

IN THE SUPREME COURT OF MISSOURI

CASE NO. SC 88777

STATE *ex rel.* FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Relator,

vs.

**THE HONORABLE NANCY L. SCHNEIDER, JUDGE
CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI**

Respondent.

On Grant of Preliminary Writ of Prohibition

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

SUPPLEMENTAL STATEMENT OF FACTS 1

 Guarantee's Discovery Efforts 2

 Guarantee's Rule 57.03 Efforts at Less Intrusive Means 7

POINT RELIED ON 9

ARGUMENT 10

RESPONDENT DID NOT ABUSE HER DISCRETION WHEN SHE ORDERED A
TOP LEVEL EXECUTIVE OF RELATOR TO BE DEPOSED BECAUSE:

- 1) LESS INTRUSIVE MEANS HAD BEEN TRIED FOR MONTHS
WITHOUT SUCCESS
 - A. RELATOR HAS DELAYED AND ATTEMPTED TO BLOCK
ALL DISCOVERY FROM THE OUTSET.
 - B. RULE 57.03 NOTICES SERVED MONTHS AGO AND
COVERING THE SAME AREAS AS RELATOR'S EXECUTIVE
WOULD BE ASKED HAVE BEEN DELAYED.
 - C. THE DEPOSITION OF A WITNESS SUGGESTED BY FIDELITY
AS A LESS INTRUSIVE MEANS WAS OBSTRUCTED AND
DELAYED.
- 2) RELATOR'S EXECUTIVE IS KNOWLEDGEABLE AND CAN
SUPPLY DISCOVERY EVIDENCE PREVIOUSLY UNAVAILABLE.

3) THE TRIAL COURT SPECIFICALLY CONDITIONED HER ORDER TO PROTECT RELATOR’S EXECUTIVE FROM MULTIPLE DEPOSITIONS AND FROM INCONVENIENCE. THERE IS NO EVIDENCE OF ANY INTENT TO ANNOY OR HARASS RELATOR OR ITS OFFICER, AND NO REAL EVIDENCE OF UNDUE HARDSHIP.

I. The Trial Judge Did Not Abuse Her Discretion.....	11
II. Mr. Quirk Has Relevant Information.....	14
CONCLUSION	18
CERTIFICATE OF SERVICE AND COMPLIANCE.....	19

TABLE OF AUTHORITIES

CASES

State ex rel. Ford Motor Company v. Messina,

71 S.W.3d 602 (Mo. banc 2002)10, 12, 18

RULES

Rule 57.03 1, 7, 9-11, 16, 19

JURISDICTIONAL STATEMENT

Guarantee Title Insurance Company (Guarantee”) accepts the Jurisdictional Statement of Fidelity National Title Insurance Company (“Fidelity”). Although a number of Fidelity companies, subsidiaries, sister companies and parents are involved below, the term “Fidelity” is used inclusively hereafter.

SUPPLEMENTAL STATEMENT OF FACTS

The trial Court order at issue here was not entered on a whim or in a vacuum. Instead, it occurred after full briefing and considerable deliberation in the context of discovery delays and failures by Relator, and in the immediate context of a terminated deposition of a Fidelity auditor and a Motion for Sanctions. That context is missing from Relator's Statement of Facts. Also missing from Relator's Statement of Facts are Guarantee's discovery efforts under Rule 57.03 to cover the questions for Mr. Quirk in the depositions of corporate representatives under Rule 57.03. Those efforts began in August and September of 2007 and are still unresolved.

Trial of the *Ruyle* case is set peremptorily to begin the week of March 10, 2008 and run an estimated two weeks. There are four other cases in St. Charles County related to the thefts at Phoenix Title (*First Franklin*, *Fremont Investment*, *Hoermann* and *National City*). (Ex. 1). There is a sixth case (*Shinell*) in St. Louis County which was stayed when plaintiff's counsel withdrew and which may be further delayed by the bankruptcy of a defendant. (Ex. 2). The claims, cross-claims and defenses in all of the cases are largely the same.

