

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 12-cv-01683-PAB-MJW

GREGORY TOY,

Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant.

**ORDER REGARDING THE PARTIES' OBJECTIONS
TO DESIGNATIONS OF DEPOSITION TESTIMONY OF VICTORIA MROWIEC**

This matter comes before the court on Plaintiff's Objections to Defendant American Family Mutual Insurance Company's Counter Designations [Docket No. 182-1 at 1-3] and American Family's Objections and Counter Designations [Docket No. 171 at 1-8] as to Victoria Mrowiec.

As a threshold matter, plaintiff seeks to present Victoria Mrowiec's deposition testimony by video, despite the fact that she is under subpoena and available to testify. Docket No. 220-1 at 7. Plaintiff argues that he is permitted to use Ms. Mrowiec's deposition testimony regardless of her availability because Ms. Mrowiec, as the adjuster assigned to plaintiff's claim, was a "managing agent" for purposes of Fed. R. Civ. P. 32(a)(3). "An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Fed. R. Civ. P. 32(a)(3). In determining whether an individual is a managing agent under the Federal Rules, courts consider (1) whether the agent's

interests are identified with those of the principal; (2) the nature and extent of the agent's functions, responsibilities, and duties; (3) the agent's power to exercise independent judgment and discretion; and (4) whether any person with higher authority than the deponent was in charge of the particular matter or possessed the necessary information sought in the deposition. *Stearns v. Paccar, Inc.*, 1993 WL 17084, 986 F.2d 1429, at *4 (10th Cir. 1993) (unpublished). A managing agent is an individual with actual discretion "in making decisions without obtaining additional authorization from superiors." *Young & Assoc. Pub. Relations, L.L.C. v. Delta Air Lines, Inc.*, 216 F.R.D. 521, 523 (D. Utah 2003). An individual's official title is not determinative; however, a managing agent must have similar authority to that of officers, directors, and Rule 30(b)(6) designees to "act on behalf of the corporation or answer for it." *Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 350643, at *2 (N.D. Cal. Feb. 2, 2008).

Plaintiff argues that, as the primary adjuster assigned to handle plaintiff's claim, Ms. Mrowiec was the person most familiar with relevant facts. Docket No. 220-1 at 8. However, plaintiff provides insufficient evidence to suggest that Ms. Mrowiec had actual discretion to make key claims handling decisions without obtaining additional authorization from her superiors. To the contrary, Ms. Mrowiec admitted that plaintiff's claim file was supervised. Docket No. 265 at 3. Moreover, Ms. Mrowiec's claim notes indicate that she requested authorization from her superior before making settlement offers to plaintiff. See, e.g., Docket No. 235-2 at 5. Thus, the Court finds that plaintiff has failed to meet his burden of showing that Ms. Mrowiec was a "managing agent" as contemplated by Fed. R. Civ. P. 32(a)(3). Because Ms. Mrowiec is under subpoena, plaintiff will be prohibited from presenting Ms. Mrowiec's videotaped deposition in lieu of

her live testimony. Plaintiff is not precluded, subject to objection, from using Ms. Mrowiec's videotaped deposition testimony for other purposes (e.g. impeachment).

The Court rules as follows as to plaintiff's objections:

Item #	Testimony	Plaintiff's Objections	Ruling
1	39:11 – 40:10	F.R.E. 401, 402; 403; not required by Fed. R. Civ. P. 32(a)(6) (the testimony need not, in fairness, be presented at the same time as Plaintiff's designated testimony)	Sustained as irrelevant. Not necessary to introduce in plaintiff's case under Rule 32(a)(6).
2.	42:20 – 45:8	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled. Rule 32(a)(6)
3.	46:2 – 46:15	No objection	
4.	51:13 – 54:23	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled. Rule 32(a)(6).
5.	66:2 – 66:3	No question designated; F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained. No question was designated.
6.	70:17 – 71:21	Answers are nonresponsive; F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
7.	81:22 – 82:13	Answers are nonresponsive; F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled. Rule 32(a)(6).
8.	90:13 – 90:18	Answers are nonresponsive; F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled. Rule 32(a)(6).
9.	90:21 – 90:23	Answers are nonresponsive; F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled. Rule 32(a)(6).
10.	91:7 – 92:1	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained.
11.	99:25 – 100:1	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained.
12.	100:3 – 100:5	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained.
13.	100:7 – 100:8	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained.
14.	100:18 – 100:21	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained. No answer designated.
15.	101:6 – 101:10	No objection	

