

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

RELATOR'S BRIEF

THE STOLAR PARTNERSHIP LLP
JAY L. LEVITCH, # 25503
MICHAEL A. FISHER, # 23524
911 Washington Avenue, 7th Floor
St. Louis, Missouri 63101
(314) 231-2800
(314) 436-8400 (Fax)

Attorneys for Relator Fidelity National
Title Insurance Company

TABLE OF CONTENTS

Table of Contents..... 1

Table of Authorities..... 3

Jurisdictional Statement..... 4

Statement of Facts 4

Points Relied On..... 9

Argument..... 10

RESPONDENT ERRED AND ABUSED HER DISCRETION WHEN SHE
ENTERED AN ORDER COMPELLING RELATOR’S TOP LEVEL
EXECUTIVE TO SUBMIT TO A DEPOSITION IN PLAINTIFFS’ LAWSUIT
BECAUSE:

1) GUARANTEE CAN OBTAIN, THROUGH LESS INTRUSIVE
MEANS, WHATEVER INFORMATION IT MAY SEEK IN A
DEPOSITION OF RELATORS’ TOP LEVEL EXECUTIVE;

2) THERE IS NO NEED FOR RELATOR’S TOP LEVEL EXECUTIVE
TO TESTIFY; AND

3) REQUIRING RELTOR’S TOP LEVEL EXECUTIVE TO TESTIFY
AT A DEPOSITION IN A CASE ABOUT WHICH HE HAS NO
PERSONAL KNOWLEDGE SERVES NO PURPOSE BUT TO
ANNOY AND HARRASS RELATOR AND ITS PRESIDENT 10

A. Standard of Review 10

B. .The Court’s rule and holding in Messina should govern its decision in this writ proceeding 11

Conclusion 22

Certificate Of Service And Compliance 23

TABLE OF AUTHORITIES

Cases**Other Authorities**

State ex rel. Ford Motor Company v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002) 4, 10, 11,
12, 13

Court Rules

Missouri Supreme Court Rule 56.01 13, 14, 16

JURISDICTIONAL STATEMENT

On September 25, 2007, this Court entered its Preliminary Writ of Prohibition, prohibiting Respondent, The Honorable Nancy L. Schneider, Judge of the Circuit Court of St. Charles County, from implementing her Order compelling Relator to produce its top-level executive, Raymond R. Quirk, to give a deposition in the underlying case. Relator asks that the Preliminary Writ be made absolute. Jurisdiction is proper in this Court pursuant to Article V, Section 3 of the Missouri Constitution because Relator alleges Respondent abused her discretion and exceeded her jurisdiction by compelling Relator to produce its top-level executive to appear for a deposition in the underlying case. State ex rel. Ford Motor Company v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002) (Prohibition is the proper remedy for an abuse of discretion during discovery.).

STATEMENT OF FACTS

This lawsuit arises out of a real estate closing company's misappropriation of funds from its escrow account.

The closing company in question was Phoenix Title, Inc., formerly located in St. Charles, Missouri. The plaintiffs John and Lillian Ruyle (the "Ruyles") allege that on April 8, 2005, they went to Phoenix Title's offices to close on their purchase of certain premises ("Premises") in St. Charles County, Missouri; at that time, they deposited \$153,615.04 with Phoenix Title; and these funds were to be used in part to pay off a loan that was secured by a deed of trust recorded against the Premises. The Ruyles further allege that Phoenix Title did not use the funds for that purpose; the loan was not paid off; and the deed of trust against the Premises was not released. The Ruyles claim that

Phoenix Title misappropriated their money. Phoenix Title has since shut down, and its owner and president, James Thurman, has pled guilty to misappropriating close to \$2 million from Phoenix Title's escrow account. Mr. Thurman is now serving a prison sentence in a federal penitentiary. *See* Respondent's Answer, ¶ 6, admitting paragraph 2 of the Writ Petition.

