IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE MC-1,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN, AND THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only),

Defendants.
_____/

Case No. 2:20-CV-10568

Hon. Paul D. Borman
Hon. Elizabeth A. Stafford

PLAINTIFF JOHN DOE MC-1'S EMERGENCY MOTION FOR LEAVE TO TAKE THE DEPOSITION AND PRESERVE THE TESTIMONY OF TOM EASTHOPE PRIOR TO THE PARTIES' FED. R. CIV. P. 26(f) CONFERENCE

ORAL ARGUMENT REQUESTED

Plaintiff, John Doe MC-1 ("Plaintiff"), by and through his attorneys, Michael A. Cox, Jackie Cook and The Mike Cox Law Firm, PLLC, as well as David J. Shea and Shea Law Firm PLLC, and for his Emergency Motion for Leave to Take the Deposition and Preserve the Testimony of Tom Easthope Prior to the Parties' Fed. R. Civ. P. 26(f) Conference, pursuant to Federal Rules of Civil Procedure 26(d)(1) and 30(a)(2)(A)(iii), states as follows:

1. Plaintiff filed his Complaint along with the other plaintiffs who have

sued the University of Michigan ("UM") and the Regents of the University of Michigan ("Regents"), collectively referred to as "Defendants," for the horrific sexually abusive acts committed by former UM physician Robert Anderson ("Anderson") against UM's own student athlete plaintiffs.

2. UM is responsible for Plaintiff's damages stemming from Anderson's sexual assaults on UM's campus, as UM placed vulnerable student athletes, like Plaintiff, in Anderson's care despite knowing he was a sexual predator.

3. This is a civil action against Defendants for declaratory, injunctive, equitable, and monetary relief for injuries sustained by Plaintiff as a result of the acts, conduct, and omissions of Defendants in their official capacity, and their respective employees, representatives, and agents relating to sexual assault, abuse, molestation, and nonconsensual sexual touching and harassment by Anderson against Plaintiff while a UM student.

4. On November 6, 2018, UM Public Safety and Security Detective Mark West interviewed Tom Easthope, UM's former Vice President of Student Life. After West told Easthope that he was investigating inappropriate behavior between Anderson and a patient, Easthope told West, "I bet there are over 100 people that could be on that list."

5. Easthope stated, among other things, that he fired Anderson from UM's Student Health Services ("UHS") "40-50 years ago" for "fooling around in the exam

room with boy patients."

6. Easthope, who is 87 years old, is one of very few living former UM administrators with personal knowledge, from as early as 1979, of Anderson's abuse and is still alive to testify to central topics to this litigation including, among other things: (1) Easthope's discussion(s) with Anderson in which only he and Anderson participated; (2) the reasons Easthope believed Anderson should be fired from UM; (3) the reasons Easthope believed there were so many survivors of Anderson's abuse; (4) how Easthope knew that Anderson "fool[ed] around in the exam room with boy patients;" (5) what Easthope did to apprise responsible persons at UM of Anderson's conduct; (6) Defendants' failure to act on and/or investigate complaints against Anderson; (7) Anderson's transfer to the Athletic Department instead of termination from UM as Easthope attempted; (8) Easthope's knowledge of the Defendants' publishing in the President's Annual Report false information that Anderson resigned, rather than was fired from UHS by Easthope; (9) Defendants' concealment of Anderson's abuse; and (10) that Anderson was a "big shot" at UM, and so former Athletic Director Don Canham "worked out a deal" to move Anderson full-time to the Athletic Department after being fired by Easthope.

7. Last year West noted in his report that there are at least 18 UM administrative, medical, and sports figures, "people with a connection" with Anderson, who are now deceased and cannot be interviewed. Indeed, Anderson

himself is also deceased.

8. Plaintiff moves under Federal Rules of Civil Procedure 26(d)(1) and 30(a)(2)(A)(iii) for expedited discovery to take the deposition of this crucial witness, Easthope, to preserve his testimony before the parties' Rule 26(f) conference and within 14 days of an Order granting this Motion.

9. Plaintiff's motion should be granted for the following three reasons:

a. Easthope has essential evidence or unique knowledge that is critical to the case and that cannot be obtained from other witnesses because many of them are already deceased.[1]

b. Easthope's advanced age of 87 years old justifies an early deposition to preserve his testimony.[2]

c. Defendants will not be prejudiced by Easthope's early deposition

[1] *See United States v. Int'l Longshoremen's Ass'n*, No. 07-CV-053212-ILG-VVP, 2007 WL 2782761, at *1 (E.D.N.Y. Sept. 24, 2007)("essential evidence to provide, and whether there are other sources for that evidence."); *see also Snow Covered Capital, LLC v. Weidner*, No. 19-CV-00595-JAD-NJK, 2019 WL 2648799, at *3 (D. Nev. June 26, 2019)("has unique knowledge or that his testimony will not be duplicative of other deposition testimony."); *see also McNulty v. Reddy Ice Holdings, Inc.*, No. 08-CV-13178, 2010 WL 3834634, at *2 (E.D. Mich. Sept. 27, 2010) (Borman, J.) (the witness' testimony is "critical to the defense in the instant case.").

[2] *In re Chiquita Brands Int'l, Inc.*, No. 07-CV-60821, 2015 WL 12601043, at *6–7 (S.D. Fla. Apr. 7, 2015) ("[T]he age of a proposed deponent is a highly relevant factor in determining whether there is a sufficient reason to perpetuate testimony [when] the preservation request is made … for expedited discovery under Rule 26(d).").

because (i) they had access to him for decades, first as an employee and now as a retiree, and (ii) Easthope voluntarily interviewed with West about Anderson's activities and UM's reaction to those activities in November 2018.[3]

10. In further support of this Emergency Motion, Plaintiff relies on the attached brief and accompanying exhibits.

11. As Local Rule 7.1 requires, Plaintiff's counsel contacted Defense counsel on April 15, 2020 to ask whether counsel would concur in this motion.[4] Defense counsel declined to concur in this motion. On April 16, 2020, Plaintiff's counsel repeated his request to Defense counsel for concurrence in the relief requested in this motion and was once again refused.[5]

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter an Order that Tom Easthope may be deposed before the parties' Rule 26(f) conference and within 14 days of entry of the Order or as soon as the witness may be served with a subpoena and/or deposition notice and his appearance at the deposition scheduled.

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[3] *See Snow Covered Capital*, 2019 WL 2648799, at *3 ("The prejudice from conducting a blind deposition is heightened by the shortened notice to opposing counsel of the deposition…").

[4] **Exhibit 1**: Cox to Bush and Linkous email, 4/15/2020, 7:48 pm.

[5] **Exhibit 2**: Cox to Bush and Linkous email, 4/16/2020, 12:25 pm, and Bush Response to Cox, 4/16/2020, 1:55 pm.

Respectfully submitted,

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Case No. 2:20-CV-10568

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BRIEF IN SUPPORT OF PLAINTIFF JOHN DOE MC-1'S EMERGENCY MOTION FOR LEAVE TO TAKE THE DEPOSITION AND PRESERVE THE TESTIMONY OF TOM EASTHOPE PRIOR TO THE PARTIES' FED. R. CIV. P. 26(f) CONFERENCE

CONCISE STATEMENT OF ISSUE PRESENTED

Tom Easthope, UM's former Vice President of Student Life, who is 87 years old, is one of very few living former UM administrators with personal knowledge, from as early as 1979, of Dr. Robert Anderson's abuse and is still alive to testify to critical topics to this litigation such as Anderson's sexual abuse of hundreds of male students, Defendants' concealment of that abuse, and Defendants' failure to act on and/or investigate complaints against Anderson.

At least three reasons justify expediting discovery to take Easthope's deposition. *First*, Easthope has essential evidence or unique knowledge that is critical to the case that cannot be obtained from other witnesses because most, if not all, of them are already deceased. *Second*, Easthope's advanced age of 87 years old alone justifies an early deposition to preserve his testimony. *Third*, Defendants will not be prejudiced by Easthope's early deposition because (a) they had access to him for decades, first as an employee and now as a retiree, and (b) Easthope voluntarily interviewed with UM Public Safety and Security Detective West about Anderson's activities and UM's reaction to those activities in November 2018.

Under these circumstances, should the Court, pursuant to Federal Rules of Civil Procedure 26(d)(1) and 30(a)(2)(A)(iii), enter an Order expediting discovery allowing Plaintiff to take Easthope's deposition before the parties' Rule 26(f) conference and within 14 days of entry of its Order?

Plaintiff answers "Yes."

Defendants answer "No."

This Court should answer "Yes."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 26(d)(1)

Fed. R. Civ. P. 30(a)(2)(A)(iii)

McNulty v. Reddy Ice Holdings, Inc., No. 08-CV-13178, 2010 WL 3834634 (E.D. Mich. Sept. 27, 2010) (Borman, J.)

In re Chiquita Brands Int'l, Inc., No. 07-CV-60821, 2015 WL 12601043 (S.D. Fla. Apr. 7, 2015)

STATEMENT OF RELEVANT FACTS

UM has known for decades that former UM physician Robert Anderson was sexually abusing male student athletes under the guise of medical treatment and did nothing about it. Because UM took no action to investigate the complaints from students that began as early as 1968 and took no corrective actions even after Tom Easthope's attempted firing of Anderson in 1979, UM allowed Anderson to continue assaulting, abusing and molesting students and student-athletes for decades.

I. A July 2018 complaint from a former UM student athlete to current Athletic Director Warde Manuel prompted UM Public Safety and Security Detective Mark West to investigate Anderson's sexual abuse of UM's male student athletes.

Over 20 months ago, on July 18, 2018, according to UM Public Safety and Security Detective Mark West, a former UM student-athlete wrestler named Tad DeLuca, who attended UM between 1972 and 1976, mailed a letter to current UM Athletic Director Warde Manuel complaining that DeLuca was sexually abused during the course of medical treatments by Anderson.[6] "Manual (sic) then forwarded this letter to representatives at the *University of Michigan General Counsel's office*, who forwarded the letter to [UM's Office of Institutional Equity ("OIE")], ..."[7]

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[6] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 10/3/2018, 11:26 am, at WCP000006-9.

[7] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 10/3/2018, 11:26 am, at WCP000003.

On October 3, 2018, West began investigating DeLuca's allegations against Anderson.[8] Between October 3, 2018 and November 6, 2018, among other things, West: (1) interviewed Deluca and confirmed his allegations against Anderson;[9] (2) learned from DeLuca that other sports athletes, including football players and cross-country runners called Anderson, "Dr. Drop your drawers Anderson;"[10] (3) interviewed Anderson's successor at the Student Health Services (previously known as UHS), Dr. Ernst, who told West "he (Dr. Ernst) has heard rumors about Dr. Anderson throughout his years, one being he performed more exams on males than necessary;"[11] and (4) interviewed another former wrestler who told West that Anderson masturbated the wrestler during medical examinations.[12]

II. Detective West discovered that Tom Easthope, a retired UM administrator, was a key witness because Easthope fired Anderson as director of UM's Health Services in 1979 after learning that Anderson sexually abused boy patients during his physical exams.

On November 6, 2018, West interviewed Easthope. Easthope was the Vice President of Student Life at UM, and so supervised Anderson while Anderson was

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[8] *Id.*

[9] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 10/8/2018, 11:46 am, at WCP000004.

[10] *Id.*

[11] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 10/8/2018, 11:46 am, at WCP000005.

[12] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 10/16/2018, 8:33 am, at WCP000011.

the director of UM's UHS. After West told Easthope that he was investigating inappropriate behavior between Anderson and a patient, Easthope told West, "I bet there are over 100 people that could be on that list."[13] Easthope described Anderson as a "big shot" at UM, while Easthope was then still fairly new in his position.[14] Easthope told West that he remembered a local activist approached him 40-50 years ago and told him that several people that were in the gay community said to the activist that they were assaulted by Anderson.[15] Easthope remembered that "fooling around with boys in the exam rooms" was the phrase the activist used.[16]

Easthope also told West that he fired Anderson from UHS for "fooling around in the exam room with boy patients."[17]

Within a day or two after the Easthope interview, ***West told the UM's General Counsel's office about his investigation into Anderson:*** "A couple of days later (after 11/5/18) Associate General Counsel Diane [sic] Winiarski contacted me to ask what I was looking for in reference to Dr. Robert Anderson. I explained about his demotion from Health Services, and about the senior University official was able to

[13] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 11/6/2018 10:56 am, at WCP000017.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

tell me of his release 'due to fooling around with boys in the exam rooms.'"[18] Thus, UM's General Counsel knew about the investigation into Anderson's abuse of male student athletes in November 2018, that Easthope was a key witness, and was able to prepare for this eventual case since then.

III. UM fraudulently concealed (with Anderson's assent) Anderson's predatory sexual conduct against student male athletes.

Despite the fact that Easthope fired Anderson for sexually assaulting male student patients during physical exams in 1979, UM allowed Anderson to continue sexually abusing students by transferring him to UM's Athletic Department to treat student athletes. According to longtime UM athletic trainer Russell Miller, the then Athletic Director, Don Canham, a legendary and powerful figure at the UM, "worked out a deal" to bring Anderson over to the Athletic Department despite Easthope's termination of Anderson.[19] Like Easthope, Canham is an important witness to what and why Anderson was fired at the UHS for sexually predatory conduct, but then foisted on athletes who were required to see him to play and keep their scholarships. But Canham is now deceased and cannot be questioned.[20] And

[18] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 11/19/2018, 11:26 am at WCP000051.

[19] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 11/9/2018, 9:23 am, at WCP000032.

[20] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 4/23/2019, 1:40 pm, at WCP000084.

so Easthope's importance to the fact-inquiry here – already meaningful on its own merits – is strengthened and heightened. Easthope is likely to have information on, among other things: (1) Anderson's transfer to the Athletic Department instead of being fired; (2) whatever conversations Easthope may have had with Canham; and (3) what Easthope reported about Anderson's conduct to Canham or other responsible UM officials.

Not only did UM allow Anderson to continue sexually assaulting students, UM failed to warn other students and actually covered up Anderson's assaults. For instance, UM praised Anderson in the published Acknowledgement preface of Volume III of the annual President's Report of The University of Michigan for 1979-1980:

> The University Health Service staff wish to acknowledge the 11 years of leadership provided by Robert E. Anderson, M.D. In January of 1980, Anderson resigned as Director of the University Health Service to devote more time to his clinical field of urology/andrology and athletic medicine…his many contributions to health care are acknowledged…The University Health Service staff wish to thank Anderson for his years of leadership and to dedicate the Annual Report to him. [21]

As this information came directly from the UHS, a department supervised by Easthope, Easthope is likely to have information about, among other things: (1) who

[21] **Exhibit 4**: Excerpt from Volume III of the annual President's Report of The University of Michigan for 1979-1980.

else knew about the firing of Dr. Anderson; (2) who decided to praise Dr. Anderson after the firing for sexually predatory conduct; (3) who decided to publish to the UM community this lie about Anderson's separation from UHS and why?; (4) were Athletic Director Canham or other members or coaches within the Athletic Department told that the publication was a lie.

III. Many critical witnesses to Anderson's abuse, UM's failure to investigate, UM's failure to take corrective action, and UM's fraudulent concealment are already deceased.

During West's investigation of Anderson, he noted at least 18 UM administrative, medical, and sports figures, "people with a connection" with Anderson, who are now deceased and cannot be interviewed. These include former Athletic Director Canham, numerous athletic department officials, the three faculty doctors and the five registered nurses who presumably worked with or around Anderson at Student Health Services (also known as UHS).[22] So, Easthope, who is already 87 years old, is one of very few living former UM administrators and employees with personal knowledge, from as early as the 1970s, of Anderson's abuse and is still alive to testify regarding critical topics in this litigation such as Anderson's sexual abuse of male students; Defendants' executives' concealment of Anderson's sexually abusive acts; failure to act on and/or investigate complaints

[22] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 4/23/19 10:17 am, at WCP000084.

against Anderson; and Easthope's direct conversation(s) with Anderson between only the two of them—of which only Easthope is still living.

IV. UM is finally forced to go public with Anderson's abuse after 19 months of stalling its disclosure to the public and its former athletes.

Defendants stonewalled any exposure of Anderson's abuse to the public or media, and even the victims of Anderson's abuse. By way of illustration, on August 21, 2019, 13 months after DeLuca's letter to Athletic Director Manuel, West received an email from his supervisor that was forwarded from "Dave Masson, general counsel for the University of Michigan."[23] This email was entitled "Anderson's Boys, My Michigan Me-Too Moment, 1971" and was sent three days earlier by Robert Julian Stone, a UM graduate who was sexually assaulted by Anderson in 1971.[24] West notes in his report that he "was not able to track down" Stone to interview him. [25]

Six months, later in February of 2020, after not hearing from UM about its investigation into Anderson, Stone reached out to *The Detroit News* because he feared UM was doing nothing: "Stone told the News one of the reasons he came

[23] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 8/22/2019, 1:40 pm, at WCP000085.

[24] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, at WCP000087-89.

[25] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 1:40 pm, at WCP000085.

forward was that he heard there were other alleged victims and he feared the university and the prosecutor could keep the case open indefinitely, and no one would ever know about the allegations against Anderson."[26] Indeed, UM did not inform the public or its former athletes about the sexual abuse by Anderson until February 19, 2020, 19 hours after *The Detroit News* began asking questions about Anderson.[27] As Stone noted, "The reason I called (The News) worked…I just wasn't willing to sit here and be stonewalled by these people indefinitely."[28]

V. Defendants continue to pursue their intentional strategy to delay any factual investigation into Anderson's abuse.

As explained in more detail in Plaintiff's Response and Brief in Support of its Response to Defendants' Motion to Consolidate Cases and For Ordered Filing of a Master Complaint, filed concurrently with this Emergency Motion, Defendants' strategy is to delay any answer or responsive motion until, at least, September 16, 2020—a full two years and two months after the DeLuca letter and 22 months after West gave the General Counsel's office a briefing on the extent of Anderson's acts on which Plaintiff's Complaint (and currently 37 other complaints) are based.[29]

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[26] **Exhibit 5:** "UM knew of sex abuse reports against doctor 19 months before going public" Kim Kozlowski, *The Detroit News*, 2/19/2020.

[27] *Id.*

[28] *Id.*

[29] **Exhibit 6**: Bush to Shea and Cox email, 3/18/20, 2:25 pm, with attachment of proposed "Does Tolling Agreement".

Even so, in the interest of comity and professionalism, Plaintiff's counsel offered to Defendants multiple extensions in exchange for a meeting and limited discovery, specifically the deposition of Easthope: "We will grant the additional 60-day extension, subject to a productive, transparent meeting in April, and subject to your client's agreement to limited discovery: the depositions of Tom Easthope and Detective West. Not to be redundant, but this would greatly assist us in settling the case(s)."[30] Defendants never answered Plaintiff's proposal or responded to Plaintiff's request to depose Easthope.

Defendants also asked for an extension based on the current coronavirus situation[31] even though a Rule 12 motion to dismiss is not fact-dependent and thus can be researched, prepared, and filed remotely based on Plaintiff's currently filed complaint.[32] Defendants further delayed this matter by filing their Motion to Consolidate even though Plaintiff agreed to the relief stated in motion's caption: consolidation of all plaintiff cases in front of Judge Borman (which was already occurring through *sua sponte* orders of the other judges of the Eastern District) and the filing of a master long-form complaint.[33] Indeed, Plaintiff even offered to file

[30] **Exhibit 7**: Cox to Bush email, 3/19/20, 12:25 pm; *see also* **Exhibit 9**: Cook to Linkous email, 4/2/20 3:39 pm.

[31] **Exhibit 7**: Bush to Cox email, 3/19/20, 7:42 am.

[32] **Exhibit 8**: Cox to Bush email, 3/27/20, 7:07 pm.

[33] **Exhibit 9**: Cook to Linkous email, 4/2/20 3:39 pm, with proposed stipulated

the master long-form complaint within four days.[34] However, Plaintiff cannot agree to the actual reason for Defendants' actions: indefinite delay. *See* Defendants' request for relief at section (e) ("The Court will thereafter set the matter for status conference – at which time, the parties will discuss…the University's time and method of response…) and section (f) ("All prior briefing schedules and response dates in the individual actions are vacated…").

Allowing further delay by Defendants only exacerbates the current unfair advantage enjoyed by Defendants as it relates to both discovery in this litigation, and ultimately, the conduct of any trial. Defendants knew about the Anderson allegations in July 2018 and spent 19 months conducting internal investigations and fact finding while keeping it a secret from alumni and the public, and more importantly, the student athlete plaintiffs, including Plaintiff, who were abused by Anderson. Defendants know that their *own* investigator, West, over 8 months ago, bemoaned the death of, at least 18 UM employed witnesses who he thought could shed light on the matters at issue here,[35] *and* know that Easthope, a key witness, is well into his Eighties.

When *The Detroit News* exposed the abuse by Anderson on February 19,

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"Order to Consolidate Cases".

[34] *Id*.

[35] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 4/23/2019, 1:40 pm, at WCP000084.

2020, Defendants were effectively 19 months ahead of Plaintiff in fact finding and discovery. And the UM's General Counsel's Office – if not even UM's outside counsel – must have already interviewed Easthope many times already to prepare for this anticipated litigation.[36] At the same time Defendants ignored Plaintiff's request to depose Easthope to stall and stymie Plaintiff's factual case.

ARGUMENT

Federal Rule of Civil Procedure 26(d)(1) provides that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except ... when authorized by these rules, by stipulation, or by court order."[37]

If, as is the case here, the plaintiff has filed suit but discovery has not commenced under Rule 26(d), because the parties have not conducted a Rule 26(f) conference, then Federal Rule of Civil Procedure 30(a)(2)(A)(iii) allows a party to take a deposition before the parties' Rule 26(f) conference with leave of the Court:

> WHEN A DEPOSITION MAY BE TAKEN. *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): … (A) if the parties have not stipulated to the deposition and: … (iii) the party seeks to take the

[36] After receiving no response from Defendants to Plaintiff's request for an early deposition of Easthope, Plaintiff's counsel reached out to Easthope at his two residences to see if he would voluntarily meet with Plaintiff's counsel, as he had with UM. No response from Easthope was received. *See* **Exhibit 10**: Cox to Easthope letter, 4/2/20, with Federal Express documents.

[37] Fed. R. Civ. P. 26(d)(1).

deposition before the time specified in Rule 26(d), ….[38]

"In reviewing such requests [for a court order authorizing early discovery], courts typically impose a good cause standard. … Good cause may be found where the plaintiff's need for expedited discovery outweighs the possible prejudice or hardship to the defendant."[39] Good cause exists for an early deposition where "there is a danger that the testimony will be lost by delay."[40] A party's motion for leave to take deposition should be granted where the Court, "weighing all of the circumstances, concludes that the interests of justice support the granting of [the] motion."[41]

I. Easthope has essential evidence or unique knowledge that is critical to the case that is not available from other witnesses because they are deceased.

Courts grant leave for early depositions before the parties' Rule 26(f) conference where the witness has essential evidence or unique knowledge that is

[38] Fed. R. Civ. P. 30(a)(2)(A)(iii).

[39] *Lashuay v. Delilne*, No. 17-CV-13581, 2018 WL 317856, at *3 (E.D. Mich. Jan. 8, 2018) (**Appendix 1**); *see also Westfield Ins. Co. v. Pavex Corp.*, No. 17-CV-14042, 2017 WL 6407459, at *2 (E.D. Mich. Dec. 15, 2017) ("A party seeking expedited discovery in advance of a Rule 26(f) conference has the burden of showing good cause or need in order to justify deviation from the normal timing of discovery.") (**Appendix 2**).

[40] *Respecki v. Baum*, No. 13-CV-13399, 2013 WL 4584714, at *2 (E.D. Mich. Aug. 28, 2013) (**Appendix 3**).

[41] *McNulty v. Reddy Ice Holdings, Inc.*, No. 08-CV-13178, 2010 WL 3834634, at *2 (E.D. Mich. Sept. 27, 2010) (Borman, J.). (**Appendix 4**).

critical to the case and cannot be garnered from other witnesses.[42]

In the *McNulty* case, this Court granted a motion to depose an elderly defendant – a witness who was 13 years younger than Easthope—where "the [first defendant's] only direct response to Plaintiff's claims … rest on [the elderly defendant's] alleged statements."[43] Plaintiff's claims were based on statements that "**involved only the two individuals**" (plaintiff and the elderly defendant).[44] Thus, this Court found "a critical need to take and preserve [the elderly defendant's] testimony."[45]

In this case, Easthope, as the Vice President of Student Life at UM, had supervisory oversight of the UHS and had knowledge that Anderson was "fooling around with boys in the exam room." Easthope had direct conversations with Anderson, with no one else present, about Anderson's abuse of young men in medical exam rooms (in a manner similar to the conduct alleged in this Complaint),

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[42] *See United States v. Int'l Longshoremen's Ass'n*, No. 07-CV-053212-ILG-VVP, 2007 WL 2782761, at *1 (E.D.N.Y. Sept. 24, 2007) ("might have essential evidence to provide, and whether there are other sources for that evidence.") (**Appendix 5**); *see also Snow Covered Capital, LLC v. Weidner*, No. 19-CV-00595-JAD-NJK, 2019 WL 2648799, at *3 (D. Nev. June 26, 2019) ("unique knowledge or that his testimony will not be duplicative of other deposition testimony.") (**Appendix 6**); *see also McNulty*, 2010 WL 3834634, at *2 (the witness' testimony is "critical to the defense in the instant case.").