To avoid multiple depositions of the same people on the same issues in five or more cases, depositions, regardless in which case originally noticed, were generally held in all the cases. At a hearing on Fidelity's motion to quash the notice for Mr. Quirk's deposition or for a protective order, Guarantee represented orally to the trial Court that its deposition of Mr. Quirk would be at Mr. Quirk's office at an agreed time. That representation appears as a footnote to Guarantee's Submission in Support of the deposition of Mr. Quirk. (Ex. 3). Thereafter, on May 29, 2007, Guarantee filed a second Notice for Mr. Quirk's deposition in all of the cases with date, time and place "To Be Determined." (Ex. 4).

The trial Court Order at issue here covered more than just that Mr. Quirk be deposed. The Order also required scheduling and coordination as provided in the Scheduling Order that was attached. Depositions in *Ruyle* that were applicable to other cases pending in St. Charles County were to be taken so that those depositions could be used in all the other cases thereby protecting Mr. Quirk from multiple depositions. (Ex. 5). By conduct and implicit assent of all parties, the *Ruyle* case became the *ad hoc* lead case for all the others, including *Shinell* until it was stayed.

Guarantee's Discovery Efforts

On July 24, 2006, Guarantee filed its Motion to Compel against Fidelity seeking *inter alia* all of Fidelity's records of its periodic audits of Phoenix, a privilege log for records withheld as privileged, and the records Fidelity had agreed to produce at a "meet and confer" in *Shinell*. (Ex. 6).

A Court Order on September 1, 2006 postponed much of the above Motion based on Fidelity's representation about doing as it had promised in *Shinell*, and filing discovery responses and a privilege log by September 21, 2006. (Ex. 7).¹

On September 29, 2006, Guarantee filed a Motion for Sanctions based, *inter alia*, on Fidelity's failure to produce items discussed above and because Fidelity had produced for the first time at 3:35 p.m. in St. Louis a heavily redacted copy of a day-to-day, hour-by-hour set of phone notes dealing with Fidelity's 2005 audit of Phoenix Title and Fidelity's purported termination of Phoenix as an agent. The Fidelity vice president who authored the notes, John Foster, was to be deposed the following morning in Chicago. Guarantee argued that the diary was within innumerable prior requests served months and months earlier. While captioned as a Motion for Sanctions, the Motion sought only further discovery. (Ex. 8). On October 22, 2006, Guarantee filed a supplement to the above Motion to point out, *inter alia*, that Fidelity had failed and refused to check its back up electronic storage records. (Ex. 9).

On October 6, 2006, the Court entered an Order requiring Fidelity to provide a privilege log (¶ 1), requiring Guarantee to propound specific requests to guide Fidelity's search of its backup electronic tapes (¶ 3), and postponing further matters because of discovery responses Fidelity had delivered to Guarantee after the close of business the previous night. (Ex. 10). Guarantee had delivered its privilege log months earlier.

¹ The date in the Order of September 11, 2006 was an error.

On October 11, 2006, Guarantee served its Second Motion to Compel stating that what Fidelity had delivered the night of October 5, 2006 was neither complete nor as represented, particularly with regard to records of Fidelity's audits of Phoenix. (Ex. 11). This Motion was supplemented six days later with the addition of numerous attachments. (Ex. 12).

On November 9, 2006, the Court entered two Orders. One Order set out a procedure for *in camera* review of allegedly privileged records withheld by both Guarantee and Fidelity. (Ex. 13). Fidelity had objected to *in camera* review by the Court. (Ex. 14). The second Order relied upon Fidelity's agreement to produce certain audit records. (Ex. 15).

On December 15, 2006, Guarantee filed its Third Motion to Compel against Fidelity seeking, *inter alia*, to learn when Fidelity destroyed certain records, to halt destruction of records by Fidelity, and to require Fidelity to comply with prior Orders including re-opening the deposition of the Fidelity vice president, John Foster. It was Mr. Foster whose heavily redacted phone notes had been withheld until hours before his deposition in Chicago. (Ex. 16).