The Ruyles filed this lawsuit to recover for their loss. Among others, they have sued two title insurance underwriters, Relator Fidelity National Title Insurance Company ("Fidelity") and Guarantee Title Insurance Company ("Guarantee"). In addition to being a real estate closing company, Phoenix Title also was a title insurance agent, serving as a title insurance agent for Fidelity between 1996 and April 4, 2005 and for Guarantee between March 22, 2005 and April 11, 2005. The Ruyles contend that, since Phoenix Title was at one time an agent for Fidelity and Guarantee, either or both of Fidelity and Guarantee are responsible for Mr. Thurman's misappropriation of funds.

Fidelity and Guarantee each have denied they have any liability to the Ruyles. Guarantee also has filed a crossclaim ("Crossclaim") against Fidelity. In its First Amended Crossclaim, Guarantee alleges three counts against Fidelity:

- (I) Guarantee claims that Fidelity, acting through Phoenix Title, fraudulently induced Guarantee into becoming an underwriter for Phoenix Title;
- (II) Guarantee claims that Fidelity, acting through Phoenix Title, converted funds that customers had entrusted to Phoenix Title; and
- (III) Guarantee claims that Fidelity has been unjustly enriched by Mr. Thurman's misappropriation of the Ruyles' money.

Guarantee contends that if it is liable to the Ruyles, then, under one or more of these three theories, Fidelity is liable to Guarantee. *See* Respondent's Answer, ¶ 6, admitting paragraph 3 of the Writ Petition.

In pursuit of its Crossclaim, Guarantee has issued a Notice of Deposition, purporting to require Fidelity to produce its president, Raymond R. Quirk, to testify about unspecified topics at the offices of Guarantee's counsel in St. Louis, Missouri. Deposition Notice, Appendix, p. A-2, Tab B.

Mr. Quirk is not a party to the Ruyles' lawsuit, and he has no personal or special knowledge of the facts and events alleged in that lawsuit or alleged in Guarantee's Crossclaim. Quirk Affidavit, ¶s 3, 4, 5, Appendix, p. A-17, Tab E. Based in Jacksonville, Florida, Mr. Quirk is not only the top-level executive at Fidelity, he also is the Co-Chief Operating Officer of Fidelity National Financial ("FNF"), which is Fidelity's indirect parent. Quirk Affidavit, ¶s 2, 7, Appendix, pp. A-17-A-18, Tab E. With more than 400 direct and indirect subsidiaries that have operations across the United States, FNF is a "Fortune 500" company, publicly traded on the New York Stock Exchange. *See* Respondent's Answer to Writ Petition, ¶ 6, admitting paragraphs 5 and 6 of the Writ Petition.

Mr. Quirk also is the Chief Executive Officer of Fidelity National Title Group ("FNTG"), which is Fidelity's direct parent. FNTG is the parent also of four other large, national title insurance companies. Organizational Chart, Appendix, pp. A-387-A-401, Tab I. Through its subsidiaries (including Fidelity), FNTG is responsible for

underwriting close to 29% of all residential and commercial title insurance issued in the United States. Quirk Bio, Appendix, p. A-33, Tab G.

At such a high level in the corporate hierarchy, Mr. Quirk had no direct or indirect dealings with Phoenix Title or with Guarantee. He does not regularly travel to St. Louis, Missouri; and he has no plans to come to St. Louis. Quirk Affidavit, ¶ 7, Appendix, p. A-17, Tab E. To force him to testify as requested in Guarantee's Notice of Deposition would place a tremendous, and unnecessary, strain and burden on him and on Fidelity. Quirk Affidavit, ¶ 6, Appendix, p. A-17, Tab E.

After receiving the Notice of Deposition, counsel for Fidelity contacted Guarantee's attorney and requested the basis for seeking a deposition of Mr. Quirk. Guarantee's attorney declined to state any basis at all. Instead, Guarantee's attorney stated that he was "confident" Fidelity would find his reasons "unpersuasive" and that, therefore, he "decided to file a Notice and let Mr. Quirk aver, if he wishes, that he has no relevant information." Counsel's Letter, final paragraph, Appendix, p. A-5, Tab C.