[43] *McNulty*, 2010 WL 3834634, at *2.

[44] *Id*. (emphasis added).

[45] *Id*.

was able to hear Anderson's response or lack of response. And so Easthope, as in the *McNulty* case, had a conversation with Anderson that "***involved only the two individuals***." In this way, Easthope possesses essential evidence and unique knowledge of Anderson's abuse of male students, and of UM's cover up of that abuse or, at least, the failure to act on that abuse, that is critical to prove UM's liability based on facts that no other witness will have.

Easthope is the only person who can testify as to what actions he personally took, if any, to report Anderson's activities to other responsible persons at UM and to make sure that Anderson never again had contact with UM students and athletes. Easthope is the only person who is uniquely able to testify to his discussion with Anderson and his reasons why he believed UM should have terminated Anderson as early as 1979—which would have prevented the sexual abuse of many male student athletes at UM, including Plaintiff.

Easthope also has essential evidence and unique knowledge of Defendants' fraudulent concealment, Defendants' failure to carry out their duties to investigate and take corrective action (Count I), Defendants' deliberately exposure of Plaintiff to a dangerous sexual predator (Count II), Defendants' failure to protect Plaintiff from the invasion of bodily integrity through sexual assault, abuse, or molestation (Count III), and Defendants' failure to train and supervise their employees, agents, and/or representatives including Anderson and all faculty and staff (Count IV).

For example, after Easthope thought he fired Anderson, former Athletic Director Canham (now deceased), "worked out a deal" to bring Anderson over to the Athletic Department.[46] Indeed, UM went so far as to overtly and fraudulently conceal (with Anderson's assent) Anderson's predatory sexual conduct against college age males and intentionally conceal the reason for Anderson's termination/demotion, by praising Anderson in the published Acknowledgement preface of Volume III of the annual President's Report.[47]

Easthope can likely testify, as no one else can: (1) that Defendants knew that Easthope fired Anderson for his sexual assaults on male students, and (2) what Easthope knew about Anderson's termination being changed to a written demotion in his human resources file, through the efforts of Canham and other "V.P.s", so that Anderson could go to the Athletic Department. Indeed, Easthope is the only known UM administrator to take Anderson's sexual abuse seriously and attempt to fire him. Thus, as this Court found in the *McNulty* case, this Court should again find "a critical need to take and preserve [Easthope's] testimony."

[46] **Exhibit 3**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, 11/9/2018, 9:23 am, at WCP000032 & 4/23/2019, 1:40 pm, at WCP000084.

[47] **Exhibit 4**: Excerpt from Volume III of the annual President's Report of The University of Michigan for 1979-1980.

II. Easthope's advanced age of 87 years old justifies an early deposition to preserve his testimony.

"[T]he age of a proposed deponent is a highly relevant factor in determining whether there is a sufficient reason to perpetuate testimony [where] the preservation request is made … for expedited discovery under Rule 26(d)."[48] "Regardless of specific ailments or physical vulnerabilities, advanced age carries an increased risk that a witness will be unavailable at the time of trial; for this reason, a witness of advanced age may be an appropriate subject for preservation testimony."[49]

Easthope, who is 87 years old, is significantly older than the deponents in the *Penn Mutual*, *Chiquita Brands*, *McNulty*, and *Texaco* cases, where the ages of those deponents – 80, 79, 74, and 71, respectively, – led those courts to order depositions to preserve the testimony of critical witnesses.[50]

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[48] *In re Chiquita Brands Int'l, Inc.*, No. 07-60821-CV, 2015 WL 12601043, at *6–7 (S.D. Fla. Apr. 7, 2015) (**79-year-old witness**) (**Appendix 7**).

[49] *Chiquita Brands*, 2015 WL 12601043, at *6–7; *see also Penn Mutual Life Ins. Co v. United States*, 68 F.3d 1371, 1375 (D.C. Cir. 1995) (allowing a Rule 27(a) pre-suit deposition to perpetuate testimony of **80-year old witness** whose age "present[ed] a significant risk that he will be unavailable to testify by the time of trial."); *see also Texaco Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967) (granting writ of mandamus directing district court to allow Rule 27(a) pre-suit deposition where "It would be ignoring the facts of life to say that a **71-year old witness** will be available, to give his deposition or testimony, at an undeterminable future date") (emphasis added); *see also McNulty*, 2010 WL 3834634, at *1 ("There is a documented significant necessity to take Mr. Corbin's deposition in the near future to preserve his testimony. Mr. Corbin is **74 years old**, but more significantly, suffers from serious medical problems, some life threatening.") (emphasis added).

[50] While Defendants did not concur to this motion, after an initial refusal to concur,

In the *Chiquita Brands* case, the court viewed the witness' advanced age (79 years) against the backdrop that the litigation was not likely to advance to trial for another two years.[51] By that time, the witness would be 81 years old and "it would be unduly risky to assume that no limitation of age or intervening infirmity might impede the ability of plaintiff's to take [the witness'] deposition testimony in the ordinary course before trial."[52] Therefore, the *Chiquita Brands* court found that the advanced age of the witness— "[r]egardless of specific ailments or physical vulnerabilities"—was alone a sufficient basis to support the taking of expedited deposition testimony from him and granted the plaintiffs' request to take expedited preservation testimony from the witness.[53]

Here, Mr. Easthope, a crucial witness, is already 87 years old. Easthope's age alone is justification for the Court to grant Plaintiff's request for expedited discovery to take Easthope's deposition now in order to preserve his testimony in case he is unavailable for deposition in the ordinary course of discovery or for trial. This justification is strengthened by the exclusive and critical nature of the evidence

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defense counsel agreed to reconsider Plaintiff's motion, based solely on the age of Mr. Easthope. **Exhibit 2**: Cox to Bush and Linkous email, 4/16/2020, 12:25 pm, and Bush response to Cox, 4/16/2020, 1:55 pm.

[51] *Chiquita Brands*, 2015 WL 12601043, at *7.

[52] *Id*.

[53] *Id*.

that Easthope alone offers toward the establishment of the facts in this litigation.

As set forth above, among other things, Easthope's testimony will include: (1) Easthope's discussion(s) with Anderson in which only he and Anderson participated; (2) the reasons Easthope believed Anderson should be fired from UM; (3) the reasons Easthope believed there were many survivors of Anderson's abuse; (4) how Easthope knew that Anderson "fool[ed] around in the exam room with boy patients;" (5) what Easthope did to apprise responsible persons at UM of Anderson's conduct; (6) Defendants' failure to act on and/or investigate complaints against Anderson; (7) Anderson's transfer to the Athletic Department instead of termination from UM as Easthope attempted to effectuate Anderson's termination; (8) Easthope's knowledge of the Defendants' publishing in the President's Annual Report false information that Anderson resigned, rather than was fired from UHS by Easthope; (9) Defendants' concealment of Anderson's abuse; and (10) that Anderson was a "big shot" at UM, and so former Athletic Director Don Canham "worked out a deal" to move Anderson full-time to the Athletic Department after being fired by Easthope. Given that Easthope is nearly 90 years old now, there is no doubt that there is a significant risk that he will be unavailable at the time of trial and so it appropriate to grant Plaintiffs' request to take expedited testimony from Easthope to preserve crucial and relevant evidence.

III. Defendants will not be prejudiced by Easthope's early deposition because they have been investigating Anderson's abuse for 19 months and knew since at least November 6, 2018 that Easthope is a critical witness.

Defendants will not be prejudiced by Easthope's early deposition as they had access to him for decades, as an employee and retiree, and certainly had access to the subject matter of his possible testimony, since his voluntary witness statement to West on November 6, 2018.[54] In fact, in contrast to the *Snow Covered Capital* case, UM has greater knowledge about Easthope's potential testimony than Plaintiff's counsel.

Defendants (and their General Counsel) knew about Anderson allegations in July 2018 and spent 19 months conducting internal investigations and fact finding while keeping it a secret from alumni and the public, and more importantly, the student athlete plaintiffs, including Plaintiff, who were abused by Anderson. Indeed, it is likely that Defendants' General Counsel already interviewed Easthope about his voluntary statements to West and his personal knowledge of the facts of this case in anticipation of this litigation. At the same time Defendants ignored Plaintiff's request to depose Easthope.[55] Additionally, Plaintiff's counsel reached out to

[54] *See Snow Covered Capital*, 2019 WL 2648799, at *3 ("The prejudice from conducting a blind deposition is heightened by the shortened notice to opposing counsel of the deposition…").

[55] **Exhibit 7**: Cox to Bush, 3/19/20, 12:25 pm; *see also* **Exhibit 9**: Cook to Linkous email, 4/2/20 3:39 pm.

Easthope for a phone call but received no response from him. Defendants had adequate time to prepare their defense including preparing for the deposition of Easthope and cannot allege any prejudice from an early deposition of Easthope.

CONCLUSION

Plaintiff respectfully requests that this Honorable Court enter an Order that Mr. Easthope may be deposed within 14 days of entry of the Order or as soon as the witness may be served with a subpoena and/or deposition notice and his appearance at the deposition scheduled.

Respectfully submitted,

The Mike Cox Law Firm, PLLC
By /s/ Michael A. Cox
Michael A. Cox (P43039)
Jackie J. Cook (P68781)
Attorneys for Plaintiff
17430 Laurel Park Drive North, Suite 120E
Livonia, MI 48152
Telephone: (734) 591-4002

Dated: April 17, 2020

Shea Law Firm PLLC
By /s/ David J. Shea
David J. Shea (P41399)
Attorneys for Plaintiff
26100 American Dr., Ste. 200
Southfield, MI 48034
Telephone: (248) 354-0224
david.shea@sadplaw.com

Dated: April 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, I electronically filed the foregoing document with the Clerk of the Court through the CM/ECF system, which will send notices of electronic filing to all counsel of record.

/s/ Mihaela Iosif
The Mike Cox Law Firm, PLLC
Livonia, MI 48152

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE MC-1,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN, AND THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only),

Defendants.
_____/

Case No. 2:20-CV-10568

Hon. Paul D. Borman
Hon. Elizabeth A. Stafford

PLAINTIFF JOHN DOE MC-1'S EMERGENCY MOTION FOR LEAVE TO TAKE THE DEPOSITION AND PRESERVE THE TESTIMONY OF TOM EASTHOPE PRIOR TO THE PARTIES' FED. R. CIV. P. 26(f) CONFERENCE

INDEX OF EXHIBITS

Exhibit 5	"UM knew of sex abuse reports against doctor 19 months before going public" Kim Kozlowski, *The Detroit News*, 2/19/2020
Exhibit 6	Bush to Shea and Cox email, 3/18/20, 2:25 pm, with attachment of proposed "Does Tolling Agreement"
Exhibit 7	Cox to Bush email, 3/19/20, 12:25 pm
Exhibit 8	Cox to Bush email, 3/27/20, 7:07 pm
Exhibit 9	Cook to Linkous email, 4/2/20 3:39 pm, with proposed stipulated "Order to Consolidate Cases"
Exhibit 10	Cox to Easthope letter, 4/2/20 & Federal Express receipts

EXHIBIT 1

Michael Cox

From: Michael Cox
Sent: Wednesday, April 15, 2020 7:48 PM
To: Linkous, Derek; Jackie Cook; Cheryl A. Bush (bush@bsplaw.com)
Cc: David Shea; Bush, Cheryl; Douglas, Stephanie; Michael Cox
Subject: Second request to depose Mr. Easthope and request for concurrence

Cheryl and Derek:

On March 19th, we asked your agreement to permit us to depose Mr. Easthope regarding his knowledge of Dr. Anderson's acts, among other things, as alleged in our complaint(s). That was asked in the context of your asking us for a delay in filing your response to our complaint(s). You did not agree. Nonetheless, in the interests of comity and collegiality, we still granted your request for more time.

In that same spirit of comity and collegiality, I am now again requesting your agreement to our deposing Mr. Easthope. As you know, he is a critical witness regarding our claims. He was already interviewed by Det West, and I have to believe he was already interviewed by UM's GC's office. Given that, I am asking you to agree to a stipulated order to present to Judge Borman that would allow us to depose him within 30 days.

Please let us know tomorrow by 4 pm if you agree and we can present a motion for a stipulate order to Judge Borman.

Thanks, Mike Cox

THE MIKE COX LAW FIRM PLLC

Michael A. Cox
The Mike Cox Law Firm, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154
mc@mikecoxlaw.com
Office: 734-591-4002
Facsimile: 734 591-4006

EXHIBIT 2

Michael Cox

From: Bush, Cheryl <Bush@bsplaw.com>
Sent: Thursday, April 16, 2020 1:55 PM
To: Michael Cox; Jackie Cook; David Shea
Cc: Douglas, Stephanie; Linkous, Derek
Subject: RE: The actual (or rough, subject to typos) brief.

Mike,

Thanks for sending. I now understand that you are concerned about the age of Mr. Easthope.

I'm talking with my client.

Cheryl

From: Michael Cox <mc@mikecoxlaw.com>
Sent: Thursday, April 16, 2020 12:25 PM
To: Bush, Cheryl <Bush@bsplaw.com>; Jackie Cook <jcook@mikecoxlaw.com>; David Shea <david.shea@sadplaw.com>
Cc: Douglas, Stephanie <douglas@bsplaw.com>; Linkous, Derek <linkous@bsplaw.com>; Michael Cox <mc@mikecoxlaw.com>
Subject: The actual (or rough, subject to typos) brief.

We will not file until at least 5 pm to give you time to look at, and perhaps, reconsider your "no" and agree to stipulate.

Mike

THE MIKE COX LAW FIRM PLLC

Michael A. Cox
The Mike Cox Law Firm, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154
mc@mikecoxlaw.com
Office: 734-591-4002
Facsimile: 734 591-4006

From: Bush, Cheryl <Bush@bsplaw.com>
Sent: Thursday, April 16, 2020 11:56 AM
To: Michael Cox <mc@mikecoxlaw.com>; Jackie Cook <jcook@mikecoxlaw.com>; David Shea <david.shea@sadplaw.com>
Cc: Douglas, Stephanie <douglas@bsplaw.com>; Linkous, Derek <linkous@bsplaw.com>
Subject: Re: Second request to depose Mr. Easthope and request for concurrence

> Mike,

Thank you for continuing to work with us on finding a way forward.

Back in March (in the email below), you offered us an extension to July 2 to respond to your complaint. You conditioned that offer on, among other things, an immediate deposition of Mr. Easthope. You felt the deposition "would greatly assist us in settling the case(s)."

As our recent motion to consolidate explained, we think that conducting discovery in dozens of cases on an ad hoc basis is not the right approach for anyone and not a productive way to work toward settlement.

Instead, we believe that the best way to resolve this and other case-management issues in these numerous cases is with a status conference with the Court. That ensures that everything progresses in an orderly fashion and mitigates any concerns of unfair treatment among the survivors, both your clients and others. It also avoids duplicative, inconsistent, and needlessly costly discovery in the various cases.

We therefore cannot agree to a deposition of Mr. Easthope at this time. The deposition should not move forward until the Court or Rule 26(d)(1) say it should.

Thank you,

Cheryl

bsp LAW

Cheryl A. Bush
Founding Member | Bush Seyferth PLLC
100 West Big Beaver Road, Suite 400
Troy, MI 48084
Tel/Fax: 248.822.7801 | Cell: 248.709.1683
V-card | Email | www.bsplaw.com

From: Michael Cox <mc@mikecoxlaw.com>
Sent: Thursday, March 19, 2020 12:25 PM
To: Bush, Cheryl <Bush@bsplaw.com>
Cc: David Shea <david.shea@sadplaw.com>; Jackie Cook <jcook@mikecoxlaw.com>; Douglas, Stephanie <douglas@bsplaw.com>; Linkous, Derek <linkous@bsplaw.com>; Carone, Andrea <Carone@bsplaw.com>; Miller, Julie <miller@bsplaw.com>; Michael Cox <mc@mikecoxlaw.com>
Subject: Response on Time and Settlement

Cheryl:

I. 30 Extra Days

We will extend the time for responding 30 days, so to May 4, 2020 (since May 3 lands on Sunday), if your client will agree to executing a Confidentiality and Protective Order in each case for the limited purpose of submitting requests for medical records that your client will respond to within a reasonable amount of time.

II. 60 or More Extra Days

We are open to discussing the possibility of an additional 60-day extension, subject to a productive, transparent meeting with your client in April and subject to your client's willingness to allow the Anderson victims to engage in limited discovery to assist in settling the case.

Your client has had unilateral and unfettered access to relevant documents and witnesses for 19 months – since July 18, 2018 – while keeping information about Anderson's abuse a secret from the public, the Legislature, alumni, and most importantly, the victims. According to Detective West, the UM General Counsel has been conducting an internal investigation since then (citing AGC Attorney Winiarski's investigative activities, for example, in his report). And when the Board of Regents was advised about the investigation (perhaps as early as the summer of 2018) Ambassador Weiser had personal knowledge verifying the accusations were valid and true that I am sure he shared with other Board members, knowledge the Board kept secret for 19 months. Plaintiffs are now 20 months behind your client on discovery; it is only fair, in the context of this litigation, that Plaintiffs be allowed limited discovery at this time. Otherwise, we are operating blindly and in a vacuum.

We will grant the additional 60-day extension, subject to a productive, transparent meeting in April, and subject to your client's agreement to limited discovery: the depositions of Tom Easthope and Detective West. Not to be redundant, but this would greatly assist us in settling the case(s).

When we met with Mr. Lynch on March 4, 2020, he said, UM's goal was to handle this matter better than MSU is handling Nassar cases. MSU's current strategy is to aggressively pursue summary judgment of pending cases and claims, many of which are valid and timely filed under applicable statutes of limitations, while stonewalling all discovery attempts. UM has an opportunity to treat its student-athletes better by avoiding motions for summary judgment and allowing Plaintiffs limited discovery in order to balance out current inequities of information so that *both* parties are in a position to discuss the possibility of settlement, which both you and Mr. Lynch indicated was UM's goal.

Thanks, Mike

THE MIKE COX LAW FIRM PLLC

Michael A. Cox

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mc@mikecoxlaw.com

Office: 734-591-4002

Facsimile: 734 591-4006

From: Michael Cox <mc@mikecoxlaw.com>
Sent: Wednesday, April 15, 2020 7:48 PM
To: Linkous, Derek <linkous@bsplaw.com>; Jackie Cook <jcook@mikecoxlaw.com>; Bush, Cheryl <Bush@bsplaw.com>
Cc: David Shea <david.shea@sadplaw.com>; Bush, Cheryl <Bush@bsplaw.com>; Douglas, Stephanie <douglas@bsplaw.com>; Michael Cox <mc@mikecoxlaw.com>
Subject: [EXTERNAL] Second request to depose Mr. Easthope and request for concurrence

Cheryl and Derek:

On March 19th, we asked your agreement to permit us to depose Mr. Easthope regarding his knowledge of Dr. Anderson's acts, among other things, as alleged in our complaint(s). That was asked in the context of your asking us for a delay in filing your response to our complaint(s). You did not agree. Nonetheless, in the interests of comity and collegiality, we still granted your request for more time.

In that same spirit of comity and collegiality, I am now again requesting your agreement to our deposing Mr. Easthope. As you know, he is a critical witness regarding our claims. He was already interviewed by Det West, and I have to believe he was already interviewed by UM's GC's office. Given that, I am asking you to agree to a stipulated order to present to Judge Borman that would allow us to depose him within 30 days.

Please let us know tomorrow by 4 pm if you agree and we can present a motion for a stipulate order to Judge Borman.

Thanks, Mike Cox

Michael A. Cox

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Office: 734-591-4002

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EXHIBIT 3

UM - UNIVERSITY OF MICHIGAN
Case Report

DIVISION OF PUBLIC SAFETY & SECURITY
UNIVERSITY OF MICHIGAN

Case No. 1890303861
Case Status Not a Crime/Other Service
Report Date/Time: 10/3/2018 11:26:04 AM
Reporting Officer: West, Mark

FILE CLASS/OFFENSE:
11003 - CSC First (1st) Degree -Penetration Oral/Anal
11007 - CSC Second (2nd) Degree - Forcible Contact

NATURE OF INCIDENT:
CSC/Anderson/DeLuca/West

OCCURRED ON: 7/18/2018 12:00:00 AM
(and Between)

VENUE: 1239 KIPKE DR ANN ARBOR, MI CAMPUS SAFETY SERVICES BUILDING
CITY/TOWNSHIP: 82 - U of M Ann Arbor, Washtenaw

VICTIM [redacted]
U of M Affiliated: N - No
Affiliation Type:
UM ID:
Campus Address:
Alcohol/Drugs: N - No
Affiliation Notes:
RACE: White
HGT:
EYES:
SSN:

VICTIM OF: 1173 - 11003 - CSC First (1st) Degree -Penetration Oral/Anal
VICTIM TYPE: Individual

DOB: [redacted]
SEX: Male
WGT:
ETH: O - Other Ethnicity/National Origin
DLN:

AGE [redacted]
JUV: N - No
HAIR:
Circumstances:
DL State:

ADDRESS INFORMATION:
H [redacted]

Phone Information:
M [redacted]

Emails: [redacted]

NOTES: University of Michigan Alumni

VICTI [redacted]
U of M Affiliated: N - No
Affiliation Type:
UM ID:
Campus Address:
Alcohol/Drugs: N - No
Affiliation Notes:
RACE: Unknown
HGT:
EYES:
SSN:

VICTIM OF: 1177 - 11007 - CSC Second (2nd) Degree - Forcible Contact
VICTIM TYPE: Individual

DOB [redacted]
SEX: Male
WGT:
ETH:
DLN:

AGE [redacted]
JUV: N - No
HAIR:
Circumstances:
DL State:

ADDRESS INFORMATION:
H - Hom [redacted]

Phone Information:
M [redacted]

Emails:

NOTES: University of Michigan Alumni

VICTIM: [redacted]
U of M Affiliated: N - No
Affiliation Type:
UM ID:
Campus Address:
Alcohol/Drugs: Y - Yes
Affiliation Notes:
RACE: White

VICTIM OF: 1173 - 11003 - CSC First (1st) Degree -Penetration Oral/Anal
VICTIM TYPE: Individual

DOI [redacted]
SEX: Male

AGE [redacted]
JUV: N - No

UM - UNIVERSITY OF MICHIGAN
Case Report

Case No. 1890303861
Report Date/Time: 10/3/2018 11:26:04 AM
Reporting Officer: West, Mark

HGT: WGT: HAIR:
EYES: ETH: Circumstances:
SSN: DLN: DL State:
ADDRESS INFORMATION:
H - Hom[redacted]
Phone Information: Emails:
M - Mob[redacted]
NOTES: University of Michigan Alumni

SUSPECT: Anderson, Robert Edward
U of M Affiliated: Y - Yes
Affiliation Type: Staff
UM ID[redacted]
Campus Address:
Alcohol/Drugs: N - No
Affiliation Notes: Retired Physician
DOB[redacted] AGE: 90
RACE: White SEX: Male JUV: N - No
HGT: WGT: HAIR:
EYES: ETH: U - Unknown Circumstances:
SMT:
SSN: DLN: DL State:
ADDRESS INFORMATION:
H - Home[redacted]
Phone Information: Emails:
NOTES: Deceased (11/27/2008)

OTHER[redacted] ENTITY TYPE: Other Person
U of M Affiliated: N - No
Affiliation Type:
UM ID:
Campus Address:
Alcohol/Drugs: N - No
Affiliation Notes:
DOB: AGE:
RACE: SEX: JUV:
HGT: WGT: HAIR:
EYES: ETH: Complexion:
Facial Hair: Attire:
SSN: POB: Resident:
DL Number: DL State: DL Country:
Employer/School: Employer Address:
Occupation/Grade:
ADDRESS INFORMATION:
H - Hom[redacted]
Phone Information: Emails:
M - Mob[redacted]
NOTES: Former University of Wisconsin Athletic Physician.

UM - UNIVERSITY OF MICHIGAN
Case Report

Case No. 1890303861
Report Date/Time: 10/3/2018 11:26:04 AM
Reporting Officer: West, Mark

NARRATIVE:
UM-0178 - West, Mark
10/3/2018 12:00:00 AM
NATURE:
Suspicious Circumstances.

LOCATION:
The incident(s) occurred at an unknown University of Michigan Campus location during the years of 1972-1976.

REPORT RECEIVED:
University of Michigan Police Department Criminal Investigations Unit Supervisor Lt. Paul DeRidder made contact with Detective Mike Mathews and I on October 3, 2018. DeRidder advised that he had been given information from the University of Michigan Office of Institutional Equity (O.I.E) of a "Campus Security Authority" (CSA) report. The report was started after information was received from alumni [redacted] had concerns about medical procedures that he experienced as a student athlete back in the years of 1972-1976. I then made contact with Pam Heatlie at O.I.E to obtain more information.

