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

JOHN DOE MC-1,

Plaintiff,

v.

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

Defendants.
_____/

Case No. 2:20-CV-10568

HON. PAUL D. BORMAN
HON. ELIZABETH A. STAFFORD

THE UNIVERSITY'S
REPLY IN SUPPORT OF MOTION TO CONSOLIDATE

The University's motion represents a sincere attempt to bring an orderly process to this ever-expanding mass litigation—through consolidation and coordination. At first blush, the parties might appear to agree that consolidation is appropriate. But Plaintiff's counsel seemingly wants consolidation in name only—that is, consolidation with no coordination. Plaintiff's counsel, who is just one of several attorneys who represent individuals affected by Anderson's misconduct, believes a status conference to manage the consolidation and other aspects of this case is unnecessary (and further declares the University's motion seeking this routine relief to be "disingenuous" "subterfuge"). Respectfully, as the *Flint Water Cases* and other multidistrict and mass litigation teach, consolidation cannot happen overnight.

The University appreciates and shares Plaintiff's desire to move expeditiously. The very purpose of this motion, Plaintiff's counsel's aspersions to the contrary notwithstanding, was to progress the case through an orderly and efficient consolidated process. For example, consolidation of these cases will avoid inconsistent rulings and duplicated efforts across the judges in this District. And a court-approved long-form and short-form complaint process will allow others to join this case without the need for an entirely new operative pleading. Coordination is essential to ensuring fairness to *all* concerned—survivors, witnesses, the Court, and counsel. But the orderly process laid out in the University's motion should be

adopted, lest a race through the proceedings create the sort of chaos that would serve no one's interests.

ARGUMENT

I. A status conference is needed to preempt confusion and streamline pretrial proceedings.

All parties believe that consolidation is the only way to manage this litigation. The only disagreement concerns what happens *after* consolidation. The University requested a status conference. But Plaintiff's counsel demands an immediate response to his proposed, self-styled "long-form complaint"—a mash-up of his prior 38 complaints. The haste that Plaintiff presses for will prove to be a false economy, and it's not clear why Plaintiff's counsel furiously attacks the notion of coordination.

Coordinating complex litigation to save time and avoid waste is an appropriate purpose for a pretrial conference. *See* Fed. R. Civ. P. 16(a) (the court may order "one or more pretrial conferences for such purposes as . . . establishing early and continuing control so that the case will not be protracted because of lack of management" and "discouraging wasteful pretrial activities."). Indeed, the *Manual on Complex Litigation* recommends that in mass actions, like this one, the Court's "first step" be "promptly scheduling the initial conference with counsel . . . before any adversary activity begins, such as filing of motions or discovery requests." *Id.* (4th ed.) § 11:1. Until this status conference is held, it may well be wise for the Court to require any motion practice or discovery "be deferred." *See id.*

What has already transpired in this case and its companions—and now parallel litigation in state court[1]—demonstrates not only the need for the coordination that only consolidation can bring, but the folly in speed for speed's sake. For example, although some companion cases have made their way before this Court, many others remain before other judges in this district. *See* Exhibit A (updated chart of Doe MC plaintiffs' cases). The inefficiencies for the Eastern District as a whole and the parties alike is already emerging. For example, Judge Lawson has set status conferences in his four cases. *See e.g.*, ECF No. 12, *Doe MC-4 v University of Michigan et al.*, No. 20-CV-10582. The University is also already fielding "emergency" requests for depositions. *See, e.g.*, ECF No. 16 (Emerg. Mot. to Depose Easthope).[2] Even if such discovery were authorized or agreed to, questions as to its scope and manner of taking it will need to be considered.

Consolidation, along with an approved long-form and short-form complaint process, will streamline filing and resolution of these matters. Of course, consolidation under this District's rules is not a unilateral process—a point the response seems to ignore, despite it being raised to Plaintiff's counsel.[3] E.D. Mich. LR 42.1(b) ("The district judge presiding in the earliest numbered case will decide

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1 *Doe MC-1 v. University of Michigan*, No. 20-379-NO (Washtenaw Cty. Cir. Ct.)

2 Plaintiff has filed a substantively identical, initially *ex parte* motion seeking the same relief in state court. Ex. B.

3 Ex. C (Apr. 17, 2020 Email from C. Bush to M. Cox).

the motion. However, the motion may not be granted unless the judges presiding in the related cases consent.").

And while Plaintiff's counsel purports to have attached a "long-form" complaint, it is not. What he has attached as an exhibit to this motion—seen for the first time by the University upon its filing—is a ***consolidated*** complaint, combining all of his individual plaintiff allegations into a single document. *See* ECF No. 18-2. A "'long form' complaint alleg[es] facts and causes of action that applied globally to all" plaintiffs, and "[e]ach individual plaintiff then file[s] a 'short form' complaint adopting all or portions of the long form complaint and asserting any new facts or causes of action not in the long form complaint." *Curran v. Ethicon, Inc.*, No. CV 19-05755, 2020 WL 1244149, at *1 (E.D. Pa. Mar. 16, 2020); *see also Manual for Complex Litigation* § 40.52 (discussing master long-form complaints). This process obviates the need for continuous amendments and responses every time a new plaintiff appears, permits each plaintiff (including those not represented by Messrs. Cox and Shea) to better tailor their claims to their specific facts, and avoids an unwieldy and unmanageably long complaint.

These initial procedural aspects require early, careful, and active judicial management. And consolidation and an actual long-form complaint pleading are only the start. Details—like the contours of the short-form complaints, the process for adding additional allegations or parties, the coordination of cases brought by

other counsel, and whether and when the parties will pursue alternative resolution or begin discovery—will still need to be worked out. This will require still more coordination between the parties and the Court. A status conference now will save time and effort down the line. Yet Plaintiff's counsel seems all too eager to avoid it.

Even if the Court were inclined to bypass an early status conference as Plaintiff's counsel would like, it should not accept Plaintiff's counsel's invitation to compress the University's time to respond to the proposed and as-yet-unfiled long-form and short-form complaints. Plaintiff's counsel wants the Court to order that all allegations filed by Plaintiff's same counsel be responded to on the same day. Although some cases brought by Doe MC plaintiffs are currently subject to an agreed-upon response deadline, many more that would be subject to the consolidation are not. For Does MC-18, 21-36, 38-39, the University has waived service based on requests from opposing counsel. Under the Rules, such waiver affords the University 60 days to respond. Fed. R. Civ. P. 4(d)(3). But these waivers came in at various times, some are yet to be requested, and opposing counsel has said some complaints for Doe MC plaintiffs are still forthcoming.[4]

The University should not be put to answer these new allegations (consolidated or otherwise) on an accelerated timetable. And Plaintiff offers no basis for the Court to *shorten* the University's time to respond to the 231-page, 1385-

[4] Responsive-pleading deadlines now range from May 3, 2020 to June 12, 2020.

paragraph proposed-but-unaccepted long-form complaint. There is none. Civil Rule 15(a)(3) generally forbids an amended pleading from shortening the time a party has to respond. *Id*. (parties are entitled to the full time to respond to the original pleading or an additional 14 days, whichever is longer). Yes, there are common issues from complaint to complaint. But the allegations are not all identical. And availability of a litigated recovery is affected by an individual's pleading. Plaintiff's repeated refrain that the University was on notice of the possibility of suit is unavailing (and could be applied to just about any federal case). *See* ECF No. 18 at 5-7. The University's time, obligation, and scope of response is dependent on how and when a plaintiff pleads his case. Fed. R. Civ. P. 12; *cf. In re Nat'l Prescription Opiate Litig.*, No. 20-3075, slip op. at 7 (6th Cir. Apr. 15, 2020) (district courts do not have "authority to disregard the Rules' requirements").

Ultimately, though these cases were filed in a single district, they are much like multi-district litigation. They require the same intentional treatment. To resolve them efficiently will require careful Court oversight. The parties can discuss the listed considerations and others with the Court at a status conference. And the Court can then issue a scheduling order that takes the complex considerations of these cases into account.

