

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Case No. 25-671
(CC-19-2023-C-142)

**STATE OF WEST VIRGINIA ex rel.
PHH MORTGAGE CORPORATION**

Petitioner

v.

**THE HONORABLE DAVID M. HAMMER, Judge of the Circuit Court of
Jefferson County, West Virginia, Anthony Delsignore, and Heather Delsignore**

Respondents

**RESPONDENTS DELSIGNORES' RESPONSE
IN OPPOSITION TO WRIT OF PROHIBITION**

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I. QUESTION PRESENTED BY PETITION

Should An American Mortgage Company Be Able To Shield Its Managing Agents From Being Deposed By A West Virginia Consumer In A State Court Dispute Over Real Estate Located In West Virginia By Outsourcing Its Customer Service To Foreign Nationals?

No. Petitioner filed this writ of prohibition seeking an extraordinary remedy based on a bold misstatement. Petitioner complains that the Circuit Court of Jefferson County “compels the unprecedented deposition testimony of approximately seven low-level call center employees who live in India and the Philippines.” Petition at 1. In doing so, the Petitioner first demonstrates a fundamental misunderstanding of the Circuit Court’s Order and then ignores the Circuit Court’s detailed analysis and findings. The Circuit Court did not order the deposition of “seven” foreign nationals. It ordered the deposition of two PHH employees who appear to be managing agents of PHH with respect to two crucial aspects of the litigation.

The individuals the Delsignores noticed for deposition include those who (1) made the decision to reject the payment of more than \$22,000 made by the Delsignores to reinstate the loan; and (2) those who conducted and resolved the investigation into the dispute lodged by Mr. Delsignore regarding this payment after he was told it was not received. The Court concludes that it is presented with a “close question” as to status as a managing agent with respect to these two topics and that under the forgoing authorities it should allow the depositions to be conducted remotely by zoom or similar technology leaving the final decision on whether these witnesses may bind the corporation for trial.

Accordingly, in addition to making all responsive witnesses located within the United States available for deposition, PHH shall make the employee(s) that made the decision to reject the reinstatement check and the employee who investigated the dispute of Mr. Delsignore with regard to this payment available for deposition. The record indicates those individuals to be Edgar Francisco and Gayatri Bachcha. Counsel are directed to meet and confer to confirm the identity of all such witnesses described in this Order within 10 days of entry and shall schedule the depositions to occur within 30 days of their conference. The Delsignores have withdrawn their notice of deposition with respect to any witness not covered by this Order, i.e., withdrawn as to those persons that are both located outside the United States and not

appearing to be “managing agents” with respect to the topics identified herein.

Order at *7 (Appx. AR 301). Thus, the depositions of two not seven foreign nationals are at issue in the Order. To justify an extraordinary remedy, PHH greatly exaggerates the breadth of the Oder. It also ignores well-established precedent permitting similar depositions. *See*, § 2103 Persons Subject to Examination—Corporations and Other Organizations, 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed. Wright and Miller), citing *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d118 (5th Cir. 1967), *cert. denied*, 393 U.S. 859, 89 S. Ct. 131, 21 L. Ed. 2d 127 (1968) and *cert. denied*, 393 U.S. 815, 89 S. Ct. 225, 21 L.Ed. 2d 179 (1968)(Under rule providing that if party or officer or managing agent of party willfully fails to appear before officer who is to take his deposition, after being served with proper notice, court may strike out all or any part of any pleading of that party or dismiss action or proceeding or enter judgment by default against that party, ...). “Foreign nationals who qualify as managing agents of a party may be subject to deposition pursuant to notice.” *Id.* at FN. 44 (citing, *Calderon v. Experian Information Solutions, Inc.*, 290 F.R.D.508 (D. Idaho 2013) (“In this case, that was true of three employees of a credit reporting service's Chilean ‘sister corporation,’ even though it was not a direct party to the current action. Doubts about a person's capacity should, at the pretrial stage, be resolved in favor of the examining party. Under these circumstances, it was not clearly erroneous for the magistrate judge to determine that party's dispute agents located in Chile were managing agents.”). By filing this writ of prohibition, PHH continues its refusal to produce key fact witnesses that were directly involved in the management of the Respondents’ mortgage and the tortious conduct at issue in this matter. In doing so, PHH failed to demonstrate even a simple abuse of discretion let alone the type of clear legal error required to invoke this Court’s extraordinary powers.

II. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this matter, as the facts and legal arguments made herein would not be significantly aided by oral argument. The only thing achieved by oral argument would be revealing Petitioner's counterproductive litigation tactics.

III. STANDARD OF REVIEW

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). In determining whether to entertain and issue the writ of prohibition, 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." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Petitioner's Writ fails here because the Circuit Court's order denying the motion for protective order and compelling the depositions of two witnesses was not clearly erroneous as a matter of law. The plain language of Rule 30 of the West Virginia Rules of Civil Procedure allows

for depositions by notice of those that appear to be managing agents. The Circuit Court properly applied the “managing agent” control test set forth in the Rule.