INFORMATION FROM PAM HEATLIE:
Heatlie relayed that current University of Michigan Athletic Director Warde Manual had received a letter in the mail fro[redacted] on July 18th. Manual then forwarded this letter to representatives at the University of Michigan General Counsels office, who forwarded the letter to O.I.E., where it was assigned to Heatlie.
Pam Heatlie said that it has been in her work pile since then. Heatlie said that she had contacted [redacted] who told her that he would be in Ann Arbor for an appointment, and would come and talk to her. Heatlie relayed what he had told her.
Heatlie said that she met wi[redacted] who advised that he was a student athlete (wrestler) during the 1972-1976 time span and wrestled for coach Bill Johannesen. Athletic Director Don Canham was in charge of athletics at that time. [redacted] old Heatlie that he had concerns about medical examinations at that time, that were performed by University of Michigan Athletics Doctor Robert Anderson. [redacted] ld Heatlie that he was called Dr. "Drop your drawers" Anderson during his time at Michigan because every time you saw him you would have to "Drop your drawers". Heatlie relayed that a complaint from [redacted] was that no matter what you saw Dr. Anderson for, you would get a hernia check, a prostate check, and a penis examination.
Heatlie told me th[redacted] nded up losing his scholarship, and later hired a lawyer [redacted] who helped him get his scholarship back, even though he was not allowed back on the wrestling team. Heatlie said that in the meeting w[redacted] e mentioned that fellow athletes [redacted] all shared with him similar stories of appointments with Dr. Anderson. Heatlie then turned over a 10 page letter th[redacted] wrote to his wrestling coach at that time, as well as correspondence from the athletic director (Canham) and Coach (Johannesen) to him during the scholarship situation.
I requested that Pam Heatlie stop any investigation that she may be conducting until my investigation was completed.

LETTER TO COACH JOHANNESEN:
The letter to coach Johannesen fro[redacted] ppeared to be from the time he was a student athlete at the University of Michigan, particularly around the time that he lost his scholarship. The letter appeared to be to explain to the coach his displeasure with the wrestling team and his medical problems (dislocated elbow). The letter is hand written, 10 pages long, and is a photo copy of the original. It is hard to read at some portions due to these reasons.
At one portion of the paper, Written in the 1970's [redacted] rites "Dr. Drop your pants Anderson says that there is nothing wrong with me". He later writes "Something was wrong with Dr. Anderson, regardless of what you are there for, he insists that you "drop your drawers and cough". I did not locate any additional mentions of Dr. Anderson in the letters.

DR. ROBERT ANDERSON:
Dr. Anderson was a team physician with the Athletic Department at the University of Michigan from 1967 to 1988. He was also a faculty member with the Internal Medicine portion of the University of Michigan, and was the director Student Life Services from 1968 to 1980. He died in 2008.

EMAIL T[redacted]
An email was sent [redacted] requesting that he contact me so that I could obtain his information.

CASE STATUS:
Open.

Officer Narrative	DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN	Case No. 1890303861 Subject 9800 [redacted] Statement/West Entered On: 10/8/2018 11:46:21 AM Entered By: UM-0178 - West, Mark

Narrative:

SUMMARY:

This report is in reference to allegations against a former University of Michigan Doctor, [redacted]

INFORMATION:

I was able to make telephone contact w[redacted] on 10/8/2018, a[redacted] esides[redacted]

STATEMENT OF[redacted]

[redacted] said that he was a student at the University of Michigan from 1972 to around 1976. He was a wrestler on the University of Michigan Wrestling team, and went to see Dr. Anderson 3 times during his freshman ye[redacted] aid that he sought treatment due to cold sores and herpes on his [redacted] said that this was a common problem with being a wrestler. He said that Dr. Anderson checked his face, and genitals for what he thought were herpes symptoms, but also checked him for a hernia and a prostate check. He said that he did not remember if Dr. Anderson told him why he checked for the hernia or prostate, but that as a 17 year old he did not think he would have asked questions. [redacted] d not remember being seen by Dr. Anderson his sophomore year (1973?), but went and saw him his Junior year due to an elbow dislocation. He said that he remembered the procedure being the same, in that his elbow was looked at, and then the genital check for herpes, the hernia check, and prostate check being done. He said that he did not know why he would have had the hernia or prostate check for an elbow injury.

[redacted] went on to say that in his later years as a student athlete, he lived with other athletes above the Golf Course pro shop. He said that football players [redacted] and [redacted] both made comments at the time about "Dr. Drop your drawers Anderson" and [redacted] emembered cross country athlete [redacted] relaying that Dr. Anderson asked him if he had "Any homosexual tendencies".

[redacted] said that in July or August of this year, he received a telephone call from his friend [redacted] He said that [redacted] was a former University of Michigan Student Athlete and was also the Wrestling coach at the University of Illinois for 20 years. He said tha[redacted] asked him what he thought of the "Larry Nassar" news and mentioned that it sounded like Dr. Anderson all over again. [redacted] aid that he was surprised, a[redacted] d never mentioned Dr. Anderson before to him.

[redacted] said that he would be willing to allow his medical records be turned over to me so that I could investigate this incident, as he was hoping to learn more about other incidents involving Dr. Anderson.

ADDITIONAL INFORMATION:

Pam Heatlie from O.I.E called me on October 3rd, 2018 and said that she was in a meeting with Dr. Robert Ernst and Dr. Ernst had mentioned to her that he had heard that they were looking at Dr. Anderson for some past complaints. Heatlie said that she did not mention the incident, and was surprised when he brought it up. Heatlie said that Dr. Ernst is the current director of Student Health Services, and had heard rumors about Dr. Anderson in the past. Heatlie said that Ernst may have information that could assist this investigation.

Officer Narrative	DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN	Case No. 1890303861 Subject 98[redacted] Statement/West Entered On: 10/8/2018 11:46:21 AM Entered By: UM-0178 - West, Mark

STATEMENT OF DR. ROBERT ERNST:

Ernst was contacted by email and called me from Washington D.C., as he was there on business. Ernst said that he was the current Director of Health Services and had talked to Teresa Oesterle from DPSS who had told him about the investigation. Dr. Ernst said that he had never known Dr. Anderson, but rather heard rumors throughout the years about the doctor.

Dr. Ernst said that he was a University of Michigan Student, starting in 1987, and did his residency here in 1991. He said that he has worked in various capacities within the University. Dr. Ernst said that he has heard rumors about Dr. Anderson throughout his years, one being that he performed more exams on males than necessary. He said that he never heard anything more than that. I asked him as a doctor if there would be a reason to conduct a prostate exam for a subject with an elbow or cold sore/herpes complaint and he did not know of any reason. He said that herpes is a disease that is spread by contact, and there would be no casual contact with the anal or rectal area other than by sexual contact.

Dr. Ernst said that Health Services at the University of Michigan transferred their patient records to "Mi Chart" in 2012, and that all records before that are stored by a company called "Iron Mountain" in the locale area. He thought that they would have medical records from the 1972 era stored there. He put me in touch with Dawn Weir and Fran Palms at the University of Michigan Health Services to assist me in gathering those documents.

MEDICAL RELEASE:

I was able to fill out the medical release form (both sides) and emailed i[redacted] for his signature. He sent it back signed, authorizing me to obtain his medical records from 1972 to 1976.

CASE STATUS:

Open.

July 18, 2018

Warde Manuel
Athletic Director
University of Michigan
1000 South State Street
Ann Arbor, MI 48109-2201

Dear Mr. Manuel,

I started this a few months ago, but it became bogged down and cumbersome, so I am rewriting this in a shorter bullet point form to help me to make my point as clear and concise as I can, and to help you...the reader...sift through this mess. I am writing to inform the University of Michigan Athletic Department about something that happened to me in the 1970's. Yep, that is a long time ago.

There are two aspects of this letter.

1) The University of Michigan wrestling team doctor felt my penis, and testicles, and inserted his finger into my rectum too many times for it to have been considered diagnostic...or therapeutic...for the conditions and injuries that I had.

2) The second aspect is that the doctor's actions initiated a cascade of events that were far more difficult for me to deal with at that time in my life.

- I attended the University of Michigan from 1972 to 1976. I was recruited for wrestling out of [redacted] got a "full ride." I graduated in 1976.

- During the first few months of the wrestling season in 1972, I contracted a form of herpes common to wrestling. My face broke out in cold sores and they were constantly crusted, scabbed or oozing. I was told to go see Dr. Anderson, the team doctor.

- Dr. Anderson looked the cold sores over and then checked my penis for herpes sores. There were none. Checking the penis didn't really concern me as I knew at the time that some forms of herpes manifest themselves there. I had to cough twice, too. I had a couple of hernias as a kid and was used to my family doctor checking for them. Dr. Anderson then put on a latex glove and conducted a prostate exam. I was 17 years old, and I didn't know what to make of it.

- I saw Dr. Anderson several times for the facial herpes and there were repeated penis, hernia and prostate checks. I didn't like it, but I didn't really pay much attention to it. He was the doctor and it never occurred to me that he was enjoying what I was not.

- Over time, my cold sores subsided a bit and I didn't see Dr. Anderson for a while.

- It was 1974 and I was 19 and in my junior year. My elbow started dislocating during wrestling practice. Again, I was sent to Dr. Anderson who examined the elbow and continued with his penis, hernia and prostate checks.

- I found it strange that I needed a penis and hernia check...plus a rubber glove check for when my elbow had dislocated, but I never really gave it much thought.

- One day a roommate and I were talking with a football player who lived down the hall from us. Somehow the football player started talking about Dr. "*Drop Your Drawers*" Anderson. To put it mildly, I was shocked. The football player related how he went in for something like a badly bruised shoulder and got "the glove" AKA, prostate exam. He also mentioned similar incidents that other athletes had encountered.

- A few weeks later my roommate told me about a cross country runner he knew in one of his classes whose times were slowing down. This runner was sent by his coach to Dr. Anderson and he had to cough, get the penis check, and the rubber glove. This athlete also got questions like "any homosexual tendencies?" Incidentally, this cross country runner had long, flowing blond hair.

- Meanwhile, the way the training department taped my elbow for practice didn't help at all. It basically turned my left arm into an immovable club bent at a 30 degree angle. A few minutes into practice every day my left hand was swollen like a red balloon because of the taping. The trainer, Lindsey McClain told me that the blood was flowing into my hand, but was unable to leave because of the taping, so he told me to go back to see Dr. Anderson. No way was that going to happen.

- Also, Lindsay McClain had told one of his staff about my elbow prior to an ultrasound session, and told the assistant that I had a "nurse maid" problem. I was furious and embarrassed. My elbow came out of socket and it hurt, but it was implied that it was all in my head. In my mind Dr. Anderson was a pervert and Lindsay and my coach were assholes. It wasn't until about 10 years ago that I learned that the way my elbow was dislocating was called "nurse maid's elbow." My apologies to Lindsay, but the damage was done.

- I didn't go back to see Dr. Anderson and I quit getting my armed taped, and therefore spent the rest of the wrestling season trying to keep my elbow from dislocating. In order to keep my elbow from dislocating, I had to do less with my left arm. I became a very cautious one armed wrestler. From a coach's point of view, I slacked off. I didn't know what else to do. Yep, I was worthless to the team.

- As I mentioned, I was 19 years old at this time. I was embarrassed. This caused problems that I didn't know how to deal with. I didn't dare talk about them.

- The elbow came out a couple of times while sleeping. It often came out when doing things like changing spark plugs in my car, swinging a baseball bat, etc. Once it came out at dinner trying to outdraw my roommate for the last roll on the table.

- The season ended. I went home for the summer. Coach Bill Johannesen sent me a letter that hit me pretty hard for "wasting" my junior year. In my mind at the time, he hit just about every point that could shame and embarrass me.

- His letter came as a bit of a shock because after the elbow had dislocated the first time, Coach Johannesen had pretty much ignored me and had said...over a period of several months...only 8 words to me. Seriously.

- Coach Johannesen even sent a copy of his letter to my high school wrestling coach. This

action was particularly devastating as I held my former coach in very high regard...and still do today. (My high school coach will get a copy of this letter.) Not only had I let the Michigan wrestling team down, I had let my high school coach down, too. I was very, very ashamed and embarrassed. Also, I have avoided my high school coach for over 40 years because of Coach Johannesen's letter.

- I was furious and in the early summer of 1975, I fired back a lengthy and angry letter in which I left out very little. I was 20 years old when I wrote this letter. I mentioned my elbow dislocating. The bed wetting. The trouble sleeping I was having. I mentioned Dr. *Drop Your Drawers* Anderson in that letter. I stand by everything I wrote in that letter. I haven't looked at it for decades, but a copy of that letter is buried somewhere in an unmarked box in the barn.

- Coach Johannesen took away my "full ride" and removed me from the team.

- I appealed to coach Johannesen for reinstatement to the the team. He refused.

- I appealed to Athletic Director Don Canham for reinstatement. He had a copy of my letter and had to have been aware of my allegations against Dr. Anderson. He sent me a letter refusing to reinstate me. I think it is in the barn, too.

- I was no longer on the wrestling team when I found out that Coach Johannesen cherry picked parts of my letter and read them totally out of context to the wrestling team at a meeting in the fall of 1975...the start of my senior year. I was humiliated. My roommates came home from the meeting visibly upset. They told me about some of the things he said, but refused to talk about others. In those few minutes in front of my friends and teammates, the coach stripped away everything I had ever been. Because I "would be a negative influence" on my wrestler roommates, Coach Johannesen tried to get the lease broken for my friends/roommates and get them to move out. Even [redacted]ried to talk them into moving out of the apartment. Luckily, my friends refused to move out. I cannot emphasize how important that was at the time. They knew who I was. I still talk to, and often see, these two guys today.

- I hired a lawyer and appealed to the members of the Board of Intercollegiate Athletics. I had a meeting with them. I was so ashamed and upset that I could barely get any words out of my mouth. The board members all had a copy of my letter that mentioned Dr. *Drop Your Drawers* Anderson. The Board of Intercollegiate Athletics reinstated my scholarship and returned me to the team. I declined to go back to the team and Coach Johannesen, but they let me keep the "full ride." Humiliation and embarrassment were a large part of why I refused to go back to the team, plus I was tired of my elbow coming out of socket. Dislocated elbows hurt.

- There has been an underlying sense of guilt and shame that has lingered for years. It was never debilitating, but it sure as hell hung around in the back of my mind. A story on NPR about the MSU gymnasts reignited the memories of this.

Summary:

- I bullet pointed a period of my life that was extremely difficult. The embarrassment of the penis checks, having to cough while Dr. Anderson checked my hernias and especially the repeated finger insertions into my rectum greatly influenced the tone of the angry letter I sent to the coach that got me booted from the wrestling team and took away my scholarship for a

while.

- Dr. Anderson's actions, coupled with a periodically dislocating elbow, led to a series of events that caused Coach Johannesen to respond in a totally incorrect way towards an angry letter written by an immature, and upset, 20 year old boy. The 20 year old boy...me...was totally unequipped to deal with any of this. Please do not read any pity into this. I am merely stating a fact.

- The removal from the team when I was 20 years old took away the only identity I had ever had until that point in time. It embarrassed the hell out of me in front of my wrestling friends on the Michigan team, and around the country. I still feel inferior around them and I have a gnawing urge to explain and apologize to them. I avoid many of them as much as possible. In February, I ran into one of my former teammates I hadn't seen in 40 years or so, and felt a wave of shame come over me. I actually stammered while trying to talk to him about nothing. I know that I made no sense.

- Luckily, my wrestler roommates did not abandon me during the 1975-76 school year.

- The wrestling coach, athletic director and the Board of Intercollegiate Athletics were informed about Dr. Anderson.

- Dr. Anderson was looking for a response that I never gave to him.

- Coach Johannesen was an dipshit then, and probably still is today. Sorry about this, but I had to state this.

- I was kicked off of the team, my scholarship was terminated and I was denigrated in front of my teammates by a person in the position of authority...representing The University of Michigan...for being unable to deal with...and complaining about...a periodically dislocating elbow...and a non-diagnostic, non-therapeutic grabbing of my penis, testicles, and the rubber gloved finger being inserted into my rectum by the team doctor.

- I am fully aware that it was the 1970's and it was an entirely different world then. I am also aware that 40 plus years is an extremely long time ago. I expect nothing. I want nothing. I just feel the need to report this. Also, I am fully aware that many people in the current UM Athletic Department were very young at the time, or not even born yet.

Thank you for your time.

[redacted]

Officer Narrative	DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN	Case No. 1890303861 Subject 98007/Suspicious Circumstan[redacted]/est Entered On: 10/16/2018 8:33:30 AM Entered By: UM-0178 - West, Mark

Narrative:

SUMMARY:

This report is in reference to former University of Michigan Doctor Robert Anderson and allegations of sexual misconduct.

INFORMATION:

At the start of this investigation, Detective Mike Mathews contacted Pamela Bacon at the Michigan LARA (licensing and regulatory affairs) office to see if any complaints had been filed against Dr. Anderson. It was learned that there was a complaint of sexual misconduct filed on 5/13/1994 and closed on 3/16/1995. The records for this were purged after 7 years, but Bacon told Mathews that she would see what she could find out about it. Bacon then supplied Mathews with the name of [redacted] along with an address and telephone number. She had contac[redacted] and he welcomed the call by this agency.

I made telephone contact [redacted] on 10/15/2018.

STATEMENT OF [redacted]

I introduced myself [redacted] and he said "I am glad someone finally called to look into this". I asked [redacted] he would feel comfortable talking to me about what had happened and he said that he w[redacted] said that he was a student at the University of Michigan and that the incident took place between the years of 1973 and 197[redacted] relayed that he went to the University health facility, and according to the description he gave, we determined that it was University of Michigan Health Services on Fletcher Street. He said that he went there for a routine physical, and remembered that it was a Saturday, as the receptionist told him that Dr. Anderson did not generally work on Saturdays, but agreed to fit him [redacted] id that Dr. Anderson "fondled his genitals" during the examination. I clarified [redacted] if this could have been a hernia check, and [redacted] replied "you don't understand, he fondled my genitals until fluid came out".

[redacted] said that he was a young kid at that time, and didn't know what to do. He said that Dr. Anderson did not appear to react to this, nor did he say anything. He said that he dealt with this for years, but finally filed the complaint because "I couldn't live with myself".

I informed him that we were looking into this, and he said that he would be willing to talk to me again. He was told of the passing of Dr. Anderson.

CASE STATUS:

Open.

Officer Narrative	DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN	Case No. 1890303861 Subject 98007/CSC/EASTHOPE/BRIGGS/JEDEL E/WEST Entered On: 11/6/2018 10:56:58 AM Entered By: UM-0178 - West, Mark

Narrative:

SUMMARY:

This report is in reference to a Criminal Sexual Conduct (CSC) investigation involving former University of Michigan Physician Dr. Robert Anderson.

INFORMATION:

Tom Easthope was the former Vice President of Student Life at the University of Michigan. Student Health Services fell under the control of Student Life. Mary Jo Despreez is currently in charge of the University of Michigan Wellness and had heard rumors from her father, Tom Easthope, in regards to Anderson. She was able to give me his contact information. Detective Ryan Cavanaugh and I were able to respond to his residence today, November 6, 2018, and talk to him.

STATEMENT OF TOM EASTHOPE:

I talked to Tom Easthope at his residence. His wife [redacted] was also present [redacted] aid that she was aware of the information about Anderson, as it has bothered her husband and he talked to her about it on different occasions.

Easthope relayed that he was the Vice President of Student Life at the University of Michigan and knew Dr. Robert Anderson. He said that Robert Anderson was the director of Health Services during his time, and that he had stories to tell about "Bob". I told him that we were investigating "inappropriate behavior" involving Dr. Anderson and a patient and he replied "I bet there are over 100 people that could be on that list".

Easthope said that he rememb[redacted] local activist, approaching him back "40-50 years ago" and telling him about Anders[redacted] relayed that he had several people that were in the gay community that told him they were assaulted by Dr. Anderson. Easthope said that he remembered the phrase "fooling around with boys in the exam rooms" a[redacted] what [redacted] told him. Easthope said that as an acti[redacted] as familiar with the homosexual community, and people talked to him as they trusted him to help.

Easthope said that he has trouble remembering all of the conversation and circumstances, but said that he "will never forget walking across the campus to Health Services to fire Bob". He said that he was fairly new in the position, and that Bob (Dr. Anderson) was a "big shot" at the University. Easthope said that he told Dr. Anderson that he knew he was fooling around in the exam rooms with the boy patients, and Dr. Anderson just looked at him, but did not deny it. He said that he told Dr. Anderson "You Gotta Go". Easthope said that he fired him on the spot, but his wife [redacted] minded him that he allowed him to resign [redacted] said that her background is in human resources, and remembered that he was allowed to resign because he was gone that same day. [redacted] aid that for a termination, there is a longer process generally.

Easthope then said that he may have resigned, but that he was gone as director that day. Easthope said that this was an emotional time for him and is still in his conscious at this time. He said that Anderson went into Private Practice after he left University of Michigan. Easthope said that he knew he was in private practice, as he had renewed his pilots license several years ago; and it was Dr. Anderson that walked in the exam room to give him the physical. Easthope said that it was awkward and that "I knew he had better not touch me". He said that this practice was near the corner of Huron River Drive and Clark in Ypsilanti MI.

Officer Narrative	DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN	Case No. 1890303861 Subject CSC/Anderson/Miller/West Entered On: 11/9/2018 9:23:25 AM Entered By: UM-0178 - West, Mark

Narrative:

SUMMARY:

This report is in reference to the Criminal Sexual Conduct investigation involving former University of Michigan Physician Dr. Robert Anderson.

INFORMATION:

I was able to determine that Russell Miller was the athletic trainer during Dr. Anderson's time with University of Michigan Athletics. Miller [redacted] said that he worked with Dr. Anderson, and that Dr. Anderson was an "Unbelievable Team Doctor".

Miller said that Dr. Anderson was the director of Health Services at the University of Michigan, and that then Athletic Director Canham worked out a deal so that he would come over and work with Athletics as well. Miller said that when he left Health Services, he opened a private practice, and Canham was able to get him to come over to the football team to work. Miller said that the team actually had two physicians. Dr. Gerald O'Conner was the Orthopedic Surgeon, and "Would make a point of letting Dr. Anderson know he was the primary care physician". He said that Dr. Anderson was more of an "Internist" working in Internal Medicine. He said that to his knowledge Dr. Anderson was more for Flu, Cold, and medical things such as that.

Miller said that he had worked with several doctors over his career, and rates Dr. Anderson near the top of them. Miller said that aside from the football team, Dr. Anderson also was the primary care doctor for most of the staff and their fami[redacted] He said that the thought of Dr. Anderson having any investigation done on him "Shatters him". Miller said that Larry Nassar was a student trainer of his and he was shocked to hear about this as well.

Miller said that the student athletes were often crude and joked about things when seeing the doctor. He said that he remembered athletes asking him "He isnt going to be using 2 fingers is he?" Miller said that the students joked about this even though Dr. Anderson did not give rectal exams. He said that he heard statements like this mentioned about all doctors, not specifically Dr. Anderson. Miller said that he never heard any complaints or nicknames about Dr. Anderson. He said that Dr. Anderson had a well known reputation for Athletics, as he had started Athletic Training in the Flint area schools prior to his days at the University of Michigan. He said that this reputation was what made him an appealing doctor to Canham.

Officer Narrative	DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN	Case No. 1890303861 Subject CSC/OGC/Winiarski/Boyce/West Entered On: 11/19/2018 2:23:19 PM Entered By: UM-0178 - West, Mark

Narrative:

SUMMARY:

This report is in reference to the CSC investigation involving former University of Michigan Physician Robert E. Anderson.

INFORMATION:

On 11/5/2018, I contacted the General Counsel office at the University of Michigan to ascertain if they had any records pertaining to Robert Anderson. I was directed to paralegal Karen Staszel, who told me that she would research this request and get back with me.

A couple of days later, Associate General Counsel Diane Winiarski contacted me to ask what I was looking for in reference to Dr. Robert Anderson. I explained about his demotion from Health Services, and about the senior University official that was able to tell me of his release due to "fooling around with boys in the exam rooms". I requested further paperwork related to this move, as Anderson continued on with his employment with the University of Michigan after this demotion.

Winiarski emailed me on 11/19/2018 and told me that she had checked with "UHS, Athletics, and someone formerly with Patient Relations and none of those departments had anything".

I have not been able to locate any additional information related to Dr. Robert Anderson's demotion from Health Services at this time.

CASE STATUS:

Open.

Officer Narrative	DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN	Case No. 1890303861 Subject CSC/Anderso[redacted]homas/West Entered On: 4/23/2019 10:17:09 AM Entered By: UM-0178 - West, Mark

This initial incident occurred in the early 1970's, and due to this, several people with a connection are now deceased. These subjects are:

Dr. Thirza Smith, faculty at Health Services during Dr. Robert Anderson's tenure.

Dr. Albert Girz, Faculty at Health Services during Dr. Robert Anderson's tenure.

Dr. Thomas Holley, Faculty at Health Services during Dr. Robert Anderson's tenure.

Jean Arndt, RN at Health Services during Dr. Robert Anderson's tenure.

Mary Taylor, RN at Health Services during Dr. Robert Anderson's tenure.

Bernice Fanning, RN at Health Services during Dr. Robert Anderson's tenure.

Sima Teadorovic, RN at Health Services during Dr. Robert Anderson's tenure.

Lois Margaret Dick, RN, Nursing services director at Health Services during Dr. Anderson's tenure.

Evart Ardis, Health Services Director prior to Dr. Robert Anderson

Ralph Mortonson, Administrative Manager who processed Dr. Anderson's transfer from Health Services to the Hospital.

Kathleen Dannemiller, Assistant to former President of Student life Henry Johnson.

Dr. Gerald O'Connor, Fellow Athletic Department physician that worked with Dr. Robert Anderson.