II. Suggestion for further proceedings.

The University respectfully suggests the following, in light of the parties' agreed-upon goals to further judicial efficiency and economy:

a. The Court grants the University's motion in full;

b. The parties work with the Court to get filed cases transferred to this Court;

c. The Doe MC plaintiffs file a master long-form complaint with the common, cross-plaintiff allegations; and,

d. The Court sets a status conference to discuss the issues raised by the parties in this motion and elsewhere.

A deliberate schedule like this one is essential "to secure the just, speedy, and inexpensive determination" of these matters that the Rules mandate and the parties desire. *See* Fed. R. Civ. P. 1.

CONCLUSION

For the reasons stated above and in its moving brief, the University respectfully requests that this Court grant its motion to consolidate.

Respectfully submitted,

/s/ *Cheryl A. Bush*

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Dated: April 20, 2020

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INDEX OF EXHIBITS

Exhibit	Description
A	Table of Cases
B	Plaintiff John Doe's Emergency Motion for Leave to Take Deposition (State Court)
C	April 17, 2020 Email from Cheryl Bush
D	Unpublished Cases

Exhibit A

Date filed	Plaintiff	E.D. Mich. No.	Judge (* denotes reassigned)	Suppl. Juris. Declined
3/4/2020	*Doe MC-1*	20-CV-10568	J. Borman	Yes
3/4/2020	*Doe MC-2*	20-CV-10578	J. Borman*	Yes
3/5/2020	*Doe MC-3*	20-CV-10579	J. Borman*	Yes
3/5/2020	*Doe MC-4*	20-CV-10582	J. Lawson	
3/8/2020	*Doe MC-5*	20-CV-10621	J. Borman*	Yes
3/5/2020	*Doe MC-6*	20-CV-10593	J. Borman*	Yes
3/5/2020	*Doe MC-7*	20-CV-10580	J. Roberts	
3/9/2020	*Doe MC-8*	20-CV-10640	J. Roberts	
3/9/2020	*Doe MC-9*	20-CV-10641	J. Borman*	Yes
3/6/2020	*Doe MC-10*	20-CV-10617	J. Borman*	Yes
3/5/2020	*Doe MC-11*	20-CV-10596	J. Borman*	Yes
3/5/2020	*Doe MC-12*	20-CV-10595	J. Borman*	Yes
3/6/2020	*Doe MC-13*	20-CV-10614	J. Parker	
3/6/2020	*Doe MC-14*	20-CV-10618	J. Borman*	Yes
3/9/2020	*Doe MC-15*	20-CV-10631	J. Borman*	Yes
3/8/2020	*Doe MC-16*	20-CV-10622	J. Borman*	Yes
3/11/2020	*Doe MC-17*	20-CV-10664	J. Borman*	Yes
3/17/2020	*Doe MC-18*	20-CV-10715	J. Lawson	
3/12/2020	*Doe MC-19*	20-CV-10679	J. Borman*	Yes
3/13/2020	*Doe MC-20*	20-CV-10693	J. Borman*	Yes
3/18/2020	*Doe MC-21*	20-CV-10731	J. Borman*	Yes
3/18/2020	*Doe MC-22*	20-CV-10732	J. Borman*	Yes
3/23/2020	*Doe MC-23*	20-CV-10772	J. Borman*	Yes
3/23/2020	*Doe MC-24*	20-CV-10771	J. Borman*	Yes
3/21/2020	*Doe MC-25*	20-CV-10759	J. Lawson	
3/31/2020	*Doe MC-26*	20-CV-10828	J. Borman*	Yes
3/26/2020	*Doe MC-27*	20-CV-10785	J. Roberts	
3/25/2020	*Doe MC-28*	20-CV-10779	J. Borman*	Yes
3/31/2020	*Doe MC-29*	20-CV-10832	J. Borman*	Yes
4/2/2020	*Doe MC-30*	20-CV-10861	J. Borman*	Yes
3/30/2020	*Doe MC-31*	20-CV-10821	J. Borman*	Yes
3/30/2020	*Doe MC-32*	20-CV-10823	J. Borman*	Yes
4/8/2020	*Doe MC-33*♦	20-CV-10895	J. Friedman	
4/3/2020	*Doe MC-34*♦	20-CV-10868	J. Cleland	Yes
4/2/2020	*Doe MC-35*	20-CV-10859	C.J. Hood	
4/6/2020	*Doe MC-36*♦	20-CV-10875	J. Parker	

Date filed	Plaintiff	E.D. Mich. No.	Judge (* denotes reassigned)	Suppl. Juris. Declined
4/7/2020	*Doe MC-38*♦	20-CV-10888	J. Borman*	Yes
4/7/2020	*Doe MC-39*♦	20-CV-10889	J. Lawson	

♦ denotes complaints filed after the initial motion to consolidate.

Plaintiff agrees that these cases should be consolidated. ECF No. 18 at 16; *see also* Wright & Miller, 9A Fed. Prac. & Proc. Civ. § 2383 (3d ed.) ("A motion is not required however, since the trial court may order consolidation on its own initiative"; collecting cases).

Exhibit B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

John Doe MC-1,

Plaintiff,

v.

The University of Michigan, and
The Regents of the University of
Michigan (official capacity only),
Jointly and Severally,

Defendants.

Case No. 20-000379 -NO

Judge Carol Kuhnke

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PLAINTIFF JOHN DOE MC-1'S EMERGENCY MOTION FOR LEAVE TO TAKE THE DEPOSITION AND PRESERVE THE TESTIMONY OF TOM EASTHOPE PRIOR TO THE SERVING OF INITIAL DISCLOSURES PURSUANT TO MCR 2.301(A)

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, for his Emergency Motion for Leave to Take the Deposition and Preserve the Testimony of Tom Easthope Prior to the Filing of Initial Disclosures Pursuant to MCR 2.301(A), states as follows:

1. Plaintiff filed his Complaint in this Court against 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. 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. This is a civil action against Defendants for 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.

2. 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." 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."

3. 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.

4. 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.

5. Plaintiff moves under MCR 2.301(A)(1) for expedited discovery to take the deposition of this crucial witness, Easthope, to preserve his testimony before the filing of the Plaintiff's initial disclosures and within 14 days of an Order granting this Motion.

6. MCR 2.301(A)(1) authorizes the Court to allow the requested deposition:

> In a case where initial disclosures are required, a party may seek discovery only after the party serves its initial disclosures under MCR 2.302(A). *Otherwise, a party may seek discovery after commencement of the action when authorized by these rules, by stipulation, or by court order.* [emphasis added].

7. MCR 2.301(A)(1) provides no standards as to when the Court should grant an order

permitting discovery before the requesting party has served his initial disclosures. MCR 2.301(A)(1) was newly adopted by the Michigan Supreme Court in 2019, and just took effect on January 1, 2020. Accordingly, there are no Michigan case decisions construing the rule.

8. However, in the absence of state authority, the Court may consider federal authorities that interpret analogous provisions of the federal rules. *Barnard Mfg Co v Gates Performance Eng, Inc*, 285 Mich App 362, 378 n 8; 775 NW2d 618 (2009), appeal den, 485 Mich 1127 (2010). The Federal Rules of Civil Procedure have since 2000 contained an analogous provision, found in in Rule 26(d)(1), which provides:

> *Timing.* 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 disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

9. The courts interpreting Federal Rule 26(d)(1) have held that the trial court's decision whether to allow a party to take a deposition of a witness before the Rule 26(f) conference is based on the following factors: (1) whether the witness has unique knowledge that is critical to the case that cannot be obtained from other witnesses; (2) whether there is a necessity to take the deposition in the near future because of the witness' advanced aged or poor health; and (3) whether the interest of the party seeking to take the deposition outweighs the prejudice to the opposing party as a result of the early deposition. *McNulty v Reddy Ice Holdings, Inc,* Case No. 08-CV-13178; 2010 WL 3834634, *1-2 (ED Mich Sept 27, 2010).

10. Applying these factors, 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.

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

testimony.

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

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

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter an Order that Tom Easthope may be deposed before the filing of Plaintiff's initial disclosures under MCR 2.301(A) 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.