On January 5, 2007, the Court granted the above Motion in part and denied it in part. The Foster deposition was re-opened; both parties were ordered not to destroy records; Fidelity was ordered to search its back-up tapes for specified emails (assessment of costs was deferred); and Fidelity was ordered to identify the person(s) most familiar with its destruction of records of its 2003 and 2004 audits of Phoenix. (Ex. 17).

On January 17, 2007, the Court entered her Order based on her *in camera* review of allegedly privileged Fidelity records requiring production of certain Fidelity records that had been withheld as privileged. (Guarantee had agreed to produce all of its challenged privileged records so long as the production was not deemed a waiver). (Ex. 18).

On March 5, 2007, Guarantee filed its Fourth Motion to Compel against Fidelity still seeking all of Fidelity's records relating to Fidelity's periodic audits of Phoenix. (Ex. 19). The Motion was heard and "denied at this time" on March 16, 2007. (Ex. 20). The issue of these records came up again, and Guarantee's Motion was denied based on Fidelity's express representation that all remaining records had been produced. (Ex. 21).

Guarantee originally served the deposition Notice for Mr. Quirk on March 13, 2007 for a deposition on April 18, 2007. (Ex. 22). A hearing was held on Fidelity's motions to block the deposition of Mr. Quirk on May 11, 2007. At that time the Court set dates for the parties to brief the issue of Mr. Quirk being deposed and took the matter under consideration. Also, Guarantee voluntarily withdrew the date in its Notice for Mr. Quirk's deposition. (Ex. 21). On May 28, 2007, Guarantee filed its Submission in Support of the deposition of Mr. Quirk. (Ex. 23). Fidelity replied on May 25, 2007. (Ex. 24). And, as noted above, on May 29, 2007, Guarantee filed its second Notice for Mr. Quirk with the date, time and place set as "To be Determined." (Ex. 4). Guarantee tendered a sur-reply concerning the Quirk deposition on May 29, 2007 (Ex. 25) which Fidelity objected to on June 1, 2007. (Ex. 26).

While the question of whether Mr. Quirk could be deposed was under submission, Guarantee took the deposition of one of Fidelity's auditors, Ares Cruz. Guarantee terminated Mr. Cruz's deposition because of perceived evasiveness and obstructionism and filed its Fifth Motion to Compel and for Sanctions. (Ex. 27). Fidelity sought a protective order to bar any resumption of the Cruz deposition. (Ex. 28). At a hearing on that motion held on June 22, 2007, a lawyer for a third party called Mr. Cruz's performance a "farce." Another third party attorney stated that it was a very difficult deposition, but he had persisted. The Court took the matter under submission. (Ex. 29). As Guarantee stated in its Fifth Motion to Compel, Fidelity had suggested the deposition of Mr. Cruz as a "less intrusive" means of discovery. A purpose in deposing Mr. Cruz was to secure simple, basic information about Fidelity's two groups of auditors (regular and "Loss Mitigation"). (See Motion to Compel, Ex. 27, ¶¶ 9 and 10 and cites therein).

On June 7, 2007, Guarantee filed its Sixth Motion to compel against Fidelity dealing with (1) Fidelity's refusal to name its employees who destroyed a box of Phoenix records, (2) Fidelity's refusal on the bases of "hearsay" and "privilege" to answer interrogatories whether its General Counsel made certain published statements to the St. Louis Post-Dispatch about Phoenix, and (3) Fidelity's refusal to identify its employees who made certain statements on Fidelity's website, namely that Fidelity stood behind the work of its agents in their real estate closing services. (Ex. 30).

On July 27, 2007, the Court granted Guarantee's Motion to Compel in part and denied it in part, without prejudice, for Guarantee to proceed in other ways on the denied matters. (Ex. 31).