On April 6, 2007, Fidelity filed its "Motion to Quash Notice of Deposition of Fidelity's President or, Alternatively, For Protective Order". Motion to Quash, Appendix, p. A-6, Tab D. In support of the Motion, Mr. Quirk submitted an affidavit attesting to his lack of involvement in the transactions at issue and his lack of personal knowledge. Quirk Affidavit, Appendix, p. A-17, Tab E.

On May 11, 2007, counsel for Fidelity and counsel for Guarantee argued Fidelity's Motion before Respondent, the Honorable Nancy L. Schneider. On August 3, 2007, Respondent issued her Order. In her Order, Respondent states: "Guarantee's motion to

compel deposition of Raymond Quirk is ordered granted.” Order, Appendix, p. A-1, Tab A. Although Guarantee had not filed a motion to compel Mr. Quirk’s deposition, Respondent’s Order effectively denied Fidelity’s Motion to Quash.

Fidelity then filed a petition for writ of prohibition with the Missouri Court of Appeals for the Eastern District. The Court of Appeals denied Fidelity’s petition on August 28, 2007. Appendix, p. A-409, Tab K.

Fidelity filed its Petition for Writ of Prohibition with this Court on September 6, 2007, and on September 25, 2007, the Court granted its Preliminary Writ of Prohibition. In its Preliminary Writ, the Court ordered Respondent to “show cause why a writ of prohibition should not issue prohibiting [Respondent] from doing anything other than vacating that portion of [her] order of August 3, 2007, granting [Guarantee’s] motion to compel the deposition of Raymond R. Quirk, in cause No. 0511CV-07338, entitled John T. Ruyle and Lillian T. Ruyle, Plaintiffs v. Guarantee Title Insurance Company, *et al.*, Defendants”. Preliminary Writ of Prohibition (September Session 2007, En Banc).

Respondent filed an Answer to Fidelity’s Petition for Writ of Prohibition on November 13, 2007.

POINT RELIED ON

RESPONDENT ERRED AND ABUSED HER DISCRETION WHEN SHE ENTERED AN ORDER COMPELLING RELATOR'S TOP LEVEL EXECUTIVE TO SUBMIT TO A DEPOSITION IN PLAINTIFFS' LAWSUIT BECAUSE:

- 1) GUARANTEE CAN OBTAIN, THROUGH LESS INTRUSIVE MEANS, WHATEVER INFORMATION IT MAY SEEK IN A DEPOSITION OF RELATOR'S TOP LEVEL EXECUTIVE;**
- 2) THERE IS NO NEED FOR RELATOR'S TOP LEVEL EXECUTIVE TO TESTIFY; AND**
- 3) REQUIRING RELATOR'S TOP LEVEL EXECUTIVE TO TESTIFY AT A DEPOSITION IN A CASE ABOUT WHICH HE HAS NO PERSONAL KNOWLEDGE SERVES NO PURPOSE BUT TO ANNOY AND HARRASS RELATOR AND ITS PRESIDENT.**

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

Missouri Supreme Court Rule 56.01

ARGUMENT

RESPONDENT ERRED AND ABUSED HER DISCRETION WHEN SHE ENTERED AN ORDER COMPELLING RELATOR'S TOP LEVEL EXECUTIVE TO SUBMIT TO A DEPOSITION IN PLAINTIFFS' LAWSUIT BECAUSE:

- 1) GUARANTEE CAN OBTAIN, THROUGH LESS INTRUSIVE MEANS, WHATEVER INFORMATION IT MAY SEEK IN A DEPOSITION OF RELATOR'S TOP LEVEL EXECUTIVE;**
- 2) THERE IS NO NEED FOR RELATOR'S TOP LEVEL EXECUTIVE TO TESTIFY; AND**
- 3) REQUIRING RELATOR'S TOP LEVEL EXECUTIVE TO TESTIFY AT A DEPOSITION IN A CASE ABOUT WHICH HE HAS NO PERSONAL KNOWLEDGE SERVES NO PURPOSE BUT TO ANNOY AND HARRASS RELATOR AND ITS PRESIDENT.**

A. Standard of Review

Prohibition is the proper remedy for an abuse of discretion during discovery. State ex rel. Ford Motor Company v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002). Although a trial court has broad discretion in determining whether to permit the taking of a deposition, that discretion is not unfettered. Messina, 71 S.W.3d at 607. A trial court abuses its discretion if its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration. Id.