Respectfully submitted,

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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 SERVICE OF INITIAL DISCLOSURES PURSUANT TO MCR 2.301(A)

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 MCR 2.301(A)(1), enter an Order expediting discovery allowing Plaintiff to take Easthope's deposition before the Plaintiff serves his initial disclosures 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

MCR 2.301(A)(1)

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.[1] "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")], ..."[2]

On October 3, 2018, West began investigating DeLuca's allegations against Anderson.[3] Between October 3, 2018 and November 6, 2018, among other things, West: (1) interviewed Deluca and confirmed his allegations against Anderson;[4] (2) learned from DeLuca that other

[1] **Exhibit 1**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, at WCP000006-9.

[2] *Id* at WCP000003.

[3] *Id.*

[4] *Id* at WCP000004.

sports athletes, including football players and cross-country runners called Anderson, "Dr. Drop your drawers Anderson;"[5] (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;"[6] and (4) interviewed another former wrestler who told West that Anderson masturbated the wrestler during medical examinations.[7]

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 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." Easthope described Anderson as a "big shot" at UM, while Easthope was then still fairly new in his position. 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. Easthope remembered that "fooling around with boys in the exam rooms" was the phrase the activist used. Easthope also told West that he fired Anderson from UHS for "fooling around in the exam room with boy patients."[8]

Within a day or two after the Easthope interview, ***West told the UM's General Counsel's***

[5] **Exhibit 1**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, at WCP000004.

[6] *Id* at WCP000005.

[7] *Id* at WCP000011.

[8] *Id* at WCP000017.

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 that was able to tell me of his release 'due to fooling around with boys in the exam rooms.'"[9] 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.[10] 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.[11] And 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

[9] **Exhibit 1**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, at WCP000051.

[10] *Id* at WCP000032.

[11] *Id* at WCP000084.

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. [12]

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 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.

IV. 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

[12] **Exhibit 2**: Excerpt from Volume III of the annual President's Report of The University of Michigan for 1979-1980.

around Anderson at Student Health Services (also known as UHS).[13] 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 against Anderson; and Easthope's direct conversation(s) with Anderson between only the two of them—of which only Easthope is still living.

V. 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." 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. West notes in his report that he "was not able to track down" Stone to interview him. [14]

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 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." Indeed, UM

[13] **Exhibit 1**: Excerpt from Report of UM Public Safety Det. Mark West, Case No. 1890303861, at WCP000084.

[14] *Id* at WCP000085-89.

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. 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."[15]

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

After the Defendants finally disclosed publicly Anderson's decades-long history of sexually abusing male UM students and student-athletes during physical exams, Plaintiff on March 4, 2020 commenced a lawsuit in the federal district court in Detroit to redress the injuries Anderson and Defendants inflicted on him, asserting both federal and state-law claims against the Defendants. Although the district court had jurisdiction over the state-law claims under 28 USC 1367(a), the district court *sua sponte* declined to exercise jurisdiction over the state-law claims under 28 USC 1367(c), on March 10, 2020. The Plaintiff subsequently filed his complaint commencing this case to assert his state-law claims that were dismissed by the district court.

In the district court case, 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.[16] 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

[15] **Exhibit 3:** "UM knew of sex abuse reports against doctor 19 months before going public" Kim Kozlowski, *The Detroit News*, 2/19/2020.

[16] **Exhibit 4**: Bush to Shea and Cox email, 3/18/20, 2:25 pm, with attachment of proposed "Does Tolling Agreement."

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)."[17] 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[18] even though a Federal Rule 12 motion to dismiss is not fact-dependent and thus can be researched, prepared, and filed remotely based on Plaintiff's filed federal court complaint.[19] Defendants further delayed the district court case by filing a Motion to Consolidate Plaintiff's case with the subsequent federal district court cases commenced by other UM students assaulted by Anderson, even though Plaintiff agreed to the relief stated in motion's caption: consolidation of all plaintiff cases in front of U.S. District 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.[20] Indeed, Plaintiff even offered to file the master long-form complaint within four days.[21] However, Plaintiff could not agree to the actual reason for Defendants' actions: indefinite delay. The request for relief in Defendants' Motion to Consolidate requested, 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…").

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[17] **Exhibit 5**: Cox to Bush email, 3/19/20, 12:25 pm; *see also* **Exhibit 7**: Cook to Linkous email, 4/2/20 3:39 pm.

[18] **Exhibit 5**: Bush to Cox email, 3/19/20, 7:42 am.

[19] **Exhibit 6**: Cox to Bush email, 3/27/20, 7:07 pm.

[20] **Exhibit 7**: Cook to Linkous email, 4/2/20 3:39 pm, with proposed stipulated "Order to Consolidate Cases."

[21] *Id.*

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,[22] *and* know that Easthope, a key witness, is well into his Eighties.

When *The Detroit News* exposed the abuse by Anderson on February 19, 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.[23] At the same time Defendants ignored Plaintiff's request to depose Easthope to stall and stymie Plaintiff's factual case. [24]

ARGUMENT

Plaintiff moves under MCR 2.301(A)(1) for expedited discovery to take the deposition of this crucial witness, Easthope, to preserve his testimony before the filing of the Plaintiff's initial disclosures and within 14 days of an Order granting this Motion. MCR 2.301(A)(1) authorizes the

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

[23] 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 8**: Cox to Easthope letter, 4/2/20, with Federal Express documents.

[24] While Defendants did not concur to this motion, see where after an initial refusal to concur, defense counsel agreed to reconsider Plaintiff's motion, based solely on the age of Mr. Easthope. **Exhibit 9**: Cox to Bush and Linkous email, 4/16/2020, 12:25 pm, and Bush Response to Cox, 4/16/2020, 1:55 pm.

Court to grant this relief:

> In a case where initial disclosures are required, a party may seek discovery only after the party serves its initial disclosures under MCR 2.302(A). *Otherwise, a party may seek discovery after commencement of the action when authorized by these rules, by stipulation, or by court order.* [emphasis added].

MCR 2.301(A)(1) provides no standards as to when the Court should grant an order permitting expedited discovery. MCR 2.301(A)(1) was newly adopted by the Michigan Supreme Court in 2019 and just took effect on January 1, 2020. Accordingly, there are no Michigan case decisions construing the rule.

However, in the absence of state authority, the Court may consider federal authorities that interpret analogous provisions of the federal rules. *Barnard Mfg Co v Gates Performance Eng, Inc*, 285 Mich App 362, 378 n 8; 775 NW2d 618 (2009), appeal den, 485 Mich 1127 (2010). The Federal Rules of Civil Procedure have since 2000 contained an analogous provision, found in Rule 26(d)(1), which provides:

> *Timing.* 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 disclosure under Rule 26(a)(1)(B*), or when authorized by these rules, by stipulation, or by court order.* [Emphasis added].

If 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 deposition before the time specified in Rule 26(d), …. Fed. R. Civ. P. 30(a)(2)(A)(iii).

"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." *Lashuay v. Delilne*, No. 17-CV-13581, 2018 WL 317856, at *3 (E.D. Mich. Jan. 8, 2018) (**Exhibit 10**); *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.") (**Exhibit 11**). Good cause exists for an early deposition where "there is a danger that the testimony will be lost by delay." *Respecki v. Baum*, No. 13-CV-13399, 2013 WL 4584714, at *2 (E.D. Mich. Aug. 28, 2013) (**Exhibit 12**). 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." *McNulty v. Reddy Ice Holdings, Inc.*, No. 08-CV-13178; 2010 WL 3834634, at *2 (E.D. Mich. Sept. 27, 2010) (Borman, J.). (**Exhibit 13**).

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.

Federal courts grant leave for early depositions before the parties' Rule 26(f) conference where the witness has essential evidence or unique knowledge that is critical to the case and cannot be garnered from other witnesses. *McNulty*, 2010 WL 3834634 at *1-2 (ED Mich Sept 27, 2010).

In the *McNulty* case, the Michigan district 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." *McNulty*, 2010 WL 3834634, at *2. Plaintiff's claims were based on statements that "**involved only the two individuals**" (plaintiff and the elderly defendant). *Id*. (emphasis added). Thus, the court found "a critical need to take and preserve [the elderly defendant's] testimony." *Id*.

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) and 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 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.[25] Indeed,

[25] **Exhibit 1**: 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.