On August 3, 2007, as stated earlier, the Court ruled that Guarantee could not resume the deposition of Mr. Cruz, but that it could depose Mr. Quirk. (Ex. 5). Said deposition was to be at a date, place and time to be agreed upon. The deposition was to be in all St. Charles County cases to avoid Mr. Quirk having to appear more than once. See previous.

Guarantee's Rule 57.03 Efforts at Less Intrusive Means.

On August 29, 2007, Guarantee served a Rule 57.03 deposition notice on Fidelity for a variety of topics, many of which could be addressed by Mr. Quirk. (Ex. 32). On September 28, 2007, Guarantee served a second Rule 57.03 on Fidelity covering the balance of topics that it believed Mr. Quirk could address. (Ex. 33).

Thereafter, there followed months of delay in getting dates or names on both Rule 57.03 Notices. That delay continued into 2008. Guarantee's efforts and Fidelity's responses are reflected in the correspondence attached. (Ex. 34).²

Recently on November 20, 2007 and again on December 18, 2007, Guarantee wrote Fidelity inquiring, *inter alia*, about when the corporate representative depositions could begin and when Fidelity would file its objections, if any. (Ex. 35). On December 26, 2007, Fidelity responded with several requests for "clarification" and several objections it was "going to" make at some unspecified future time. (Ex. 36).

² There was a short period of settlement discussions when both Guarantee and Fidelity stood down. Guarantee, however, continuously pushed for firm deposition dates in case those discussions failed.

Many points raised by Guarantee in its letters were not addressed by Fidelity, particularly if any corporate representatives would be produced and when. Guarantee responded to Fidelity's letter on January 3, 2008. (Ex. 37). As of this date, no corporate witnesses have been identified, no dates set, and no formal objections served or filed by Fidelity.

POINTS RELIED ON

RESPONDENT DID NOT ABUSE HER DISCRETION WHEN SHE ORDERED A TOP LEVEL EXECUTIVE OF RELATOR TO BE DEPOSED BECAUSE:

- 1) LESS INTRUSIVE MEANS HAD BEEN TRIED FOR MONTHS WITHOUT SUCCESS
 - a. RELATOR HAS DELAYED AND ATTEMPTED TO BLOCK ALL DISCOVERY FROM THE OUTSET.
 - b. RULE 57.03 NOTICES SERVED MONTHS AGO AND COVERING THE SAME AREAS AS RELATOR'S EXECUTIVE WOULD BE ASKED HAVE BEEN DELAYED.
 - c. THE DEPOSITION OF A WITNESS SUGGESTED BY FIDELITY AS A LESS INTRUSIVE MEANS WAS OBSTRUCTED AND DELAYED.
- 2) RELATOR'S EXECUTIVE IS KNOWLEDGEABLE AND CAN SUPPLY DISCOVERY EVIDENCE PREVIOUSLY UNAVAILABLE.
- 3) THE TRIAL COURT SPECIFICALLY CONDITIONED HER ORDER TO PROTECT RELATOR'S EXECUTIVE FROM MULTIPLE DEPOSITIONS AND FROM INCONVENIENCE. THERE IS NO EVIDENCE OF ANY INTENT TO ANNOY OR HARASS RELATOR OR ITS OFFICER, AND NO REAL EVIDENCE OF UNDUE HARDSHIP.

State ex rel. Ford Motor Company v. Messina, 71 S.W.3d 602 (Mo. banc 2002)

Missouri Supreme Court Rule 57.03

ARGUMENT

RESPONDENT DID NOT ABUSE HER DISCRETION WHEN SHE ORDERED A TOP LEVEL EXECUTIVE OF RELATOR TO BE DEPOSED BECAUSE:

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I. The Trial Judge Did Not Abuse Her Discretion.

The definition of an abuse of discretion in the situation at issue here is defined in *State ex rel Ford Motor v. Messina*, 71 S.W. 3d 602, 607 (Mo. Banc 2002) as a three part test: the order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration. (Emphasis supplied.)