IV. STATEMENT OF THE CASE

A. Factual Background

Anthony Delsignore is, or at least was, the owner of the residential real estate at issue in this litigation with an address of 363 Palomino Place, Charles Town, WV 25414 (herein “subject property” or “property”). Mr. Delsignore resides at the property with his wife and children. Mr. Delsignore obtained a mortgage loan to purchase the property and executed a note and deed of trust dated January 14, 2011 with the lender Millennium Financial Group, Inc., in the amount of \$136,353 (herein, the “subject loan” or “loan”). The loan was eventually assigned to Ocwen Loan Servicing, LLC, which later merged with and became Counterclaim Defendant PHH.¹

Mr. Delsignore, who works as an electrician, suffered a financial hardship during the COVID-19 pandemic. For a time, the loan was placed in forbearance. On April 12, 2023 and again on April 18, 2023, Mr. Delsignore called PHH and informed it about monies that he was in the process of receiving through the sale of real estate by a family trust to which he was a beneficiary. These funds would allow Mr. Delsignore to fully reinstate the loan, and he communicated his intent to PHH to reinstate the loan with these proceeds.²

Mr. Delsignore received a loan reinstatement quote dated April 13, 2023 that stated \$22,331.78 was necessary to reinstate the loan. The reinstatement quote had a good-through date of April 30, 2023. Specifically, it stated, “If funds are not received by 04/30/2023, additional funds may

¹ Appx. AR 277. Unless otherwise noted, the factual allegations are taken from Amended Counterclaim. (Appx. AR274-294).

² Appx. AR 278.

be required to fully reinstate the account.”³ Notably, the reinstatement quote does not state that funds will be returned if received after April 30, 2023. The only warning with regard to returning funds is if the funds are not certified.

A mortgage billing statement was subsequently issued to Mr. Delsignore by PHH on April 18, 2023 that plainly stated that \$22,331.78 was due on May 1, 2023 (not April 30).⁴ Relying on this statement and its due date, Mr. Delsignore obtained a certified check in said amount on May 1, 2023 and mailed it to PHH. The billing statement also includes a separate page titled Delinquency Notice that made it appear to Mr. Delsignore (and most any consumer) that the regular payment due on May 1, 2023 was included in the total due of \$22,331.78 needed to bring the loan current.⁵ The statement also tells the consumers that there is an 18-day grace period during which no late fee will be charged. Moreover, it states that “[i]f the account is presently past due, any partial payments that you make are not applied to your mortgage, but instead are held in a separate suspense account. If you pay the balance of a partial payment, the funds will then be applied to your mortgage.”⁶ Thus, the subsequent billing statement flatly contradicts any notion that by mailing the payment on May 1, 2023 that it would get rejected and returned.

A notice of sale was mailed to Mr. Delsignore on April 18, 2023 that set a sale date of May 9, 2023. The sale date was later continued for reasons unrelated to this payment dispute to June 8, 2023 though no written or formal notice was given to the Delsignorees.⁷

Mr. Delsignore followed the instructions of PHH to submit payment. Mr. Delsignore obtained a cashier’s check in the amount of \$22,331.78 from BCT bank on May 1, 2023, which

³ Appx. AR 142-144.

⁴ Appx. AR 153.

⁵ Appx. AR 155.

⁶ Appx. AR 153.

⁷ Appx. AR 280.

matches the amount he was instructed to pay. Mr. Delsignore mailed the cashier's check to the address PHH provided. The check was successfully delivered to PHH but for reasons that remain unclear PHH failed to apply it.⁸

On May 11, 2023, Mr. Delsignore called PHH to confirm receipt of his payment. The call recording produced in discovery demonstrates that PHH told Mr. Delsignore that the reinstatement check was not received.⁹ PHH repeated this representation in recorded calls that occurred on May 25, 2023 and June 2, 2023.¹⁰ On June 2, 2023, Mr. Delsignore per PHH's instructions stopped payment on this missing check and waited at the bank for a new reinstatement quote and wire instructions that supposedly would be emailed immediately so he could take care of this delinquency once and for all. The representative noted that it would also be mailed to him. A review of Anthony's email account confirms that no such information was ever received.¹¹ However, PHH has produced what purports to be an email attaching this information with a time stamp showing it was sent several hours later and after business hours. The Delsignores question the validity of this email that they did not receive.

On June 8, 2023, while the Delsignores now awaited wire instructions by mail, Pill & Pill at the instruction of PHH sold the Delsignores' home at a foreclosure sale.¹² Pill & Pill closed the sale and issued a trustee's deed to Plaintiff Irvin on July 19, 2023. On this same day, Irvin sued Mr. Delsignore for wrongful detainer in Magistrate Court, issued a civil summons to him, and demanded his eviction by August 3, 2023. After dismissal of the Magistrate court action, Irvin again sued

⁸ Appx. AR 146-151, 280. During this litigation PHH has claimed that the check was returned because the funds were insufficient as the May 1 payment was now due and not included in the reinstatement figure.

⁹ Appx. AR 280.

¹⁰ Appx. AR 280.

¹¹ Appx. AR 281.

¹² Appx. AR 281.