Donald Canham, Former Athletic Director at the University of Michigan

Lilyan Duford, former secretary of Donald Canham

Glenn E. "Bo" Schembechler, Former University of Michigan Football Coach during Dr. Robert Anderson's transfer from Health Services Director.

Tirrel Burton, Assistant Football Coach during the early 1970's.

Milan Vooletich, Former Assistant Football Coach during the early 1970's.

Alex Aggse-Former Assistant Football Coach during the early 1970's.

These subjects worked with, or for Dr. Anderson during the years of his employment and may have been able to provide details or information about these incidents.

CASE STATUS:

Closed.

Officer Narrative

DIVISION OF PUBLIC SAFETY & SECURITY UNIVERSITY OF MICHIGAN

Case No. 1890303861
Subject: CSC/Anderson/[redacted] West
Entered On: 8/22/2019 1:40:33 PM
Entered By: UM-0178 - West, Mark

Narrative:

SUMMARY:

This report is in reference to the Criminal Sexual Conduct investigation involving Dr. Robert Anderson.

INFORMATION:

On 8/21/2019, Criminal Investigations Unit Supervisor Lt. Paul DeRidder forwarded me an email he received from Dave Masson, general counsel for the University of Michigan. Masson had received an email from Dr. Robert Ernst, current director of the University of Michigan Health Services, who had received an email from a former student of the University of Michigan.

The email was from [redacted] who obtained his Bachelors degree from the University of Michigan in 1972 and a Masters Degree in 1973.

The email consisted of an assault [redacted] was a victim of when he was a student at the University, and the suspect was identified as Dr. Robert Anderson.

EMAIL:

The email was titled "Anderson's Boys, My Michigan Me-Too Moment, 1971". This email was attached to this report. The email was about a visit to the Health Services department when Dr. Anderson was director and physician the[redacted] explained that he was a "young gay man just coming to terms with his sexuality" and that he had thought that he has contracted a sexually transmitted disease. He said that he reached out to some of his "few gay male friends in Ann Arbor" and was told to "Go see Dr. Anderson, he'll take care of yo[redacted] did not think he could just "name request" Dr. Anderson and the friend told him to just tell his office that he (friend) sent you[redacted] did so and was able to obtain an appointment 2 days later.

[redacted] said that he met with Dr. Anderson in his office, and they then went into the exam room. This was just the 2 of them. Dr. Anderson asked him if he "pulled back his foreskin and look for deposits or discharges", and then Dr. Anderson "without warning or hesitation" "opened his lab coat and began to remove his belt and unzip his pants". "Dr. Anderson then said "here, let me show you". "Dr. Anderson then pulled down his pants and boxers, jumped up on the exam table, and began to digital manipulation of his small, uncircumcised penis". Dr. Anderson then insisted that I come over to the exam table and he "placed my hand on his erect penis and asked me to pull back the foreskin. I complied, and then he placed his hand on top of mine and began moving it up and down on his erection[redacted] said that he "wanted to get this over as quickly as possible, but I was not going to allow this to continue without the doctor's acknowledgement of what was really going on, So I asked Dr. Anderson, Do you want to have an orgasm? He replied yes".

[redacted] ote that he was horrified and dazed, and questioned how something like that could happen to h[redacted] aid that "I am reaching out to you (Ernst) with this letter in hopes you will do everything within your power to make sure something like this never happens again at Michigan".

CONTACT WI[redacted]

Officer Narrative

DIVISION OF PUBLIC SAFETY & SECURITY
UNIVERSITY OF MICHIGAN

Case No. 1890303861
Subject
CSC/Anderson/[redacted] West
Entered On: 8/22/2019 1:40:33 PM
Entered By: UM-0178 - West, Mark

I was able to [redacted] by telephone on 8/22/20[redacted] agreed to speak with me and said that he has thought of the incident every since it happened, and thought it should be made aware of. I told [redacted] that I had read his letter, and he said that he could not give me much more detail than what he had written. I then went over the letter with him and he said that he could still remember the small details of everything that had happened, due to the stress of the situation. [redacted] could remember the family photograph of Anderson's family on the credenza behind him, down to the large window in his office, with venetian blinds, overlooking Fletcher Street.

[redacted] said that his friend that told him to contact Dr. Anderson [redacted] but did not have any other information about [redacted] said that after graduating from the University of Michigan, [redacted] He lost touch with all of his Michigan friends at that point. He said that when he [redacted] "Why didn't you warn me", [redacted] could do was shrug his shoulders. [redacted] said that he figured that all of Anderson's gay patients just had to endure it. [redacted] said that at that time, homosexuality was still classified as a mental illness by the American Psychiatric Association. [redacted] said that Anderson would see him whenever he needed after that, and it was strictly professional on the other visits.

[redacted] said that he requested his medical records from the University of Michigan in 1993 and the visit on June 30, 1971 was annotated as a "V.D Survey". [redacted] said that he thought this was a code Anderson used for the "special treatment reserved for his gay male patients".

[redacted] said that he would send me his medical records. I informed [redacted] that he was not alone, and provided him with this case report number. [redacted] said that he would call if he remembered anything else.

ADDITIONAL INFORMATION:

I was not able to track down [redacted] at this time. There are multiple in the state of Michigan and multiple alumni with that name.

CASE STATUS:

Open.

UNIVERSITY OF MICHIGAN

Mark West [redacted]

Fwd: Dr. Anderson

2 messages

Paul DeRidde[redacted]
To: Mark West [redacted]

Wed, Aug 21, 2019 at 5:25 PM

FYI
Sent from my iPhone

Begin forwarded message:

From: Dave Masson [redacted]
Date: August 21, 2019 at 17:11:16 EDT
To: "DeRidder, Paul" [redacted]
Subject: Dr. Ande[redacted]on

Hello Lt. DeRidder:
I understand that recently UMPD was investigating issues related to Dr. Robert Anderson (deceased). I am not sure if this matter is still an open investigation or not, however I am forwarding the email below which appears to be related to Dr. Anderson. Dave

---------- Forwarded message ----------
From: [redacted]
Date: Sun, Aug 18, 2019 at 7:05 PM
Subject: My Michigan Me-Too moment
To: <[redacted]

Dr. Robert Ernst and Acting Dean Elizabeth Cole,

I am reaching out to you with this letter in hopes you will do everything within your power to make sure something like this never happens again at Michigan.

Anderson's Boys
My Michigan Me-too Moment, 1971

Some things you never forget. I was 20, an undergraduate in the school of Literature, Science, and the Arts, and a young gay man just coming to terms with his sexuality. Ann Arbor was a kind and tolerant place for those of us who did not conform to the gender-normative standards of the era. But there were times when medical issues could "out" us and leave us vulnerable.

Dr. Anderson was the head of the University of Michigan Student Health Service when I was an undergraduate and graduate student there. I saw him several times in December, 1970 because of the recurrence of a hydrocele - an acutely painful testicular swelling. I was sent to his office, I believe, because I dropped in a dead faint onto the floor of the health service while I was standing in line to check-in to see a physician. The health service rotated students to whatever physician was available when you arrived. I believe they sent me to the head of the

health service because my situation was clearly acute. Dr. Anderson prescribed medications which successfully addressed the problem.

But in June of 1971, I was told by a sexual partner that he had a sexually transmitted disease and he recommended I see a physician. This was a new experience for me and I didn't know what to do. I was home for the summer, working a production line in a Detroit auto factory to put myself through school. I couldn't see my family physician and the factory didn't have one available for anything other than a work injury. So I reached out to a few gay male friends in Ann Arbor who were also Michigan students. One of them told me, "Go see Dr. Anderson, he'll take care of you." Seeing a physician of choice at the health service was rarely possible. Dr. Anderson was the Director of the university's health service, and I couldn't just name-request him. My friend continued, "It won't be a problem, he takes care of all the gay guys on campus. And he doesn't make those awkward referrals to the Department of Public Health. Just call his office and tell them I sent you."

I doubted my friend, but I didn't know where else to turn. So I placed the call. I was somewhat astonished when I was given an appointment with Dr. Anderson two days later, on June 30, 1971. It was summer and I had to drive from Detroit to Ann Arbor to keep the appointment. Throughout my one-hour drive, I remained nervous and uncomfortable with my situation. I had never been exposed to a venereal disease, and I had only recently begun having sex with men.

I walked through the doors of the health service and paid the appointment fee. Then I headed for Dr. Anderson's suite which was located prominently in the front of the building, not far from the main entrance. I identified myself to his receptionist and waited to be called. Soon Dr. Anderson emerged from his office and motioned me in.

Dr. Anderson was a short, rotund little man with brown hair, wearing a white lab coat over his street clothes. I guessed him to be about forty-years-old. I don't think he had any memory of me from the appointment I had six months earlier. After all, Michigan was, and still is, a big school. I glanced around the office as I sat down at his desk, noticing for the first time how spacious and well-appointed it was - much better than the offices of other physicians I had consulted for routine health matters. I sat in the chair in front of his desk, as he sat down opposite me. I will never forget the framed picture on the credenza behind him, showing the smiling faces of several young children and a woman I assumed to be his wife. The large window behind his desk opened onto Fletcher St. and sun streamed through Venetian blinds as I haltingly explained the information I received from my sexual partner. Dr. Anderson listened, then got up from his chair saying, "Let's go into the exam room."

He led me into a large adjacent examination room and asked me to take a seat in the room's only chair. Anderson then launched into a dissertation about the symptoms of venereal disease (none of which I had) and what to look for. Nothing he said was new to me; I was naive, not stupid. I responded, "Thanks, this is stuff I know." Then his presentation took an awkward and unexpected turn. He inquired, "Do you know how to pull back your foreskin and look for deposits or discharges?"

"I'm circumcised," I replied, "so that's not an issue."

Then, without warning or hesitation, Anderson opened his lab coat and began to remove his belt and unzip his trousers. "Here," he volunteered, "let me show you." He proceeded to pull down his pants and boxers, jump onto the exam table, and begin the digital manipulation of his small, uncircumcised penis. He continued talking, offering some quasi-medical accompaniment for his masturbation. Anderson insisted I come over to the exam table. I stood up, walked over, and he placed my hand on his erect penis and asked me to pull back the

foreskin. I complied, and then he placed his hand on top of mine and began moving it up and down on his erection. At this point, I knew exactly what this was; it was not educational. But I had not yet received the medical examination I needed. I had to get this over as quickly as possible, but I was not going to allow this to continue without the doctor's acknowledgement of what was really going on.

So I asked Dr. Anderson, "Do you want to have an orgasm?"

He replied, "Yes."

And so the doctor got the hand-job he was seeking. Afterwards, he quickly stood up, cleaned himself off, and did a cursory exam of his patient. He took a slide off the tip of my penis (despite the fact that there was no discharge) and he drew blood. The tests would all come back "negative."

When I left the office, I was horrified and dazed. How could such a thing happen to me, or anyone, at the school I loved? I was not traumatized, just disgusted. Before leaving Ann Arbor, I visited my friend who made the referral to Dr. Anderson, to tell him what happened. "Why didn't you warn me?" I protested. My friend just shrugged his shoulders and looked away. Evidently this was the price all Dr. Anderson's gay male patients paid for his services and confidentiality. Everyone simply endured it. It was 1971; homosexuality was still classified as a mental illness by the American Psychiatric Assocation. We were "beggars, not choosers" and we just had to "man-up" and take it.

I saw Anderson for a follow-up, and the exam was strictly business, without a sexual component. After this, I guess you could say I became one of Anderson's boys. He would see me whenever I needed, and all the subsequent exams were strictly professional.

Almost half a century has passed, and I have often thought about it this experience. I wondered if it happened multiple times to some of Anderson's gay patients, or if there was only one introductory "lesson" for each of us. I will never know, because we didn't talk about these things in those days. I moved to San Francisco after finishing graduate school at Michigan. And most the gay men I knew and loved in that magical city did not live to see old age, as I have. I'm a lucky man, now married to a retired physician. The irony of this is not lost on me.

In 1993, I requested my medical records from the University. They were sent to me in the mail, and there on the dark, poorly photocopied record was Dr. Anderson's annotations for my visit of June 30, 1971. It showed "slide neg, VDRL" and the cryptic annotation "V.D. Survey" which I now assume was the doctor's code for the special treatment he reserved for his gay male patients.

I am the author of four books, under my pen name [redacted] and I briefly toyed with including a chapter on this experience in one of them. But frankly, I couldn't bring myself to relive it. Only recently have I been able to sit down and write it out. I hold no ill-will toward the University or Dr. Anderson. I imagine the doctor's closeted life was not an easy one. But when abuse survivors come forward to report long-suppressed instances of sexual abuse, I don't doubt them. Once you have had your own "me-too" moment, it changes you. And you never forget.

[redacted]

EXHIBIT 4

VOLUME III

PRESIDENT'S REPORT

of

THE UNIVERSITY OF MICHIGAN

for

1979-80

ACKNOWLEDGEMENT

The University Health Service staff wish to acknowledge the 11 years of leadership provided by Robert E. Anderson, M.D.

In January of 1980, Dr. Anderson resigned as Director of the University Health Service to devote more time to his clinical fields of urology/andrology and athletic medicine both here and in private practice. During his tenure as Director, he energetically developed many programs--his many contributions to health care are acknowledged at all levels of the University community.

The University Health Service staff wish to thank Dr. Anderson for his years of leadership and to dedicate the Annual Report to him.

EXHIBIT 5

UM knew of sex abuse reports against doctor 19 months before going public

Kim Kozlowski, The Detroit News Published 10:18 p.m. ET Feb. 19, 2020

The University of Michigan learned about allegations of sexual misconduct by former sports Dr. Robert E. Anderson (http://www.medicineatmichigan.org/sites/default/files/archives/v2classnotes.pdf)in 2018 — but 19 months passed before UM publicized a hotline, announced the hiring of an outside investigator and publicly asked for any other potential victims to come forward.

UM announced the moves Wednesday morning — 19 hours after The Detroit News began asking questions about allegations lodged in August by Robert Julian Stone, (/story/news/local/michigan/2020/02/19/university-michigan-investigates-sex-complaints-against-former-football-doctor/4712724002/) a UM alum who alleged the late doctor fondled him during a medical exam in 1971.

Robert Julian Stone accused Anderson of sexually assaulting him nearly 50 years ago. *(Photo: PDTN)*

"The reason I called (The News) worked," Stone said. "I just wasn't willing to sit here and be stonewalled by these people indefinitely."

In a press release issued Wednesday morning, university officials said UM police began an investigation in July 2018 after a former student athlete wrote to Athletic Director Warde Manuel about alleged abuse during medical exams in the early 1970s.

More: Former University of Michigan team doctor investigated for multiple sex abuse complaints (/story/news/local/michigan/2020/02/19/university-michigan-investigates-sex-complaints-against-former-football-doctor/4712724002/)

UM said the outreach to possible victims it announced Wednesday was part of an independent review by lawyers at the firm of Steptoe & Johnson, which the university hired in January. The university also said the Washtenaw County Prosecutor's Office finished its review of the case Tuesday and decided against filing criminal charges.

When asked why UM waited to call for victims until The News asked about Anderson, university spokesman Rick Fitzgerald responded in an email.

"Thanks for asking this important question," Fitzgerald said. "The university took this action based on receipt of an initial review by the external law firm and the prosecutor's decision Tuesday."

Later, Fitzgerald said: "We made a decision to wait on any additional outreach until the prosecutor made a decision on criminal charges. We would never want to do anything that would interfere with a police investigation."

The UM police investigation, which Fitzgerald said was completed in April 2019, was sent to the Washtenaw County Prosecutor's office for review.

Chief Assistant Prosecutor Steven Hiller said UM sent the report between May and June.

Two hours after The News asked about the case Wednesday, Hiller said the review had been concluded; in a later email, he said his office finished reviewing the allegations months ago.

He added that no charges could be filed even if evidence existed because Anderson was deceased and no ancillary charges could be filed against others because the statute of limitations had expired.

"This office concluded our review of the report sometime last fall," Hiller said. "The review was initially completed some time before that, and then the matter was looked at again after UMPD submitted an additional report in the late summer or early fall."

The allegations against Anderson became public Wednesday when The News published a story detailing Stone's account of the alleged assault by the doctor and numerous emails he exchanged with UM officials.

Stone reported his allegations to the university in August, and followed up Jan. 3, asking for his report.

Jesse Johnson, UM police records and evidence manager, told Stone he wouldn't get the report because it was under review by prosecutors, adding that the report is "extremely large and documents many other victims, and any release will have to be heavily redacted."

"That report could not be released until the Prosecutor's Office has completed its review," Johnson told Stone in an email.

Stone told the News one of the reasons he came forward was that he learned there were other alleged victims and he feared that the university and the prosecutor could keep the case open indefinitely, and no one would ever know about the allegations against Anderson.

"I want to reach out to all of the other men who were assaulted by this doctor and I want them to step forward, because we're stronger together," Stone said. "Only if they step forward in a public way can we guarantee the integrity of the case file."

On Wednesday, after Stone's story was published online, he said he got a call from UM police Detective Mark West.

Stone said West told him he did the right thing by contacting the media because it "forced the hand" of the prosecutor's office, and accusers needed an update.

"He said I was right in my assumptions that they were just sitting on it and not doing anything," Stone said. "They are now doing something. That can't undo what happened to me and the other men, so they have to have some sort of face-saving modus operandi in order to make themselves like they are doing something. That's what they have to do and it's what they should do."

West did not respond Wednesday to phone messages from The News.

Anyone who wants a copy of their report came make a request under the Freedom of Information Act with UM's FOIA office at foia-email@umich.edu.

kkozlowski@detroitnews.com

EXHIBIT 6

Michael Cox

From: Bush, Cheryl <Bush@bsplaw.com>
Sent: Wednesday, March 18, 2020 2:53 PM
To: David Shea; Michael Cox
Cc: Douglas, Stephanie; Linkous, Derek
Subject: proposal
Attachments: Does MC Tolling Agreement (w- Stay).pdf

I understand that you had requested a tolling agreement. Attached is a proposal.

Talk to you soon.

Cheryl

AGREEMENT

This Agreement is entered into by and between the University of Michigan and its Board of Regents (collectively, the "University"), and certain individuals who have sued under litigation pseudonyms as plaintiffs in the lawsuits listed in Exhibit A (collectively, the "Does").

The Does assert legal claims as to the University for actions arising out of the conduct of Dr. Robert E. Anderson (collectively, the "Claims"). In consideration of delaying any litigation over those Claims and out of a desire to investigate and negotiate the Claims to determine a prudent resolution, the Parties agree as follows:

1. Tolling Period. The Tolling Period of this Agreement shall be from March 16, 2020 (the "Effective Date") to September 16, 2020 (the "Expiration Date").

2. Tolling. The Parties shall forbear and postpone the filing, commencement, and prosecution of any legal or equitable action related to the Claims commencing on the Effective Date and continuing until the Expiration Date. The Tolling Period shall not be included in computing the applicable statute of limitations for the Claims. Nothing in this Agreement shall have the effect of reviving any claims that are otherwise barred by any statute of limitations prior to the Effective Date, or of waiving any defenses.

3. Stay. The Does have certain Claims pending in the U.S. District Court for the Eastern District of Michigan. The Does shall seek, and the University shall not oppose, a stay of any pending Claims until the Expiration Date.

4. No Admissions. Nothing in this Agreement shall constitute an admission of any factual matter, or a waiver of any right or defense (except as provided in Section 2). The Parties agree this Agreement will not be admissible for any purpose other than to rebut a statute-of-limitations defense or to defend against any claim, action, or other proceeding that may be

initiated by one of the Parties against another in breach of this Agreement or relating to this Agreement.

5. Entire Agreement. This Agreement contains all the understandings and representations between the Parties with respect to its subject matter and supersedes any prior or contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to its subject matter.

6. Modification. No provision of this Agreement may be amended or modified unless such amendment or modification is agreed to in writing and signed by the Parties.

7. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

8. Authority. The Parties represent and warrant that their attorneys each has the right and authority to execute this Agreement; and that neither Party has sold, assigned, transferred, conveyed or otherwise disposed of any claim or demand relating to any matter covered in this Agreement.

9. Governing Law: Jurisdiction and Venue. This Agreement shall be construed in accordance with the laws of Michigan without regard to conflicts-of-law principles. Any action or proceeding by either of the Parties to enforce this Agreement shall be brought only in the Washtenaw County Circuit Court, State of Michigan or the federal court for the Eastern District of Michigan. The Parties hereby irrevocably submit to the exclusive jurisdiction of such courts and waive the defense of inconvenient forum to the maintenance of any such action or proceeding in such venue.

Signatures on the next page.

On behalf of the University:

_____
Cheryl A. Bush

Dated: _____

On behalf of the Does:

_____
Michael A. Cox

Dated: _____

EXHIBIT A: List of Lawsuits

1. *Doe MC-1 v. Univ. of Michigan et al.*, No. 20-CV-10568 (E.D. Mich., filed March 4, 2020)
2. *Doe MC-2 v. Univ. of Michigan et al.*, No. 20-CV-10578 (E.D. Mich., filed March 5, 2020)
3. *Doe MC-3 v. Univ. of Michigan et al.*, No. 20-CV-10579 (E.D. Mich., filed March 5, 2020)
4. *Doe MC-4 v. Univ. of Michigan et al.*, No. 20-CV-10582 (E.D. Mich., filed March 5, 2020)
5. *Doe MC-5 v. Univ. of Michigan et al.*, No. 20-CV-10621 (E.D. Mich., filed March 8, 2020)
6. *Doe MC-6 v. Univ. of Michigan et al.*, No. 20-CV-10593 (E.D. Mich., filed March 5, 2020)
7. *Doe MC-7 v. Univ. of Michigan et al.*, No. 20-CV-10580 (E.D. Mich., filed March 5, 2020)
8. *Doe MC-8 v. Univ. of Michigan et al.*, No. 20-CV-10640 (E.D. Mich., filed March 9, 2020)
9. *Doe MC-9 v. Univ. of Michigan et al.*, No. 20-CV-10641 (E.D. Mich., filed March 9, 2020)
10. *Doe MC-10 v. Univ. of Michigan et al.*, No. 20-CV-10617 (E.D. Mich., filed March 6, 2020)
11. *Doe MC-11 v. Univ. of Michigan et al.*, No. 20-CV-10596 (E.D. Mich., filed March 5, 2020)
12. *Doe MC-12 v. Univ. of Michigan et al.*, No. 20-CV-10595 (E.D. Mich., filed March 5, 2020)
13. *Doe MC-13 v. Univ. of Michigan et al.*, No. 20-CV-10614 (E.D. Mich., filed March 6, 2020)
14. *Doe MC-14 v. Univ. of Michigan et al.*, No. 20-CV-10618 (E.D. Mich., filed March 6, 2020)
15. *Doe MC-15 v. Univ. of Michigan et al.*, No. 20-CV-10631 (E.D. Mich., filed March 9, 2020)
16. *Doe MC-16 v. Univ. of Michigan et al.*, No. 20-CV-10622 (E.D. Mich., filed March 8, 2020)
17. *Doe MC-17 v. Univ. of Michigan et al.*, No. 20-CV-10664 (E.D. Mich., filed March 11, 2020)
18. INTENTIONALLY OMITTED (Doe MC-18 hasn't filed suit)
19. *Doe MC-19 v. Univ. of Michigan et al.*, No. 20-CV-10679 (E.D. Mich., filed March 12, 2020)
20. *Doe MC-20 v. Univ. of Michigan et al.*, No. 20-CV-10693 (E.D. Mich., filed March 13, 2020)

EXHIBIT 7

Jackie Cook

From: Michael Cox
Sent: Thursday, March 19, 2020 12:25 PM
To: Bush, Cheryl
Cc: David Shea; Jackie Cook; Douglas, Stephanie; Linkous, Derek; Carone, Andrea; Miller, Julie; Michael Cox
Subject: Response on Time and Settlement

Cheryl:

I. 30 Extra Days

We will extend the time for responding 30 days, so to May 4, 2020 (since May 3 lands on Sunday), if your client will agree to executing a Confidentiality and Protective Order in each case for the limited purpose of submitting requests for medical records that your client will respond to within a reasonable amount of time.

II. 60 or More Extra Days

We are open to discussing the possibility of an additional 60-day extension, subject to a productive, transparent meeting with your client in April and subject to your client's willingness to allow the Anderson victims to engage in limited discovery to assist in settling the case.

Your client has had unilateral and unfettered access to relevant documents and witnesses for 19 months – since July 18, 2018 – while keeping information about Anderson's abuse a secret from the public, the Legislature, alumni, and most importantly, the victims. According to Detective West, the UM General Counsel has been conducting an internal investigation since then (citing AGC Attorney Winiarski's investigative activities, for example, in his report). And when the Board of Regents was advised about the investigation (perhaps as early as the summer of 2018) Ambassador Weiser had personal knowledge verifying the accusations were valid and true that I am sure he shared with other Board members, knowledge the Board kept secret for 19 months. Plaintiffs are now 20 months behind your client on discovery; it is only fair, in the context of this litigation, that Plaintiffs be allowed limited discovery at this time. Otherwise, we are operating blindly and in a vacuum.

We will grant the additional 60-day extension, subject to a productive, transparent meeting in April, and subject to your client's agreement to limited discovery: the depositions of Tom Easthope and Detective West. Not to be redundant, but this would greatly assist us in settling the case(s).