16.	106:10 – 107:5	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained. Rule 32(a)(6).
17.	107:22 – 108:10	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained. Rule 32(a)(6).
18.	123:3 – 123:6	F.R.E. 403 (misleading because question re refreshing memory does not pertain to subject matter of designated questions); not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
19.	133:2 – 133:25	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
20.	138:8 – 138:16	No objection	
21.	140:6 – 141:9	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained. Rule 32(a)(6).
22.	143:6 – 144:4	No objection	
23.	146:1 – 148:4	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
24.	151:10 –	No objection	
25.	153:15 – 153:20	F.R.E. 403; attorney comments regarding document are not proper evidence; not required by Fed. R. Civ. P. 32(a)(6)	Sustained.
26.	157:8 – 157:18	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained.
27.	163:5 – 163:10	No objection	
28.	166:22 – 167:4	Answers are nonresponsive; F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
29.	167:14 –	No objection	
30.	181:21 – 184:1	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained. Rule 32(a)(6).
31.	190:7 – 191:23	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Sustained.
32.	195:20 – 196:10	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
33.	201:9 – 201:19	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
34.	213:10 –	No objection	
35.	223:1 – 223:24	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
36.	244:22 – 245:15	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6)	Overruled.
37.	264:20 –	No objection	
38.	272:17 –	No objection	
39.	292:15 –	Not required by Fed. R. Civ. P. 32(a)(6)	Overruled.

40.	303:23 – 304:10	F.R.E. 403; not required by Fed. R. Civ. P. 32(a)(6); see Plaintiff's Motion <i>In Limine</i> to Preclude Defendant From Contesting Plaintiff's Damages as Determined at Arbitration (Motion <i>In Limine</i> No. 3) [Doc. #174]	Overruled.
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The Court rules as follows as to defendant's objections:

Testimony	Defendant's Objections	Ruling
36:18-39:1	Relevance	Overruled.
63:9 – 63:11	Relevance, foundation, calls for a legal conclusion, vague, improperly requests the witness to instruct the jury on the law, misstates the law	Overruled.
63:20 – 63:25	Relevance, foundation, calls for a legal conclusion, vague, improperly requests the witness to instruct the jury on the law, misstates the law	Overruled.
66:8 – 10	Relevance, foundation, calls for a legal conclusion, vague, improperly requests the witness to instruct the jury on the law, misstates the law	Overruled.
69:22-70:8	Relevance, foundation, calls for a legal conclusion, vague, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
72:11-17	Vague, incomplete hypothetical	Overruled.
75:2-4, 75:9-10	Relevance, foundation, calls for a legal conclusion, vague, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled. Moreover, any objection was waived.
76:14-76:21	Vague, incomplete hypothetical, relevance discusses a denied claim	Overruled.

76:22 – 77:1	Vague, incomplete hypothetical, relevance discusses a denied claim	Overruled.
78:21-79:24	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
79:25-80:23	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	As to 79:25-80:12, overruled. As to 80-18-80-23, sustained. Assumes facts not in evidence.
80:24 – 81:7	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
82:14-21	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Sustained. Vague and misleading.
83:14-84:1	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Sustained. Vague and misleading. A compound question.
84:12-84:16	Relevance, vague, incomplete hypothetical, asks about “fairness” which is not the applicable legal standard	Overruled.
84:24-85:6	Relevance, vague, incomplete hypothetical, asks about “fairness” which is not the applicable legal standard	Sustained. Assumes facts not in evidence.

85:12-23	Relevance, vague, incomplete hypothetical, asks about "fairness" which is not the applicable legal standard	Sustained. Assumes facts not in evidence.
88:16-89:19	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
89:20-90:1	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
90:2-90:5	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
90:8 – 90:12	Relevance, vague, incomplete hypothetical, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
94:4 – 17	Document referenced is incomplete. Question is misleading.	Overruled. Defendant fails to attach document so defendant fails to support claim of incompleteness.
114:15-115:25	Relevance, foundation, calls for a legal conclusion, improperly requests the witness to instruct the jury on the law, misstates the law and is therefore misleading	Overruled.
123:7-124:25	Foundation, leading question, the question contains hearsay	Overruled.

125:2-126:14	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
127:20-128:7	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
130:6-130:9	Asked and answered, cumulative	Overruled.
131:19 – 132:1	Lack of foundation, calls for a legal conclusion	Overruled.
137:21-138:7	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
138:17 – 139:19 [sic]	Leading question, the question contains hearsay	Overruled.
160:13 – 161:9	Foundation, leading question, the question contains hearsay	Overruled contingent on prior admission of document.
161:10 – 162:6	Foundation, leading question, the question contains hearsay	Overruled contingent on prior admission of document.
162:8 – 163:4	Foundation, leading question, the question contains hearsay	Overruled contingent on prior admission of document.
166:15-166:21	Leading, mischaracterizes testimony in the record	Overruled.
168:12-171:5	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
176:2-22	Calls for a legal conclusion, foundation	As to 176:2-19, overruled. As to 176:20-22, see 181:13-18.
177:3-22	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
179:11-15	The question contains hearsay	Overruled.
180:1-181:18	Leading, hearsay, foundation	Overruled.