B. The Court's rule and holding in *Messina* should govern its decision in this writ proceeding.

At issue in this writ proceeding is whether a corporation's high-level executive may be compelled to give a deposition in a case arising out of transactions in which the executive has had no involvement and about which he or she has no personal knowledge. The Court recently settled this question in Messina. 71 S.W.3d at 607. There, the Court ruled that such a deposition should not go forward in the absence of a showing that: (1) the information to be sought in the deposition was unavailable through less intrusive means; (2) there was more than only a slight need for the deposition; and (3) the deposition would not impose undue burden, annoyance and oppression on the organization and the proposed deponent. Id.

Guarantee did not and could not make the requisite showing. Consequently, Respondent abused her discretion when she entered her Order compelling Mr. Quirk to sit for a deposition in the Ruyles' lawsuit. The Court, therefore, should make absolute its Preliminary Writ of Prohibition.

1. The Facts of *Messina*

The relevant facts before the Court in Messina are remarkably similar to the facts now before the Court. In Messina, the plaintiffs sued Ford Motor Company on allegations of defective design of the Ford Bronco II, which also was allegedly equipped with defective tires. In pursuit of their claims, the plaintiffs served a notice to take the depositions of four high-level executives at Ford. In response to the deposition notice, Ford requested that the plaintiffs "specify 'the discoverable subject matter' because Ford

could not ‘conceive of any discoverable information which could not be obtained through less burdensome means.’” Id. at 605.

The plaintiffs argued that they were “‘entitled to have the testimony of high-level management personnel who are empowered with the decision making responsibility on the kinds of product defect issues that are central to our case.’” Id. In particular, the plaintiffs contended they wanted to ask the Ford executives about tread-separation problems with other Ford products – the 1991-2001 “Explorers” – in order to “contrast Ford’s recall of the Explorers’ tires with Ford’s failure to recall the 1987 Bronco II or its tires.” Id.

As did Fidelity, Ford filed a motion for a protective order or, alternatively, to quash the depositions. In support of Ford’s motion, three of the four Ford executives, like Mr. Quirk, submitted an affidavit asserting no personal involvement in designing and developing the Bronco II, or selecting its tires.¹ Id. at 605-06.

The trial court denied Ford’s motion. Ford then filed a petition for a writ of prohibition. This Court issued a preliminary writ, which, after argument, was made absolute. Id. at 606.

¹ Ford conceded that the deposition of one of the four employees named in the notice of deposition was proper and, presumably for this reason, did not submit an affidavit on behalf that employee. Id. at 607.

2. The Holding of *Messina*.

In its opinion, the Court first considered whether to adopt the “apex rule”, which is followed by courts in Texas and California. The apex rule holds that “an officer at the apex of the corporate hierarchy cannot be deposed unless the employee has special or unique knowledge, or the information is first pursued through less intrusive means.” Id. at 606-07. The Court declined to follow the apex rule. It did so, however, not because it believed that an executive’s lack of knowledge or the availability of less intrusive means of discovery were immaterial or improper factors for courts to consider when determining whether or not to allow the deposition of a high-level executive. To the contrary, the Court recognized that a deposition of a top-level executive may be an “annoyance, burden and expense” that may be “unnecessary” because “[p]ersons lower in the organization may have the same or better information”. Id.

The Court’s reason for rejecting the apex rule, rather, was simply that the apex rule is unnecessary under Missouri law inasmuch as, without resort to the apex rule, the problems and concerns that arise when a litigant seeks the deposition of a high-level executive can be adequately addressed within the framework of Rule 56.01. Id. at 607. As the Court pointed out, under Rule 56.01(b)(1), “[a] top-level employee – like anyone else – should not be deposed unless the information sought is relevant, or reasonably calculated to lead to the discovery of admissible information.” Id. Under Rule 56.01(c), “[e]ven if the top-level employee has discoverable information, the organization or its top-level executive may seek a protective order”, and “[a] protective order should issue if

annoyance, oppression, and undue burden and expense outweigh the need for discovery.”
Id.; Rule 56.01.