Anthony Delsignore for eviction as well as his wife Heather. Irvin's unfortunate actions were set in motion by PHH recklessly proceeding with foreclosure while failing to accurately and honestly communicate with Mr. Delsignore and failing to apply his payment.¹³

B. The Legal Claims Relevant to This Petition and the Insufficient Testimony Offered to Date

i. Failure to Apply or Return Payment

West Virginia Code §46A-2-115(c) provides, in relevant part: "All amounts paid to a creditor arising out of any consumer credit sale or consumer loan shall be credited upon receipt against payments due." In simple terms, this provision "requires a lender of a consumer loan to credit any full or partial payments received from the borrower, subject to the exception that a lender may [return] partial payments received after the foreclosure process has begun." *Kesling v. Countrywide Home Loans, Inc.*, No. 2:09–588, 2011 WL 227637, at *3 (S.D. W.Va. Jan.24, 2011); *see also, Patrick v. PHH Mortg. Corp.*, 937 F. Supp. 2d 773, 783 (N.D. W. Va. Mar. 27, 2013) ("Plaintiffs satisfied the statute by pleading that money they paid to PHH pursuant to their loan agreement was not credited against payments due."). If the check sent by Mr. Delsignore on May 1, 2023 was only a partial payment as PHH contends, PHH may have been permitted by statute to reject it provided that it returned the check to him (and its conduct was otherwise lawful).¹⁴ Here, PHH asserts it returned the check. The Delsignores contend it did not.

¹³ Appx. AR 283-284.

¹⁴ The Circuit Court and/or a jury in this matter may be faced with determining how the prior inconsistent representations in the account statement can be reconciled with the statutory right to return a partial payment during foreclosure. The billing statement (Appx. AR 153-155) issued by PHH indicates that the payment was both sufficient in amount and, even if not, would be applied to suspense with an opportunity to pay the balance. At a minimum, these representations within the billing statement were misleading and may constitute independent violations of W.Va. Code § 46A-2-127(d).

The sole evidence that the check was returned is an electronic copy of a correspondence that PHH produced late in discovery and claims was mailed to Mr. Delsignore by a third-party vendor. The copy contains no mailing or tracking information.¹⁵ The evidence against the return of the check is as follows: (1) Delsignore's testimony that he never received the check as corroborated by the recorded conversations with PHH and his actions to stop payment on the lost check on June 2, 2023; (2) three recorded calls dated May 11, 2023, May 25, 2023, and June 2, 2023 wherein PHH representatives informed Delsignore that it never received his payment and, therefore, could not have returned the payment; and (3) PHH maintains a letter log that contains a list of all outstanding letters sent to the borrower which does not reflect a letter returning the check.¹⁶

The state of evidence in this regard is curious to say the least. Incredibly, PHH did not log in receipt of the check or at least its corporate representative Benjamin Verdooren does not know where such documentation is located.¹⁷ PHH would have given an instruction to its vendor Repay to return the check but Verdooren has never seen the instruction.¹⁸ The employee that supposedly made the decision to reject the check, whom the Delsignorees seek to depose, also failed to note or document her work.¹⁹

The only documentation that the check was received and returned in PHH's operating system is a note that was generated following the call from Mr. Delsignore to PHH on May 11 to confirm receipt of the check. That call ended with PHH's representative, who Delsignore also seeks to depose, telling him that the check was not received and that he should contact his courier to

¹⁵ Appx. AR 157-159.

¹⁶ Appx. AR 171-173, 177-178 (Excerpts from Deposition of PHH's Rule 30(b)(6) witness, Benjamin Verdooren).

¹⁷ Appx. AR 162-163.

¹⁸ Appx. AR 170.

¹⁹ Appx. AR 183-186.

investigate this. Supposedly, shortly after this lengthy call, this PHH representative (P2R) opened a dispute and then the sole notation appears that the check was returned for insufficient funds.²⁰ Assuming this occurred, the representative did not bother to call Mr. Delsignore back and inform him of this or spare him the inconvenience of contacting his courier.

Because of these irregularities including a notable lack of documentation, significant doubt exists as to what really happened here --- whether the check was handled appropriately upon receipt, whether it was returned and if so how, why none of the representatives that spoke to Mr. Delsignore were able to inform him that PHH received and/or returned the check, and even whether this notation dated May 11 in response to a borrower dispute that was supposedly “overlooked” by multiple representatives who later spoke to Mr. Delsignore was not added much later perhaps for litigation purposes. For these reasons, the testimony that the Delsignores seek from those involved in these very acts is appropriate and warranted.

Instead, PHH argues that the Delsignores must accept the accounts of a Rule 30(b)(6) witness, who is not directly employed by PHH, and has never spoken to these key witnesses. In fact, the Rule 30(b)(6) witness responded, “I don’t know” fifty-one (51) times during his deposition and “I don’t remember” on another 20 occasions to the questions posed to him. PHH’s purported lack of knowledge is, to say the least, harmful to the Delsignores’ claims to set aside the foreclosure sale, retain their family home and recover damages against PHH.

ii. False Representations and the Bona Fide Error Defense

In addition to West Virginia Code § 46A-2-115, the representations made by PHH in calls dated May 11, 2023, May 25, 2023, and June 2, 2023 violate West Virginia Code §§46A-2-127 and 128. PHH represented that it never received the payment in not one but in each call with Mr.