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.[26]

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 the court found in the *McNulty* case, this Court should again find "a critical need to take and preserve [Easthope's] testimony."

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)." *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**) (**Exhibit 14**). "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." *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)[27] deposition to perpetuate testimony of **80-year old witness** whose age

[26] **Exhibit 2**: Excerpt from Volume III of the annual President's Report of The University of Michigan for 1979-1980.

[27] Federal Rule 27(a) provides a detailed procedure to take a pre-suit deposition.

"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, 609 (3d Cir. 1967) ("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); *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).

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. 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. *Chiquita Brands*, 2015 WL 12601043, at *7. 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." *Id*. 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. *Id*.

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 critical nature of

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

As set forth above, 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; (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 is 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. *See Snow Covered Capital, LLC v. Weidner*, No. 19-CV-00595, *3 (D. Nev. June 26, 2019) ("The prejudice from conducting a blind deposition is heightened by the shortened notice to opposing counsel of the deposition…"). 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 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. 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.[28] Additionally, Plaintiff's counsel reached out to 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 by the attorneys for Plaintiff,

The Mike Cox Law Firm, PLLC

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Dated: April 17, 2020

[28] **Exhibit 5**: Cox to Bush, 3/19/20, 12:25 pm; *see also* **Exhibit 7**: Cook to Linkous email, 4/2/20 3:39 pm.

Exhibit C

From: Bush, Cheryl
Sent: Friday, April 17, 2020 8:44 AM
To: Michael Cox; Jackie Cook; David Shea
Cc: Douglas, Stephanie; Linkous, Derek; Williams, Michael
Subject: RE: Stipulated order for consolidation, long form complaint tomorrow, Easthope deposition, and UM responsive date

Mike,

Thanks for responding and for continuing to work with us.

As part of our discussions, it will be helpful if Plaintiffs could limit accusations of "phony" motions, "charade" requests, or ill intent in filing ordinary motions. *See* E.D. Mich. Civility Principles ("[Attorneys] will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses."). Such rhetoric seems especially inappropriate here, where the University has expressed its wish (repeatedly) to work cooperatively with plaintiffs to try to resolve these cases.

That said, we're glad that we agree on so many things, including (1) the need for consolidation; and (2) the need for short-form and-long form complaints.

We are disappointed that you do not see the need for a conference. As Mr. Shea can share from his experience in the *In re Flint Water Cases*, it requires substantial court involvement to put in place a process for managing complaints, responses, and other case-management matters in litigation of this scale. The Court needs to ensure that the process is a fair one for *all* plaintiffs. The Court would also explain how the process works—for instance, the Court would likely clarify that there is no operative complaint to move against until both a long-form and a short-form complaint are filed.

On consolidation, even though we agree, Judge Borman and the other judges in the district with cases would need to agree to the consolidation. *See* E.D. Mich. LR 42.1(b) ("The district judge presiding in the earliest numbered case will decide the motion. However, the motion *may not be granted unless the judges presiding in the related cases consent*.") This process could also take time, and may require appearances before the judges in the related cases. *See, e.g.*, Dkt. 4 in *Doe MC-4* (setting status conference before Judge Lawson).

Yes, coordination might require some time. In *Flint Water*, it took nearly two years from the time of the first cases being filed before a long-form complaint was ever filed. The University has no interest in that sort of delay, but it highlights why your proposed order calling for a filing in one short day is not realistic in mass litigation like this.

We also do not think that a response to your 313-paragraph complaint, which you intend to be inoperative after the filing of the long-form complaint, can rightfully be analogized to an appellate brief. But again, that's why we want to meet with the Court to discuss an appropriate timeline for responses.

Further, your proposal to depose Mr. Easthope in just two weeks is unrealistic given that (1) we are in the midst of a pandemic-driven shelter-in-place order during which most court operations are suspended; and (2) neither of us have even been in contact with Mr. Easthope. Indeed, 14 days from *issuance* of a subpoena would be an unreasonable time even in ordinary circumstances. *See, e.g., CareFusion 2200, Inc. v. Entrotech Life Sci., Inc.*, No. 2:15-MC-16, 2015 WL 1954587, at *2 (S.D. Ohio Apr. 29, 2015) (noting that 14 days *after service* is the presumptively reasonable time for subpoena compliance).

Given all the above, please let us know whether you agree to (1) the need for a status conference before setting a response date; and (2) a later date for Mr. Easthope's deposition, which would be taken on behalf of all of your clients. If you can, we're happy to stipulate to an early deposition—which the Rules would not ordinary allow at all.

Cheryl

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From: Michael Cox <mc@mikecoxlaw.com>
Sent: Thursday, April 16, 2020 7:28 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>; Williams, Michael <Williams@bsplaw.com>; Michael Cox <mc@mikecoxlaw.com>
Subject: Stipulated order for consolidation, long form complaint tomorrow, Easthope deposition, and UM responsive date

Cheryl:

Sorry for my delay, I had a few fires to put out.

As we stated in our prior emails and telephone calls, we view the phony motion to consolidate and your proposed undated status conference as simply devices for continued delay by UM after UM has known about the likelihood of this litigation since November 5, 2018, if not July 18, 2018. This is especially true where you have stated on numerous occasions, and in the below email, that UM's intent is to dismiss these meritorious claims.

If you are going to seek to dismiss our complaint(s) under a Rule 12 motion, there is no reason for further delay, as that motion(s) is necessarily dependent on *John Doe MC-1's* complaint which was filed on March 4, 2020. It defies logic to put the parties and the Court through a charade of a future conference date, when UM's stated goal is to seek dismissal of the Plaintiff's/plaintiffs' claims. But if your recognition that Mr. Easthope's advanced age is a valid reason to depose him early also presents an opportunity to agree on an order to resolve our issues, I want to do so.

So here are the terms/concepts we propose to resolve your current motion for consolidation and our prospective motion to depose Mr. Easthope:

(1) Consolidation: We agree, as we told you last week, to an order consolidating all of the currently filed 38 federal cases in front of Judge Borman (for full disclosure, I expect we will filed 2-4 new complaints over the next 2 days unless an agreement is reached);
(2) Master Long-form Complaint: We agree, as we told you last week, that we would file a master long-form complaint under the currently captioned *John Doe MC-1 v UM et al* filing;

(3) Plaintiff's Filing of Long-Form Complaint: We agree to an order that requires us to file that master long-form complaint by midnight tomorrow, Friday, April 17, 2020;

(4) Date to File Responsive Pleading To Dismiss Plaintiff"s (Plaintiffs') Claims: We agree to an order that requires you to file your responsive pleading to dismiss the John Doe matters in the master long-form complaint by midnight, Friday, May 15, 2020. This would extend your current responsive pleading date from the current date of May 3, 2020 in *John Doe MC-1 v UM et al.*, an additional 12 days. Because as you wrote in your brief in support of consolidation motion, "(i)n each, the factual allegations are nearly identical and the same 18 [now 38] causes of action are raised" (Consolidation Brief, p. 1), and you later noted the "common issues of law" in all of the complaints, (Consolidation Brief, p. 3), this extension would be more than adequate if you were to file answer that required factual inquiry. Those statements make the case better than I can, that there is no need for an extended period for you, especially where you plan to prepare a motion to dismiss, especially as John Doe MC-1 was filed on March 5, 2020. ***Thus, the proposed responsive pleading date of May 15, 2020 gives you over 10 weeks from the initial filing to write your motion to dismiss.*** This is as much more time as you would get for any state supreme court or federal court appellate brief.

(5) Deposition of Mr. Easthope: We agree to an order that (a) stipulates to the issuance of a subpoena to Mr. Easthope and (b) permits us to depose Mr. Easthope within two weeks after service of that subpoena absent an exigent circumstance;

(6) Supplemental Short-Form Complaints: We agree, as you seek in your motion, to file supplemental short-form complaints for any new plaintiffs that will just provide the new individual plaintiff allegations and incorporate by reference the master long-form complaint that we will file on Friday, April 17, 2020; Because these short-form complaint are relatively rudimentary, and you and Mr. Shea are already using short-form complaints in the Mays v Snyder (so-called, Flint Water Case) we see little need – other than further needless delay – to wait on a status conference to file these simple complaints.