While rejecting the apex rule, the Court in Messina nevertheless adopted a factorial analysis under Rule 56.01 very similar to the apex rule. Specifically, “[f]or top-level employee depositions, the [trial] court should consider: whether other methods of discovery have been pursued; the proponent’s need for discovery by top-level deposition; and the burden, expense, annoyance and oppression to the organization and the proposed deponent.” Id. at 607.

Ford’s petition for writ of prohibition was granted because “Ford showed that plaintiffs have not sought the information through less intrusive means, plaintiffs’ need for the discovery is slight, and there is significant burden, expense, annoyance, and oppression to Ford and these top-level officers.” Id. at 607-08.

C. Mr. Quirk should not be forced to testify on the topics about which Guarantee purportedly intends to question him because what little relevant information Mr. Quirk may have on these topics can be obtained through less intrusive means.

In its Answer, Guarantee has identified three topics about which it intends to question Mr. Quirk:

- 1) Guarantee wants Mr. Quirk “to explain title insurance and the business of title insurance which are poorly understood by customers and the general public”;
- 2) Guarantee wants Mr. Quirk “to testify about the relation between Fidelity and its agent Phoenix Title”; and

- 3) Guarantee wants to depose Mr. Quirk because he is “intimately knowledgeable about title insurance commitments and policies, and about closing protection letters.”

Answer to Petition for Writ, ¶ 1, p. 1. These topics are hereinafter referred to as, respectively: 1) “The Title Insurance Business”; 2) “The Fidelity/Phoenix Relationship”; and 3) “Commitments, Policies and CPLs”. Information on each of these topics is readily available to Guarantee without subjecting Mr. Quirk to a deposition in the Ruyles’ lawsuit.

1. The Title Insurance Business

Guarantee has no need for Mr. Quirk’s testimony on the topic of “The Title Insurance Business” because Guarantee is itself a title insurance company engaged in the business of selling and issuing title insurance policies, commitments and closing protection letters. Guarantee obviously can obtain whatever testimony it wants on this topic from its own employees. Or, if Guarantee’s employees are unable to provide adequate explanation of the Title Insurance Business, Guarantee can depose lower level employees at Fidelity on this topic.

Alternatively, Guarantee can obtain testimony from Fidelity on this topic by way of a deposition of a corporate representative, pursuant to Rule 57.03(b)(4).² In Messina, the fact that the plaintiffs had not yet taken a Rule 57.03(b)(4) deposition served as part

²Guarantee has served a notice to take the deposition of a Fidelity corporate representative, but Guarantee has not yet taken that deposition.

of the basis for granting a writ of prohibition and making it absolute. *See Id.* (“Plaintiffs noticed Ford for a Rule 57.03(b)(4) deposition, but have not yet taken that deposition.”). The same facts pertain here and, likewise, should serve as a basis upon which the Court should make its Preliminary Writ of Prohibition absolute.

Guarantee may not bypass these readily accessible sources of information on the topic of The Title Insurance Business in favor of burdening Mr. Quirk and Fidelity with a deposition on the same topic. Rule 56.01 forbids such an approach to discovery. *Id.* at 607.

2. The Fidelity/Phoenix Relationship

Mr. Quirk has no personal knowledge on this topic, so there is no reason or basis to force him into a deposition on this topic. Quirk Affidavit. ¶s 3,4,5, Appendix pp. A-17-A-18, Tab E. He was not involved in the events that led up to the decision to terminate Fidelity’s Issuing Agency Agreement with Phoenix, and he has no direct or personal knowledge of the events or of the transactions that Guarantee has alleged in its Crossclaim against Fidelity. Quirk Affidavit. ¶s 4, Appendix pp. A-17-1A-18, Tab E.

Moreover, Guarantee already has sought and obtained extensive discovery on this topic by way of interrogatories, requests for documents and depositions of multiple lower and mid-level Fidelity employees as well as several former Phoenix Title employees. Even if Guarantee had been able to demonstrate that these avenues of discovery were inadequate, it still could obtain whatever additional discovery it purportedly wants on this topic by way of a deposition of a corporate representative, pursuant to Rule 57.03(b)(4). Contrary to the Court’s decision in Messina, Respondent entered her Order compelling

Mr. Quirk's deposition without any showing that Guarantee has been unable to obtain the information it seeks through these less intrusive means.

3. Commitments, Policies and CPLs

What has been said above with respect to the first two topics applies with equal force to the third topic, "Commitments, Policies and CPLs". As a title insurance company, Guarantee is in the business of issuing title commitments, title insurance policies and closing protection letters. In fact, unlike Fidelity, Guarantee has been sued by the Ruyles on the theory that Guarantee breached the title commitment it issued to the Ruyles and breached the policy of title insurance that was to be issued pursuant to that commitment. Plaintiffs' First Amended Petition, Count 1 and Count 2. Guarantee, therefore, can access whatever information it wants on this topic from its own employees, from lower level Fidelity employees or, if necessary, from a corporate representative.

Since there has been no showing that Mr. Quirk possesses any information on this topic that is not within Guarantee's reach through less intrusive means, Respondent erred and abused her discretion when she entered her Order compelling a deposition of Fidelity's top-level employee.

D. A deposition of Mr. Quirk is unnecessary.

From company headquarters in Jacksonville, Florida, Mr. Quirk presides over a nation-wide title insurance operation involving five separate title insurers, thousands of agents and millions of transactions annually. From this high level and remote location, Mr. Quirk obviously played no role in the alleged events or transactions at Phoenix Title or Guarantee – certainly, Respondent was presented with no evidence to suggest

otherwise – and, as stated in his Affidavit, Mr. Quirk has no special or personal knowledge of the transactions pertinent to the claims or issues in the Ruyles’ lawsuit or in the Crossclaim. Quirk Affidavit, Appendix, pp. A-17-A-18, Tab E. To the extent Fidelity may have engaged in these facts or transactions at all, it did so through lower level, “rank and file employees” who acted without direction from Mr. Quirk. *See Id.* at 606 (In large corporations, “[r]ank and file employees perform most tasks, while top-level employees are responsible for coordination and oversight.”). Indeed, the depositions of these lower-level employees and those of other witnesses have been taken in this case, and, tellingly, while those depositions comprise hundreds upon hundreds of pages of transcript, Mr. Quirk is mentioned in none of them.

Mr. Quirk had no direct or indirect involvement in the facts of this case, and, as a result, Respondent was presented with no evidence to suggest that Guarantee or any other party is in need of his deposition.

In particular, Guarantee failed to show Respondent that Mr. Quirk has information necessary to prove any of its three claims against Fidelity. Guarantee claims that Fidelity, acting through Phoenix Title, fraudulently induced Guarantee into becoming another underwriter for Phoenix Title (Count I), converted customer funds that had been deposited into Phoenix Title’s escrow account (Count II), and has been unjustly enriched (Count III). Each of these claims arises out of some alleged conduct between Fidelity and Phoenix Title and/or Guarantee. Since Mr. Quirk never had any dealings with Phoenix Title or with Guarantee – and Guarantee makes no claim and has no evidence suggesting otherwise – his knowledge of the pertinent facts is limited to that which other,

lower-level employees may have reported to him. Accordingly, if Guarantee is to prove any of its claims, it will do so with the testimony of persons other than Mr. Quirk. Mr. Quirk's testimony is unnecessary.

E. To force Mr. Quirk to give a deposition in the Ruyles' lawsuit would impose a significant annoyance and burden upon Fidelity and its top-level executive.