²⁰ Appx. AR 188-189.

Delsignore. If PHH had indeed returned the payment as it contends, these statements are plainly false. West Virginia Code § 46A-2-127(d) makes it a violation of statute to make “[a]ny false representation or implication of the character, extent or amount of a claim against a consumer.” The Delsignores contend PHH’s assertions that the check was not received were false representations of the amount, character or status of the debt. Of course, the information that these customer service representatives did or did not see and could or could not access is plainly relevant to the claim. Mr. Verdooren never even spoke to these witnesses²¹ and answered questions as to what information they had access to in the all too often refrain “I don’t know.”²² Deposition of Verdooren at 133-134. Had PHH told them the check was returned in the May 11 or May 25 calls, the Delsignores would have acted sooner to remedy the situation.

Here, PHH asserts an affirmative defense under West Virginia Code 46A-5-101(8):

If the creditor or debt collector establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and (4) of this section and the validity of the transaction is not affected.

Incredibly, through its motion for protective order, PHH contends that the Delsignores cannot question these witnesses, who otherwise violated the statute, about their intent. It contends the Delsignores must live with PHH’s “I don’t know” responses and presume any violation was unintentional.²³ Further, PHH contends the Delsignores cannot question these employees about what errors may have occurred, whether the errors were bona fide, what procedures were in place to prevent error, and whether those procedures were implemented into their jobs and maintained by

²¹ Mr. Verdooren did communicate with the employee, who supposedly rejected the check, by email but simply asked one leading question that nowhere near covers the inquiry that Delsignores’ counsel wishes to make. See, Appx. AR 191-194.

²² Appx. AR 174-175.

²³ See, Appx. AR 176.

PHH. If a litigant were permitted to prevent such basic testimony as to the elements of an affirmative defense as burdensome or duplicitous merely because the opposing party took a 30(b)(6) deposition, the remaining rules of discovery including Rule 30(b)(1) would become illusory. Nor should a company chartered in New Jersey and based in Florida be able to avoid providing such evidence simply by outsourcing the jobs of those that service the mortgages of Americans. While certain employees may indeed avoid deposition due to the lengthy, complex and expensive process encompassed in international treaties, those that make managerial type decisions, such as to reject a large payment and proceed with foreclosure, should not be able to do so in all fairness to our citizens.

V. DISCUSSION

A. PHH Cannot Meet the *Hoover* Factors Required for an Extraordinary Remedy

Depositions are governed by the provisions of West Virginia Rule of Civil Procedure 26. This Court has acknowledged that “[t]he scope of discovery in civil cases is broad[.]” *State ex rel. Shroades v. Henry*, 187 W.Va. 723, 725, 421 S.E.2d 264, 266 (1992). The Circuit Court entered a detailed and reasoned Order finding that the two witnesses at issue appeared to be managing agents of a domestic corporation and, therefore, subject to deposition by notice under Rule 30(b)(1). In doing so, it followed persuasive case law interpreting the same rule in several other jurisdictions. Here, PHH fails to demonstrate even an abuse of discretion and falls far short of showing clear legal error. In addition, there are remedies available to PHH that are far less drastic than seeking an extraordinary writ from this Court. In its Order at Appx. AR 309, the Circuit Court left open the possibility of not allowing the testimony of these witnesses at trial. Exclusion of the testimony by the Circuit Court or by way of direct appeal from an adverse outcome is available to PHH and weighs against granting extraordinary relief at this stage of the litigation. *See, State ex rel. Hoover*, 199 W.Va. 12, syl. pt. 4. Finally, the unique circumstances here are not indicative of

“an oft repeated error” and the Circuit Court certainly did not “manifests persistent disregard for either procedural or substantive law.” *See, id.* Therefore, extraordinary relief is not appropriate.

B. The Hague Convention Does Not Apply and No Subpoena Is Necessary to Depose Managing Agents

A party to a lawsuit may be compelled to give a deposition pursuant to notice as opposed to subpoena. Pursuant to Rule 30 of the West Virginia Rules of Civil Procedure, a party may request the deposition of another party to the litigation by serving a notice of deposition upon that party. If the party to be deposed is a corporation, the party seeking discovery may either designate an appropriate individual by name or general description under Rule 30(b)(1)²⁴ or describe the subject matter to be covered in the proposed deposition and allow the corporate deponent to designate its own spokesperson under Rule 30(b)(6). Rule 30(b)(1) and Rule 30(b)(6) are not mutually exclusive. In fact, Rule 30(b)(6) states, “This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.”

However, if the party seeking discovery chooses to designate a particular witness, the person so designated must be an “officer, director, or managing agent” of the corporation. *See, Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169 (S.D.N.Y.1985).²⁵ “If the

²⁴“A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.” Rule 30(b)(1).