191:25 – 192:15	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
201:20-25	Foundation, calls for speculation	Overruled.
202:10 – 204:21	Leading	Overruled.
207:7 – 211:19	Leading, hearsay, calls for speculation	Overruled contingent on prior admission of document.
213:3 [sic] – 212:10	Calls for speculation	Overruled. Objection waived.
213:22 - 214:11	Leading, the question contains hearsay	Overruled contingent on prior admission of document.
213:22-214:11	Leading, the question contains hearsay	Duplicate.
214:21-215:16	Leading, the question contains hearsay	Overruled contingent on prior admission of document.
215:17 – 216:1	Calls for speculation, lack of foundation	Overruled.
215:24 – 216:14	Leading, the question contains hearsay	Overruled contingent on prior admission of document.
217:5 – 218:12	Leading question, the question contains hearsay	Overruled. Objection waived.
218:16 – 219:11	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
219:16 – 220:5	The question contains hearsay	Overruled contingent on prior admission of document.
220:10-221:7	The question contains hearsay	Overruled contingent on prior admission of document.
222:7-25	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
225:16 [sic] – 227:8	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.
228:5 – 230:24	Leading question, the question contains hearsay	Overruled contingent on prior admission of document.

233:23 [sic] – 231:2	Calls for speculation	Sustained.
231:3 – 232:3	The question contains hearsay, speculation, lack of foundation	Overruled contingent on prior admission of document.
232:4 – 235:21	Leading, the question contains hearsay	Overruled contingent on prior admission of document.
236:7 – 237:11	Leading, the question contains hearsay	Overruled contingent on prior admission of document.
237:17 – 237:18	Asked and answered	Overruled.
237:22 – 239:16	Leading, the question contains hearsay, asked and answered	Overruled.
239:19 – 240:1	Leading, the question contains hearsay, asked and answered	Overruled.
240:4 - 240:16	Leading, mischaracterizes the evidence	Overruled.
240:14 -20	Leading, mischaracterizes the evidence	Overruled.
240:21 – 241:11	Leading, the question contains hearsay	Overruled contingent on prior admission of document.
244:2 – 244:21	Asked and answered	Overruled.
245:16 -245:20	Mischaracterizes evidence	Overruled.
247:5 -14	Asked and answered	Overruled.
248:1 – 250:20	Leading, the question contains hearsay,	Overruled.
250:21 – 251:3	Lack of foundation, calls for a legal conclusion	Sustained.
251:3 – 245:15	Asked and answered, mischaracterizes evidence, the question contains hearsay	Overruled. Citations to record make no sense.
254:23 – 255:7	Asked and answered, the question contains hearsay	Overruled.
255:25 – 256:12	Asked and answered, mischaracterizes evidence	Overruled.
256:13 – 256:23	Asked and answered, the question contains hearsay	Overruled contingent on prior admission of document.

257:18 – 258:21	Asked and answered, the question contains hearsay	Overruled.
258:22 – 260:5	Asked and answered, mischaracterizes evidence, the question contains hearsay	Overruled.
260:13 -261:20	The question contains hearsay	Overruled contingent on prior admission of document.
261:24 – 261:5	Mischaracterizes the evidence, calls for speculation, lack of foundation, the question contains hearsay	Sustained.
263:19 – 263:9	Calls for speculation, lack of foundation, asked and answered	Overruled. Citations to the record make no sense.
263:12 -263:20	Asked and answered, the question contains hearsay	Overruled.
263:24-264:2	Mischaracterizes evidence	Overruled.
264:3 – 264:19	Asked and answered, the question contains hearsay	Overruled.
268:5 – 269:4	Leading, the question contains hearsay	Overruled. contingent on prior admission of document.
270:22 – 271:17	Leading, the question contains hearsay	Overruled contingent on prior admission of document.
272:11-16	Relevance	Overruled.
272:25 – 275:10	Leading, the question contains hearsay, relevance	Overruled.
275:14 – 275:23	Relevance	Sustained. Foundation.
276:14 – 277:21	Relevance, the question contains hearsay	Overruled contingent on prior admission of
278:9 – 279:15	The question contains hearsay	Overruled.
283:13 – 284:9	The question contains hearsay,	Overruled contingent on prior admission of document. 284:5-23 is irrelevant.
284:10 – 285:1	Mischaracterizes evidence, misleading,	Sustained. Irrelevant.

286:23 – 278:10 [sic]	Mischaracterizes evidence, misleading, the question contains hearsay	Sustained. Irrelevant.
287:11 – 290:12	Lack of foundation, the question contains hearsay	Overruled.
298:19 – 303:16	Questions contain hearsay, lack of foundation,	Overruled.

DATED February 11, 2014.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge