IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 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.

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONERS' VERIFIED PETITION FOR WRIT OF PROHIBITION

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COMES NOW Respondent/Plaintiff, Ken Skiles (hereinafter "Plaintiff") by and through his undersigned counsel, and files its brief in opposition to the petition for writ of prohibition filed by Petitioners/Defendants Partners Too, Inc. d/b/a Stanley Steemer ("Stanley Steemer") and Stanley Steemer International, Inc.'s ("Stanley Steemer International") (hereinafter collectively "Petitioners" or "Defendants").

Petitioners have failed to identify any legally cognizable abuse of discretion or legal error committed by the Circuit Court. Petitioners writ of prohibition is entirely premised on the inaccurate assertion that the Circuit Court "abused its discretion" by not following this Court's holding in *GMS Mine Repair & Maint., Inc. v. Miklos*, 238 W.Va. 707, 798 S.E.2d 833 (W. Va. 2017), i.e., by purportedly ordering Petitioners to provide class discovery before resolving their dispositive motion on Plaintiff's individual claims. However, Petitioners assertions are incorrect. First, the Circuit Court has not elected to defer ruling on issues of class certification pending a decision on the Petitioners' not-yet-filed motion for summary judgment or their motion to dismiss, making this Court's 2-prong holding in *GMS Mine Repair* inapplicable. Second, even if the Circuit Court had made such a ruling, the Circuit Court's order does not compel Petitioners to produce **any** class discovery, instead explicitly excluding open-ended class discovery at this time. Third, even if the Circuit Court had ordered the production of class discovery, no statutory threshold issues exist that should have been resolved prior to ordering the limited, non-class fuel surcharge discovery and the Circuit Court's decision to order such discovery is entirely discretionary under West Virginia law. Petitioners have, therefore, failed to meet the stringent standard for a writ of prohibition, as they have not shown clear error as a matter of law in this discretionary, interlocutory decision. Accordingly, the petition for writ of prohibition should be denied. In further opposition, Respondent states as follows:

I. QUESTIONS PRESENTED

1. Whether the Petitioners have met their heavy burden to show that the Circuit Court committed clear legal error or abused its discretion in ordering limited, non-class discovery related to the fuel surcharge because such discovery will necessarily have overlapping relevance to the class claims, particularly when the Circuit Court has not elected to defer ruling on class certification until it first decides a motion for summary judgment.
2. Whether a writ of prohibition is an appropriate remedy under the facts and circumstances of this case, where the petition is in essence an attempt to obtain an impermissible appeal of a discretionary, interlocutory order to produce limited, non-class discovery.

II. STATEMENT OF THE CASE

Plaintiff filed its Complaint on February 19, 2019 (almost two years ago), and was forced to file its Motion to Compel on October 8, 2019 and Motion to Extend Discovery on November 1, 2019, as a direct result of the ongoing delay caused by Petitioners' continued and unfounded refusal to produce the limited fuel surcharge discovery (which they have now been ordered to produce twice).[1] Pet. Appx. 292-311, 530-537. Petitioners suggestion that they have promptly acted throughout this litigation is as disingenuous as their assertions that the Circuit Court has ordered them to produce class discovery, which it has not. Petitioners have universally refused to comply with the Circuit Court's multiple orders to produce the limited fuel surcharge discovery,

[1] Due to the backlog of the Circuit Court's docket, Respondent's motion to compel and motion to extend discovery was not able to be heard until March 2, 2020. After which, the impacts of the global COVID-19 pandemic delayed the case an additional eight (8) months.

produced only fourteen (14) documents responsive to Plaintiff's requests for production, and incorporated numerous improper general objections into each of Plaintiff's Requests for Production, Interrogatories, and Requests for Admissions in direct disregard for the Circuit Court's rulings.

By way of background, on July 30, 2019, the Circuit Court emailed the parties its Order Deferring and Holding in Abeyance its ruling on Defendants' Motion to Dismiss Plaintiff's Class Action Complaint and Granting in Part Defendants' Motion to Stay Discovery Pending Resolution of Defendants' Motion to Dismiss Plaintiff's Class Action Complaint.[2] Pet. Appx. 313. The Court directed counsel for Petitioners to prepare and circulate an order reflecting the Court's ruling. *Id.* However, upon reviewing Petitioners draft proposed order, Respondents noticed that it contained improper additional language that the Circuit Court had not included in the order it originally drafted and emailed to the parties on July 30, 2019; namely (1) proposed language limiting discovery "to the fuel surcharge charged to Mr. Skiles only" and (2) language staying any class discovery. Pet. Appx. 293-294, 313-325. Respondent requested the opportunity to edit Petitioners' proposed order in order to eliminate this additional language and to simply make the order consistent with the Court's email, but Petitioners would not agree. *Id.* Respondent, therefore, submitted its Alternative Proposed Order to the Court, including a redlined version of Petitioners' proposed order demonstrating the provisions that Respondent originally sought to strike. *Id.*