²⁵ W.Va. R. Civ. P. 30(b)(1) and Fed. R. Civ. P. 30(b)(1) are identical. As such, federal case law is persuasive and often cited by this Court in discussing identical rules. *See e.g., In re W.Va. Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003). Here, it does not appear that this Court has explained the inter-working of Rule 30(b)(1). However, the Court follows a “usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of

person is not an ‘officer, director, or managing agent’ of the corporation, the party seeking the discovery must proceed as though the person is an ordinary non-party witness and obtain a subpoena to secure the attendance of the deponent. A “corporation is responsible for producing its officers, managing agents, and directors if notice is given; a subpoena for their attendance is unnecessary, and sanctions may be imposed against the corporation if they fail to appear.” § 2103 Persons Subject to Examination—Corporations and Other Organizations, 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed. Wright and Miller), citing *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118 (5th Cir. 1967), cert. denied, 393 U.S. 859, 89 S. Ct. 131 (1968) and cert. denied, 393 U.S. 815, 89 S. Ct. 225 (1968). These same rules apply to witnesses located overseas. If the witness sought to be deposed is *not* an officer, director, or managing agent of a corporate opponent, ‘the procedures of the Hague Convention or other applicable treaty must be utilized.’” *Calderon v. Experian Information Solutions, Inc.*, 287 F.R.D. 629, 631 (D. Idaho 2012)(emphasis added).

The deponents here are not officers or directors. Thus, the resolution to this motion largely turns on whether those that the Delsignores seek to depose qualify as “managing agents.” The framework for determining whether a particular individual qualifies as a managing agent is “primarily a construction of decisional law concerned with ensuring that an organization is deposed through its proper representatives concerning the matters at issue in the litigation.” *E.I. DuPont de Nemours & Company v. Kolon Industries*, 268 F.R.D. 45, 48 (2010). Here, at least at this stage of the litigation, the Court should consider the two identified witnesses as managing

civil procedure.” *Lawyer Disciplinary Bd. v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181, n. 11 (1995) (citing *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755, n. 6 (1994)).

agents due to their level of action and unique knowledge of the key matters at issue in this litigation.²⁶

C. PHH's Foreign Witnesses Qualify as Managing Agents

A person may be a managing agent solely concerning the testimony sought. That a person is not a 'higher-up' for the corporation is irrelevant. *Botell v. United States*, No. 2:-11-cv-1545, 2013 U.S. Dist. LEXIS 12075, at *16 (E.D. Cal. Jan. 28, 2013) (finding that "although [the witness] may not be a higher-up managing agent in the course of his everyday duties for defendant, he is a managing agent for the purpose of providing testimony regarding the [] trail condition in and around the time of the accident, which is extremely relevant to this [wrongful death] litigation"). Sometimes an employee is a managing agent simply because he is the only person with knowledge of events precipitating the lawsuit. *Sugarhill Records, Ltd.* 105 F.R.D. at 171.

While the burden is on the party seeking the discovery to prove that the potential witness is a managing agent of the corporation, this burden is a modest one, and at least at the discovery stage, all doubts are to be resolved in favor of the party seeking the depositions. *Calderon*, 632-33, *aff'd*, 290 F.R.D. 508 (D. Idaho 2013) ("These same rules apply to witnesses located overseas."); *Inventus Power v. Shenzhen Ace Battery*, 339 F.R.D. 487, 508 (N.D. Ill. 2021); *Nationstar Mortg., LLC v. Flamingo Trails No. 7 Landscape Maint. Ass'n*, 316 F.R.D. 327, 333 (D. Nev. 2016) ("this burden is a modest one and any doubts are resolved in favor of the examining

²⁶ Petitioner relies on *Gebr. Eickhoff Maschinenfabrik und Eisengieberei MbH v. Starcher*, 174 W. Va. 618, 620, 328 S.E.2d 492, 495 (1985), in which it was contested whether Gebr. Eickhoff even had the requisite minimum contacts to subject it to the personal jurisdiction of the state court. *Gebr. Eickhoff* involved a Circuit Court ordering written discovery and the production of evidence located in Germany from a German company. There was no analysis of the rules governing the ability of a West Virginia resident and American citizen to depose a "managing agent" of an American company who by virtue of outsourcing American jobs happens to be located overseas. The decision in *Gebr. Eickhoff* has no application to the circumstances here.

party."). Moreover, "[t]he term 'managing agent' should not be given too literal an interpretation." *Bayer Schering Pharma AG v. Watson Pharm. Inc.*, No. 2:07-cv-01472-KJD-GWF, 2009 U.S. Dist. LEXIS 150425, at *15 (D. Nev. Dec. 8, 2009); *Aranda v. Nissan Motor Acceptance Corp.*, No. 2:21-cv-03451-CBM-PDx, 2022 U.S. Dist. LEXIS 136715, at *1-2 (C.D. Cal. June 3, 2022).

Federal district courts have considered several factors to determine whether an employee is a "managing agent," including:

whether the individual is invested with general powers allowing [her] to exercise judgment and discretion in corporate matters; 2) whether the individual can be relied upon to give testimony, at [her] employer's request in response to the demand of the examining party; 3) whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area regarding which information is sought by the examination; and, 4) the general responsibilities of the individual respecting the matters involved in the litigation.