No fair-minded person having seen the trial Court's work over the long course of the *Ruyle* case and the related cases could possibly conclude that Judge Schneider's order meets any part of the definition of abuse in *Messina*. Through numerous discovery disputes, motions and hearings in multiple, complex multi-party cases, the trial Court's attention, hard work and careful reasoning are apparent. As stated earlier, the order as to Mr. Quirk's deposition was not in a vacuum or on a whim; rather, it occurred in a specific context, after full briefing and after careful consideration.

The *Messina* decision places the burden of proving an abuse of discretion on Fidelity, but the arguments Fidelity makes are insufficient and many of them are unblinkingly false.

Even putting aside the facts that Fidelity's Petition for a Writ of Prohibition addressed the wrong Notice for Mr. Quirk and that Fidelity omitted that the ordered deposition was to be held only at an agreed date, time and place, not in St. Louis, the argument by Fidelity that Guarantee should have proceeded by "less intrusive means" ignores the many months of discovery history involving protracted efforts at "less intrusive means." That history and those facts are the background and context of the order at issue here.

From day one, Fidelity's approach to discovery has been trench warfare. Critical telephone notes were withheld for months and months until the very eve of their author's deposition. Documents have been destroyed. Documents have been withheld. Fidelity's remaining records of audits of Phoenix from 2001 into 2005 have been dribbled out piecemeal over the course of several Motions to Compel. Motions to Compel were necessary for such things as what Fidelity had promised to do in a "meet and confer" and things that the law required such as a privilege log. Guarantee tried "less intrusive means" for well over a year. Ironically, but not surprisingly, many of the discovery requests Fidelity objected to in St. Charles were essentially the same as it proposed in a Chicago federal lawsuit where it is the plaintiff and is suing Stewart Title and Intercounty Title Agency for roughly \$35 million. In that case, Fidelity occupies basically the same position as Guarantee here. In short, their positions are reversed, but what Fidelity vigorously sought and received in Illinois, it objected to and delayed in Missouri.

Six months ago Guarantee tried to depose Mr. Ares Cruz, a Fidelity auditor, on several technical matters including when and why Fidelity's regular auditors transfer their work to a specialized audit group named "Loss Mitigation." This happened at Phoenix Title in March 2005. In opposing the deposition of Mr. Quirk, Fidelity specifically suggested that Guarantee depose Mr. Cruz, among others. That relatively routine deposition became a litany of "I don't know" and "I don't recall". At one point, Mr. Cruz literally testified that he did not remember what he could not remember. A

lawyer for a third party castigated Fidelity's actions on the record, and another proceeded despite several sharp exchanges and threats.

Roughly four months ago, Guarantee filed two Notices for corporate representative depositions, the second of which was particularly meant to secure the discovery that Mr. Quirk could have provided, but which was not in the first Notice. (See Exs. 32 and 33). The initial Notice included some information that Mr. Quirk could address, particularly the later paragraphs. On December 26, 2007, Fidelity wrote and asked for "clarification" of items in the notices and mentioned several objections it was "going to" make. Tellingly, Fidelity waited four months to tell Guarantee that it did not receive an exhibit that Guarantee thought had been attached to the first Notice.

Less intrusive means have not been available. Less intrusive means have been tried again and again, but they have been blocked or show-played for over a year. The trial judge knew this. She saw the motions, the pleadings, the exhibits; and she heard the positions advanced at the many oral arguments and hearings. Fidelity's argument that less intrusive means should have been used is false, and it should be seen for what it is.

Fidelity states that counsel for Guarantee refused to discuss why Guarantee wanted to depose Mr. Quirk. This is the prototypical red-herring because the law does not require futile acts, and that discussion would have been totally futile given the parties history. Further, it would have only resulted in even more delay. Finally, and in any event, Guarantee's reasons were spelled out in the pleadings, and, if Fidelity had any alternatives or compromises in mind, they were never raised.

II. Mr. Quirk Has Relevant Information

The argument that Mr. Quirk is so far up in Fidelity's large organization that he does not know Phoenix Title from Phoenix, Arizona is misdirected and omits what Mr. Quirk does know.