Subsequently, on August 15, 2019, this Court entered Respondents proposed order holding in abeyance Defendants' Motion to Dismiss and Granting in Part Defendants' Motion to Stay Discovery. Pet Appx. 326-329. In doing so, the Circuit Court specifically declined to include

[2] Petitioners' Motion to Stay Discovery did not seek to stay "class discovery", but all discovery. Pet. Appx. 049-055; *see also* Pet. Writ. P. 4, fn. 14.

Petitioners additional language limiting the scope of discovery to Mr. Skiles only, or to staying class discovery, instead reiterated that its ruling was "clear and unambiguous". Pet. Appx. 330-331. The Court's Order specifically directed "**the parties to engage in limited discovery for a period of three months on the fuel surcharge issue *only***" and ordered that discovery be completed by November 13, 2019. Pet Appx. 326-329.

Prior to this order, on August 13, 2019, Respondent served Petitioners with its First Set of Requests for Production, Interrogatories, and Requests for Admissions. Pet. Appx. 294-296. On September 12, 2019, Petitioners filed and served their responses and objections to Respondents written discovery which included only fourteen documents responsive to Plaintiff's First Requests for Production of Documents. *Id.* Petitioners discovery responses were severely limited due to Petitioners incorporation of numerous, improper "General Objections" into each of Respondent's Requests for Production, Interrogatories, and Requests for Admission – which directly ignored the Circuit Court's ruling.[3] For example, Petitioners' "General Objections" objected to:

a) disclosing internal business information regarding how either Defendant sets prices or accounts for income and expenses (regarding the fuel surcharge);

b) responding to class discovery;

c) answering discovery requests that are premised on Plaintiff's purported "inaccurate suppositions regarding the fuel surcharge at issue in this case"; and

d) to producing documents regarding Defendants' fuel surcharge and asserting that "[d]iscovery is limited to the fuel surcharge charged to Mr. Skiles only."

[3] Under the functionally identical federal rule, "[i]t is well established in this jurisdiction that general objections are impermissible. *Hager v. Graham*, 267 F.R.D. 486, 492 (N.D.W. Va. 2010); *Fisher v. Baltimore Life Ins. Co.*, 235 F.R.D. 617, 622 (N.D. W.Va. 2006). This is because "[g]eneral objections to discovery, without more, do not satisfy the burden of the responding party under the Federal Rules of Civil Procedure to justify objections to discovery because they cannot be applied with sufficient specificity to enable courts to evaluate their merits. *Hager*, 267 F.R.D. at 492.

Id. Respondent subsequently requested via letter that Petitioners supplement their discovery responses and document production. Pet. Appx. 295. In addition, Respondent stipulated that it would treat any document production as confidential until entry of an agreed upon protective order.[4] Petitioners further objected to producing Rule 30(b)(7) corporate representative depositions for Defendant Partners Too, Inc., instead limiting any testimony to the named Plaintiff only, and objected to producing a 30(b)(7) witness for Defendant Stanley Steemer International ("International") other than to verify International's interrogatory responses.[5] Pet. Appx. 530-537. Respondent was, therefore, forced to notice and conduct the depositions without the benefit of responsive documents or information to ensure compliance with the then-pending November 13, 2019 discovery deadline. Pet Appx. 121-145, 562-576. Despite Respondent's repeated attempts to resolve these issues, Petitioners would not agree and Respondent was forced to file its Motion to Compel and Motion to Extend Discovery.[6] Pet. Appx. 292.

Ultimately, after considering the briefs and extensive oral argument of the parties, including Petitioners arguments regarding *GMS Mine Repair*, the Circuit Court agreed with Respondent's motions to compel and extend discovery. Pet. Appx. 001-009. Analyzing the record evidence, the Circuit Court reasonably determined that limited discovery on the fuel surcharge was

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[4] The parties have subsequently agreed upon and filed a Protective Order protecting any documents Petitioners may designate as confidential.

[5] The record evidence presented to the Circuit Court demonstrated that International does, in fact, require specific accounting and reporting of the fuel surcharge revenue from its franchisees (Partners Too, Inc.), which is ultimately paid to International. Pet. Appx. 620-621.