Because we must respond to your captioned motion to consolidate tomorrow, please let me know if above points are acceptable by 9:30 am tomorrow; if so, we will draft a proposed motion for a stipulated order that reflects these terms to circulate.

Thanks, Mike

THE MIKE COX LAW FIRM PLLC

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From: Bush, Cheryl <Bush@bsplaw.com>
Sent: Thursday, April 16, 2020 4:37 PM
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>; Williams, Michael

<Williams@bsplaw.com>
Subject: RE: The actual (or rough, subject to typos) brief.

Mike–

The University continues to believe that the best way to deal with this is at a status conference with the Court, but is willing to work with you on a pre-Rule 26(f) conference deposition of Mr. Easthope. To effectuate both, we would ask that:

- You agree to the remainder of the relief in our motion to consolidate—status conference to set the schedule for long-form and short-form complaints with a new responsive-pleading deadline to follow that—thereby removing the need for further Court attention to that motion; and

- We will agree to work with you to schedule a date for deposition of Mr. Easthope in the next 60 days, subject to his availability, his (presumed) counsel's availability and further orders—thereby removing the need for your motion. This deposition would be the only Easthope deposition taken on behalf of any of your clients.

This agreement is not intended to waive—and should not be construed as a waiver—of the University's sovereign immunity under either federal (11th Amendment) or state law (GTLA).

If this is acceptable to you, we are happy to work on a proposed stipulated order for Judge Borman.

Please let me know,

Cheryl

From: Bush, Cheryl
Sent: Thursday, April 16, 2020 1:55 PM
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: 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

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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

Cheryl A. Bush
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Troy, MI 48084
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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

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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

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2020 WL 1244149
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Virginia CURRAN, Plaintiff,
v.
ETHICON, INC., et al., Defendant.

CIVIL ACTION NO. 19-05755
|
Filed 03/16/2020

Attorneys and Law Firms

Esther Berezofsky, Motley Rice, LLC, Cherry Hill, NJ, Michael J. Quirk, Motley Rice LLC, Philadelphia, PA, for Plaintiff.

Julie A. Callsen, Tucker Ellis LLP, Cleveland, OH, Melissa A. Merk, Molly Elizabeth Flynn, Faegre Drinker, Biddle & Reath LLP, Philadelphia, PA, for Defendant.

MEMORANDUM

PAPPERT, J.

***1** This is one of the many cases involving an allegedly defective pelvic mesh device made by Ethicon, Inc. and Johnson & Johnson (collectively "Ethicon"). Virginia Curran sued Ethicon, as well as Secant Medical, Inc., in the Philadelphia Court of Common Pleas for injuries related to a procedure implanting the pelvic mesh device. After the court dismissed Curran's claims against Secant with prejudice, Ethicon removed the case to federal court. Curran now moves to remand the case back to the Common Pleas Court; Ethicon moves to dismiss for lack of personal jurisdiction or, alternatively, to transfer the case to the United States District Court for the District of Rhode Island. The Court denies Curran's Motion to Remand and Ethicon's Motion to Dismiss but grants Ethicon's Motion to Transfer.

I

The pelvic mesh litigation began over a decade ago. To cope with the influx of cases, the Philadelphia Court of Common Pleas created a mass tort proceeding, *In re Pelvic Mesh Litigation*, over which Judge Arnold L. New still presides. On the master docket, the "pelvic mesh plaintiffs collectively ... file[d] a 'long form' complaint alleging facts and causes of action that applied globally to all pelvic mesh cases." *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1256 (Pa. Super. Ct. 2018). Each individual plaintiff then filed a "short form" complaint adopting all or portions of the long form complaint and "asserting any new facts or causes of action not in the long form complaint." *Id.* The long form complaint in the *Pelvic Mesh Litigation* named Ethicon and Secant, among others, as defendants. *See* (Mot. to Dismiss or Transfer Venue Ex. C, at ¶¶ 2–19, ECF No. 5-5).

In 2014, Secant moved to dismiss all claims against it in the mass tort proceeding. Secant argued that, as a biomaterials supplier, it was immune from liability under the Biomaterials Access Assurance Act, 21 U.S.C. §§ 1601–06 (2012). After briefing and oral argument, Judge New agreed and dismissed all claims against Secant with prejudice. *See* (Defs.' Resp. Opp'n Mot. to Remand Ex. A, ECF No. 7-1) (2014 Order).

Months later, the parties in the *Pelvic Mesh Litigation* entered a stipulation agreeing that Judge New's order dismissing Secant was "global in nature and binding on all Pelvic Mesh cases then pending or thereafter filed in the Philadelphia Court of Common Pleas." (Notice of Removal Ex. A-2, at ¶ 1, ECF No. 1) (2015 Stipulation). The plaintiffs also promised not to name Secant "as a defendant in any Pelvic Mesh matter initiated in the [Philadelphia Court of Common Pleas]." (*Id.* at ¶ 2.) Judge New adopted this stipulation with the clarification that his 2014 Order applied to, and thus dismissed, all claims against Secant filed from August of 2014 to January of 2015. *See* (Notice of Removal Ex. A-3, ECF No. 1) (Clarifying Order). From 2015 through 2018, no plaintiff asserted a claim against Secant in the *Pelvic Mesh Litigation*. *See* (Resp. Opp'n Mot. to Remand 4–5, ECF No. 7); *Monroe v. Ethicon, Inc.*, No. 2:19-cv-05384-MAK, 2019 WL 7050130, at *6 (E.D. Pa. Dec. 23, 2019).

***2** But in 2019, a law firm—Motley Rice, LLC—began filling dozens of individual cases in the *Pelvic Mesh Litigation* naming Secant as a defendant. *See* (Notice of Removal Ex. A-4, at 6 n.1, ECF No. 1). Without adding any new facts or legal theories, the new plaintiffs merely adopted the 2014 long form complaint. *See, e.g.*, (Notice of Removal Ex. A, ECF No. 1) (Short Form Compl.); *Monroe*, 2019 WL 7050130, at *6. Hoping to avoid relitigating the immunity issue, Secant moved to enforce the 2014 Order and the 2015 Stipulation dismissing all claims against it. (Notice of Removal Ex. A-4, ECF No. 1.) Though Judge New

declined this request, he noted that nothing prevented Secant from moving to dismiss the new suits on immunity grounds. *See* (*id.* Ex. A-5, ECF No. 1). Secant did just that, and by late September of 2019 Judge New had dismissed all claims against Secant with prejudice in at least eleven cases filed by Motley Rice. [1]

In October of 2019, Virginia Curran—represented by Motley Rice—sued Ethicon and Secant in the Philadelphia Court of Common Pleas. *See* (Short Form Compl.). As in the other dozen or so Motley Rice cases, Curran's Short Form Complaint adopted the 2014 long form complaint; other than noting that she lived in Massachusetts and had had the pelvic mesh device implanted in Rhode Island, Curran added no new facts or legal theories. *See* (*id.*) Secant promptly moved to dismiss. *See* (Notice of Removal Ex. A, ECF No. 1). In opposing that motion, Curran relied on the facts set out in the long form complaint. *See* (Defs.' Resp. Opp'n Mot. to Remand Ex. C, at 2–4, ECF No. 7-3). As he had done so many times before, Judge New dismissed all claims against Secant with prejudice and ordered Curran to "file an Amended Short Form Complaint that d[id] not name ... Secant ... as a defendant." (Defs.' Mot. to Dismiss Ex. A, ECF No. 5-3.)

II

A defendant may remove a case originally filed in state court to federal court if the federal court would have had original jurisdiction over the case. [2] 28 U.S.C. § 1441(a). In cases lacking a federal question, removal is allowed only if the parties are diverse and the amount in controversy exceeds $75,000. *Id.* § 1332(a). For removal purposes, courts require diversity both when removal is sought and when the suit was filed in the state court. *See Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 346 (3d Cir. 2013). But even if diversity jurisdiction exists, the "forum-defendant rule" bars removal "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2); *see also Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 152 (3d Cir. 2018).