Odsather v. Fay Servicing, LLC, 2019 U.S. Dist. LEXIS 4916, at *3 (W.D. Wash. Jan. 10, 2019), citing *Sugarhill Records Ltd.* 105 F.R.D. at 170. [C]ourts have concluded that if there is at least a "close question" as to the managing agent status of a potential witness, doubts should be resolved in favor of allowing the deposition, with the final determination of whether the agent has the ability to bind the corporation to be left for trial. *Calderon*, 287 F.R.D. 629 at 633.

The term 'managing agent' should not be given too literal an interpretation ***but rather should depend largely on whether the interests of the individual involved are identified with those of his principal and on the nature of his 'functions, responsibilities and authority respecting the subject matter of the litigation.'*** . . . This Court concludes, therefore, that although [the engineers] may not be 'managing agents' in the course of their everyday duties for the defendant corporation, ***they are 'managing agents' for the purpose of giving testimony regarding the accident investigation, a most relevant aspect of this litigation.*** Although the characterization of these two proposed deponents as 'managing agents' is not free from doubt, whatever doubt remains should be resolved in favor of the examining party.

Calderon, 287 F.R.D. at 633 (emphasis added).

The individuals the Delsignores noticed for deposition include those who (1) made the decision to reject the payment of more than \$22,000 made by the Delsignores to reinstate the loan (presumably Gayatri Bachcha) and (2) those who conducted and resolved the investigation into the dispute lodged by Mr. Delsignore regarding this payment (presumably Edgar Francisco).²⁷ These witnesses are the best—and only—people with the ability to testify concerning the crux of the legal and factual issue at play. With respect to Topic 4 dealing with the treatment of the reinstatement check, the Delsignores seek information on whether the payment was indeed rejected; why was it rejected; what policies and procedures were considered in rejecting the payment; was the rejection of the payment documented – if so, where, and if not, why; what instruction was given to any vendor to return the check and where is that instruction documented; and whether the act of returning the check was documented and, if so, where. Note, despite argument to the contrary, no recorded call has been produced or presumably even exists pertaining to the work of Ms. Bachcha.

With respect to Topic 3, customer service representative P2R or Edgar Francisco did much more than speak to Mr. Delsignore. He opened and closed an investigation into the missing check. He did this *after* the recorded call with Mr. Delsignore concluded. The only documentation that the check was received and returned in PHH's operating system is a note that was generated purportedly through this investigation. This person is the sole witness that can testify regarding

²⁷ The Court ordered the testimony of foreign agents solely as to Topics 3 and 4. Compare Appx. AR 196-197 to Appx. AR 301. Note, Topic 4 identified 3 separate individuals, because it was not entirely clear at the time the nature of the involvement of each and which of the three made the decision to reject the reinstatement check. It now appears from PHH's pleadings and the testimony of the Rule 30(b) witness that person was Gayatri Bachcha, who is located in India. Indeed, it appears from PHH's testimony that Ms. Bachcha exercised her discretion to reject this payment. Therefore, the Court's order identifies Ms. Bachcha by name and also requires the parties to confer to confirm the identify of witnesses.

the nature of the investigation and why he ultimately sent Mr. Delsignore on a wild goose chase and let him believe the check had not been received if he truly determined on May 11 through his investigation that the check was received and returned. Because of these irregularities including a notable lack of documentation, the requested testimony is crucial to the Delsignores' claims. Each of these depositions will provide critical information for determining the existence and degree of culpability of PHH and the validity of PHH's defenses, including its alleged "bona fide error" defense.

The Delsignores discuss each of the factors identified in *Sugarhill Records* below.

- i. *Whether the individuals are invested with general powers allowing them to exercise judgment and discretion in corporate matters*

Delsignore sought the identity of the individuals who rejected his payment and investigated his dispute through the discovery process. As discussed *supra*, those individuals appear to be Edgar Francisco and Gayatri Bachcha. The testimony of Verdooren indicates that Bachcha solely made the decision to reject the payment.²⁸ Further, he testified that Edgar Francisco (P2R) opened, closed and otherwise handled Mr. Delsignores payment dispute.²⁹ At no point in its underlying motion or during the testimony of Verdooren does PHH argue any of these employees are required to obtain approval from, or even consult with, other employees or superiors within PHH before rejecting the payment or closing the borrower's dispute over the payment. This discretion wholly supports the Delsignores desire to depose these witnesses. *See Nationstar Mortg., LLC v. Flamingo Trails No. 7 Landscape Maint. Ass'n*, 316 F.R.D. 327, 333 (D. Nev. 2016) (finding employee with "sole authority" to be managing agent).

- ii. *Whether the individuals can be relied upon to give testimony at their employer's request*

²⁸ See, Appx. AR 164-170.

²⁹ See, Appx. AR 179-185.