When we met with Mr. Lynch on March 4, 2020, he said, UM's goal was to handle this matter better than MSU is handling Nassar cases. MSU's current strategy is to aggressively pursue summary judgment of pending cases and claims, many of which are valid and timely filed under applicable statutes of limitations, while stonewalling all discovery attempts. UM has an opportunity to treat its student-athletes better by avoiding motions for summary judgment and allowing Plaintiffs limited discovery in order to balance out current inequities of information so that *both* parties are in a position to discuss the possibility of settlement, which both you and Mr. Lynch indicated was UM's goal.

Thanks, Mike

THE MIKE COX LAW FIRM PLLC

Michael A. Cox
The Mike Cox Law Firm, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154
mc@mikecoxlaw.com
Office: 734-591-4002
Facsimile: 734 591-4006

From: Bush, Cheryl <Bush@bsplaw.com>
Sent: Thursday, March 19, 2020 7:42 AM
To: Michael Cox <mc@mikecoxlaw.com>
Cc: David Shea <david.shea@sadplaw.com>; Jackie Cook <jcook@mikecoxlaw.com>; Douglas, Stephanie <douglas@bsplaw.com>; Linkous, Derek <linkous@bsplaw.com>; Carone, Andrea <Carone@bsplaw.com>; Miller, Julie <miller@bsplaw.com>
Subject: RE: [EXTERNAL] Our tentative thoughts on your proposal

Michael and David,

Let me start over on my request for an extension of time to respond to your complaints.

As you know, my client agreed to accept service of your complaints. Responses to the first wave are due April 3.

During this time of pandemic and as a professional courtesy, may my client have an additional 60 days to respond to your complaints?

Please let me know today.

Stay safe,

Cheryl

From: Michael Cox <mc@mikecoxlaw.com>
Sent: Wednesday, March 18, 2020 4:52 PM
To: Bush, Cheryl <Bush@bsplaw.com>
Cc: David Shea <david.shea@sadplaw.com>; Jackie Cook <jcook@mikecoxlaw.com>; Michael Cox <mc@mikecoxlaw.com>
Subject: RE: [EXTERNAL] Our tentative thoughts on your proposal

Please pardon my poor wordsmithing. Point made and taken.

Thanks, Mike

THE MIKE COX LAW FIRM PLLC

Michael A. Cox
The Mike Cox Law Firm, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154
mc@mikecoxlaw.com

Office: 734-591-4002
Facsimile: 734 591-4006

From: Bush, Cheryl <Bush@bsplaw.com>
Sent: Wednesday, March 18, 2020 4:34 PM
To: Michael Cox <mc@mikecoxlaw.com>
Cc: David Shea <david.shea@sadplaw.com>; Jackie Cook <jcook@mikecoxlaw.com>
Subject: RE: [EXTERNAL] Our tentative thoughts on your proposal

I will discuss your email with my client.

However, in our discussion, I used the word "response" to your complaint, not "answer."

From: Michael Cox <mc@mikecoxlaw.com>
Sent: Wednesday, March 18, 2020 4:24 PM
To: Bush, Cheryl <Bush@bsplaw.com>
Cc: David Shea <david.shea@sadplaw.com>; Jackie Cook <jcook@mikecoxlaw.com>; Michael Cox <mc@mikecoxlaw.com>
Subject: [EXTERNAL] Our tentative thoughts on your proposal

Cheryl:

Thanks for the call this afternoon. We thought it was helpful.

We understand your need to get up to speed and the need for added time before answering any of our complaints, etc.

Here is where we are tentatively:

1) **30 days, plus 60 days, as a minimum**: We think tying an answer date to a yet-to-be-determined scheduling or calendar conference date is too uncertain. So we would like propose the following: a) We (our firms and/or all the firms, depending on you/UM) meet with you and UM within 30 or so days, sometime before or by Friday, April 24th. The point of the meeting would be to see where things are, or more specifically, where UM is. It would also give you time to get up to speed. According to Parker Sinar, the Denver lawyer, he and Tim Lynch have already been talking about a mid-April meeting, so I expect this time frame works. Then based on how that meeting goes, we could discuss and decide answering our complaints by June 24th or some later date.
2) **Limited discovery/FOIA**: In conjunction with that, we would like some limited discovery. If it is more palatable, the discovery could be called FOIA requests where UM decides not to use the "in litigation" exemption. We believe some limited discovery now can assist us in making more informed decisions earlier, which I expect would also ultimately expedite the process.

Let us know your thoughts. If these make sense, we can flesh out an agreement and I think we can also resolve the lesser issue of the state claims as well.

Thanks, Mike

THE MIKE COX LAW FIRM PLLC

Michael A. Cox
The Mike Cox Law Firm, PLLC

17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154
mc@mikecoxlaw.com
Office: 734-591-4002
Facsimile: 734 591-4006

EXHIBIT 8

Jackie Cook

From: Michael Cox
Sent: Friday, March 27, 2020 7:07 PM
To: Bush, Cheryl
Cc: David Shea; Jackie Cook; Douglas, Stephanie; Linkous, Derek; Carone, Andrea; Miller, Julie; Michael Cox
Subject: 1) One medical point of contact; 2) Your request for an additional 30 days to respond to our complaints

Dear Cheryl:

1) One medical point of contact: Thanks for assisting with creating a rationale approach to processing our 35 or so current medical releases. We have already have signed releases based on a generic form that we have used in other litigation, but if UM requires something different, we can use a different form.

2) Request for additional time beyond May 3rd: Last week, in the spirit of comity and collegiality, we agreed to extend the time for UM to file an answer or response to our complaints from April 3rd to May 3rd. It is my understanding from your prior emails that UM has no interest in answering our complaints, but rather, its strategy is to file a motion for judgment on the pleadings or some other motion based on a defense under Rule 12. As we see it, such a response is not fact-dependent and thus can be researched, prepared, and filed remotely based on our currently filed complaints. Thus there is not, at least that I can see presently, any reason for you to do any of the normal fact investigation that might accompany answering a complaint in accordance with Rule 8(b). So I view any further time extension as a needless delay of what UM appears to want to do anyway - seek dismissal of our clients' meritorious complaints.

   If I am mistaken, and UM instead needs more time to properly conduct further fact investigation to meet its obligations under Rule 8(b), then an extension of 30 more days *is* appropriate. If that is the case, then we will agree to an additional 30 days if UM will waive (a) any motions or defenses arguably permissible under Rule 12 and (b) further waive any other motion(s) to dismiss, or otherwise impair or challenge our complaints until discovery is concluded as ordered in Judge Borman's eventual scheduling order, and so commit UM to prospectively only move for dismissal under Rule 56, based on "no genuine dispute as to any material fact" after the Plaintiffs have had a full opportunity to pursue all discovery permissible under the federal rules.

   If that is the case, please let me know and we will draft the appropriate written agreement and waiver to send to you on Monday.

Thanks, Mike

THE MIKE COX LAW FIRM PLLC

Michael A. Cox
The Mike Cox Law Firm, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154

EXHIBIT 9

Jackie Cook

From: Jackie Cook
Sent: Thursday, April 2, 2020 3:39 PM
To: Linkous, Derek
Cc: Bush, Cheryl; Douglas, Stephanie; Michael Cox; David Shea
Subject: RE: Doe MC: Motion to Consolidate
Attachments: Draft 20.04.02 Stip Order re consolidation.docx

Dear Derek:

I was able to talk to Mike and Dave, and so I am able to respond earlier than I initially thought.

Now that I/we have had an opportunity to look and think about your proposed motion, I can say that we think consolidation in front of Judge Borman and the filing of a long-form consolidated complaint are both great ideas and we agree to those wholeheartedly.

You did not send a proposed order, so for clarity sake, I am going over your (a) through (h) points in your conclusion:

(a) We agree with you that under Rule 42(a) it is appropriate to consolidate all the listed cases with the initial case in front of Judge Borman. As an aside, we expect to file another two or so cases today and we agree those should be consolidated with the first case in front of Judge Borman;
(b) We agree with the master docket and master file remaining with Judge Borman and the first case;
(c) We agree with the caption being what is currently filed with Judge Borman in Case No. 2:20-cv-10568-PDB-EAS. In footnote 1, you suggest that the UM is not a proper defendant; if you can provide us with the appropriate law on that point, we may be able to agree on your proposed caption before we file our long-form consolidated complaint on or before April 6, 2020;
(d) As stated above, we agree to file a master long-from complaint with common, cross-complaint allegations, but we do not need 30 days. We will file that on or by April 6, 2020 and serve UM on that date.

We do not see the need or efficacy for sections (e) through (h). Rule 12(a) already provides that a defendant must answer within 21 days, so that date would ordinarily be April 28, 2020, but we would agree in the below motion/stipulated order to give you an extra week until Monday, May 4, 2020. This would be an extra day over your current deadline to answer Judge Borman's first case (the case you propose to use as the master case here), Case No. 2:20-cv-10568-PDB-EAS, ***where by agreement of the parties***, UM is required to answer the complaint or file a response date of May 3, 2020.

As you may recall, just last Thursday Ms. Bush asked for additional time beyond UM's original date of April 3, 2020 (tomorrow) to answer or file a response. And on Friday we gave UM an additional 30 days until May 3, 2020.

Finally, Rule 16 already leaves it to the trial court to decide when and if to have a status conference. And in the sequence of the federal rules, this rule, Rule 16, is sequentially after pleading rules addressing filing of complaints, answering complaints or filing dispositive motions under Rule 12, precisely because there is little or no reason to have a conference until both sides have stated their relative positions by complaint and answer with affirmative defenses, or the defense moves for summary disposition under Rule 12.

Ms. Bush emphatically told us by telephone and email on March 18, 2020 that UM does not intend to file "answer" but rather a "response". (The quotes are from Ms. Bush's email). So any reference to a "status conference" as proposed in

your subparagraph (3) is patently a delay tactic. The irony is that one of the purposes of a Rule 16 pretrial conference is "discouraging wasteful pretrial activities." Fed Rule Civ Pro Rule (a) (3).

From Ms. Bush's first call with Mr. Cox where she requested a conference date in the fall of 2020, UM's strategy has been focused on delay. We cannot agree to further delay, especially because once your Rule 12 motion(s) are disposed of, we need to get into discovery and preserve testimony as many of the key witnesses here are retired UM employees, and many are in their 80s or older.

So we do agree with the stated goals of your motion – to consolidate in front of Judge Borman and file a long-form complaint for judicial economy – but we cannot agree with the unstated and primary goal of delay.

So we suggest a stipulated order to address your stated goals of consolidation and filing a long form complaint roughly as follows below (subject to some minor wordsmithing if you agree with us on the substantive points)

ORDER TO CONSOLIDATE CASES

This matter is before the Court upon the stipulation of the parties and Court being duly advised in the premises:

IT IS HEREBY ORDERED that:

a. Under Federal Rule of Civil Procedure 42(a), the following cases are consolidated for all pretrial purposes with *John Doe MC-1 v. University of Michigan and the Regents of the University of Michigan*, No. 20-CV-10568 (E.D. Mich.):

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- *Doe MC-6 v. Univ. of Michigan et al.,* No. 20-CV-10593 (E.D. Mich., filed March 5, 2020)
- *Doe MC-7 v. Univ. of Michigan et al*., No. 20-CV-10580 (E.D. Mich., filed March 5, 2020)
- *Doe MC-8 v. Univ. of Michigan et al.,* No. 20-CV-10640 (E.D. Mich., filed March 9, 2020)
- *Doe MC-9 v. Univ. of Michigan et al.,* No. 20-CV-10641 (E.D. Mich., filed March 9, 2020)

- *Doe MC-10 v. Univ. of Michigan et al.,* No. 20-CV-10617 (E.D. Mich., filed March 6, 2020)
- *Doe MC-11 v. Univ. of Michigan et al.,* No. 20-CV-10596 (E.D. Mich., filed March 5, 2020)
- *Doe MC-12 v. Univ. of Michigan et al*., No. 20-CV-10595 (E.D. Mich., filed March 5, 2020)
- *Doe MC-13 v. Univ. of Michigan et al*., No. 20-CV-10614 (E.D. Mich., filed March 6, 2020)
- *Doe MC-14 v. Univ. of Michigan et al*., No. 20-CV-10618 (E.D. Mich., filed March 6, 2020)
- *Doe MC-15 v. Univ. of Michigan et al.,* No. 20-CV-10631 (E.D. Mich., filed March 9, 2020)
- *Doe MC-16 v. Univ. of Michigan et al.,* No. 20-CV-10622 (E.D. Mich., filed March 8, 2020)
- *Doe MC-17 v. Univ. of Michigan et al*., No. 20-CV-10664 (E.D. Mich., filed March 11, 2020)
- *Doe MC-18 v. Univ. of Michigan et al.,* No. 20-CV- 10715 (E.D. Mich., filed March 17, 2020)
- *Doe MC-19 v. Univ. of Michigan et al*., No. 20-CV-10679 (E.D. Mich., filed March 12, 2020)
- *Doe MC-20 v. Univ. of Michigan et al*., No. 20-CV-10693 (E.D. Mich., filed March 13, 2020)
- *Doe MC-21 v. Univ. of Michigan et al*., No. 20-CV- 10731 (E.D. Mich., filed March 18, 2020)
- *Doe MC-22 v. Univ. of Michigan et al*., No. 20-CV- 10732 (E.D. Mich., filed March 18, 2020)
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- *Doe MC-24 v. Univ. of Michigan et al*., No. 20-CV-10771 (E.D. Mich., filed March 23, 2020)
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- *Doe MC-26 v. Univ. of Michigan et al.,* No. 20-CV-10828 (E.D. Mich., filed March 31, 2020)
- *Doe MC-27 v. Univ. of Michigan et al*., No. 20-CV-10785 (E.D. Mich., filed March 26, 2020)
- *Doe MC-28 v. Univ. of Michigan et al*., No. 20-CV-10779 (E.D. Mich., filed March 25, 2020)
- *Doe MC-29 v. Univ. of Michigan et al*., No. 20-CV-10832 (E.D. Mich., filed March 31, 2020)

- *Doe MC-31 v. Univ. of Michigan et al.,* No. 20-CV-10832 (E.D. Mich., filed March 30, 2020)
- *Doe MC-32 v. Univ. of Michigan et al.,* No. 20-CV-10823 (E.D. Mich., filed March 30, 2020)

b. The Master Docket and Master File for the Consolidated Action shall remain Civil Action No. 20-CV-10568.

c. The caption for the Consolidated Action shall become:

JOHN DOE MC-1 *et al* v. THE UNIVERSITY OF MICHIGAN, THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only)	No. 2:20-cv-10568-PDB-EAS

d. The Doe MC plaintiffs shall file a Master Long-Form Complaint with the common, cross-plaintiff allegations on or by April 6, 2020;

e. The Defendant(s) shall answer the Master Long-Form Complaint on or by May 4, 2020, or file any appropriate motion by that same date;

IT IS SO ORDERED.

Dated:_____

_____
The Honorable Judge Paul D. Borman
United States District Judge

Jackie J. Cook

THE MIKE COX LAW FIRM, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154
Email: jcook@mikecoxlaw.com
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Bio: http://mikecoxlaw.com/attorneys/jackie-cook/

From: Linkous, Derek <linkous@bsplaw.com>
Sent: Thursday, April 2, 2020 11:18 AM
To: Jackie Cook <jcook@mikecoxlaw.com>
Cc: Bush, Cheryl <Bush@bsplaw.com>; Douglas, Stephanie <douglas@bsplaw.com>
Subject: Doe MC: Motion to Consolidate

Jackie–

I appreciate you discussing today. As I noted, we are hoping to get this on file today and would appreciate your feedback by 3:30pm today. Happy to discuss live if useful.

Thanks,
Derek

Derek J. Linkous
Partner | Bush Seyferth PLLC
100 West Big Beaver Road, Suite 400
Troy, MI 48084
Tel/Fax: 248.822.7831 | Cell: 248.730.2375
V-card | Email | www.bsplaw.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JOHN DOE MC-1,

Plaintiff,

vs.

THE UNIVERSITY OF MICHIGAN, THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only),

Jointly and Severally,

Defendants.

Case No. 20-cv-10568

Hon. Paul D. Borman

STIPULATION FOR ENTRY ORDER TO CONSOLIDATE CASES

The parties, through their respective counsel, stipulate to the entry of the attached Order.

Michael A. Cox (P43039)
Jackie J. Cook (P68781)
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Attorneys for Plaintiff
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Cheryl A. Bush (P37031)
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248.822.7800
bush@bsplaw.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JOHN DOE MC-1,

Plaintiff,

vs.

THE UNIVERSITY OF MICHIGAN, THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only),

Jointly and Severally,

Defendants.

Case No. 20-cv-1056

Hon. Paul D. Borman

ORDER TO CONSOLIDATE CASES

This matter is before the Court upon the stipulation of the parties and Court being duly advised in the premises:

IT IS HEREBY ORDERED that:

a. Under Federal Rule of Civil Procedure 42(a), the following cases are consolidated for all pretrial purposes with *John Doe MC-1 v. University of Michigan and the Regents of the University of Michigan*, No. 20-CV-10568 (E.D. Mich.):

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- *Doe MC-18 v. Univ. of Michigan et al.,* No. 20-CV- 10715 (E.D. Mich., filed March 17, 2020)
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JOHN DOE MC-1 *et al* v. THE UNIVERSITY OF MICHIGAN, THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only)	No. 2:20-cv-10568-PDB-EAS

d. The Doe MC plaintiffs shall file a Master Long-Form Complaint with the common, cross-plaintiff allegations on or by April 6, 2020;

e. The Defendant(s) shall answer the Master Long-Form Complaint on or by May 4, 20120, or file any appropriate motion by that same date;

IT IS SO ORDERED.

Dated:_____

_____
The Honorable Judge Paul D. Borman
United States District Judge

EXHIBIT 10

17430 Laurel Park Drive North
Suite 120E
Livonia, Michigan 48152

THE MIKE COX LAW FIRM PLLC

Telephone: (734) 591-4002
Facsimile: (734) 591-4006
Email: info@mikecoxlaw.com
Website: www.mikecoxlaw.com

April 2, 2020

Mr. Thomas Easthope
[redacted]

Dear Mr. Easthope:

I hope this letter finds you and your family safe and healthy, given the unprecedented time we find ourselves in.

I'd like to introduce myself. I am an alumnus of The University of Michigan Law School and its undergraduate program; I am currently an attorney in Livonia. I served as Michigan Attorney General from 2003-2011 while Governor Granholm was in office. Before then, I was a career prosecutor in Detroit, heading the Homicide Unit for then-Prosecutor, but now Detroit Mayor Mike Duggan, after spending years as a sexual assault prosecutor.

Since the news broke in February about Dr. Robert Anderson, I received several calls from fellow U of M alumni and former U of M student-athletes, including a very close, personal friend who wrestled at the U of M, all of whom were reaching out to share their experiences with Dr. Anderson.

My firm handles very little plaintiff's injury work; most of our work involves defending businesses and individuals against lawsuits and investigations. But these stories compelled me to look further into their claims. I quickly saw that the university and its lawyers were controlling the flow of information, along with the narrative that Dr. Anderson's crimes must be looked at in isolation and that anyone who could shed light on how this tragedy happened was now – in the words of Ambassador Ron Weiser – "long gone". I believe U of M's response to the victims has been woefully inadequate. So, I recently filed lawsuits against the university and its Board of Regents to help my fellow alum learn the truth of how and why they were sexually abused by Dr. Anderson. I do not find joy in suing my alma mater, but these former student-athletes (including my friend) need and deserve answers.

It is clear to me and my clients that ***you alone*** tried to do something about Dr. Anderson, and so I am reaching out today to request a call to discuss your experience with Dr. Anderson. Your time and willingness to connect with me would mean a lot to my clients as they attempt to come to terms with what happened to them as young men so many years ago.

You can reach me anytime on my cell phone, (734) 306-0958. Please feel free to call or text. Your time is greatly appreciated.

Very truly yours,

Mike Cox

Mihaela Iosif

From: TrackingUpdates@fedex.com
Sent: Friday, April 3, 2020 2:01 PM
To: Mihaela Iosif
Subject: FedEx Shipment [redacted] Delivered

Your package has been delivered

Tracking # [redacted]

Ship date:
Thu, 4/2/2020

Michael A. Cox, Esq.
THE MIKE COX LAW FIRM PLLC
Livonia, MI 48152
US

Delivered

Delivery date:
Fri, 4/3/2020 2:00 pm

Thomas Easthope
[redacted]

Shipment Facts

Our records indicate that the following package has been delivered.

Tracking number:	[redacted]
Status:	Delivered: 04/03/2020 2:00 PM Signed for By: Signature not required
Signed for by:	Signature not required
Delivery location:	[redacted]
Delivered to:	Residence
Service type:	FedEx Standard Overnight®
Packaging type:	FedEx® Envelope
Number of pieces:	1
Weight:	0.50 lb.
Special handling/Services:	Deliver Weekday
	Residential Delivery
Standard transit:	4/3/2020 by 8:00 pm

Please do not respond to this message. This email was sent from an unattended mailbox. This report was generated at approximately 1:01 PM CDT on 04/03/2020.

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17430 Laurel Park Drive North
Suite 120E
Livonia, Michigan 48152

THE MIKE COX LAW FIRM PLLC

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Tracking # [redacted]

Ship date:
Thu, 4/2/2020

Michael A. Cox, Esq.
THE MIKE COX LAW FIRM PLLC
Livonia, MI 48152
US

Delivered

Delivery date:
Fri, 4/3/2020 10:46 am

Thomas Easthope
[redacted]

Shipment Facts

Our records indicate that the following package has been delivered.

Tracking number:	[redacted]
Status:	Delivered: 04/03/2020 10:46 AM Signed for By: Signature not required
Signed for by:	Signature not required
Delivery location:	[redacted]
Delivered to:	Residence
Service type:	FedEx Standard Overnight®
Packaging type:	FedEx® Envelope
Number of pieces:	1
Weight:	0.50 lb.
Special handling/Services:	Deliver Weekday
	Residential Delivery
Standard transit:	4/3/2020 by 8:00 pm

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All weights are estimated.

To track the latest status of your shipment, click on the tracking number above.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE MC-1,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN, AND THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only),

Defendants.
_____/

Case No. 2:20-CV-10568

Hon. Paul D. Borman
Hon. Elizabeth A. Stafford

PLAINTIFF JOHN DOE MC-1'S EMERGENCY MOTION FOR LEAVE TO TAKE THE DEPOSITION AND PRESERVE THE TESTIMONY OF TOM EASTHOPE PRIOR TO THE PARTIES' FED. R. CIV. P. 26(f) CONFERENCE

APPENDIX OF UNPUBLISHED CASES

Appendix 1	*Lashuay v. Delilne*, No. 17-CV-13581, 2018 WL 317856 (E.D. Mich. Jan. 8, 2018)
Appendix 2	*Westfield Ins. Co. v. Pavex Corp.*, No. 17-14042, 2017 WL 6407459 (E.D. Mich. Dec. 15, 2017)
Appendix 3	*Respecki v. Baum*, No. 13-13399, 2013 WL 4584714 (E.D. Mich. Aug. 28, 2013)
Appendix 4	*McNulty v. Reddy Ice Holdings, Inc.*, No. 08-CV-13178,

	2010 WL 3834634 (E.D. Mich. Sept. 27, 2010) (Borman, J.)
Appendix 5	*United States v. Int'l Longshoremen's Ass'n*, No. 07-CV-053212-ILG-VVP, 2007 WL 2782761 (E.D.N.Y. Sept. 24, 2007)
Appendix 6	*Snow Covered Capital, LLC v. Weidner*, No. 19-CV-00595-JAD-NJK, 2019 WL 2648799 (D. Nev. June 26, 2019)
Appendix 7	*In re Chiquita Brands Int'l, Inc.*, No. 07-60821-CV, 2015 WL 12601043 (S.D. Fla. Apr. 7, 2015)

APPENDIX 1

2018 WL 317856
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Northern Division.

David LASHUAY, Plaintiff,
v.
Aimee DELILNE, et al., Defendants.

Case No. 17-cv-13581
|
Signed 01/08/2018

Attorneys and Law Firms

Cynthia Heenan, Constitutional Litigation Associates, Detroit, MI, for Plaintiff.

John L. Thurber, MI Dept. of Atty. Gen., Lansing, MI, Carly A. Van Thomme, Ronald W. Chapman, Chapman Law Group, Troy, MI, for Defendants.

ORDER DENYING WITHOUT PREJUDICE MOTION FOR EXPEDITED DISCOVERY, GRANTING MOTION TO STRIKE SECOND AMENDED COMPLAINT, STRIKING SECOND AMENDED COMPLAINT, AND SETTING PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT FOR HEARING

THOMAS L. LUDINGTON, United States District Judge

***1** On November 1, 2017, Plaintiff David Lashuay filed a complaint against a variety of medical staff and medical providers alleging that they were deliberately indifferent to his medical needs while he was incarcerated by the Michigan Department of Corrections. ECF No. 1. On November 10, 2017, and before any Defendants were served, Lashuay filed an amended complaint which made minor factual clarifications and corrected several clerical errors. ECF No. 4. On the same day, Lashuay filed two ex parte motions for leave to commence limited discovery immediately.[1] ECF Nos. 5, 6. In the request, Lashuay explains that his prefiling investigation did not reveal the identity of two potential Defendants (named as John Does in the complaint). Lashuay seeks leave to take a deposition and issues subpoenas to identify the proper parties.