***3** Ethicon appropriately removed this case. The parties agree that the amount in controversy exceeds $75,000. *See* (Notice of Removal ¶¶ 10–12); (Mem. Supp. Mot. to Remand 5, ECF No. 4-1). Curran is a Massachusetts citizen. (Defs.' Mot. to Dismiss or Transfer Venue Ex. B, at ¶ 2, ECF No. 5-4) (Am. Short Form Compl.) Ethicon is a citizen of New Jersey. (Notice of Removal ¶¶ 14–15.) Secant is a citizen of Pennsylvania. *See* (Mem. Supp. Mot. to Remand 7). Thus, diversity jurisdiction existed when Curran first filed the suit and at the time of removal. *See* 28 U.S.C. § 1332(a).

The forum-defendant rule does not apply because Secant was not "properly joined." 28 U.S.C. § 1441(b)(2). The "properly joined" language "prevent[s] a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed." *Encompass Ins.*, 902 F.3d at 153 (quotation omitted). That is, "the phrase 'properly joined and served' addresses a specific problem—fraudulent joinder by a plaintiff." [3] *Id.* A plaintiff fraudulently joins a defendant if: (1) there is no reasonable basis in fact or colorable ground supporting the claim," or (2) the plaintiff had "no real intention in good faith to prosecute the action against the defendant." *In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2006) (quoting *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992)).

Curran lacked a good-faith intention to prosecute her claims against Secant. Judge New dismissed Secant with prejudice from the *Pelvic Mesh Litigation* in 2014. Yet, of all the courts where she could have filed her lawsuit, she went back to Judge New. In doing so, Curran benefited from prior plaintiffs' efforts in drafting the long form complaint. But she also had to know that claims against Secant in the Philadelphia Court of Common Pleas mass tort proceeding were doomed. After all, just weeks before Curran sued Secant, Judge New had dismissed Secant with prejudice from at least eleven identical cases filed by Curran's lawyers. *See supra*, note 1. In not one of those cases did Curran's lawyers offer any new facts or legal theories. Nor did they appeal any of those adverse rulings. This *Groundhog Day*-esque sequence leaves little to no doubt that Curran—and her counsel—knew all along that Secant would be dismissed. Curran had no good-faith intention to prosecute her claims against Secant. Secant was not "properly joined," and Ethicon properly removed the case.

III

"For convenience of parties and witnesses, a district court may transfer any civil action to any other district or division where it might have been brought...." 28 U.S.C. § 1404(a). Transfer under § 1404(a) is appropriate only if "both the original and the requested venue are proper." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 878 (3d Cir. 1995). Venue is proper in any "judicial district in which a substantial part of

the events or omissions giving rise to the claim occurred" or any "district in which [a] defendant is subject to the court's personal jurisdiction with respect to the civil action in question." 28 U.S.C. § 1391(b)(2), (c)(2).

***4** When resolving a motion to transfer, courts consider several private and public interests. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 (2013). Relevant private interests include: (1) the plaintiff's choice of forum; (2) the defendant's preferred forum; (3) where the claims arose; (4) the convenience of the parties; and (5) "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses." *Id.* at 62 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)); *see also Jumara*, 55 F.3d at 878. Relevant public interests include: (1) "practical considerations that could make trial easy, expeditious, or inexpensive"; (2) "the local interest in deciding local controversies at home"; and (3) "the public policies of the fora." *Id.*

The Court concludes that transfer to the District of Rhode Island under § 1404(a) is appropriate here. Venue is proper in this district because, as Judge New ruled, Ethicon is subject to personal jurisdiction in Pennsylvania. *See* (Mem. Opp'n Mot. to Dismiss or Transfer Ex. C, ECF No. 9-3). Venue is proper in the District of Rhode Island because a substantial part of the events or omissions giving rise to the claim— namely, the implantation of the pelvic mesh device —occurred in that district. *See* (Am. Short Form Compl. ¶ 7). Although Curran's preferred forum counsels against transfer, the remaining private interests favor transfer. Far more of the relevant events occurred in Rhode Island, and trial in that district would be more convenient for Curran as a Massachusetts resident. And several key witnesses—such as the physician who implanted the device—are likely in Rhode Island, beyond the Court's subpoena power. The public interests also favor transfer; trial in Philadelphia (removed from the witnesses and evidence) would be more expensive and cumbersome than in Rhode Island, the venue with a greater local interest in resolving this case.

An appropriate order follows.

All Citations

Slip Copy, 2020 WL 1244149

Footnotes

1 *See Newman v. Ethicon, Inc.*, No. 2:19-cv-04496-WB at *1 (E.D. Pa. Nov. 21, 2019) (unpublished); *Seger v. Ethicon, Inc.*, (No. 2:19-cv-04494-TJS, ECF No. 13-6); *Murphy v. Ethicon, Inc.*, (No. 2:19-cv-04495-NIQA, ECF No. 10-6); *Roth v. Ethicon, Inc.*, (No. 2:19-cv-04497-JP, ECF No. 12-6); *Pena v. Ethicon, Inc.*, (No. 2:19-cv-04498-NIQA, ECF No. 10-6); *Crosby v. Ethicon, Inc.*, (No. 2:19-cv-04500-JHS, ECF No. 13-6); *Kuminski v. Ethicon, Inc.*, (No. 2:19-cv-04501-WB, ECF No. 13-6); *Burkhart v. Ethicon, Inc.*, (No. 2:19-cv-04502-ER, ECF No. 12-6); *Morrison v. Ethicon, Inc.*, (No. 2:19-cv-04503-PD, ECF No. 12-6); *Stewart v. Ethicon, Inc.*, (No. 2:19-cv-04776-GAM, ECF No. 8-6); *Davis v. Ethicon, Inc.*, (No. 2:19-cv-04778-ER, ECF No. 8-6).

2 Courts strictly construe removal statutes and resolve all doubts in favor or remand. *See In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2006). The rationale for this rule flows from federal courts' obligation to "scrupulously confine their own jurisdiction to the precise limits which [Congress] has defined." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Indeed, recitations of that strict-construction rule invariably also note that "a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists." *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990). But here "the forum defendant rule is procedural rather than jurisdictional" because this case could have been filed in federal court originally. *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 153 (3d Cir. 2018) (quotation omitted). Given the lack of jurisdictional concerns, it is unclear the Court must strictly construe § 1441(b)(2) or impose any heightened burden on Ethicon. The Court need not resolve that question here, however, because Ethicon prevails under any interpretation of § 1441(b) or any heightened burden.

3 As Judge Baylson warns, courts "must use caution in applying the concept of 'fraudulent joinder,' " particularly when dealing with § 1441(b) because "[t]here is a big gap of facts and law between the concept of a defendant who is not 'properly joined' and a defendant who is 'fraudulently joined.' " *Markham v. Ethicon, Inc.*, —— F. Supp. 3d Cir. ——, 2:19-cv-05464-MMB, 2020 WL 372147, at *3 (E.D. Pa. Jan. 22, 2020) (unpublished). The doctrine of fraudulent joinder typically applies when a plaintiff names a non-diverse party as a defendant to defeat diversity jurisdiction. *See, e.g.*, *In re Briscoe*, 448 F.3d at 217–18. Whether the doctrine also applies when a plaintiff names a diverse, forum defendant is unclear. *See*

Jallad v. Madera, 784 F. App'x 89, 94 (3d Cir. 2019) (unpublished). That said, given § 1441(b)(2)'s "fraudulent-joinder rational," the Court assumes that the traditional fraudulent-joinder standards apply here. *Encompass Ins.*, 902 F.3d at 153.

End of Document

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0116p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION.

IN RE: CVS PHARMACY, INC.; OHIO CVS STORES, L.L.C.; DISCOUNT DRUG MART, INC.; GIANT EAGLE INC.; HBC SERVICE COMPANY; RITE AID OF MARYLAND, INC., dba Mid-Atlantic Customer Support Center; RITE AID OF OHIO, INC.; RITE AID HDQTRS. CORP.; WALGREEN CO.; WALGREEN EASTERN CO., INC.; WALMART, INC.,

Petitioners.

No. 20-3075

On Petition for a Writ of Mandamus.
United States District Court for the Northern District of Ohio at Cleveland;
No. 1:17-md-02804—Dan A. Polster, District Judge.