Under this Court's teaching and holding in Messina, the top-level executive at a large corporation does not become a target for opposing parties to depose merely because suit has been filed against the corporation. Id. If the rule were any different, senior executives – particularly those of insurance companies, which are so often involved in litigation – would be continually mired in deposition after deposition on matters about which the executive has no personal knowledge, to the point that such executives would never be able to conduct the business of the corporation. The Court recognized that “[u]nnecessarily deposing these [high-level] executives is annoying, unduly burdensome and expensive, and oppressive.” Id. at 608.

This is particularly true for a deposition of Mr. Quirk. Given Mr. Quirk's remote location and high-level responsibilities, requiring him to sit for an unnecessary deposition on topics about which he has no personal knowledge is, by definition, unduly annoying, burdensome, and oppressive. Quirk Affidavit, ¶ 6, Tab I.

In his Affidavit, Mr. Quirk states that “requiring me to sit for a deposition on matters about which I know and can say little or nothing would place a tremendous, and unnecessary, strain and burden on myself and Fidelity.” Quirk Affidavit, ¶ 6, Appendix, p. A-18, Tab E. With no contrary evidence to refute the Affidavit, Respondent merely

says that Mr. Quirk's statement is a "patent exaggeration". Answer, ¶ 4.A., p. 2. We respectfully submit, however, that pestering a corporation's top-level executive with hours of questioning about disputed matters in which he has had no involvement and about which he has no personal knowledge will, *ipso facto*, impose an unnecessary strain and burden on that executive and on the corporation for which he works. The Court in Messina agreed. *See Id.* at 607.

Respondent also attempts to minimize the burden and annoyance that Mr. Quirk will experience at his proposed deposition by claiming that the deposition will last no more than "three hours". Answer, ¶s 4.A., B., 9, 13. If there has been any exaggeration in this case, this is it. Lawyers are infamous for underestimating the length of their questioning at depositions, and this estimate of "three hours" is certainly no exception. Of the various depositions taken in the Ruyles' lawsuit, almost all have lasted more than three hours and some have gone on for days.

Moreover, while representing that the deposition will last no more than "three hours", Guarantee also says that it will depose Mr. Quirk not only in the Ruyles' lawsuit (as indicated in the Notice of Deposition, Appendix, p. A-2, Tab B) but also *in five other lawsuits as well*. Answer ¶s 4.C., 6, pp. 3, 4. This means that Guarantee intends to invite no less than fifteen parties and their lawyers to examine Mr. Quirk on all manner of subjects related to six separate lawsuits, including one in which Fidelity is not even

named as a party.³ Such a deposition is bound to last much longer than “three hours”, and it seems disingenuous to suggest otherwise.

The deposition sought by Guarantee will undoubtedly impose upon Mr. Quirk and Fidelity an unnecessary burden and annoyance.

Indeed, this appears to be Guarantee’s purpose in seeking a deposition of Fidelity’s top level executive. At his high level, Mr. Quirk was undeniably far removed from the facts that allegedly have given rise to the Ruyles’ lawsuit and Guarantee’s Crossclaim. Yet, it is precisely because Mr. Quirk is so highly placed at Fidelity and at Fidelity’s parent companies that he is a prime target for harassment during the discovery phase of this case. No one else’s deposition could be more disruptive to Fidelity, and, given Mr. Quirk’s stature and the fact that he had no role in any of the alleged events or transactions, few others at Fidelity would be more vexed at having to give his deposition in this case. Seeking Mr. Quirk’s deposition can only be viewed as a calculated attempt on the part of Guarantee to gain a tactical advantage in this case. Indeed, why, except to harass Mr. Quirk, would Guarantee seek to take his deposition before deposing a corporate representative pursuant to Rule 57.03(b)(4)? Why, given his remote connection to the case, attempt to depose Mr. Quirk at all?

This Court previously has decried such tactics. The Court stated in Messina: “The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to

³Fidelity is not a party to the First Franklin lawsuit. See Answer, ¶ 6.

mindless overzealous representation of plaintiffs and defendants.” Id. at 606 (citations omitted). An opposing party may not “use the threat of a burdensome deposition as a bargaining chip or annoying tactic.” Id. Rather, “[d]iscovery should be conducted on a ‘level playing field’, without affording either side a tactical advantage.” Id.