Over the next several weeks, most named Defendants were served. On December 8, 2017, the served Defendants filed a motion to dismiss the claims against them. ECF No. 26. That motion is currently set for hearing on February 28, 2018. ECF No. 32. On December 27, 2017, Plaintiff filed a second amended complaint. ECF No. 35. That second amended complaint does not name new Defendants, but does amend the claims being advanced. In its reply brief in support of its motion to dismiss, Defendants noted that the second amended complaint had been improperly filed because Lashuay had already amended once as by right. On January 3, 2018, Lashuay filed a motion for leave to file its second amended complaint. ECF No. 39. The next day, the served Defendants filed a motion to strike the previously filed second amended complaint. ECF No. 40.

In his motion for leave to file a second amended complaint, Lashuay acknowledges that Federal Rule of Civil Procedure 15(a)(1) only permits one amendment as of right. By making that admission (and, indeed, filing the motion for leave to file a second amended complaint), Lashuay has conceded that the second amended complaint was improperly filed. The second amended complaint, ECF No. 35, will be stricken, and Lashuay's motion for leave to file a second amended complaint will be scheduled for hearing.[2] If Lashuay's motion is granted, he will be directed to refile the second amended complaint. Additionally, and for the reasons provided below, Lashuay's motion for expedited discovery will be denied.

I.

A.

Lashuay's amended complaint alleges that, on July 9, 2014, Lashuay suffered third degree burns on 49% of his body because of an explosion in Otsego County, Michigan. Am. Compl. at 10, ECF No. 4. Lashuay was treated at the Hurley Hospital Burn Unit in Flint Michigan for many weeks. *Id.* On October 16, 2014, Lashuay was

released from Hurley Hospital and into the custody of the Michigan Department of Corrections. *Id.* He remained in MDOC custody until September 1, 2016, when he was released on parole. *Id.*

***2** Lashuay's claims arise out of the MDOC's alleged deliberate indifference to his medical needs upon his release from Hurley Hospital. He contends that, when released into MDOC custody, "Hurley hospital recommended additional skin grafts and surgery to release contractures caused by the burns, with a re-visit at their Burn Unit in 2 weeks to evaluate for planned surgeries." *Id.* at 10–11.

According to Lashuay, MDOC medical personnel "assured the Hurley Hospital medical staff that all of Plaintiff's medical needs would be met," but failed to fulfill that promise. *Id.* at 11. Specifically, Lashuay contends that, "[u]pon arrival at [MDOC's Dwayne Waters Hospital (DWH)], Plaintiff had open wounds requiring daily dressing changes and application of medications." *Id.* Despite his condition, he was "placed in isolation for 30 days." *Id.* He alleges that, during his incarceration, he received "minimal or no wound care." *Id.* Rather, Lashuay was "required to attend to his daily wound-care needs, dressing changes and medication application with no or minimal assistance from healthcare staff." *Id.* He alleges that he was "frequently not provided with adequate supplies to change his wound dressing and had to resort to tearing up garbage bags to cover some of the open wounds." *Id.* at 11–12.

Lashuay alleges that "[t]here are numerous notations in the RN's and NP and other defendant medical provider records indicating that Plaintiff was doing his own wound care and asking for help 'if needed' however, [sic] there is only 1-2 records of any medical provider actually providing any assistance with wound care." *Id.* at 12. The Defendants "merely documented the existing oozing wounds, new open wounds, failed skin grafts, and reopened wounds"; they did not take "any action to provide wound care, continuing to leave it to Plaintiff with inadequate supplies." *Id.*

Lashuay contends that, as a result of Defendants' "failure to provide medically necessary wound care and supplies," he suffered medical complications "most or all of which would not have occurred with professional wound care." *Id.* He further alleges that, as a result of his "continued and new wounds," necessary surgery and physical therapy was delayed and denied. *Id.* Specifically, Lashuay alleges that, on or around January 2015, the Hurley Hospital recommended that he undergo surgery. *Id.* at 14. Despite that recommendation, "[i]n January 2015, and continuing thereafter, Defendants denied Hurley's recommendation for surgeries." *Id.*

Lashuay now contends that he is "severely disabled in the use of his right hand and his range of motion in his neck and other body parts is severely restricted and he suffered extreme pain throughout his" incarceration "and continuing to the present." *Id.* at 12–13. He alleges that the "Hurley Burn Clinic professionals" have advised him that "it is too late for there to be any reasonable chance that the surgery would help." *Id.* at 13.

B.

Because their identities and roles are relevant to Lashuay's request for expedited discovery, the Defendants named in the amended complaint will be briefly identified. Aimee Delilne "was the first RN to see Plaintiff upon his arrival at DWH ... and provided nursing care per records throughout his stay there." *Id.* at 2–3. FNU Trout "was the 'wound care nurse' at DWH who was notified of Plaintiff's arrival and reportedly evaluated Plaintiff upon arrival for necessary wound care services." *Id.* at 3. FNU Wetzel "was from physical therapy services at DWH and reportedly evaluated Plaintiff for physical therapy needs and prescribed or oversaw Plaintiff's physical therapy services while in custody of MDOC." *Id.* Gary Duncan "was one of the 4 providers involved in Plaintiff's transfer and intake into DWH and provided or supervised care on various occasions thereafter." *Id.* at 3–4. Mollie Klee, Lorraine Vanbergen, Timothy Zeigler, and Kimberly Dunning-Meyers provided nursing care to Lashuay throughout his incarceration. *Id.* at 4–5. Tana Hill and Jennifer Wierman provided medical services to Lashuay and oversaw the nursing care and wound management efforts. *Id.* at 4, 7.

***3** Dr. Keith Papendick, the "Regional Medical Director for Corizon Health and/or the MDOC," was responsible for "approving or denying specialty services, such as physical therapy, assistive or therapeutic devices, surgical consult and surgery" to MDOC patients. *Id.* at 5. Scott Weaver was responsible for "providing physical therapy services to inmate patients" at DWH. *Id.* at 6. Danielle Alford "saw Plaintiff upon admission to DWH and indicated in her care plan that Plaintiff would provide his own wound care." *Id.* at 6–7. Dr. Terence Whiteman saw Lashuay when initially incarcerated and "approved Plaintiff being required to provide his own wound care." *Id.* at 7. Lynn Larson "was involved in responding to

Plaintiff's requests for recommended surgery and following upon on or noting the responses thereto by other Defendants." *Id.* at 8. Dr. Muhammad Rais "oversaw Plaintiff's care beginning 7/8/15 ... until his release from MDOC custody." *Id.* William Borgerding "denied Plaintiff pain and burn care medications." *Id.* And Defendant Corizon Health, Inc., "employed or contracted with some or all of the individual medical providers named as Defendants." *Id.* at 9.

Finally, the amended complaint identifies two John Does. According to Lashuay, John Doe 1 "is the Chief Medical Officer for the MDOC ... who is responsible for approving or denying corrective and reconstructive surgical procedures and for all other inmate medical services." *Id.* at 6. John Doe 2 is the Assistant Chief Medical Officer at DWH and "denied or failed to take adequate measures to provide Plaintiff with medically necessary surgery, pain management, wound care and physical therapy." *Id.* at 8–9.

II.

A.

Federal Rule of Civil Procedure 26(d)(1) provides that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except ... when authorized by these rules, by stipulation, or by court order." Lashuay seeks a court order authorizing early discovery. In reviewing such requests, courts typically impose a "good cause standard." 8A Charles Alan Wright and Arthur R. Miller, *1993 Discovery Moratorium Pending Discovery Plan*, Fed. Prac. & Proc. Juris. § 2046.1 (4d ed.). Neither party has identified controlling Sixth Circuit precedent. However, decisions within the circuit provide some guidance. In *In re Paradise Valley Holdings, Inc.*, the bankruptcy court explained that " '[g]ood cause may be found where the plaintiff's need for expedited discovery outweighs the possible prejudice or hardship to the defendant.' " No. 03-34704, 2005 WL 3841866, at *2 (Bankr. E.D. Tenn. Dec. 29, 2005) (quoting *Metal Bldg. Components, LP v. Caperton*, 2004 U.S. Dist. LEXIS 28854, at *10 (D.N.M. Apr. 2, 2004)). Further, "[g]ood cause is usually found in cases involving requests for injunctive relief, challenges to personal jurisdiction, class actions, and claims of infringement and unfair competition." *Id.* The *Paradise Valley Holdings* opinion also emphasizes that Rule 26(d) " 'protects defendants from unwarily incriminating themselves before they have a chance to review the facts of the case and to retain counsel. This important protection maintains the fairness of civil litigation.' " *Id.* (quoting *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982)). *See also USEC Inc. v. Everitt*, No. 3:09-CV-4, 2009 WL 152479, at *3 (E.D. Tenn. Jan. 22, 2009) (adopting the analysis in *Paradise Valley Holdings*); *Whitfield v. Hochsheid*, No. C-1-02-218, 2002 WL 1560267, at *1 (S.D. Ohio July 2, 2002) (imposing a good cause standard).

Other district courts have also identified certain relevant factors. In *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, the district court specified four factors:

> (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.

202 F.R.D. 612, 613 (D. Ariz. 2001) (quoting *Notaro* and noting that *Notaro* borrowed the test for granting a preliminary injunction and applied it to a request for expedited discovery). Similarly, in *Meritain Health Inc. v. Express Scripts, Inc.*, the district court enumerated a different five factors that have relevance:

> ***4** (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.

No. 4:12-CV-266 CEJ, 2012 WL 1320147, at *2 (E.D.

Mo. Apr. 17, 2012) (citing *Qwest Comm. Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003)).

B.

Lashuay's request for expedited discovery is focused solely on identifying the two John Does mentioned in his amended complaint. He asks that the Court permit him to "immediately take a F.R.Civ.P. 30(b)(6) deposition and issue subpoenas with short response times in order to identify the proper parties." Mot. Exp. Discovery at 3, ECF No. 6. Lashuay contends that "[n]either the named nor the as yet unnamed Defendants will be harmed by granting Plaintiff's request to proceed immediately with discovery for the limited purpose of identifying John Doe Defendants." *Id.* The motion identifies only one reason why the expedited discovery is necessary: "[t]he time for Plaintiff to identify and substitute actual parties for the John Does is running." *Id.* In his supplemental brief, Lashuay expands upon the perceived urgency of the request: "The matter is urgent since the Hurley Hospital recommendation was affirmed on 12/14/14, when Defendants sent him there for reevaluation. Subsequently, the need and recommendation for surgery is noted repeatedly in Plaintiff's medical records, but there is no indication who was responsible for failing or electing not to follow those recommendations." Supp. Br. Exp. Disc. at 5, ECF No. 37.

The parties agree that the statute of limitations for 42 U.S.C. § 1983 causes of action is three years. *See* Def. Resp. Mot. Exp. Disc. at 2, ECF No. 30. And Lashuay appears to be arguing, in vague terms, that waiting until the typical discovery stage may prevent him from amending his complaint and identifying the two John Does. But Lashuay's cursory briefing on this issue does not suffice to carry his burden of justifying early discovery. According to his amended complaint, Lashuay was not released from MDOC custody until September 1, 2016. Am. Compl. at 10. His claims of mistreatment appear to span his entire term of incarceration. Thus, the statute of limitations time bar does not appear to be imminent.

True, Lashuay's claims regarding the two John Does appear to center on a recommendation for surgery which the Hurley Hospital made in December 2014. *Id.* at 14. But he also contends that "[i]n January 2015, *and continuing thereafter*, Defendants denied Hurley's recommendation for surgeries." *Id.* (emphasis added). Neither party has addressed whether, for statute of limitations purposes, the MDOC refusal to approve the surgeries should be construed separately from Lashuay's other allegations of mistreatment. Even if they are, Lashuay's complaint alleges that refusal was ongoing. Thus, even focusing solely on the January 2015 surgery recommendation, the statute of limitations deadline does not appear to be looming.

In short, Lashuay has not carried his burden of demonstrating that there is good cause to depart from the established default timeline for discovery. Lashuay's concern regarding he statute of limitations is the only potentially irreparable injury he identifies. There is no motion for a preliminary injunction pending, no challenge to personal jurisdiction, no class action claims, and no allegations of infringement or unfair competition. Absent some indication that the statute of limitations deadline is imminent, then, Lashuay has not identified good cause for expedited discovery. Lashuay's motion to commence limited discovery immediately will be denied without prejudice. If Lashuay can identify additional evidence which would satisfy the good cause standard, his request may be reconsidered.

III.

***5** Accordingly, it is **ORDERED** that Plaintiff Lashuay's motions for leave to commence limited discovery immediately, ECF Nos. 5, 6, are **DENIED without prejudice.**

It is further **ORDERED** that Plaintiff Lashuay's motion for leave to file a second amended complaint, ECF No. 39, is **SCHEDULED** for hearing on **February 28, 2018, at 4:00 p.m.**

It is further **ORDERED** that Defendants' motion to strike the improperly filed second amended complaint, ECF No. 40, is **GRANTED.**

It is further **ORDERED** that the improperly filed second amended complaint, ECF No. 35, is **STRICKEN.**

All Citations

Not Reported in Fed. Supp., 2018 WL 317856

Footnotes

1 Because the two motions are materially identical, the first motion, ECF No. 5, will be denied as moot.

2 In their motion to strike the second amended complaint, Defendants allege that Lashuay agreed to withdraw the second amended complaint. *See* Mot. Strike at 3, ECF No. 40.

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APPENDIX 2

2017 WL 6407459
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

WESTFIELD INSURANCE COMPANY, Plaintiff,
v.
PAVEX CORPORATION, Brian Morrison, Defendants.

CASE NO. 17-14042
|
Signed 12/15/2017

Attorneys and Law Firms

Mark M. Cunningham, Kerr, Russell, Detroit, MI, for Plaintiff.

ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND SETTING HEARING DATE FOR PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [#2]

DENISE PAGE HOOD, Chief Judge

***1** On December 15, 2017, Plaintiff Westfield Insurance Company ("Westfield") filed a complaint against Defendants Pavex Corporation ("Pavex") and Brian Morrison ("Morrison") (collectively, "Defendants"). (Doc #1) Plaintiff alleges that the Defendants have breached their Indemnity Agreement with Westfield, and requests the Court grant certain declaratory and monetary relief. Now before the Court is Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction as to Defendants, which Plaintiff also filed on December 15, 2017. (Doc # 2) For the reasons stated below, Plaintiff's Motion for a Temporary Restraining Order is **DENIED**, and a hearing for the Motion for Preliminary Injunction will be held on January 5, 2018 at 9:30 a.m.

I. BACKGROUND

Plaintiff Westfield is an Ohio company. (Doc # 1, Pg ID 1) Defendant Pavex Corporation is a Michigan corporation. Defendant Brian Morrison is a citizen residing in the state of Michigan. (*Id.*) Plaintiff filed its Complaint on December 15, 2017. (Doc # 1) Plaintiff's complaint alleges five-counts for relief, but has brought the present Motion "to compel the Indemnitors to abide by their contractual obligations to indemnify, hold harmless and exonerate Westfield from any and all claims and to provide Westfield payment necessary to secure Westfield against potential liability under bonds is furnished on behalf of one or more of the Indemnitors and to recover and protect trust funds." (Doc # 2, Pg ID 8) Westfield also seeks immediate access to Defendants' books and records "so that it can evaluate the claims made by those subcontractors and suppliers who claim Pavex has failed to pay them; assess it liability and mitigate its damages." (*Id.*)

II. ANALYSIS

Federal Rule of Civil Procedure 65(b) allows the Court to issue a temporary restraining order without notice to the opposing party if the following circumstances are met:

> (A) specific facts shown by affidavit or by a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition;
>
> (B) the movant's attorney certifies to the court in writing any efforts made to give the notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b). Rule 65(b) is clear that the possibly drastic consequences of a restraining order mandate careful consideration by a trial court faced with such a request. 1966 Advisory Committee Note to 65(b). Before a court may issue a temporary restraining order, it should be assured that the movant has produced compelling evidence of irreparable and immediate injury and has exhausted reasonable efforts to give the adverse party notice. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Sniadach v. Family Finance Corp.,* 339 U.S. 337 (1969); 11 Wright & Miller, Federal Practice and Procedure § 2951, at 504–06 (1973). Other factors such as the likelihood of success on the

merits, the harm to the nonmoving party and the public interest may also be considered. 11 Wright & Miller at § 2951, at 507–08; *Workman v. Bredesen,* 486 F.3d 896, 904–05 (6th Cir. 2007). Regarding the irreparable injury requirement, it is well established that a plaintiff's harm is not irreparable if it is fully compensable by money damages. *Basicomputer Corp. v. Scott,* 973 F.2d 507, 511 (6th Cir. 1992). However, an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate. *Id.* at 511–12. For example, the Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Newsome v. Norris,* 888 F.3d 371, 378 (6th Cir. 1989).

***2** Here, Plaintiff has failed to show that it will be irreparably harmed absent a temporary restraining order. Plaintiff has requested that the Court order Defendants to pay Westfield $741,882.08. (Doc # 2, Pg ID 28) The Court is satisfied that this request seeks monetary damages. The Court notes that Plaintiff's request for damages to this point evidences a pecuniary loss.

The Court notes that the language used in Plaintiff's Motion is entirely compensable by money damages. Plaintiff requests that this Court enjoin Defendants from "selling, transferring, disposing of, or liening" various pecuniary interests including, but not limited to, "personal property, bonds, securities, companies, and other investments." (Doc # 2, Pg ID 29) Plaintiff also requests that the Court enjoin Defendants from performing various financial acts. (*Id.*) The Court is satisfied that these actions are pecuniary-based and this weighs against granting Plaintiff's motion.

In *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999), the Supreme Court held that the district court had no authority to issue a preliminary injunction preventing a defendant from disposing of assets pending adjudication of a plaintiff's claim for monetary damages. *Id.* at 333. The *Grupo Mexicano* case involved a breach of contract claim for money damages by unsecured creditors of a group of investors who purchased notes involving a toll road construction. The Supreme Court recognized the case of the usual preliminary injunction where a plaintiff seeks to enjoin, pending the outcome of the litigation, an "action" that a plaintiff claims is unlawful. *Id.* at 314.

The Supreme Court also noted the difference between that injunctive relief and a preliminary injunction to protect an anticipated judgment of the court. *Id.* at 315. The Supreme Court stated that if a district court enters a preliminary injunction to protect assets in anticipation of a judgment of the court, as opposed to enjoining an "act" by the defendant, the defendant is harmed by the issuance of the unauthorized preliminary injunction. *Id.* at 315.

Plaintiff also request immediate access to the records which is a term under the Parties' agreement, which the Court has yet to determine was breached. This request is essentially a request for expedited discovery. A party seeking expedited discovery in advance of a Rule 26(f) conference has the burden of showing good cause or need in order to justify deviation from the normal timing of discovery. *See Qwest Communications Int'l, Inc. v. Worldquest Networks, Inc.,* 213 F.R.D. 418, 420 (D. Colo. 2003); *Diplomat Pharmacy, Inc. v. Humana Health Plan, Inc.,* 2008 WL 2923426 (W.D. Mich. Jul. 24, 2008) (unpublished). Other than preserving the records, Plaintiff has not sufficiently justified deviation from the normal timing of discovery. Plaintiff has not carried its burden of showing good cause or need in order to justify deviation from the normal timing of discovery. Plaintiff's request for immediate access to the records is denied.

Plaintiff seeks an Order to Show Cause to compel Defendants to appear. However, E.D. Mich. LR 65.1 provides that requests for temporary restraining orders and for preliminary injunctions must be made by motion and not by order to show cause.

Regarding equitable relief in the form of constructive trust, Courts have held that in order to issue an order freezing certain assets, the court must have sufficient evidence to show a threat that an individual will dissipate the assets. *Gen. Ret. Sys. of the City of Detroit v. Onyx Capital Advisors, LLC,* 10–CV–11941, 2010 WL 2231885 (E.D. Mich. June 4, 2010) (citing *Newby v. Enron Corporation,* 188 F.Supp.2d 684, 707–08 (S.D. Tex. 2002)). In this case, Plaintiff has not submitted any evidence that there is a threat that Defendant will dissipate the assets. Plaintiff's Motion for Temporary Restraining Order as to Defendants Pavex and Morrison is **DENIED**.

III. CONCLUSION

***3** Accordingly,
IT IS ORDERED that Plaintiff's Motion for Temporary Restraining Order as to Defendants Pavex Corporation and Brian Morrison (Doc # 2) is **DENIED** pursuant to Fed. R. Civ. P. 65(b).

IT IS FURTHER ORDERED that the hearing for the Motion for Preliminary Injunction is set for **Friday, January 5, 2018 at 9:30 a.m.** Plaintiff must serve a copy of this Order to Defendants by December 18, 2017. Any response brief to the motion must be filed by December 26, 2017 and any reply brief must be filed by January 2, 2018.

All Citations

Not Reported in Fed. Supp., 2017 WL 6407459

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APPENDIX 3

2013 WL 4584714
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Northern Division.

Gerald John RESPECKI, and Laura Respecki,
Plaintiffs,
v.
Doug BAUM, Defendant.

No. 13–13399.
|
Aug. 28, 2013.

Attorneys and Law Firms

Todd H. Nye, Nye & Associates, PLLC, Roscommon, MI, for Plaintiffs.

ORDER DENYING MOTION TO EXPEDITE DEPOSITION WITHOUT PREJUDICE

THOMAS L. LUDINGTON, District Judge.

***1** Gerald and Laura Respecki own a house in Grayling, Michigan, located at 402 Eric Street. On that property, the Respecki's amassed a number of vehicles, which the City of Grayling (the City) did not like. So the City "filed an action for declaratory and injunctive relief" against the Respeckis "regarding an alleged public nuisance, in the form of automobiles and other trash" located on their property. *See* Pl.'s Compl. Ex. 3 at 1, ECF No. 1. The action was filed in Michigan's Crawford County Circuit Court on April 8, 2011. *Id.* at 2.

Before the state-court action resolved, however, it is alleged that the City of Grayling Police Chief, Doug Baum, "stated that he would remove the vehicles in question from [the Respeckis'] property regardless of the progress of judicial proceedings." *Id.; see also* Pl.'s Compl. Ex. 1, at 2 (" 'After 90 days, the vehicles will be getting towed,' Baum said. 'I don't care where we are at in court.' "). Then, on August 8, 2011, Baum followed through—"officers from the Grayling police department entered [the Respeckis'] property and seized several vehicles in order to abate the nuisance." Pl.'s Compl. Ex. 3, at 3.

Because the officers acted without a warrant, the Respeckis requested that the state court "find that the seizure was unconstitutional, order the vehicles returned, and award costs[.]" *Id.* at 1. For the most part, the court agreed, finding that the warrantless seizure of the Respeckis' vehicles violated their Fourth Amendment rights. The court granted the Respeckis' motion and ordered "that the items which were seized ... on August 8, 2011 be returned[.]" *Id.* at 11. But the court did not award the requested costs and attorney's fees. *Id.*

Now the Respeckis have filed an action in this Court against Doug Baum in his individual capacity seeking damages pursuant to 42 U.S.C. § 1983. This second case was filed on August 7, 2013. Two weeks later, the Respeckis filed two motions: a motion to expedite the deposition of Gerald Respecki, who is allegedly "terminally ill with cancer," Pls.' Mot. Exp. 2, ECF No. 4, and an *ex-parte* motion for immediate consideration of the motion to expedite Gerald's deposition, Pls.' Mot. Imm. Cons., ECF No. 5. In the second motion, the Respeckis indicate that "[t]ime is of the essence, because Mr. Respecki is terminally ill with cancer and has only a few weeks to several weeks to live [.]" *Id.* at 1.

Attorney Gus Morris filed an appearance on behalf of Baum on August 13, 2013 (although Baum has yet to answer the complaint). Baum responded to the Respeckis' motion to expedite Gerald's deposition the same day it was filed, and indicated that "[o]n the main, [he] does not object to [the Respeckis'] request for a deposition to perpetuate [Gerald's] testimony in the pending action, subject to two (2) caveats." Def.'s Resp. 1, ECF No. 6. Specifically, before relief is granted, Baum asks that the Respeckis "show[ ] why the requested testimony must be perpetuated, as well as establishing cause for conducting discovery outside the bounds of Fed.R.Civ.P. 26." *Id.* (citations omitted). Further, Baum indicates that he "will be significantly prejudiced if the Court grants [the Respeckis'] motion" because the case was recently filed, and there has been no opportunity to investigate the Respeckis' claims or to prepare for the proposed deposition. *Id.* at 2. So if the motion is granted, and "if [Gerald] survives," Baum wants the opportunity "to depose [Gerald] a second time at a later date in the normal course of discovery." *Id.*

I

***2** Baum is correct with his first contention—the Respeckis have not carried their burden to establish that Gerald's testimony must be immediately perpetuated—and the Respeckis' motion to expedite Gerald's deposition will be denied without prejudice.

Federal Rule of Civil Procedure 27 relates to depositions to perpetuate testimony. But the rule only contemplates such depositions before an action is filed, Fed.R.Civ.P. 27(a), or after judgment pending an appeal, Fed.R.Civ.P. 27(b). Rule 27 does not address motions to perpetuate testimony filed while an action remains pending before a district court. Rule 30, on the other hand, allows a party "to take [a] deposition before the time specified in Rule 26(d)" if the leave of Court is obtained, no matter if the action has already been filed. Fed.R.Civ.P. 30(a)(2)(A)(iii).