First and foremost, Mr. Quirk knows his company. He knows, presumably, what its Loss Mitigation auditors do, and when and why they are brought in. He managed Fidelity's agents like Phoenix for many years. He knows how the agents worked with Fidelity. The role of Phoenix Title and the scope of its agency for Phoenix are key issues here, and agency lives not just in the term of Fidelity's contract with agents like Phoenix, but in the day to day operations of the two companies and the control that Fidelity had over Phoenix. How Guarantee ran its business and dealt with its agents has nothing to do with what Fidelity did. Mr. Quirk also knows the ins and outs of Fidelity's title insurance commitments, its policies of title insurance and its closing protection letters. He signed both the title policies and the closing protection letters at issue below, albeit that they are electronic signatures.

Presumably, Mr. Quirk also knows something about the Fidelity subsidiary that runs the Fidelity website, Fidelity National Information Services, wherein Fidelity said it stood behind its agents. And he presumably knows at least something about what Fidelity is asserting in the \$35 million case in federal court in Chicago. He should also be able to explain why Fidelity is asserting the opposite in Missouri. (Guarantee's First Amended Cross-Claims below contain specific allegations of judicial estoppel based on Fidelity's conflicting positions.)

Fidelity argues that Guarantee has specified the areas that Guarantee wants to depose Mr. Quirk in its Answer to Fidelity's Petition for Prohibition, and it then purports to diminish or dismiss those topics: (*See* Fidelity Brief p. 14, *et seq.*). These arguments are against straw men. Guarantee's topics for Mr. Quirk are in their submission to the trial Court and in the two Rule 57.03 deposition notices.

One example of Fidelity's arguments is that there is no need to question Mr. Quirk about Fidelity's dealings with its agents, its commitments, policies, closing letters and the like is because Guarantee is in the same business. What Guarantee does, what its commitments and policies and protection letter provide, and how it deals with agents, however, are wholly irrelevant to what Fidelity does.

Fidelity claims, through conclusory language in the affidavit of Mr. Quirk, that his deposition would cause "a tremendous...strain on himself and Fidelity..." No details are offered, and Fidelity ignores the host of presidents, vice-presidents and others who surround Mr. Quirk. They presumably maintain the far flung Fidelity empire when Mr. Quirk goes on vacation, plays golf or is sick. As demonstrated in the Answer of Guarantee, there are between seven and twelve people including a President and Co-CEO or Co-President, at or just below Mr. Quirk. (Ex. 38). Mr. Quirk is the only upper tier officer Guarantee has sought to depose, and he was selected for his years of managing Fidelity agents, his long experience in the Fidelity enterprise, and for the other reasons cited such as the mysterious Loss Mitigation auditors.

Both the former president of Guarantee, Tom Conroy, and its current president, Hi Blomquist, were deposed for two days each in June and July, 2007. This happened

without objection, delay or petitions for Prohibition. Guarantee's former president, Mr. Conroy, did have personal knowledge, and the current president, Mr. Blomquist, had some information, albeit largely second hand. Many hours of questions by Fidelity, however, dealt with the provisions of Guarantee's title insurance commitments, its title insurance policies, its closing protection letters, its auditors, company procedure and the like. Guarantee is infinitely smaller than Fidelity and does not have the vast internal support that is available to Fidelity and Mr. Quirk.

It is near incredible, if not beyond incredible, for Fidelity to argue that a deposition at Mr. Quirk's office for approximately three or four hours would "tremendously" damage or impair Mr. Quirk or the giant Fidelity. Fidelity recognizes this and argues that counsels' estimates of deposition time are notoriously inaccurate. That is true, but it is a non-argument. This Court can order that the deposition of Mr. Quirk be limited to three or four hours with the time apportioned among Guarantee and the other parties as they may agree. Delays or obstruction in that deposition could be remediable before this Court.