Decided and Filed: April 15, 2020

Before: SILER, GRIFFIN, and KETHLEDGE, Circuit Judges.

COUNSEL

ON PETITION FOR A WRIT OF MANDAMUS: Benjamin C. Mizer, JONES DAY, Washington, D.C., Robert M. Barnes, Scott D. Livingston, Joshua A. Kobrin, MARCUS & SHAPIRA LLP, Pittsburgh, Pennsylvania, Kelly A. Moore, MORGAN, LEWIS & BOCKIUS LLP, New York, New York, Kaspar Stoffelmayr, BARTLIT BECK LLP, Chicago, Illinois, Alexandra W. Miller, ZUCKERMAN SPAEDER LLP, Washington, D.C., Timothy D. Johnson, CAVITCH FAMILO & DURKIN, CO. LPA, Cleveland, Ohio, for Petitioners. **ON RESPONSE:** Hon. Dan Aaron Polster, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, Cleveland, Ohio, for the Court. Peter H. Weinberger, SPANGENBERG SHIBLEY & LIBER, Cleveland, Ohio, for Respondents Summit County and Cuyahoga County. **ON BRIEF:** Mary Massaron, LAWYERS FOR CIVIL JUSTICE, Bloomfield Hills, Michigan, Nathan Freed Wessler, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, Carter G. Phillips, SIDLEY AUSTIN LLP, Washington, D.C., for Amici Curiae.

OPINION

KETHLEDGE, Circuit Judge. The rule of law applies in multidistrict litigation under 28 U.S.C. § 1407 just as it does in any individual case. Nothing in § 1407 provides any reason to conclude otherwise. Moreover, as the Supreme Court has made clear, every case in an MDL (other than cases for which there is a consolidated complaint) retains its individual character. That means an MDL court's determination of the parties' rights in an individual case must be based on the same legal rules that apply in other cases, as applied to the record in that case alone. Within the limits of those rules, of course, an MDL court has broad discretion to create efficiencies and avoid duplication—of both effort and expenditure—across cases within the MDL. What an MDL court may not do, however, is distort or disregard the rules of law applicable to each of those cases.

The rules at issue here are the Federal Rules of Civil Procedure, which have the same force of law that any statute does. The petitioners seek a writ of mandamus, on grounds that, in three instances, the district court has either disregarded or acted in flat contradiction to those Rules. We grant the writ.

I.

The petitioners here are twelve retail pharmacy chains (the Pharmacies) doing business in the respondent counties, namely Cuyahoga and Summit counties in Ohio. Those counties are plaintiffs in two cases now pending in federal court in the Northern District of Ohio. The Counties' complaints in those cases initially did not include claims against the Pharmacies, but instead asserted claims against certain manufacturers and distributors of prescription opioids. Also pending in the Northern District of Ohio—before the same district judge, but only for purposes of "pretrial proceedings[,]" 28 U.S.C. § 1407(a)—are more than 2,700 other cases transferred there by the Judicial Panel on Multidistrict Litigation. The plaintiffs in all those cases likewise assert claims arising out of the Nation's opioid crisis.

The district court's first Case Management Order in the multidistrict litigation put the Counties' cases (along with one other case that likewise originated in the Northern District of Ohio) on an accelerated "Track One," with a trial date in March 2019. (Most if not all of the other cases in the MDL, so far as the record reveals here, were brought in other districts and thus are ones in which the district court lacks jurisdiction to conduct a trial.) The same Case Management Order set a deadline of April 25, 2018 for the Counties to amend their complaints, which they did, on that date, by asserting claims against the Pharmacies as "distributors" of pharmaceuticals to their own retail pharmacies. The Counties expressly declined, however, to bring any claims against the Pharmacies as "dispensers" of prescription opioids. (Distributors ship pharmaceuticals wholesale; dispensers fill prescriptions.)

The Track One parties thereafter engaged in massive discovery, which included more than 600 depositions and the production of tens of millions of documents. Finally, after discovery ended, the Pharmacies moved for summary judgment on the Counties' claims. Rather than rule upon those motions, however, the district court granted the Counties' motion to sever all but one of the Pharmacies (namely, Walgreens) from the upcoming Track One trial, which by then had been rescheduled for October 2019. Yet on the morning of that trial, the other defendants (*i.e.*, everyone but Walgreens) settled with the Counties, agreeing to pay them $260 million, which came in addition to the $40 million the Counties had already received from earlier settlements. (Together those amounts exceed the sum of all the damages specified in the Counties' complaints.) With only Walgreens left as a defendant for that trial, the district court then cancelled it altogether.

That left the Pharmacies as the remaining defendants in their Track One cases, along with their motions for summary judgment as to the Counties' distribution claims. But again the district court did not rule on those motions. Instead, sometime in October 2019, the district court's Special Master for the MDL informed the Pharmacies that his "understanding" was that the district court "will allow [the Counties] to amend [their complaints] to add dispensing claims." Those were claims, as the district court earlier recognized, that the Counties had expressly disavowed 18 months before. The Counties then moved to amend their complaints to add those claims. In an order dated November 19, 2019—now almost 19 months after the

court's deadline for amendments to the Counties' complaints, and more than 10 months after discovery had closed—the court granted the motion to amend and ordered discovery to proceed anew as to those claims.

That same order also stated that the court "will not receive additional motions to dismiss on distributing claims." The Counties then amended their complaints to add dispensing claims, which the Pharmacies timely moved under Civil Rule 12(b)(6) to dismiss. But the district court refused to rule upon those motions, stating that its order granting the motion to amend "was meant to direct defendants not to file *any* non-jurisdictional motions to dismiss." (Emphasis added.) Meanwhile, the district court ordered the Pharmacies to produce data on every prescription that their pharmacies had filled for virtually any opioid medication, anywhere in the United States, for a period of more than 20 years. The district court later shortened that period to 13 years, requiring data as to all such prescriptions dating back to 2006. And though the court stated that the nationwide data "will be available for future trials of MDL cases[,]" the court stated that all the non-Ohio data would be inadmissible in the Pharmacies' Track-One trial—*i.e.*, in the case in which it would be produced.

This petition for mandamus followed. The Counties and the district court filed responses. The Pharmacies separately moved in the district court to stay the court's discovery order during the pendency of their petition to this court. The district court denied that motion. The Pharmacies then filed the same motion to stay in our court. We granted it.

II.

We grant a writ of mandamus only in "exceptional circumstances" involving a "judicial usurpation of power" or a "clear abuse of discretion." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). In applying that standard, we consider, among other things, whether "the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired"; whether "the petitioner will be damaged or prejudiced in a way not correctable on appeal"; whether the district court's order is plainly incorrect as a matter of law; whether the district court's order "manifests a persistent disregard of the federal rules"; and whether "the district

court's order raises new and important problems[.]" *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008).

Here, the Pharmacies seek relief as to three of the district court's decisions in particular: first, the court's decision to allow the Counties to amend their complaints 19 months after the court's deadline for doing so, and more than 10 months after the close of discovery; second, the court's refusal to adjudicate the Pharmacies' motions under Civil Rule 12(b)(6) to dismiss the Counties' dispensing claims; and third, the court's order requiring the Pharmacies—in a case brought by two counties in Ohio—to produce data for nearly every opioid prescription that they have filled anywhere in the United States for the past 13 years.

