, 2019, Order. Mere discoverability is not a justification to compel additional discovery in these circumstances.

3. By compelling class discovery at this time, the circuit court here made an error identical to that made by the *GMS* circuit court.

The October 30, 2020, Order rejects *GMS Mine Repair* and grants Plaintiff's request for wide-ranging class discovery. The Order does so despite the circuit court's decision to keep Defendants' motion to dismiss pending and allow it to be expanded to a motion for summary judgment before the putative class claims proceed. The Order reasons that *GMS Mine Repair* does not apply here because Plaintiff is not seeking "open-ended class discovery" regarding "the scope and membership of the purported class." But class discovery is not only to identify members of a purported class. The Order also characterizes the compelled discovery as "limited" in scope, although even of casual review of the Order shows that characterization to be inaccurate. Nothing about the Order is "limited." That the Order unjustifiably compels class discovery cannot be changed by the Order's own mischaracterizations of what it does.

Despite the procedural posture of this case being identical to that in *GMS Mine Repair*, the Order compels Defendants to open to Plaintiff eight years of business records when only Plaintiff's individual claim for $8.00 is at issue. As specifically described above, the information and documents that Defendants must produce include profit and loss statements, revenue streams, methods of calculation, methods of accounting, fuel costs, and internal budgeting information. This is open-ended class discovery that *GMS Mine Repair* prohibits in the current procedural

posture of this case. Stanley Steemer already explained the origin and implementation of the fuel surcharge, and International explained that it is not involved in its franchisees' pricing decisions. Any additional information or documents about Defendants' business practices since 2012 has no bearing on Plaintiff's individual claims.

The circuit court's August 15, 2019, Order left all the legal arguments in Defendants' motion to dismiss pending while the parties conducted limited discovery. Defendants could then expand their motion to dismiss into a motion for summary judgment. "[L]imited discovery directed to a purported class representative may be necessary for summary judgment purposes . . . ."[81] Plaintiff, however, abused the opportunity for limited discovery, and the circuit court gave its imprimatur to that abuse. The circuit court now has ordered that Plaintiff is entitled to class discovery. But Plaintiff does not need discovery at this stage to "prove [his] allegations," by which he means class allegations. *GMS Mine Repair* requires that Defendants' dispositive motion on Plaintiff's individual claims be resolved first.

VI. CONCLUSION

WHEREFORE, the Defendants respectfully request that this Court: (1) vacate the circuit court's Order compelling further discovery from Defendants and order the circuit court to allow Defendants to move for summary judgment on Plaintiff's individual claims, which must be resolved before anything further occurs in the case, and (2) award Defendants such other relief as set forth herein and/or that the Court deems appropriate.

[81] *GMS Mine Repair*, 238 W. Va. at 719, 798 S.E.2d at 845.

Respectfully submitted,

PARTNERS TOO, INC., d/b/a STANLEY STEEMER; and STANLEY STEEMER INTERNATIONAL, INC.,

By Counsel:

Ancil G. Ramey (W. Va. Bar No. 3013)
ancil.ramey@steptoe-johnson.com
Russell D. Jessee (W. Va. Bar No. 10020)
russell.jessee@steptoe-johnson.com
James E. McDaniel (W. Va. Bar No. 13020)
jim.mcdaniel@steptoe-johnson.com
STEPTOE & JOHNSON PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Facsimile: (304) 353-8180
Counsel to Petitioners

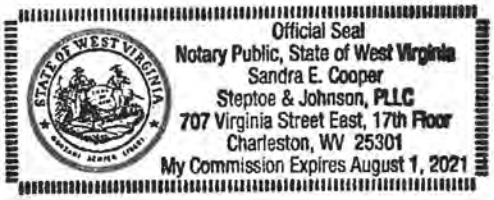
VERIFICATION

I, Russell D. Jessee, Esq., being first duly sworn, state that I have read the foregoing VERIFIED PETITION 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.

Russell D. Jessee

Taken, subscribed, and sworn to before me this 4th day of November, 2020.

My Commission expires: August 1, 2021.



CERTIFICATE OF SERVICE

I, Russell D. Jessee, do hereby certify that (i) the following are the persons upon whom a rule to show cause should be served, if granted, and (ii) I served this "VERIFIED PETITION FOR WRIT OF PROHIBITION" and this "APPENDIX TO PETITION FOR WRIT OF PROHIBITION" on November 9, 2020, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Honorable Carrie L. Webster, Judge
Kanawha County Judicial Building
P.O. Box 2351
111 Court Street
Charleston, WV 25301

Stuart Calwell, Esq.
L. Dante' diTrapano, Esq.
David H. Carriger, Esq.
Calwell Luce diTrapano
Laws and Arts Center West
500 Randolph Street
Charleston, WV 25302

Patrick C. Marshall, Esq.
Methvin, Terrell, Yancy, Stephens & Miller, P.C.
2201 Arlington Avenue South
Birmingham, AL 35205

Ancil G. Ramey (W. Va. Bar No. 3013)
ancil.ramey@steptoe-johnson.com
Russell D. Jessee (W. Va. Bar No. 10020)
russell.jessee@steptoe-johnson.com
James E. McDaniel (W. Va. Bar No. 13020)
jim.mcdaniel@steptoe-johnson.com
STEPTOE & JOHNSON PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000;
Facsimile: (304) 353-8180
Counsel to Petitioners