The trial Court had seen over a year of discovery delay and arguments as specious as those above.³ She took the issue of Mr. Quirk's deposition under advisement after ordering a full briefing. She knew that less intrusive means had been tried and, as

³ The trial docket itself in *Ruyle* is 43-pages long, (Ex. 1), and the pleadings cover four feet of shelving.

required by *Messina*, she undeniably gave the matter careful consideration. To say otherwise is simply incorrect.

Before the trial judge at the same time was a dispute over what should have been a short simple routine deposition of Mr. Cruz. Mr. Cruz could not remember anything and, as stated earlier, a lawyer for a third party and a lawyer for the Ruyles orally commented on the talking objections and reluctance of the witness at argument. That lawyer called the Cruz deposition a “farce” at oral argument. The lawyer for the plaintiffs in *Ruyle* stated that Fidelity’s practices were objectionable, but that his toughness and tenacity allowed him to complete his questions. The trial Court heard that, but this Court cannot because there was no transcript.

The “logic of the circumstances”, mentioned in *Messina*, included here that a party with months of delay to its account was insisting on “less intrusive means” before it would produce a knowledgeable executive witness. Further, the deposition of a witness that Fidelity had nominated as a less intrusive witness, Mr. Cruz, was unduly long and contentious. The trial Court knew and understood the “logic of the circumstances,” and her order was not against that logic. Her order was neither arbitrary nor unreasonable; rather it demonstrated a very clear and cogent understanding of the “logic of the circumstances.” That one or more members of this Court would not have done as the trial Court, did not mean that she abused her inherent authority to manage the cases before her in her Court.

The trial Court protected Mr. Quirk from multiple depositions by requiring that that deposition be able to be used in all the St. Charles County cases. Her order,

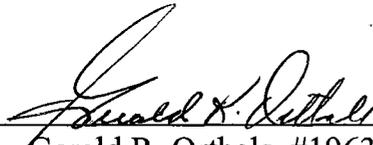
notwithstanding Fidelity's false argument that Mr. Quirk would have had to come to St. Louis, was understood by everyone to be a deposition at his office at an agreed date and time. The trial Court closed the deposition of Mr. Cruz and provided that Mr. Quirk, who is likely to be less wasteful of time, speak for his company at a date, time and place "To Be Determined" by agreement.

Fidelity did not propose dates or times for a deposition of Mr. Quirk, and Mr. Quirk apparently did not have one single hour or day between the trial Court's order of August 3, 2007 and trial, March 10, 2008, to be deposed. Fidelity also did not tender any substitute witnesses, as it could have under the pending Rule 57.03 Notices. Instead, Fidelity has continued to drag this case out almost to the eve of trial by seeking a Writ of Prohibition based on the wrong Notice, the wrong place of deposition, an omission of the history of discovery and the facts before the trial Court, and specious and false arguments.

CONCLUSION

This Court should allow the deposition of Mr. Quirk to proceed. If this Court accepts any of the non-specific hyperbole about the alleged "tremendous" harm to Mr. Quirk and Fidelity, and ignores the great harm his company has allegedly caused in Missouri, this Court can limit the time of Mr. Quirk's deposition.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that a copy of the Respondent's Brief and the accompanying Appendix (two volumes) was mailed this 12th day of January, 2008, by first-class U.S. Mail, postage prepaid, along with one CD containing a copy of the same addressed to the following:

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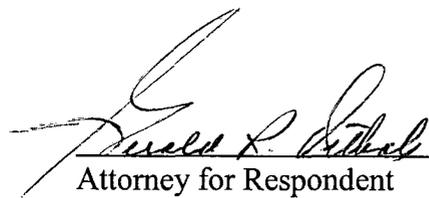
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Furthermore, the undersigned certifies that: (1) Respondent's Brief complies with the limitations contained in Rule 84.06 (excluding the cover, certificate of service and compliance, signature block and appendix, there are 4,304 words in Respondent's Brief; (2) the name and version of the word processing software used to prepare Respondent's Brief is Microsoft Word; and (3) the CD provided to this Court has been scanned for viruses and is virus-free.



Attorney for Respondent