Respondent should have stopped this ill-conceived effort to depose Fidelity’s top level executive. When she failed to do so and entered her Order of August 3, 2007, she clearly abused her discretion. This Court properly stepped in when it issued its Preliminary Writ of Prohibition. That Writ should be made absolute.

CONCLUSION

Accordingly, for the reasons and authorities given above, Relator Fidelity National Title Company prays that the Court make absolute its Writ of Prohibition.

THE STOLAR PARTNERSHIP LLP

By _____

JAY L. LEVITCH, #25503

jll@stolarlaw.com

MICHAEL A. FISHER, #23524

maf@stolarlaw.com

HENRY F. LUEPKE, #38782

hfl@stolarlaw.com

911 Washington Avenue, 7th Floor

St. Louis, Missouri 63101

(314) 231-2800

(314) 436-8400 (Facsimile)

Attorneys for Relator Fidelity National Title
Insurance Company

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that a copy of the foregoing Relator's Brief was served the 14th day of December 2007 by hand-delivery, expenses prepaid, along with one (1) diskette containing a copy of the same, to:

The Honorable Nancy Schneider
300 North 2nd Street
Division 2
St. Charles, Missouri 63301
Facsimile: 636-949-7343

and by first-class U.S. Mail, postage prepaid, addressed to:

Daniel R. O'Neill
John Phillips
Stinson, Morrison, Hecker LLP
100 South Fourth Street, Suite 700
St. Louis, Missouri 63102
Facsimile: 314-259-4599
Attorneys for Guarantee Title Insurance Company

John L. Davidson
11906 Manchester Road, Suite 303
St. Louis, Missouri 63131
Facsimile: 314-966-3095

Richard D. Schreiber, PC
The Kearns Law Office
7321 S. Lindbergh Blvd #400
St. Louis, Missouri 63125
636-754-9949
Attorney for Plaintiffs;

John R. Hamill, III
Barklage, Brett, Martin
211 North 3rd Street
St. Charles, Missouri 63301
Facsimile: 636-949-8786
Attorneys for Glen Sills and Melissa Sills

H.A. Moore, III
623 Main Street, Suite 301
Hattiesburg, Mississippi 39401
Facsimile: 601-583-8838
Attorneys for Regions Bank

James Whaley
Brown & James
1010 Market Street, 20th Floor
St. Louis, Missouri 63101
Facsimile: 314-421-3128
Attorneys for Mary Hoffman and Jeffrey Hardie.

Robert E. Eggman
Melissa Price Smith
Copeland, Thompson, Farris, P.C.
231 South Bemiston, 12th Fl.
St. Louis, Missouri 63105
Facsimile: 314-726-2361
Attorneys for James Thurman

Deborah J. Alessi
Shea, Kohl, Alessi & O'Donnell LLC
400 North Fifth Street, Suite 200
St. Charles, Missouri 63301
Facsimile: 636-946-8623
Attorneys for Timothy Humm

Scott J. Hill
Robinson & Hill, LLC
1422 Elbridge Payne, Suite 170
Chesterfield, Missouri 63017
Facsimile: 636-405-7165
Attorneys for Rob Salyer

Steven M. Cohen
Michael J. Sewell
Berger, Cohen & Brandt
222 S. Central Avenue, Suite 1100
Clayton, Missouri 63105
Facsimile: 314-721-1668
Attorneys for Joseph D. Riley

Terry Shinell
14 Jamestown Acres Lane
Florissant, Missouri 63034

John J. Allan
Allan Law Group, LLC
4931 Lindell Boulevard, Suite 1E
St. Louis, Missouri 63108
Attorneys for Terry Shinell
Facsimile: (314) 361 8440

Furthermore, the undersigned certifies that: (1) Relator'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 4657 words in Relator's Brief; (2) the name and version of the word processing software used to prepare Relator's Brief is

Microsoft Word; and (3) the diskette provided to this Court has been scanned for viruses and is virus-free.