We begin with the district court's decision to allow the Counties to amend their complaints. Those amendments came long after the deadline set by the court's scheduling order, which means the court's discretion to allow them was limited by Civil Rule 16(b). *See Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003). That rule provides that "the district judge . . . must issue a scheduling order" that itself "must limit the time[,]" among other things, in which the parties may "amend the pleadings" in the case. Fed. R. Civ. P. 16(b)(1), (3)(A). The Rule thus "ensure[s] that at some point both the parties and the pleadings will be fixed." *Leary*, 349 F.3d at 906 (internal quotation marks omitted). Here, as noted above, the district court entered such an order, setting a deadline of April 25, 2018 for the Counties to amend their complaints in these cases. Thus—in November 2019—the district court could grant the Counties leave to amend their complaints only if the Counties showed "good cause" for their failure to make the amendments 19 months earlier. *See* Fed. R. Civ. P. 16(b)(4); *see also, e.g.*, *Sherman v. Winco Fireworks, Inc*., 532 F.3d 709, 716 (8th Cir. 2008) ("the application of Rule 16(b)'s good-cause standard is not optional"). And that meant the district court could grant leave to amend only if the Counties demonstrated that "despite their diligence they could not meet the original deadline." *Leary*, 349 F.3d at 907; *see also, e.g.*, *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002); *Kmak v. Am. Century Cos.*, 873 F.3d 1030, 1034 (8th Cir. 2017); *Somascan, Inc. v. Phillips Med. Sys. Nederland, B.V.*, 714 F.3d 62, 64 (1st Cir. 2013); *S. Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235, 1241-43 (11th Cir. 2009); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

Neither the Counties nor the district court have even attempted to show that the Counties demonstrated diligence as required by Rule 16(b). Quite the contrary: as the district court recognized then, and as the Counties concede now, the Counties did not bring their dispensing claims earlier because they *expressly chose not to bring them*. Counties' Opp. at 4. Indeed, the Counties' knowing and voluntary relinquishment of those claims arguably amounts to an outright waiver of them. *See generally United States v. Olano*, 507 U.S. 725, 733 (1993). Not a circuit court in the country, so far as we can tell, would allow a district court to amend its scheduling order under these circumstances.

The district court appeared to recognize as much in its order granting leave to amend, conceding that the Pharmacies' "point would be better taken in the context of a single case." But the court asserted that, "in the context of an MDL, their objections lose much of their import." Specifically, in its response to the petition here, the court stated as follows:

> The MDL court determined that the next bellwether trial ("Track One-B") should address claims against the six severed pharmacy defendants, and the trial would be most efficient if it included not only existing "distribution claims" but also claims against those same pharmacies as *dispensers*. . . . Accordingly, good cause existed to grant [the Counties'] motion for leave to amend.

The district judge in this case is notably conscientious and capable, and we fully recognize the complexity of his task in managing the MDL here. But the law governs an MDL court's decisions just as it does a court's decisions in any other case. The Supreme Court illustrated precisely that point in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998). There, a unanimous Court stopped in its tracks the MDL courts' nascent practice of conducting trials in cases where, under the plain terms of 28 U.S.C. § 1407, the MDL courts lacked power to conduct them. *See* 28 U.S.C. § 1407(a) (authorizing the transfer of cases to an MDL court for only "pretrial proceedings"). That some observers thought it "more desirable" that MDL courts should have that power was beside the point—because the relevant law made clear they did not. *Id*. at 40.

Here, the relevant law takes the form of the Federal Rules of Civil Procedure. Promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, those Rules are binding upon court and parties alike, with fully the force of law. *See Bank of Nova Scotia v. United States*, 487

U.S. 250, 255 (1988); *In re Pangang Grp. Co.*, 901 F.3d 1046, 1055 (9th Cir. 2018); *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 506 (D.C. Cir. 2016). For our purposes the relevant rule is Rule 16(b), whose requirements, as shown above, are woefully unmet here. And the district court's stated basis for finding "good cause"—namely, that "the trial would be most efficient if it included not only existing 'distribution claims' but also claims against those same pharmacies as *dispensers*"—is simply no substitute for the showing of diligence required by the Rule. To the contrary, the requirements of the Civil Rules in an MDL case—indeed, the requirements for granting "a motion to amend" in particular—"are the same as those for ordinary litigation on an ordinary docket." *In re Korean Air Lines Co.*, 642 F.3d 685, 700 (9th Cir. 2011).

Respectfully, the district court's mistake was to think it had authority to disregard the Rules' requirements in the Pharmacies' cases in favor of enhancing the efficiency of the MDL as a whole. True, § 1407 provides for the transfer of certain actions to MDL courts to "promote the just and efficient conduct of such actions"; and true, Civil Rule 1 says that the Rules should be construed "to secure the just, speedy, and inexpensive determination of every action and proceeding." But MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance. For neither § 1407 nor Rule 1 remotely suggests that, whereas the Rules are law in individual cases, they are merely hortatory in MDL ones.

Indeed the very premise of that proposition is wrong. Instead, the Supreme Court—again unanimously—has said that, subject to one exception not relevant here, the cases within an MDL "retain their separate identities." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 (2015). That means a district court's decision whether to grant a motion to amend in an individual case depends on the record in that case and not others. Nor can a party's rights in one case be impinged to create efficiencies in the MDL generally. "Section 1407 refers to individual 'actions' which may be transferred to a single district court, not to any monolithic multidistrict 'action' created by transfer." *Id.*

Had the Counties timely amended their complaints to add dispensing claims, of course, the district court would have been entirely within its discretion to find that, for purposes of the MDL as a whole, the trial in these cases "would be most efficient if [the trial] included" both distributing and dispensing claims. The problem with the finding here was that, by the time the

court made it, the Counties had "affirmative[ly] disavow[ed]" those claims, and discovery as to the claims that the Counties actually did plead was already complete. Those developments gave the Pharmacies certain procedural rights that the district court was bound to respect. The court's attempt nonetheless to inject those claims back into the Pharmacies' cases was plainly contrary to law, in the form of Rule 16(b)—which means that the court's decision to grant the Counties leave to amend was a clear abuse of discretion.

Nor is the court's decision defensible on the ground that, if dispensing claims are not tried in the Counties' cases (over which the district court has trial jurisdiction), they will perforce be tried "in front of some other Court that does not have the expertise I have developed over the past two years." The reason why those claims would be tried in front of another judge is that—under the plain terms of § 1407(a) and the Supreme Court's holding in *Lexecon*—the MDL court's adjudicatory authority in transferred cases is limited to "pretrial proceedings." And a desire to circumvent those limits does not constitute "good cause" under Rule 16(b).

None of this is to say that an MDL court lacks broad discretion to create efficiencies and to avoid unnecessary duplication in its management of pretrial proceedings in the MDL. But an MDL court must find efficiencies within the Civil Rules, rather than in violation of them. As the Ninth Circuit explained in circumstances similar to those here:

> There is much, of course, that an MDL court can do in its sound discretion in order to manage multidistrict litigation effectively. It can designate a lead counsel. It can hold some cases in abeyance while proceeding with others. In discretionary matters going to the phasing, timing, and coordination of the cases, the power of the MDL court is at its peak. But when it comes to motions that can spell the life or death of a case, such as motions for summary judgment, motions to dismiss claims, or, as here, a motion to amend pleadings, it is important for the district court to articulate and apply the traditional standards governing such motions.

In re Korean Air Lines Co., 642 F.3d at 700.

In sum, the district court's decision to grant leave to amend was plainly incorrect as a matter of law; the Pharmacies have "no other adequate means" to obtain relief from that decision; the Pharmacies will be prejudiced by that decision "in a way not correctable on appeal"; and the decision "manifests a persistent disregard of the federal rules," which—in the

MDL context especially—presents "important problems" that often evade appellate review. *John B.*, 531 F.3d at 457. We will therefore grant the writ and order that the Counties' November 2019 amendments to their complaints be stricken.

That relief renders the petition moot as to the other grounds on which the Pharmacies sought relief—namely, that the district court had refused to adjudicate their motions to dismiss, and that the court had ordered nationwide discovery of prescription data in a case where the parties could use very little of that data. Given that more than 2,700 cases remain pending in the MDL, however, we make the following observations for purposes of the litigation going forward. The first is that Civil Rule 12(b) states that "a party *may* assert" the defenses enumerated therein "by motion," which means that the district court may *not* refuse to adjudicate motions properly filed under that Rule. (Emphasis added.) The second is that the question whether discovery is "proportional to the needs of the case" under Rule 26(b)(1) must—per the terms of the Rule—be based on the court's determination of the needs of the particular case in which the discovery is ordered. That limitation does not prevent the MDL court from creating efficiencies in the MDL generally; to the contrary, presumably the very reason the cases were transferred to the MDL court in the first place is that the needs of some cases are the same as those of many others.

* * *

The petition for a writ of mandamus is granted, and the cases are remanded with instructions to strike each County's November 2019 "Amendment by Interlineation."