Yet, regardless of the timing of the Respeckis' motion, to secure the relief they request, they must "show that there is a danger that the testimony will be lost by delay." *May v. Int'l Bus. Assocs., Inc.,* 791 F.2d 934, at *1 (6th Cir.1986) (unpublished) (citing *Arizona v. California,* 292 U.S. 341, 347–48, 54 S.Ct. 735, 78 L.Ed. 1298 (1934)). "Mere allegations that witnesses might die or memories might fade are not sufficient to justify granting the motion." *May,* 791 F.2d at *1 (citations omitted). The Respeckis' bare-boned assertions do not satisfy the required showing for granting their motion, and therefore, it will be denied without prejudice. Should the Respeckis decide to refile the motion with additional evidentiary support corroborating Gerald's medical circumstance, the Court suggests they adhere closely to the requirements of Rule 27(a)(1).

Because Baum's first point is sound, there is no need to reach his second point at this juncture (the Court anticipates taking up the question if the Respeckis decide to refile their motion with adequate factual support).

II

Accordingly, it is **ORDERED** that the Respeckis' *ex-parte* motion for immediate consideration, ECF No. 5, is **GRANTED.**

It is further **ORDERED** that the Respeckis' motion to expedite Gerald Respecki's deposition, ECF No. 4, is **DENIED** without prejudice.

All Citations

Not Reported in F.Supp.2d, 2013 WL 4584714

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APPENDIX 4

2010 WL 3834634
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. Michigan,
Southern Division.

Martin G. McNULTY, Plaintiff,
v.
REDDY ICE HOLDINGS, INC., Reddy Ice Corporation, Arctic Glacier Income Fund, Arctic Glacier, Inc., Arctic Glacier International, Inc ., Home City Ice Company, Inc., Keith Corbin, Charles Knowlton, Joseph Riley, Defendants.

No. 08–CV–13178.
|
Sept. 27, 2010.

Attorneys and Law Firms

Andrew A. Paterson, Jr., Pleasant Ridge, MI, Daniel A. Kotchen, Daniel L. Low, Kotchen & Low LLP, Washington, DC, for Plaintiff.

Arthur Thomas O'Reilly, David A. Ettinger, Honigman, Miller, Schwartz and Cohn LLP, Detroit, MI, David H. Bamberger, DLA Piper US, LLP, Washington, DC, James R. Nelson, DLA Piper US, LLP, Dallas, TX, for Defendants.

ORDER GRANTING DEFENDANT ARCTIC GLACIER'S MOTION FOR LEAVE TO DEPOSE DEFENDANT KEITH CORBIN

PAUL D. BORMAN, District Judge.

***1** On June 11, 2010, Defendant Arctic Glacier filed a Motion for Leave to Depose Keith Corbin. (Dkt. No. 188).

On June 25, 2010, Plaintiff McNulty filed a brief in opposition to the instant motion. (Dkt. No. 189).

On June 29, 2010, Arctic Glacier filed a Reply in Support of this motion. (Dkt. No. 190).

The Court gave notice of the instant motion to the United States Department of Justice, which is conducting a related criminal anti-trust investigation/prosecution, pursuant to the DOJ's request in a letter to this Court on November 20, 2008, that it be given 30 days notice prior to a deposition to determine whether to formally intervene "to seek the Court's assistance in delaying the deposition."

On September 8, 2010, the Court held a hearing on the instant motion. The Government appeared to formally intervene, requesting that the Court reject Defendant Arctic Glacier's motion at this time. Plaintiff joined the Government's request.

In addition to the open court proceedings, the Government requested, and the Court granted the Government's request, to discuss its objections *in camera* and under seal under Federal Rule of Criminal Procedure 6(e)(2)(B), because the investigation related to an ongoing federal grand jury proceeding.

Having read the briefings and heard the arguments,, the Court grants Defendant's Motion for Leave to Depose Keith Corbin, effective October 13, 2010 and thereafter.

There is a documented significant necessity to take Mr. Corbin's deposition in the near future to preserve his testimony. Mr. Corbin is 74 years old, but more significantly, suffers from serious medical problems, some life threatening. These ailments include an existing aortic aneurysm, and severe swelling in his legs, which increases the chances he will develop life-threatening blood clots. Indeed, Defendant Corbin's medical condition led U.S. District Judge Herman Weber to sentence him to "one day which he has already served", essentially probation, after his guilty plea in the criminal case. *U.S. v. Keith Corbin,* 09–CR–146 (S.D.OH., Feb. 2, 2010) Sentencing Transcript P.16. Also see Corbin's Judgment and Commitment Order, Feb. 2, 2010, P.2.

It is also significant that Mr. Corbin's testimony is argued to be critical to the defense in the instant case. Defendants deny Plaintiff McNulty's claims, a significant part of which rest on statements Plaintiff attributes to Defendant Corbin in a scenario that involved only the two individuals. Thus, Corbin's testimony is the only direct

response to Plaintiff's claims that rest on Corbin's alleged statements.

Although the Government requests that the Court deny the instant motion at this time, the Court concludes that the interests of justice mandate the granting of this motion.

In *Texaco v. Borda,* 383 F.2d 607, 609 (3d Cir.1967) the Third Circuit granted a writ of mandamus directing the district court to allow the plaintiff to depose an elderly witness. *Accord, DRFP, LLC v. Republica Bolivariana de Venezuela,* 2:04–CV–793, 2009 WL 4281261, at * 1 (S.D.Ohio, Nov.24, 2009); *Cate v. City of Rockwood,* 3:02–CV–611, 2006 WL 1663607, at *1 (E.D.Tenn., June 7, 2006).

***2** The Court notes that the Government's criminal investigation has been proceeding for more than two years. Further, the Government has already indicted, convicted and sentenced Defendant Corbin.

As a respected jurist noted in an article:

> If criminal proceedings are over or there is no substantial criminal exposure, the courts are most likely to deny a plaintiff's discovery or other pretrial release.

Judge Milton Pollack, Parallel Civil Criminal Proceedings, 129 F.R .D. 201 (1989). Although the instant case involves a defendant's discovery, Judge Pollack's logic applies.

Defendant Arctic Glacier and the other defendants who have joined this motion have established a critical need to take and preserve Mr. Corbin's testimony. This "trumps" the Government's concerns at this late stage of a very lengthy criminal investigation.

Accordingly, the Court, weighing all of the circumstances, concludes that the interests of justice support the granting of this motion.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3834634

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APPENDIX 5

2007 WL 2782761
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

UNITED STATES of America, Plaintiff,
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, et al., Defendants.

No. CV-05-3212 (ILG)(VVP).
|
Sept. 24, 2007.

Attorneys and Law Firms

Kathleen Anne Nandan, Richard K. Hayes, Zachary A. Cunha, United States Attorneys Office, Brooklyn, NY, for Plaintiff.

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ORDER

VIKTOR V. POHORELSKY, United States Magistrate Judge.

***1** By letter dated August 22, 2007, the plaintiff has moved for leave to conduct the deposition *de bene esse* of defendant John Bowers, the former President of the International Longshoremen's Association (the "ILA") on the ground that there is a significant risk that he will be unavailable for trial given his advanced age of 83 years. The plaintiff's application follows closely on the heels of an Order entered on August 1, 2007 by Judge Glasser which reinstated the stay of deposition discovery previously imposed by this court, but then lifted in May of this year. The plaintiff has seized on one qualification in Judge Glasser's Order which left the plaintiff "free to request the right to take depositions *de bene esse* of any witnesses about whom it can demonstrate a good-faith need for expedited discovery in light of age, health, fading memory, or any other sufficiently compelling circumstance." Order, Aug. 1, 2007, at 8. The application has been opposed by Bowers, by the ILA and by the Management-ILA Managed Health Trust Fund and its Board of Trustees.

The defendant Bowers argues that his advanced age alone is an insufficient basis for granting the plaintiff's application. Judge Glasser's Order, however, seems to imply the contrary since it lists age in the disjunctive as one of the "sufficiently compelling" circumstances that would justify a *de bene esse* deposition. And in *Texaco, Inc. v. Borda,* 383 F.2d 607, 609 (3rd Cir.1967), the court of appeals found that age alone was indeed sufficient justification to order the deposition *de bene esse* of a 71-year old witness, overturning the district court's ruling to the contrary as an abuse of discretion worthy of mandamus. Similarly, in *Penn Mutual Life Ins. Co. v. United States,* 68 F.3d 1371, 1375 (D.C.Cir.1995), the court found the witness' age alone a sufficiently compelling circumstance that required remand for the district court to consider whether a deposition to perpetuate testimony should be permitted pursuant to Rule 27 of the Federal Rules of Civil Procedure.

Nevertheless, the court declines to grant the plaintiff's application at this point. The plaintiff asserts that if Bowers were to become unavailable, evidence essential to the plaintiff's case would be lost and the plaintiff would be prejudiced. Pl. Letter, Aug. 22, 2007, at 2. The plaintiff provides no clue, however, what evidence would be lost and what prejudice would be suffered. The plaintiff cites only to the deposition *de bene esse* of George Barone, who testified in conclusory fashion that Bowers was an associate of the Genovese family. Barone apparently provided no details, however, concerning what Bowers did to assist the Genovese family or otherwise promote the racketeering enterprise alleged in the complaint, and

admitted that he himself had met Bowers on only two occasions, one of which was fleeting and unrelated to business. There is therefore little to guide the court concerning the aspects of the plaintiff's case about which Bowers might have essential evidence to provide, and whether there are other sources for that evidence. Moreover, Bowers has already given testimony under oath concerning his leadership of the ILA before the Waterfront Commission, and therefore presumably has provided information about his role in the activities of the ILA, including his role in the two racketeering acts with which he is charged in the indictment. Judge Glasser's Order staying discovery was based on the considerable expense that would be incurred, much of it to the detriment of the real victims of the wrongs alleged by the plaintiff, expense that would be avoided if the motions to dismiss were granted. Without a greater showing of need and prejudice, the court is reluctant to put the parties to that expense.

***2** Accordingly, the plaintiff's motion is denied, but without prejudice to renewal upon a sufficiently detailed showing of need and prejudice. Similarly, any argument in opposition to a renewed motion which seeks to rest on the vigor and good health of the defendant Bowers should be supported by more than an attorney's statement.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2782761

End of Document

APPENDIX 6

2019 WL 2648799
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

SNOW COVERED CAPITAL, LLC, Plaintiff(s),
v.
William WEIDNER, et al., Defendant(s).

Case No.: 2:19-cv-00595-JAD-NJK
|
Signed 06/26/2019

Attorneys and Law Firms

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Order

[Docket Nos. 27, 33]

Nancy J. Koppe, United States Magistrate Judge

***1** Pending before the Court is Plaintiff's motion for expedited discovery to take the deposition of nonparty John Knott prior to the Rule 26(f) conference, which Plaintiff filed on an emergency basis. Docket No. 27. Defendants filed a response in opposition. Docket Nos. 32, 34 (joinder), 35 (joinder). Plaintiff filed a reply. Docket No. 39. Defendants also filed a counter-motion for protective order. Docket Nos. 33, 34 (joinder), 35 (joinder). Plaintiff filed a response in opposition. Docket No. 40. These motions are properly resolved without a hearing. *See* Local Rule 72-1. For the reasons discussed below, the motion for expedited discovery is hereby **DENIED** and the counter-motion for protective order is **DENIED** as unnecessary.[1]

I. BACKGROUND

This is a civil case arising out of loan agreements for the now-defunct Lucky Dragon Hotel and Casino. Docket No. 1. Plaintiff is seeking to recover from Lucky Dragon and individual guarantors for losses associated with a loan default. The complaint was filed on April 8, 2019. Defendants answered the complaint on June 18 and June 19, 2019. Docket Nos. 19, 21, 22. Given that recent appearance, no discovery conference has taken place pursuant to Rule 26(f) of the Federal Rules of Civil Procedure.

Mr. Knott is not a party to this action, but he participated in the marketing of the Lucky Dragon before and after the foreclosure of the property. He has been diagnosed with Stage IV pancreatic cancer and has approximately one month before he passes away. Knott Decl. (Docket No. 29) ¶ 7. He has already hosted a "final going away party." *Id.* at ¶ 8. Mr. Knott is preparing to enter hospice care. *Id.* He has been prescribed medications to help manage his anticipated pain and to provide him comfort, medications that will interfere with his ability to testify. *Id.* at ¶ 9. Notwithstanding the above, Plaintiff obtained a declaration from Mr. Knott that he is available on a few dates to be deposed "[a]ssuming that [his] medical condition permits." *Id.* at ¶ 10.

The instant dispute centers on whether the Court should allow early discovery for that deposition.[2]

II. STANDARDS

***2** "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosures under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Fed. R. Civ. P. 26(d); *see also* Fed. R. Civ. P. 30(a)(2)(A)(iii) (addressing the need to obtain leave of court for depositions taken before the Rule 26(d) timeframe). Early discovery may be permitted by court order upon a showing of good cause. *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009).[3] The party seeking expedited discovery bears the burden of making that showing. *Id.* Because expedited discovery is not the norm, the movant must make a *prima facie* showing of the *need* for that expedited discovery. *Id.* A finding of

good cause may be made where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party. *Id.* Court engage in that balancing analysis by evaluating the reasonableness of the request in light of all the surrounding circumstances. *Id.* at 1067.[4] At bottom, courts have "wide discretion" in determining whether the circumstances justify expedited discovery. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) (citing *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988)).

Moreover, courts always maintain the discretion, in the interests of justice, to prevent excessive or burdensome discovery. *American LegalNet*, 673 F. Supp. 2d at 1067; *see also* Fed. R. Civ. P. 30(a)(2)(A)(iii) (incorporating limitations on discovery in Rule 26(b)). Courts are more likely to authorize expedited discovery on specific, limited topics. *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE, § 2046.1 at p. 291 (2019 suppl.). On the other hand, courts generally eschew requests for open-ended discovery at this stage, such as "a free ranging deposition" for which there is not sufficient time or information to prepare. *Semitool*, 208 F.R.D. at 277.

III. ANALYSIS

Plaintiff's motion fails to show good cause for the relief requested. As a threshold matter, Plaintiff's highlight that Mr. Knott "generous[ly] offer[ed] to testify" and "volunteered to give his deposition." *See* Docket No. 43 at 1. The Court is not privy to Mr. Knott's beliefs other than understanding them from his attestations in his declaration that he "could attend a deposition" and would be "available" if his medical condition permits. *See* Knott Decl. at ¶ 10. These statements do not strike the Court as someone excited about spending his precious remaining time being deposed in a civil suit about a loan agreement. At any rate, the Court is aware that Mr. Knott himself has not objected to the deposition.

Nonetheless, the remaining circumstances make clear that allowing expedited discovery to conduct this deposition is not justified. Most significantly, there has been no showing that there is any need for the deposition testimony. The motion identifies certain issues related to affirmative defenses on which Mr. Knott may have relevant knowledge. *See* Docket No. 27 at 5-6. The motion also indicates that his testimony "may be relevant" to expert witness opinions. *See id.* at 6. Problematically, the motion does not identify any facts or subjects that are uniquely known to Mr. Knott and cannot be attested to by other employees or a Rule 30(b)(6) deponent. To the contrary, Plaintiff conceded during the meet-and-confer process that "[m]ost *if not all* of what [Mr. Knott] can testify to can be covered by other CBRE marketing team members." Docket No. 32-3 at 2 (emphasis added).[5] Given this concession that deposition testimony can be obtained from other witnesses, there is no need to proceed with Mr. Knott's deposition now. *See, e.g.*, Fed. R. Civ. P. 26(b)(2)(C)(i) (courts should not permit discovery that "can be obtained from some other source that is more convenient, less burdensome, or less expensive").

***3** The Court is also persuaded by Defendants' argument that allowing a free-wheeling deposition would be prejudicial. *See, e.g.*, Resp. at 4, 7-8. Plaintiff contends that it is proper to conduct this deposition now so that Mr. Knott's deposition testimony can be preserved and the other parties have their own opportunity to examine Mr. Knott. *See* Docket No. 27 at 5. At the same time, Plaintiff has not clearly identified what ground this deposition will cover. Indeed, Plaintiff represents amazingly in reply that it still does not know what information it will seek at the deposition. Docket No. 39 at 5 ("SCC is still determining how to use its thirty minutes of testimony"). For depositions taken outside the normal course of discovery, this alone is highly problematic. *Cf.* Fed. R. Civ. P. 27(a)(1)(C) (to obtain an order to allow a pre-litigation deposition to preserve testimony, the movant must identify "the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it"). The prejudice from conducting a blind deposition is heightened by the shortened notice to opposing counsel of the deposition and the very limited time for the deposition itself.[6] Moreover, no discovery has been conducted in this case, so the parties are unaware what documentary evidence may bear on the issues that will in fact be discussed. Defendants cannot examine (or cross-examine) Mr. Knott effectively without an understanding of the issues that will be discussed and how discovery that is obtained bears on the answers provided.

In short, this case involves a nonparty in his final days. No showing has been made that he has unique knowledge or that his testimony will not be duplicative of other deposition testimony. In fact, Plaintiff's counsel acknowledges the contrary. No guidance has been provided as to the testimony that would be covered, and no discovery has been conducted that would enable effective examination by opposing counsel. These are not circumstances that establish good cause for early discovery to conduct that deposition.

IV. COUNTER-MOTION FOR PROTECTIVE ORDER

Defendants have filed a counter-motion for protective order to preclude the deposition from moving forward. Docket No. 33 at 9-11. The Court has declined to issue an order allowing that deposition to move forward. As a consequence thereof, the deposition cannot take place by simple operation of the governing rules. Fed. R. Civ. P. 26(d). There is no need for a protective order.

V. CONCLUSION

For the reasons discussed above, the motion to compel is hereby **DENIED**. The counter-motion for protective order is hereby **DENIED** as moot.

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 2648799

Footnotes

1 The Court issued a minute order denying the motion for expedited discovery on June 25, 2019, indicating that this written order would follow. *See* Docket No. 42. The Court will issue a somewhat truncated analysis herein so that its reasoning can be available to the parties in an accelerated manner.

2 As a threshold matter, the Court notes Defendants' objections to the timing of this emergency motion. Docket No. 32 at 7. When an attorney unreasonably delays in filing an emergency motion, the Court may deny the motion outright on that basis. *Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d 1137, 1143 (D. Nev. 2015). The instant motion was filed at 6:54 p.m. on Friday, June 21, 2019, *see* Docket No. 27 (notice of electronic filing), and sought the allowance for the deposition to move forward on Tuesday, June 25, 2019, *see* Docket No. 27 at 2. The reply acknowledges that simply providing time to resolve the dispute rendered it impossible for the deposition to move forward on June 25, 2019, which raises the prospect of the deposition occurring even later within the window of Mr. Knott's remaining time. *See* Docket No. 39 at 3. While the Court shares Defendants' concerns that this timing was unreasonable, it declines to ultimately weigh in on that issue as the motion fails on its merits at any rate.

3 A request for expedited discovery generally arises in the context of a motion for preliminary injunction or a motion challenging personal jurisdiction. *See El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F. Supp. 2d 986, 991 (S.D. Tex. 2004); *see also* Fed. R. Civ. P. 26, Advisory Committee Notes (1993). Such a request has also arisen in the context of a plaintiff seekign discovery to identify a doe defendant. *See, e.g.*, *Rotten Records, Inc. v Doe*, 108 F. Supp. 3d 132, 133 (W.D.N.Y. 2015). Plaintiff has presented no legal authority regarding a request for expedited discovery to obtain deposition testimony from a terminally-ill nonparty witness.

4 "Factors commonly considered in determining the reasonableness of expedited discovery include, but are not limited to: (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made." *American LegalNet*, 673 F. Supp. 2d at 1067 (citation and internal quotation omitted).

5 Plaintiff asserts in reply that there is "some truth" to the fact that Mr. Knott may not have any unique knowledge, but insists that he "*may have*" knowledge of facts or occurrences on which other representatives of CBRE competently testify. Docket No. 39 at 6 (emphasis added). Plaintiff bears the burden of establishing good cause to justify this deposition, and its speculation that the deposition may in some unknown manner not duplicate later testimony by other witnesses falls well short of meeting that burden.

6 Plaintiff proposes a deposition for all four interested parties that covers a total of two hours (*i.e.*, 30 minutes per party). *See* Docket No. 27 at 5. The Court certainly appreciates the attempt to limit the burden on Mr. Knott. At the same time, it is unclear how attorneys working largely in the blind could protect their clients' interests in 30 minutes.

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APPENDIX 7

2015 WL 12601043
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC., Alien Tort Statute and Shareholder Derivative Litigation
This Document Relates to: ATS Actions
John Doe 1 et al.,
v.
Chiquita Brands International, Inc., et al.,
Jose Leonardo Lopez Valencia, et al.,
v.
Chiquita Brands International, Inc., et al.,
Antonio Gonzalez Carrizosa, et al.,
v.
Chiquita Brands International, Inc., et al.,

CASE NO. 08-01916-MD-MARRA
|
NO. 08-80421-CV-MARRA, No. 08-80508-CV-MARRA
|
07-60821-CV-MARRA
|
Signed 04/07/2015

ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION FOR LEAVE TO TAKE DEPOSITIONS TO PERPETUATE TESTIMONY OF ROLDAN PEREZ, MANGONES LUGO AND RENDON HERRERA & GRANTING CORRESPONDING MOTION FOR ISSUANCE OF REQUESTS FOR JUDICIAL ASSISTANCE TO THE REPUBLIC OF COLUMBIA PURSUANT TO THE HAGUE EVIDENCE CONVENTION [DE 688]

and

ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO TAKE DEPOSIITON TO PERPETUATE TESTIMONY OF CYRUS FREIDHEIM JR. [DE 687]

KENNETH A. MARRA, United States District Judge

***1** This matter is before the Court on the plaintiffs' motion to perpetuate the testimony of Cyrus Freidheim, Jr., former CEO and Chairman of the Board of Directors of Chiquita Brand International, Inc., based on the advanced age and importance of the witness [DE 687]. Also before the Court is plaintiffs' emergency motion to take preservation depositions of paramilitary witnesses identified as former commanders in the United Self-Defense Committees of Columbia (Autodefensas Unidas de Colombia) ("AUC"), the alliance of right-wing, government-aligned paramilitary units that allegedly killed the plaintiffs' family members, based on the importance of the witnesses and fear that they will abscond upon their imminent release from prison before they can be served with compulsory process to appear [DE 688].

The latter motion includes an application for issuance of Letters of Request to the Republic of Columbia to take the depositions of the three paramilitary witnesses—Roldan Perez, Mangones Lugo and Rendon Herrera—pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 ("Hague Evidence Convention") [DE 688]. Plaintiffs indicate they are seeking the voluntary cooperation of these witnesses to give testimony, and are advised by the U.S. State Department that, if the witnesses agree, plaintiffs will be able to conduct the depositions in Columbia without the assistance or participation of any Columbian state official [DE 688-1]. However, plaintiffs are concerned the witnesses may be released from prison in Columbia where they are currently confined and disappear before this is accomplished; therefore, in an "abundance of caution," plaintiffs move the Court to issue Requests for Judicial Assistance to the Republic of Columbia pursuant to the Hague Evidence Convention as "the proper means to request Columbia to exercise its compulsory jurisdiction in order to perpetuate their testimony in this case."

Given the current procedural posture of the case, the Court construes both submissions as motions for expedited discovery under Rule 26 (d) (1), Federal Rules

of Civil Procedure.

I. Background

The plaintiffs, Columbian nationals and family members of banana-plantation workers, trade unionists, political organizers, social activists and other civilians killed by terrorists in Columbia during the 1990s through 2004—including members of the Autodefensas Unidas de Colombia ("AUC") paramilitary organization—brought this action against defendants Chiquita Brand International, Inc. and Chiquita Fresh North America, LLC (cumulatively "Chiquita") alleging that Chiquita funded, armed and otherwise supported the AUC in order to produce bananas in an environment free from labor opposition and social disturbances, knowing the AUC to be a violent terrorist organization, in violation of Colombian law, U.S. law and international law prohibiting crimes against humanity, extrajudicial killing, torture, war crimes and other abuses.[1]

***2** Following the Court's resolution of Chiquita's earlier motion to dismiss, and the subsequent opinion and mandate of the Eleventh Circuit Court of Appeals in its interlocutory review of that order, the only claims remaining against Chiquita in the nine groups of Alien Tort Statute ("ATS") actions consolidated in this MDL proceeding are tort claims under Columbian law asserted under the Court's diversity jurisdiction. These claims are currently the subject of Chiquita's recently filed motion to dismiss based on *forum non conveniens* (all claims) and statute of limitation grounds (New York and District of Columbia cases only) [DE 741; Case No. 08-MD-01916].

In addition to the Columbian law claims remaining against Chiquita, the plaintiffs' most recently amended complaints in five of the nine ATS actions include claims under the ATS, Torture Victims Protection Act (TVPA), state common law, and Colombian law against nine current or former Chiquita directors, officers or employees allegedly involved in Chiquita's decision to fund the AUC (Cyrus Freidheim,[2] Roderick Hills,[3] Steven Warshaw, Fernando Aguirre, Keith Lindner, Charles Keiser, Robert Olson, William Tsacaslis and Robert Kistinger).[4] These claims are also the subject of a pending (consolidated) motion to dismiss under Rule 12(b) (6) [DE 735], supported by individual supplements to the motion [DE 731-733, 736-740].