At no point has PHH claimed its employees would flout a request from their employer to appear for the depositions. To the contrary, it would be rather shocking if either Bachcha or Francisco would not honor PHH's demand that they appear for their depositions. *See In re Air Crash at Taipei, Taiwan*, Case No. MDL 1394 GAF (RCx), 2001 U.S. Dist. LEXIS 19981, at *14 (C.D. Cal. Nov. 21, 2001) ("a current employee of a party is within that party's practical control..."). The Delsignores thus argue that this factor should be resolved in their favor "[g]iven that 'all doubts [about managing agent status] are to be resolved in Plaintiff's favor...'" *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420-YGR (DMR), 2016 U.S. Dist. LEXIS 41105, at *43 (N.D. Cal. Mar. 24, 2016).

iii. *Whether any person or persons are employed by the corporate employer in positions of higher authority*

PHH indicates that these witnesses are low level employees, but ignores that those of higher authority are far removed from the investigations at issue herein. The Delsignores seek to depose the individuals with first-hand knowledge of the applicable payment rejection and payment investigation or to establish their habits in connection with Rule of Evidence 406. *See United States v. Brown*, No. 12-cr-97 GMN VCF, 2018 U.S. Dist. LEXIS 66671, at *5 (D. Nev. Apr. 19, 2018) ("Evidence of a person's habit...may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.").

Moreover, simply having other employees in higher positions does not preclude the requested depositions. *See Botell*, 2013 U.S. Dist. LEXIS 12075, at *16-17; *Sugarhill Records*, 105 F.R.D. at 171; *Alcan Int'l Ltd. v. S.A. Day Mfg. Co. Inc.*, 176 F.R.D. 75, 79 (W.D.N.Y. 1996); and, *Calgene, Inc. v. Enzo Biochem*, 1993 U.S. Dist. LEXIS 20217, at *8 (E.D. Cal. Aug. 23, 1993).

Here, the same conclusion should be reached because these witnesses' actions, or inactions, are at the heart of the Delsignores' prima facie claims and will also be utilized in connection with their demand for punitive damages. Thus, this factor should be deemed to favor the Delsignores as well with any associated doubts being resolved in favor of proceeding with the depositions. *See Holloway v. 3M Co.*, No. EDCV19-708 JAK (KKx), 2019 U.S. Dist. LEXIS 222001, at *67-68 (C.D. Cal. Oct. 31, 2019) citing to *Calderon*, 287 F.R.D. at 632-33.

iv. *The general responsibilities of the individual respecting the matters involved in the litigation*

Application of the “managing agent” term is “dependent largely on the functions, responsibilities and authority of the individual *respecting the subject matter of the litigation* (emphasis in the original).” *Botell*, 2013 U.S. Dist. LEXIS 12075, at *13 citing to *Kolb v. A.H. Bull Steamship Co.*, 31 F.R.D. 252, 254 (E.D.N.Y. 1962) (employee found to be managing agent because even though he was under a higher authority, he had authority concerning the subject matter of the litigation).

Here, PHH has argued against this factor asserting that these deponents are not in managerial positions. This improperly places form over substance since title alone is not determinative. *See Botell*, 2013 U.S. Dist. LEXIS 12075, at *12-13 (“The *Calderon* court noted that it is not a requirement that an employee be titled a ‘manager’ in order to qualify as a managing agent, but the inquiry is rather whether ‘their duties and activities are closely linked with the events giving rise to the lawsuit.’”).

These witnesses are in a unique position as key percipient witnesses to provide information relevant to this litigation; in fact, no other witnesses can provide such first-hand relevant information. *Compare, Tomingas v. Douglas Aircraft Co.*, 45 F.R.D. 94, 96-97 (S.D.N.Y. 1968).

Thus, the Delsignores request this Court deny PHH’s motion for protective order and grant their motion to compel.

D. Ample Analogous Authority Supports This Discovery

A string of federal cases has emerged permitting the deposition of “low level” employees of creditors, like PHH, as managing agents under Rule 30(b)(1). These cases are largely in reference to analogous circumstances involving credit-reporting disputes under the Fair Credit Reporting Act:

Odsather – Plaintiff Steven Odsather sought to depose defendant Fay Servicing, LLC’s employee, Madelyn Feliciano, pursuant to Fed. R. Civ. P. 30(b)(1) arguing this employee was “necessary to establish that [Fay Servicing] willfully violated the [FCRA].” *Odsather v. Fay Servicing, LLC*, 2019 U.S. Dist. LEXIS 4916, at *1-2 (W.D. Wash. Jan. 10, 2019). Fay Servicing countered by arguing Ms. Feliciano was “not a managing agent and other persons within the company should be deposed instead.” *Id.* The District Court permitted the deposition to move forward noting, “[a]s an automated consumer dispute operator, Ms. Feliciano appears to have had discretion about how to communicate [Odsather’s] debt information to the credit bureaus.” *Id.*, at *3. The Court also noted in compelling Ms. Feliciano’s deposition that she was not a manager and other employees held higher positions of authority but Ms. Feliciano’s first-hand involvement and “her general responsibilities were highly relevant to [the] litigation.” *Id.*

Lardizabal – In an FCRA matter, Plaintiff Gregorio Lardizabal similarly sought to depose two furnisher employees, Pat Bisbee and Wendeleite Johnson, pursuant to Fed. R. Civ. P. 30(b)(1). *Lardizabal v. Arvest Cent. Mortg. Co.*, No. 22cv345-MMA(BLM), 2023 U.S. Dist. LEXIS 31522, at *2 (S.D. Cal. Feb. 24, 2023). The Court explained, “[d]etermining whether an individual is a management agent ‘is to be answered pragmatically, on an ad hoc basis, considering the facts of

the particular case.” *Id.*, citing *Nationstar Mortg., LLC*, 316 F.R.D. at 333. In weighing the pertinent factors, the Court found Bisbee and Johnson to be managing agents for purposes of 30(b)(1). *Lardizabal*, 2023 U.S. Dist. LEXIS 31522, at *15-17.

Moore – In yet another FCRA matter, defendant Chase sought to preclude Plaintiff Oleta Moore from deposing its “fraud queue employees” pursuant to Fed. R. Civ. P. 30(b)(1). The Court relied in part upon *Lardizabal* in allowing the depositions to move forward stating, “the employees’ general responsibilities are highly relevant to the fraud investigation at the heart of this case.” *Moore v. JPMorgan Chase Bank, N.A.*, No. 22-cv-01849-JSC, 2023 U.S. Dist. LEXIS 59343, at *2-3 (N.D. Cal. Apr. 4, 2023)

Villa – The court permitted 30(b)(1) depositions to proceed over a furnisher’s objection in *Villa v. ProCollect, Inc.*, No. CV 22-5299-MWF (KSx), 2023 U.S. Dist. LEXIS 14792, at *3 (C.D. Cal. Jan. 18, 2023). During written discovery, plaintiff Kiri Villa “sought the identity of ‘all persons who conducted an investigation on [the furnisher’s] behalf regarding [Villa’s] disputes.’” Judge Stevenson found the 30(b)(1) depositions were neither disproportionate nor burdensome and further found that Villa was not required to first depose a Fed. R. Civ. P. 30(b)(6) witness. *Id.*, at *2 (“The Court notes that there is no rule of deposition priority. Indeed, Rule 26(d)(3) provides that unless the Court orders otherwise, ‘methods of discovery may be used in any sequence.’”).

The authorities provided show there is more than a close question as to whether PHH’s agents who rejected the check and conducted the investigations of a similar consumer dispute are “managing agents” of PHH for purposes of this litigation. As the above cases make clear, it is not so much the title or status of an individual, but his or her duties and responsibilities respecting the subject matter of the litigation that is important. These individuals were charged with handling the Delsignores’ major payment and then their dispute over that payment. They are therefore the only

people who might have information about what was actually done, as opposed to simply what PHH's policies and procedures theoretically required. Further, the factor that many courts have described as "paramount" also cuts in favor of allowing the depositions, because there is no reason to suppose that PHH's employees would identify with the Delsignores, as opposed to the corporation, which provides them with their livelihood. *Calderon*, at 634. Finally, the Delsignores have not had complete discovery into the work conducted by these agents or the amount of discretion that they possess. PHH has thwarted the Delsignore's search for the truth by responding, "I don't know" to these areas of inquiry and by clinging to claims that it failed to document basic loan activity.

E. PHH's Witnesses Located in the United States

The Delsignores noticed the depositions by providing a general description of the deponents, a situation specifically contemplated by W.Va. R. Civ. P. 30(b)(1). To the extent that PHH's customer service representatives that spoke with Mr. Delsignore on May 25, 2023 (Topic 2) or June 2, 2023 (Topic 1) are located within the territories of the United States, the Circuit Court has ordered PHH to make them available or provide their last known address, telephone number and other necessary contact information for purposes of issuing a subpoena. While the record remains unclear as to whether any responsive witness is located within the United States, PHH's petition does not appear to challenge this aspect of the Circuit Court's Order. Nor should it. The Delsignores are entitled to full and fair discovery in an effort to save their home. PHH may not consider this to be much in controversy – but it is everything to this family. Not to mention, the Delsignores had nearly \$200,000 in equity in the property when it was sold out from under them by PHH. There is no just cause for these depositions not going forward.

VI. CONCLUSION

Because it is clear the Petitioner has not met the standard for a writ of prohibition, where it cannot be credibly maintained that the Circuit Court's order is clearly erroneous as a matter of law, Respondents respectfully request this Court to enter an Order denying the Petitioner's Writ and return this case to the Circuit Court of Jefferson County.

ANTHONY DELSIGNORE and
HEATHER DELSIGNORE,
Defendants

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CERTIFICATE OF SERVICE

I, Jason E. Causey, counsel for Respondents, Anthony and Heather Delsignore, do hereby certify that on November 13, 2025, I electronically filed the Certificate of Service for **RESPONDENTS DELSIGNORES' RESPONSE IN OPPOSITION TO WRIT OF PROHIBITION** using the File & ServeXpress filing system, which will send notification of such filing to counsel of record, including the following participants:

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