[6] Petitioners' statement that Respondent never "pursued his motion to compel" is categorically false. Pet. Writ. P. 12. Being well aware of this Court's November 13, 2019 discovery deadline, Respondent made repeated attempts to obtain a hearing date for Plaintiff's Motion to Compel and even filed a notice of hearing for a date to be determined on October 22, 2019 so that these issues could be resolved expeditiously. Pet. Appx. 532. However, because a hearing date could not be obtained prior to the discovery deadline, Respondent was forced to conduct these depositions subject to Petitioners improper limitations.

necessary, finding that "even though Plaintiff is not seeking open-ended class discovery at this time, discovery as to the fuel surcharge charged to Plaintiff Skiles will necessarily overlap with discovery as to the fuel surcharge charged to each of Defendants' West Virginia customers" because it is "clear based on the evidence presented through the parties' motions and during oral argument that the fuel surcharge is charged in the same uniform manner and amount for each of Defendants' West Virginia customers." Pet. Appx. 001-009.[7] "Therefore, evidence as to when, how, and why Defendants charged the fuel surcharge will be the same for Plaintiff as it is for any other West Virginia customer. That the evidence necessary to establish Plaintiff's claims happens to be the same as that needed to establish the claims of Defendants' other West Virginia customers, does not provide Defendants with any justifiable objection to producing such evidence or preclude Plaintiff from obtaining such information and documents." *Id.* While Petitioners take issue with the Circuit Court's ruling that individual fuel surcharge discovery will necessarily overlap with class fuel surcharge discovery, *See* Pet. Writ. P. 14, Petitioners themselves admit that such discovery will necessarily overlap. *See* Pet. Writ. P. 10 ("[p]roviding class discovery was necessary to provide complete explanation about Plaintiff's individual transaction."). Such

[7] The court further stated that "[i]ndeed, the limited information produced by Defendants confirms that the decisions about their fuel surcharge were made on a corporate level and applied in the same uniform manner for each of their West Virginia customers. (citation omitted). For example, Defendant Partners Too, Inc.'s response to Plaintiff's Interrogatory No. 4 states that: (1) 'Defendant began applying the fuel surcharge in September 2012" and that "the decision to apply a fuel surcharge was prompted by a loss of money' (2) that 'Defendant decided to implement a fuel surcharge in the liquidated amount of $8.00 per job', (3) that the fuel surcharge is not calculated or charged 'on a customer-by-customer basis', and (4) that in setting the amounts of the fuel surcharge 'Defendant calculated what would be approximately 3%-4% of the total charge for its average residential job and rounded to $8.00.' Furthermore, Defendants verified that the fuel surcharge has always been charged in the standard, uniform amount of $8.00 since September 2012. *Id.* Therefore, evidence as to when, how, and why Defendants charged the fuel surcharge is the same for Plaintiff as it is for any other West Virginia customer.. . . Such discovery is permitted under the *West Virginia Rules of Civil Procedure* and this Court's August 15, 2019 Order, and is necessary to establish Plaintiff's claims and defend against Defendants' affirmative defenses and anticipated dispositive motions." Pet. Appx. 003, fn. 3.

contradictions only highlight the frivolousness of Petitioners' writ of prohibition and the reasonableness of the Circuit Court's limited discovery order.

Additionally, the Circuit Court again reiterated that it was not ordering the production of any class discovery in its recent Order Denying Defendants' Motion to Stay, stating that:

> The Court disagrees with Defendants' characterization of its rulings in the Order on *Plaintiff's Motion to Compel* and *Plaintiff's Motion to Extend Discovery*. In the order, the Court directed specific, limited discovery pertinent to the fuel surcharge issue only, which discovery is expressly permitted under the West Virginia Rules of Civil Procedure and this Court's inherent authority. **The discovery directed was not open-ended class discovery as suggested by Defendants' both in their motion seeking a stay and in their "Verified Petition for Writ of Prohibition."**
> . . .
> Moreover, West Virginia law is clear that "[d]iscovery orders lie within the discretion of a trial court." *Bartles v. Hinkle*, 472 S.E.2d 827, 835 (1996). In this case, the Court determined that discovery as to the fuel surcharge charged to Plaintiff Skiles will necessarily overlap with discovery as to the fuel surcharge charged to each of Defendants' West Virginia customers. *See GMS Mine Repair*, (recognizing that "certification-related discovery may overlap with merits-based discovery."). However, in light of the particular needs of the case, the Court's Order on *Plaintiff's Motion to Compel* and *Plaintiff's Motion to Extend Discovery* was crafted to direct specific, limited discovery pertinent to the fuel surcharge issue only; established a schedule for discovery; and set limitations on discovery in a fashion it deemed necessary for the proper management of discovery in the action.