At the outset of this litigation, and by agreement of the parties, the Court suspended all discovery until resolution of the defendants' motions to dismiss the plaintiffs' initial complaints [DE 66]. The Court ruled on Chiquita's initial motions to dismiss in June 2011 and March 2012, and later certified its rulings to the Eleventh Circuit Court of Appeals for interlocutory review. After the Eleventh Circuit granted Chiquita's petition for review, this Court entered a general stay of all proceedings until conclusion of the interlocutory appeal. The general stay order tolled the defendants' obligation to respond to plaintiffs' last-amended complaints until sixty days after the Eleventh Circuit completed its review, and reserved the plaintiffs' right to seek a lift of the stay for purpose of preserving testimony upon showing of a reasonable basis to believe that relevant and material testimony might be lost if not taken during the period of stay.

The general stay remained in effect until January 6, 2015, when the Eleventh Circuit issued its mandate dismissing all of the ATS and TVPA claims against Chiquita [DE 693]. Three of the nine ATS plaintiffs' groups have since filed the instant discovery motions seeking, first, to perpetuate the discovery of Cyrus Freidheim—a former Chiquita executive who allegedly made or participated in the decision of Chiquita to make secret payments to the AUC—and second, to perpetuate the testimony of three high-level commanders in the AUC alleged to have direct knowledge of Chiquita's financial support of the AUC or the murder and torture allegations, or both.

***3** Under the terms of the Court's original Case Management Order [DE 141], the stay on discovery remains in place until resolution of Chiquita's newly-filed motion to dismiss the Columbian tort claims on *forum non conveniens* grounds, and the individual defendants newly-filed motions to dismiss the plaintiffs' common law, Columbian law and statutory claims under the ATS and TVPA for failure to state a claim under Rule 12 (b) (6) [DE 735, 741]. Due to the pendency of these motions, there has been no Rule 26(f) conference. That is, because this case remains in the early pleading stages, with a discovery stay in effect pending disposition of the defendants' recently filed motions to dismiss, the parties have not met and conferred.

II. Discussion

A. Request to Perpetuate Testimony

Under Rule 26 (d) (1), a party may not seek discovery from any source before the parties have met and conferred as required by Rule 26 (f), Fed. R. Civ. P. The rule is subject to certain exceptions, including a court order permitting discovery. The Court accordingly treats the plaintiff's motions to perpetuate the testimony of Cyrus Freidman and the three above-named AUC members as requests to proceed with expedited discovery under Rule 26 (d) (1).

Although the Federal Rules do not provide a standard for the court to use in exercising its authority to order expedited discovery under Rule 26 (d), courts have generally adopted one of two approaches in determining a party's entitlement to such discovery: (1) the preliminary injunction-style analysis set out in *Notaro v. Koch*, 95 F.R.D. 403 (S.D.N.Y. 1982) or (2) a general "good cause" or "reasonableness" standard which allows expedited discovery when the need for it outweighs the prejudice to the responding party. *See e.g. Edgenet, Inc. v. Home Depot USA, Inc.*, 259 F.R.D. 385 (E.D. Wis. 2009).

The *Notaro* approach is the more rigid of the two, and requires consideration of a set of four factors similar to the analysis used to justify a decision to grant a preliminary injunction, i.e. the existence of: (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery is greater than the injury a party will suffer if the expedited relief is granted. *See Edgenet*, 259 F.R.D. at 386, citing *Notaro*, 95 F.R.D. at 405.

In contrast, under the more general "good cause" standard, which has been adopted by an "increasing majority" of district courts confronted with the issue, *St. Louis Group, Inc. v. Metals and Additives Corp*, 275 F.R.D. 236, 239 (S.D. Tex. 2011), citing *Merrill Lynch, Pierce Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618 (N.D. Ill. 2000); *Semitool Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273 (N.D. Cal 2002): *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325 (S.D.N.Y. 2005); *Dimension Data North America v. NetStar-1, Inc.,* 226 F.R.D. 528, 530 (E.D. N.C. 2005), a court must examine the expedited discovery request "on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances." *Ayyash*, 233 F.R.D. at 327. Good cause may be found "where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Energy Prod. Corp. v. Northfield Ins. Co.,* 2010 WL 3184232 at *3 (E.D. La. 2010). Good cause has been found, for example, where there is a showing of irreparable harm that can be addressed by limited, expedited discovery, *JP Morgan Chase Bank N.A. v. Reijtenbagh*, 615 F. Supp. 2d 278 (S.D.N.Y. 2009); *Ayyash,* 233 F.R.D. at 326-27; where failing to allow expedited discovery would substantially impact the progress of the case on the court's docket, *Sheridan v. Oak St. Mortgage, LLC*, 244 F.R.D. 520, 522 (E.D. Wis. 2007), or where there is a need to preserve evidence that may be destroyed before it can be obtained by ordinary discovery. *Monsanto Co. v. Woods*, 250 F.R.D. 411, 413 (E.D. Mo. 2008).

***4** Under the general reasonableness approach, the party requesting expedited discovery has the burden of showing the existence of good cause, and that the need for the discovery outweighs any prejudice to the opposing party. *See e.g. Ayyash v. Bank Al-Madina*, 233 F.R.D. 325 (S.D.N.Y. 2005); *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002). In assessing good cause, the court should also consider whether the subject matter of the request is narrowly tailored in scope.

The Eleventh Circuit Court of Appeals has not adopted a standard for allowing expedited discovery. Noting that several district courts within the Eleventh Circuit have expressly used a general "good cause" standard when confronted with requests for expedited discovery, *see e.g. Tracfone Wireless, Inc. v. Holden Property Services, LLC*, 299 F.R.D. 692 (S. D. Fla. 2014); *United States v. Gachette*, 2014 WL 5518669 (M.D. Fla. 2014); *Dell Inc. v. Belgiumdomains, LLC*, 2007 WL 6862341 (S.D. Fla. 2007), and that other courts have criticized the *Notaro* preliminary injunction-style analysis as inconsistent with Rule 26(d), which requires the Court to consider, among other things, "the interests of justice," as well as the overarching mandate of Rule 1, which requires that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action," *Semitool,* 208 F.R.D. at 275-276; *OMG Fidelity Inc. v. Sirious Technologies, Inc.,* 239 FRD 300 (N.D.N. Y 2006); *Merrill Lynch*, 194 F.R.D. at 624; *Ayyash*, 233 F.R.D. at 326, this court declines to follow *Notaro* and instead applies the conventional standard of "good cause" in evaluating plaintiffs' request for expedited discovery.

Having done so, the court finds, first, as to plaintiffs' request to perpetuate the deposition testimony of the three paramilitary witnesses, that good cause is shown. Plaintiffs have made a strong showing that the proposed deponents are individuals with both the incentive and capacity to disappear after their release from Columbian prison. As to Roldan Perez, identified as the chief of

security for the Castano family that ran the AUC, and who previously testified to having direct knowledge of the financial arrangements between Chiquita and the AUC, plaintiffs show that he has confessed to the murder of Carlos Castano Gil, former chief of the AUC, and therefore has a strong incentive to go underground after he is released from prison to avoid retaliation from Castano supporters. To illustrate the reality of this prisoner's incentive to abscond, plaintiffs show that since demobilization of the AUC in 2007, approximately 1,600 Colombian paramilitary persons have been murdered, while countless others have simply disappeared from public view.

As to Rendon Herrera, identified as the commander of the Elmer Cardenas Bloc of the AUC, and who previously testified in Columbian judicial proceedings that Chiquita payments to the AUC directly benefited his unit, plaintiffs show that Herrera was the earlier subject of an extradition request from the United States, which was denied based on a determination by Columbian authorities that his crimes against the Republic of Columbia were more serious than his crimes against the United States. Plaintiffs allege that Herrera has strong incentive to abscond upon his release from prison either to avoid the possibility of extradition to the United States, or re-arrest, investigation and punishment by Columbian authorities on the same drug trafficking charges he would have faced in the United States under its original extradition request.

***5** Finally, as to Mangones Lugo, identified as the commander of the William Rivas Front of the AUC in Cienaga, a banana-growing region where a number of the alleged murders occurred, and who previously testified in Columbian judicial proceedings regarding his direct knowledge and participation in financial payments for security services provided to Chiquita, plaintiffs show he was a fugitive from justice when he was captured in 2004 on charges of murder, money laundering and document falsification.

With this background, plaintiff demonstrates a reasonable basis to infer that the paramilitary witnesses are likely to become process-averse upon their release from Columbian prison, and the court finds a legitimate urgency to the plaintiff's request to serve compulsory process and immediately depose the witnesses while they are still in the custody of Columbian government and prison authorities. Plaintiffs adequately demonstrate that all three of the proposed deponents have material knowledge regarding the core allegations of the plaintiffs' complaints, and that all three, simply by virtue of their roles as prior AUC commanders—combined with the individual trigger factors identified above—have a strong incentive to disappear after they are released from prison, an event which theoretically may occur at any time after December 2014, although neither party is able to identify the respective release dates with any certitude.

The Court next weighs plaintiffs' demonstrated good cause for the taking of the paramilitary witness depositions against any prejudice to the defendants occasioned by the taking of the depositions at this juncture in the proceedings. On this issue, defendants assert that allowing the depositions to proceed during the pleading stage of the litigation places an undue financial burden on them, theorizing that the cost of preparing for and taking the depositions will be wasted if the court ultimately grants the defendants' newly-filed motions to dismiss. In a related vein, defendants question the legitimacy of representing to Columbian authorities that the testimony of these witnesses is "required" in a proceeding which has not progressed beyond the motion to dismiss phase.

Finally, defendants argue that it is unfair to allow the taking of potential trial testimony from the paramilitary witnesses at this juncture, before defendants have had an opportunity to conduct general discovery on plaintiffs' claims or to investigate the possibility that the witnesses may have been recipients of a witness-payment scheme, in light of allegations which recently surfaced in ATS litigation pending in Alabama against Attorney Terrence Collingsworth, lead counsel for one the plaintiff ATS groups in this proceeding. Specifically, in a defamation case pending in the Northern District of Alabama, *Drummond Co. v. Collingsworth,* No. 11-CV-3695-RDP-TMP (N.D. Ala. 2011), Attorney Collingsworth is charged with making unlawful payments to Colombian paramilitary witnesses who were allegedly involved in numerous murders in Columbia in complicity with Drummond Company, an Alabama-based coal company which retained the AUC to provide security in coal mines operated by a Colombian subsidiary.

Defendants do not present any competent evidence linking any of plaintiffs' counsel in this case to any (non-expert) witness payment activity. However, they do present a redacted memorandum from "T. Collingsworth" to "Chiquita ATS Plaintiffs' Counsel," produced in supplementary discovery proceedings before this division, *Drummond Co. v Collingsworth*, Case No. 14-MC-81189 (S.D. Fla. 2014), [DE 696 Ex. A], entitled "CHIQUITA: Ethics of Paying Witness's Legal Fees." Defendants also supply the affidavit of Attorney Paul Wolf, one of the plaintiffs' attorneys in this proceeding, who avers that he has personally participated in meetings with ATS plaintiffs' counsel in this case during which payments to

paramilitary witnesses were discussed [DE 662-4; ¶¶ 19-21, 23-24]

***6** Citing extensively to discovery regarding Mr. Collingsworth's financial entwinement with Columbian paramilitary members which has surfaced in the matter of *Drummond Co. v Collingsworth*, No. 11-CV-3695 (N.D. Ala. 2014), defendants express a concern that members of the prosecution teams for the plaintiffs' groups in the instant litigation may have participated in meetings at which Mr. Collingsworth was present and have been privy to discussions on the ethics of making payments to influence witness testimony in this case. In light of Attorney Collingsworth's embroilment in a witness-for-hire controversy in the Alabama ATS litigation, defendants contend there is a reasonable basis for investigating the possibility of a payment scheme in this case, before preservation deposition testimony is taken from Colombian witnesses who may have been the beneficiary of such a scheme.

In response, Plaintiffs' liaison counsel, John Scarola, has filed an affidavit stating that neither he nor any of his co-counsel in these consolidated ATS proceedings have ever paid money or given anything of value to any witness or potential witness in this case. While Mr. Scarola acknowledges that the subject of paying potential witnesses was discussed at a Chiquita MDL meeting at which Attorney Paul Wolf was present, he avers that neither he nor any other counsel representing a plaintiff group in this MDL proceeding ever agreed that payments or anything else of value should be paid to any witnesses, or that payments to any fact witness (as opposed to expert witnesses) would ever be appropriate under any circumstances [DE 216].

Given Mr. Collingsworth's participation as ATS counsel in both cases, and in light of uncontested evidence that the issue was at least discussed at a meeting of ATS counsel in this MDL proceeding, along with circulation of the "Chiquita: Ethics of Paying Witness's Legal Fees" memorandum authored by Mr. Collingsworth, the Court agrees that the defendants should be allowed an opportunity to conduct discovery on the witness payment issue, under an accelerated schedule, before the paramilitary witnesses are deposed in this case.

Specifically, the Court shall allow the defendants an opportunity to issue limited written discovery requests (interrogatories and requests to produce) addressing the issue of (non-expert) witness payments, gifts or benefits of any kind or nature in this case, and shall impose an abbreviated briefing schedule for any legal objections that might be lodged to the discovery to permit expedited resolution of the matter well in advance of the scheduled deposition dates. This order shall further be without prejudice for either party to seek leave of court to take a supplemental (second) deposition of any of these witnesses, through voluntary or compulsory process, at a later stage of the litigation, upon motion filed and good cause shown. With this preliminary discovery schedule in place, the defendants will not be unfairly prejudiced by allowing the expedited preservation depositions of the paramilitary witnesses to proceed at this juncture.

In summary, given the limited number of proposed deponents, the potential importance of testimony likely offered by the proposed deponents, and the possibility that plaintiffs might permanently lose the ability to take the testimony of these witnesses if their appearance is not compelled while they are still in custody of Colombian governmental and security authorities, the court finds "good cause" to support the plaintiffs' request for expedited discovery. At the same time, the court does not find any undue financial burden on the defendants posed by the proposed discovery, nor does it find undue prejudice to defendants' ability to prepare adequately for the depositions.

With regard to the plaintiffs' additional request for the preservation deposition of Cyrus Freidheim, based on his advanced age, the court agrees that the age of a proposed deponent is a highly relevant factor in determining whether there is a sufficient reason to perpetuate testimony, whether the preservation request is made pre-suit under Rule 27, or in conjunction with a post-filing request for expedited discovery under Rule 26 (d). Regardless of specific ailments or physical vulnerabilities, advanced age carries an increased risk that a witness will be unavailable at the time of trial; for this reason, a witness of advanced age may be an appropriate subject for preservation testimony. *See Penn Mutual Life Ins. Co v. United States*, 68 F.3d 1371 (D.C. Cir. 1995) (allowing Rule 27(a) deposition to perpetuate testimony of 80-year old witness whose age "present[ed] a significant risk that he will be unavailable to testify by the time of trial."); *Texaco Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967) (granting writ of mandamus directing district court to allow Rule 27(a) deposition where "[t] would be ignoring facts of life to say that a 71-year old witness will be available, to give his deposition or testimony, at an undeterminable future date").

***7** In this case, the court views Mr. Freidheim's advanced age (79 years) against the backdrop of this MDL litigation which has been pending since 2008 and—assuming it ultimately progresses beyond the motion to dismiss and summary judgment stages—is not likely to advance to

trial until calendar year 2017 at the earliest. By that time, the witness will be 81 years old and it would be unduly risky to assume that no limitation of age or intervening infirmity might impede the ability of plaintiff's to take Mr. Freidheim's deposition testimony in the ordinary course before trial.

Thus, in the context of this specific case, the court agrees that the advanced age of Mr. Freidheim is a sufficient basis to support the taking of expedited deposition testimony from him, and shall accordingly grant the plaintiffs' request to take expedited preservation testimony from Mr. Freidheim. Again, the order allowing preservation testimony of Mr. Freidheim, now a party-witness, shall be without prejudice for either party to request a supplemental deposition of the witness in the ordinary course of Rule 26 discovery, upon motion filed and good cause shown.

B. Requests for Judicial Assistance

The plaintiffs have also applied for issuance of Letters of Request for the Examination of Witnesses in Columbia pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), pursuant to 28 U.S.C. § 1781 (b) (2) and Fed. R. Civ. P. 28 (b) (1) (A) and (B). Plaintiffs contend that resort to Hague Convention procedures is necessary to procure and preserve the testimony of these witnesses in light of the substantial risk that the witnesses will disappear and become permanently unavailable to testify after they are released from prison, an event which may occur at any time without notice to the plaintiffs.

Federal Rule of Civil Procedure 28 (b), governing the taking of depositions in a foreign country, provides that a foreign deposition may be taken "under a letter of request," which the court may issue "on appropriate terms after an application and notice of it." A letter of request is simply a "request by a domestic court to a foreign court to take evidence from a certain witness." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 n. 1, 124 S. Ct. 2466, 159 L.Ed.2d 355 (2004).

The Hague Evidence Convention, of which both the United States and the Republic of Columbia are signatories, provides the mechanism for gathering evidence abroad through the issuance of a letter of request. The Hague Convention is not, however, the exclusive avenue for obtaining discovery in a foreign country. *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 539-40, 107 S. Ct. 242, 96 L.Ed. 2d 461 (1987), nor is it necessarily even the means of first resort. *Id.*, 482 U.S. at 541-42. Rather, courts must consider the facts of each particular case in determining whether it is more appropriate to take discovery abroad under the Federal Rules of Civil Procedure or the Hague Evidence Convention. *Mandanes v. Mandanes*, 199 F.R.D. 135, 140 (S.D. N.Y. 2001).

A party seeking application of the Hague Evidence Convention procedures, rather than the Federal Rules, bears the burden of persuading the court of the necessity of proceeding pursuant to the Hague Evidence Convention based on the specific facts and sovereign interests involved. *In re: Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 300 (3d Cir. 2004). In determining whether to employ Hague Evidence Convention means or to allow other procedures, a court must look to considerations of comity, the relative interests of the parties, including the interest in avoiding abusive discovery, and the ease and efficiency of alternative formats for discovery. *Mandanes*, citing *Aerospatiale,* 482 U.S. at 545-46.

***8** Where discovery is sought from a foreign *party,* over whom a federal court has *in personam* jurisdiction, there is no rule of first resort requiring the discovery party to use the procedures of the Hague Convention before resorting to the Federal Rules of Civil Procedure. *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525 (D. N.J. 2009), citing *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 299 (3d Cir. 2004). In this instance, the Federal Rules remain the "normal method[ ] for federal litigation involving foreign national parties," unless the facts of a given case indicate "the 'optional' or 'supplemental' convention procedures prove to be conducive to discovery." *Id* at 300, quoting *Societe Nationale*, 482 U.S. at 36, 107 S. Ct. 2542.

On the other hand, resort to the Hague Evidence Convention is particularly appropriate where, as here, a litigant seeks to depose a foreign *non-party* who is not subject to the court's *in personam* jurisdiction. *In re Urethane Antitrust Litigation*, 267 F.R.D. 361 (D. Kan. 2010), citing *Newmarkets Partners, LLC v. Oppenheim Jr. & Cie. S.C.A.*, 2009 WL 1447504 at *1 (S.D.N.Y. 2009); *Abbott Labs v. Impax Labs, Inc.,* 2004 WL 1622223 at *2 (D. Del. 2004);

In this case, plaintiffs have made a sufficient showing that

the three paramilitary witnesses possess knowledge relevant to the plaintiffs' claims in these cases, and that they reside in Columbia beyond the *in personam* jurisdiction of this court. Defendants argue, however, that it is premature to issue a request for judicial assistance to the Republic of Columbia at this stage, during the pendency of a second round of motions to dismiss, because "the potential for dismissal makes it impossible for this Court to faithfully represent to a foreign government, as required by the Hague Evidence Convention and requested in plaintiff's motion, that the testimony of the paramilitary witnesses is required for purposes of this proceeding." [DE 696, p. 15].

Defendants cite no authority for the proposition that a party seeking foreign assistance under the Hague Convention is required to show its claims have survived legal challenge at the motion to dismiss (or summary judgment) stage of the proceedings. The Court finds imposition of such a stringent limitation on use of the Hague Convention procedures to be at odds with the "liberal discovery permitted under the Federal Rules of Civil Procedure," and accordingly declines defendants' invitation to adopt it.

Plaintiffs have shown that Messrs. Perez, Lugo and Herrera likely have knowledge that goes to the heart of the claims in this litigation; that they may be subject to release from prison at any time without notice to the litigants in this case, and that they have strong motive to abscond once they are released. Thus, resort to compulsory process, available only under the Hague Convention, is appropriate to compel their attendance at depositions to preserve their testimony. At the same time, defendants fail to show good reason why the application for the issuance of letters of request should be denied. Accordingly, the Court shall issue the requested letters.

With regard to the content of the letters, the Court approves the proposed forms submitted by plaintiffs, with certain modifications on the procedural requests sections of the letters drafted by plaintiffs. First, with regard to the section outlining specific written questions on which each witnesses' response is requested, plaintiffs are directed to confer with defense counsel to incorporate any additional written questions which the defendants wish to propose to the witnesses (not to exceed twenty-five questions per witness). Second, the procedural request section shall include a request to allow oral interrogation of the witnesses on additional questions following the witnesses' responses to the written, pre-set questions. Third, to the extent an oral examination is allowed, the procedural requests shall include a request for a single direct examination by a designated liaison counsel for plaintiffs' groups, and a single cross-examination by a designated liaison counsel for all defendants. Fourth, to the extent an oral examination is allowed, the procedural request section shall include a request to allow the presentation of designated documents to the witness for identification and questioning. Any counsel wishing to present documents to the witness for identification or discussion shall identity the documents in the procedural request section and attach a copy of the document to the request which is clearly labelled; in addition, any counsel wishing to present documents to the witness shall create a corresponding exhibit list and make arrangements for exchanging copies of the documents with opposing counsel at least twenty (20) days prior to the scheduled deposition date. Finally, in the event that the Columbian judicial authority decides to limit the oral examinations, either by the amount of time, or by specific number of questions permitted, the letters shall request that the examination be divided equally between plaintiffs' questions and defendants' questions.

III. Decretal Provisions

***9** Based on the foregoing, it is **ORDERED AND ADJUDGED**:

1. Plaintiffs' motion for issuance of letters of request to the Central Authority for the Hague Convention of the Republic of Columbia [DE 688] in connection with the depositions of the paramilitary witnesses is **GRANTED.**

2. Plaintiff's motions for expedited discovery by way of preservation testimony from the paramilitary witnesses designated above [DE 688] and the testimony of Cyrus Freidheim [DE 687] are **GRANTED.**

3. Plaintiffs shall confer in good faith with defendants and prepare final versions of the letters of request that incorporate the rulings made in this order. Plaintiffs shall further submit revised letters of request to the court, within **TEN (10) DAYS** from the date of entry of this order, which will then be issued by the Court and returned to plaintiff's counsel for delivery to the proper authorities.

4. The depositions of the paramilitary witnesses shall be scheduled to commence on a date no earlier than sixty (60) days from the date of entry of this order. In the interim, the defendants are granted leave to issue

limited written discovery requests to plaintiffs on the witness-payment issue identified above, by way of interrogatories and requests to produce (not to exceed twenty-five interrogatories and corresponding requests to produce) by no later than **TEN (10) DAYS** from the date of entry of this order. Plaintiffs shall have **FIVE (5) DAYS** to respond to the requests, or to file objections; if objections are filed, they shall be accompanied by a supporting memorandum of law not to exceed three (3) pages; the defendants shall then file its response, if any, to the objections within **TRHEE (3) DAYS** of service, not to exceed three pages in length. No further submissions shall be entertained unless specifically invited by the Court, which shall rule on any disputed discovery item on the basis of the written submissions.

5. The defendant's motion for leave to file surreply [to DE 708] is **DENIED** and the plaintiff's request for leave to file a "sur-sureply" [DE 711] is **DENIED as MOOT**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 7th day of April, 2015.

All Citations

Not Reported in Fed. Supp., 2015 WL 12601043

Footnotes

1 Specifically, Plaintiffs alleged claims under what is known as the Alien Tort Statute (ATS) or Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, 28 U.S.C. § 1350. They also alleged tort claims under the state laws of New Jersey, Ohio, Florida and the District of Columbia, as well as the foreign law of Colombia, for assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, negligent hiring, negligence per se and loss of consortium.

2 Cyrus Fredheim was chairman of the Board of Directors of Chiquita from March 2002 through May 2004 and the CEO of Chiquita from March 2002 until January 2004.

3 Roderick Hills, former Chiquita director, passed away at age 82 in October, 2014.

4 The *Valencia*, *Montes*, and *Carrizosa* complaints [Case Nos. 08-80508; 10-60573; 07-60821 respectively] name only two individual defendants, Cyrus Fredheim and Keith Linder, asserting claims against these individuals under the ATS, TVPA state common law and Columbian law. The *Does 1-11* complaint [Case 08-80421] asserts claims under the ATS, TVPA, state common law and Columbian law against six of these individuals (Fredheim, Hills, Keiser, Kistinger, Olson and Tsacalis). The *Does 1-144* complaint [Case No. 08-80465] asserts claims under the ATS, TVPA, state tort law and Colombian law against eight of these individuals (Aguirre, Fredheim, Hills, Keiser, Kistinger, Olson, Tsacalis and Warshaw).