Resp. Appx. 001-003.[8]

III. SUMMARY OF ARGUMENT

Petitioners' are seeking through the guise of a writ of prohibition an impermissible interlocutory appeal of the Circuit Court's discretionary decision to order specific, limited discovery pertinent to the fuel surcharge issue only. Petitioners have failed to identify any legally cognizable abuse of discretion or legal error committed by the Circuit Court. Importantly, the Circuit Court has not ordered Petitioners to produce any class discovery, nor has it elected to defer

[8] The Circuit Court entered this Order after the date that Petitioners filed their Verified Petition for Writ of Prohibition and Appendix.

ruling on the issues of class certification pending a decision on a not-yet-filed motion for summary judgment. Instead, the Circuit Court made a well-reasoned determination that limited fuel surcharge discovery was necessary for Respondent's individual claims. Therefore, the Circuit Court has not abused its discretion or exceeded its legitimate powers in any way by not following *GMS Mine Repair & Maint., Inc. v. Miklos*, 238 W.Va. 707, 798 S.E.2d 833 (W. Va. 2017), which is procedurally distinguishable from the facts of the present action. Petitioners simply disagree with the Circuit Court's discretionary decision, which is not sufficient to meet its heavy burden to justify the extraordinary relief of a writ of prohibition. Accordingly, Petitioners' writ of prohibition should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes that the issues presented are neither novel, nor do they present unsettled areas of law. While Respondent always welcomes oral argument under W. VA. R. APP. P. 18(a), should the Court deem it appropriate in this case, Respondents concede that this matter may be appropriate for memorandum decision under W. VA. R. APP. P. 21. Should the Court grant oral argument, Respondent believes that this case would fall under W. VA. R. APP. P. 19.

V. ARGUMENT

A. A Writ of Prohibition Should Not Issue Because the Circuit Court Was Well Within Its Discretion to Order Petitioners to Produce Limited, Non-Class Discovery Directed Towards the Fuel Surcharge.

Petitioners' petition for writ of prohibition is entirely premised on the argument that the circuit court "abused its discretion" by not following *GMS Mine Repair & Maint., Inc. v. Miklos*, 798 S.E.2d 833 (W. Va. 2017); essentially by purportedly ordering Petitioners to provide class discovery before resolving their dispositive motion on Plaintiff's individual claims. *See* Ver. Pet. at 1. This argument is legally and factually flawed. West Virginia law is clear that "[d]iscovery

orders lie within the sound discretion of a trial court." *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827, 835 (1996) (citing *Cox v. State*, 194 W.Va. 210, 460 S.E.2d 25 (1995)). Here, the Circuit Court's discovery order does not require Petitioners to produce "wide-ranging" class discovery, and the Circuit Court has not elected to defer ruling on the issues of class certification pending a decision on Petitioners' yet-to-be-filed motion for summary judgment. Therefore, the Circuit Court has not abused its discretion or exceeded its legitimate powers in any conceivable way.

1. *GMS MINE REPAIR* does not hold that a Circuit Court abuses its discretion by refusing to stay class discovery pending a ruling on motion for summary judgment.

Contrary to Petitioners' assertions, *GMS Mine Repair* does not hold that a circuit court abuses its discretion by refusing to stay class discovery pending a ruling on motion for summary judgment. Nor does *GMS Mine Repair* hold that class discovery is categorically barred absent a showing of "significant prejudice". What *GMS Mine Repair* does hold is that "where the interests of judicial efficiency and economy warrant, a circuit court **may** defer ruling on class certification under Rule 23(c)(1) of West Virginia Rules of Civil Procedure until a motion for summary judgment directed to the purported class representative's claim is decided", and that "the decision as to how best to proceed is dependent upon the facts and circumstances of a given case." *Id.* at 844–45 (emphasis added).[9] If a circuit court chose this path – to defer ruling on class certification

[9] As recognized in *GMS Mine Repair*, "whether to stay discovery is subject to a trial court's discretion." *Id.* at 840 (citing *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219-JST, 2015 WL 273188, *1, *3 (N.D. Cal. Jan. 20, 2015) (observing that "[t]he decision to bifurcate discovery in putative class actions prior to certification is committed to the discretion of the trial court" and finding that "bifurcation of discovery at this time is not warranted."); *Adams v. AllianceOne, Inc.*, No. 08-CV-248-JAH (WVG), 2011 WL 2066617, *2 (S.D. Ca. May 25, 2011) ("Defendant resisted further class discovery on grounds that a grant of its summary judgment motion would vitiate the need for the discovery. After consideration, the Court denied Defendant's motion to stay discovery, *again* ordered Defendant to produce documents, and warned Defendant of the consequence of not complying."); *Donnelly v. NCO Fin. Sys., Inc.*, 263 F.R.D. 500, 502 (N.D. Ill. 2009) (granting, in part, plaintiff's motion to compel discovery and denying defendant's

until a motion for summary judgment is decided – then, and only then, should class discovery "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." *Id.* at 845.

Here, unlike *GMS Mine Repair*, the Circuit Court has neither bifurcated discovery in this matter nor elected to defer ruling on class certification pending a decision on any motion for summary judgment.[10] In fact, the Circuit Court specifically declined to include Defendants' additional language limiting the scope of discovery to Mr. Skiles only or to staying class discovery. Pet. Appx. 330-331. Therefore, this Court's 2-prong holding in *GMS Mine Repair* is inapplicable to the present matter. Petitioners have failed to demonstrate how the Circuit Court has abused its discretion in any conceivable manner as it is under no requirement to follow the second prong of *GMS Mine Repair* and stay class discovery.

This Court also held that "[i]n deciding whether to stay the proceedings, the circuit court should consider[] the procedural posture of the case and fairness to the parties in conjunction with the objective of advancing the goal of a 'just, speedy, and inexpensive determination of every action.'" *Id.* at 845 (citing W.Va. R. Civ. P. 1), 836, n. 3. The Circuit Court's order specifically contemplated *GMS Mine Repair's* permissive holding that "a trial court **may** defer ruling on class certification until it first decides a dispositive motion directed to the named plaintiff's claim, and [] the decision as to how best to proceed is dependent upon the facts and circumstances of a given case." Pet. Appx. 004. In doing so, the Circuit Court held that, while "is not permitting open-ended class discovery" "it directs specific, limited discovery pertinent to the fuel surcharge issue

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motion to stay class discovery pending resolution of " 'to-be-filed' " motion for summary judgment); *Wike v. Vertrue, Inc.*, No. 3:06-0204, 2007 WL 869724, at *11 (M.D. Tenn. Mar. 20, 2007) (overruling as moot defendant's challenge to magistrate judge's decision not to stay class discovery pending district court's decision on dispositive motion)).

[10] Defendants have not even filed a motion for summary judgment.

only." Pet. Appx. 004. As the Circuit Court has repeatedly determined, "discovery as to the fuel surcharge charged to Plaintiff Skiles will necessarily overlap with discovery as to the fuel surcharge charged to each of Defendants' West Virginia customers". Resp. Appx. 001-003. "In light of the particular needs of the case, the Court's Order on *Plaintiff's Motion to Compel and Plaintiff's Motion to Extend Discovery* was crafted to direct specific, limited discovery pertinent to the fuel surcharge issue only; establish a schedule for discovery; and set limitations on discovery in a fashion it deemed necessary for the proper management of discovery in the action." *Id.* (citing this Court's holding in *GMS Mine Repair* that "limited discovery directed to a purported class representative may be necessary for summary judgment purposes" and that certification-related discovery often overlaps with merit-based discovery."). In essence, Petitioners are attempting to manipulate this Court's holding in *GMS Mine Repair* in order to avoid producing limited discovery directed towards the merits of Respondent's individual claims, simply because such discovery also overlaps with class discovery. However, while Petitioners take issue with the Circuit Court's ruling that class discovery regarding the fuel surcharge will overlap with individual fuel surcharge discovery, *See* Pet. Writ. P. 14, Petitioners themselves admit that such discovery will necessarily overlap. *See* Pet. Writ. P. 10 ("[p]roviding class discovery was necessary to provide complete explanation about Plaintiff's individual transaction."). Such contradictions only highlight the frivolousness of Petitioners' writ of prohibition.

Furthermore, as discussed *infra*, Respondent is not seeking open-ended class discovery like that sought in *GMS Mine Repair*[11], and the Circuit Court has not ordered Petitioners to produce such discovery. As a result, the sole reasoning behind the 2-prong holding in *GMS* – that it would

[11] In *GMS Mine Repair*, the plaintiff's discovery requests were directed not only to the respondent's individual wage claim, **but also to the scope and membership of the purported class**, seeking among other things the identification of all the petitioner's employees in West Virginia who were discharged within the last five years. 798 S.E.2d at 835. Here, no such issues exist.

be 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 claims – is even more irrelevant, as the Circuit Court specifically stated that such discovery regarding the identity of class members and the fuel surcharge fees they were charged is not required.

2. The Circuit Court has not ordered Petitioners to produce class discovery.

Petitioners' repeated attempts to characterize the Circuit Court's discovery order as improperly requiring Petitioners to produce "wide-ranging class discovery" is blatantly incorrect. To be clear, the circuit court **has not ordered** Petitioners to produce any "class discovery", and, in fact, unequivocally excluded such discovery. Pet. Appx. 001-009.

In the Circuit Court's October 30, 2020 Order, the Circuit Court ordered the parties "to engage in limited discovery regarding the fuel surcharge. . .." *Id.* The Circuit Court further stated that "even though Plaintiff is not seeking open-ended class discovery at this time, discovery as to the fuel surcharge charged to Plaintiff Skiles will necessarily overlap with discovery as to the fuel surcharge charged to each of Defendants' West Virginia customers" because it is "clear based on the evidence presented through the parties' motions and during oral argument that the fuel surcharge is charged in the same uniform manner and amount for each of Defendants' West Virginia customers." *Id.* "Therefore, evidence as to when, how, and why Defendants charged the fuel surcharge will be the same for Plaintiff as it is for any other West Virginia customer. That the evidence necessary to establish Plaintiff's claims happens to be the same as that needed to establish the claims of Defendants' other West Virginia customers, does not provide Defendants with any justifiable objection to producing such evidence or preclude Plaintiff from obtaining such information and documents." *Id.*

The Circuit Court again reiterated that it was not ordering the production of any class discovery in its Order Denying Defendants' Motion to Stay, stating that:

> The Court disagrees with Defendants' characterization of its rulings in the Order on *Plaintiff's Motion to Compel* and *Plaintiff's Motion to Extend Discovery*. In the order, the Court directed specific, limited discovery pertinent to the fuel surcharge issue only, which discovery is expressly permitted under the West Virginia Rules of Civil Procedure and this Court's inherent authority. **The discovery directed was not open-ended class discovery as suggested by Defendants'** both in their motion seeking a stay and in their "Verified Petition for Writ of Prohibition."
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> Moreover, West Virginia law is clear that "[d]iscovery orders lie within the discretion of a trial court." *Bartles v. Hinkle*, 472 S.E.2d 827, 835 (1996). In this case, the Court determined that discovery as to the fuel surcharge charged to Plaintiff Skiles will necessarily overlap with discovery as to the fuel surcharge charged to each of Defendants' West Virginia customers. *See GMS Mine Repair*, (recognizing that "certification-related discovery may overlap with merits-based discovery."). However, in light of the particular needs of the case, the Court's Order on *Plaintiff's Motion to Compel* and *Plaintiff's Motion to Extend Discovery* was crafted to direct specific, limited discovery pertinent to the fuel surcharge issue only; established a schedule for discovery; and set limitations on discovery in a fashion it deemed necessary for the proper management of discovery in the action.

Resp. Appx. 001-003 (emphasis added). For this very reason, Petitioners' continued (and unfounded) assertion that the Circuit Court ordered them to produce "class discovery" is entirely false. No such production of class discovery has been ordered.[12]

B. No Threshold Legal Issue Exists That Should Be Resolved Prior To Conducting Limited Discovery as To the Fuel Surcharge.

Even if the Circuit Court's discovery order had required Petitioners to produce class discovery, which it does not, Petitioners have failed to identify any threshold statutory legal issue

[12] This is not just an $8 breach of contract claim, but a putative class action on behalf of every West Virginia customer who was improperly charged the $8 fuel surcharge each and every time they used Stanley Steemer. Although Respondent is not seeking class discovery at this time, class discovery will inevitably demonstrate that potentially hundreds of thousands, if not millions of dollars in damages have been incurred by putative West Virginia class members. This is exactly the type of alleged misconduct a class action is designed to protect. *See In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 75, 585 S.E.2d 52, 75 (2003) ("forcing numerous plaintiffs to litigate the alleged misconduct of the defendants in hundreds or thousands of repeated individual trials, especially where a plaintiff's individual damages may be relatively small, runs counter to the very purpose of a class action.") (*denying* writ of prohibition).

that should be resolved prior to conducting the limited fuel surcharge discovery. In *GMS Mine Repair*, this Court's decision to grant a writ of prohibition was premised on a "threshold legal issue of statutory construction" that went to the viability of the plaintiff's individual claim; whether, as a matter of law, the plaintiff was discharged within the meaning of the Wage Payment Collection Act. *GMS Mine Repair & Maint., Inc.,* 798 S.E.2d at 845. Here, no such potentially dispositive statutory construction issue exists[13], as the Court's October 30, 2020 Order recognizes:

> Furthermore, no potentially dispositive issue of statutory construction related to Plaintiff's individual claim exists and the Court has complied with Rule 26(f) by differing and holding in abeyance Defendants' Motion to Dismiss and granting in part Defendants' Motion to Stay Discovery, whereby the Court established a plan and schedule for discovery, set limitations on discovery, and now enters this order which it deems necessary for the proper management of discovery in the action.

Pet. Appx. 0004. In fact, the Circuit Court found that Respondent's "[c]omplaint was sufficient given the claims asserted" and, therefore, held Petitioners' Motion to Dismiss in abeyance so that limited fuel surcharge discovery could be conducted. Pet. Appx. 56.

C. A Writ of Prohibition Should Not Issue Because Petitioners Have Failed to Meet the Standard for It and A Writ of Prohibition May Not Act as A Substitute for An Impermissible Appeal of An Interlocutory Order.

Importantly, Petitioners have not met the standard for awarding a writ of prohibition. Petitioners have not shown that the Circuit Court exceeded its legitimate powers or shown any other clear legal error. At best, all Petitioners show is that they disagree with the Circuit Court's decision. Furthermore, an abuse of discretion is not sufficient for an extraordinary writ of

[13] Similarly, the two cases cited by Petitioners to support their position, *State ex rel. Erickson v. Hill*, 191, W. Va. 320, 326, 445 S.E.2d 503, 509 (1994) and *State Ex Rel. Potomac Trucking & Excavating, Inc. v. Courrier,* No. 16-0183, 2016 WL 5851925, at *5 (W. Va. Oct. 6, 2016) (unpublished decision), are distinguishable and also involved statutory issues. In *State ex rel. Erickson*, the issue involved the compelled disclosure of assets outside of the statutory disclosure information required by W. Va. Code 48-2-33 (1992). Similarly, in *State Ex. Rel. Potomac Trucking*, the issue involved whether W. Va. R. Civ. P. 34 required an opposing party to participate in recreation of an accident at the direction of the party seeking the discovery. In the present case, no such statutory issues exist.

prohibition and Petitioners have failed to show even this. A review of the question presented by the Petition for Writ of Prohibition readily reveals that Petitioners are essentially seeking--through the guise of a petition for writ of prohibition--an appeal of the Circuit Court's clearly discretionary, interlocutory decision based on an incorrect interpretation of *GMS Mine Repair*.

1. **A writ of prohibition is issued only in extraordinary circumstances, not under the discretionary findings made here, even if there was an abuse of discretion.**

As to writs of prohibition, this Court has pronounced:

> This Court has explained the standard of review applicable to a writ of prohibition, stating that **"[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.** It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.VA. CODE 53–1–1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977) . . . .
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> **We have held that an extraordinary writ . . . is not to be used as a substitute for an appeal.** "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 1, *Crawford v. Taylor,* 138 W.Va. 207, 75 S.E.2d 370 (1953). In addition, "[t]his Court is 'restrictive in its use of prohibition as a remedy.' *State ex rel. West Virginia Fire Cas. Co. v. Karl,* 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997)." *State ex rel. Allstate Ins. Co. v. Gaughan,* 220 W.Va. 113, 118, 640 S.E.2d 176, 182 (2006). In syllabus point 4 of *State ex rel. Hoover v. Berger,* [199 W.Va. 12, 483 S.E.2d 12 (1996)], this Court said:
>
> "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. 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."

State ex rel. Owners Ins. Co. v. McGraw, 233 W.Va. 776, 779-80, 760 S.E.2d 590, 593-94 (2014) (per curiam) (emphases added). Petitioners have not, and cannot, demonstrate their entitlement to relief by way of prohibition. As this Honorable Court has repeatedly cautioned, "[t]o justify this extraordinary remedy, the petitioner[s] ha[ve] the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Stewart v. Alsop*, 207, W.Va. 430, 533 S.E.2d 362, 364 (W.Va. 2000) (citing *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 254, 496 S.E.2d 198, 204 (1997) (*quoting State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring))).

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 4, *State ex rel. Jeanette H. v. Pancake*, 529 S.E.2d 865 (W.Va. 2000); *State ex rel. Lambert v. King,* (2000 WL 973741 W.Va. July 14, 2000). A heavy burden of proof is required to demonstrate that a circuit court's finding is clearly erroneous. As explained by this Court in *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. at 780, 760 S.E.2d at 594:

> A finding is "clearly erroneous" when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, **a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely**.

(emphasis added) (quoting Syl. Pt. 1, in part, *In the interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)). Petitioners are essentially disagreeing with the Circuit Court for compelling the limited, non-class discovery regarding the fuel surcharge, but that does not meet the standard for extraordinary relief they seek.

2. Petitioners cannot show prejudice.

Petitioners have not argued, and cannot show, that the production of the limited fuel surcharge documents and information will prejudice them in any way. The documents are clearly relevant to the Plaintiff's individual claims and Petitioners anticipated affirmative defenses, and are in Petitioners' possession. Additionally, any documents containing potentially sensitive information can be produced subject to the parties agreed-upon Protective Order.

3. Petitioners have not shown substantial, clear cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate.

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among the litigants, lawyers and courts; however, **this Court will use prohibition in this discretionary way to correct only substantial, clear cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate** which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance."

Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 7445 (1979) (emphasis added). *See also State ex rel. DeFrances v. Bedell*, 191 W.Va. 513, 446 S.E.2d 906 (1994). There is no case these Petitioners could find that says it is never permissible for a Circuit Court to weigh the evidence and allow limited, non-class discovery to proceed when that Circuit Court has neither elected to bifurcate discovery or stay class discovery pending a ruling on a dispositive motion. As such, Petitioners have failed support the third factor.

4. The arguments by Petitioners do not go to prove clear error as a matter of law.

Addressing the remaining factors for a writ of prohibition, Petitioners do not contend that what the Circuit Court did is an oft repeated error or manifests persistent disregard for either procedural or substantive law, nor can it seriously make this argument given the broad discretion accorded the Circuit Court under West Virginia law. Neither can Petitioners credibly contend that

the order raises new and important problems or issues of law of first impression, because this is well settled law. As such the fourth and fifth factors are not satisfied.

5. Petitioners actually seek an appeal of an interlocutory order under the guise of a petition for a writ of prohibition.

As explained by the West Virginia Supreme Court of Appeals *in State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 460 S.E.2d 54 (1995):

> The principle of non-appealability in interlocutory rulings is well grounded in reason. It prevents the loss of time and money involved in piece-meal litigation and the moving party, though denied of immediate relief or vindication, is not prejudiced. The action simply continues toward a resolution of its merits following a decision on the motion. If unsuccessful at trial, the movant may still raise the denial of his motion as error on the appeal subsequent to the entry of the final order.

Citing Wilfong v. Wilfong, 156 W.Va. 754, 758-59, 197 S.E.2d 96, 99-100 (1973). Although for obvious reasons Petitioners resist categorizing this request for prohibition as an appeal of an interlocutory order, essentially that is what this proceeding involves. Petitioners fail to convincingly show circumstances in this case meeting the standard for prohibition. Accordingly, the lower court's order compelling limited, non-class fuel surcharge discovery is interlocutory and is, therefore, not immediately appealable. Petitioners may not indirectly raise this issue by seeking a writ of prohibition.

6. A writ of prohibition is not to be used to resolve disputed facts.

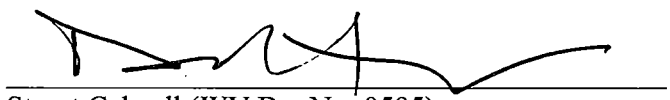
Moreover, there is no dispute that writs of prohibition will not be granted when there are issues of disputed fact. *See* Syl. Pt. 1, *State ex rel. USF&G v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995); *Accord* Syl. Pt. 2, *State ex rel. Allstate Ins. Co. v. Gaughan, supra.* The Circuit Court made substantial factual findings in its order and properly exercised its discretion under W. VA. R. CIV. P. 26(f). While Petitioners may disagree with these findings, a writ of prohibition cannot be

issued to resolve disputed facts.

VI. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that Your Honorable Court deny the Petitioners' Writ of Prohibition.

Respectfully Submitted
Ken Skiles, on behalf of himself
And on behalf of a class of West Virginia residents similarly situated,
Respondent/Plaintiff, by counsel:



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VERIFICATION

I, David H. Carriger, Esq., being first duly sworn, state that I have read the forgoing **RESPONSE IN OPPOSITION TO PETITIONERS' VERIFIED 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.

David H. Carriger

Taken, subscribed, and sworn to before me this 14th day of December, 2020.

My commission expires: Feb. 20, 2022.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Paula A. McLane
500 Randolph Street
Charleston, WV 25302
My Commission Expires 2/20/2022

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 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.

CERTIFICATE OF SERVICE

I, David H. Carriger, counsel for Plaintiff, do hereby certify that a true and correct copy of the foregoing **"Opposition to Petitioners' Verified Petition for Writ of Prohibition" and "Respondents' Appendix in Support of Opposition to Petitioners' Verified Petition for Writ of Prohibition"** was served upon the following parties by electronic mail (e-mail) on this 14th day of December, 2020:

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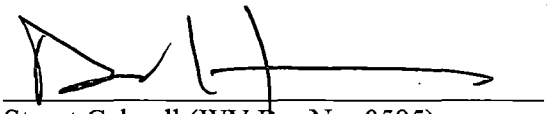

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