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 only)

Defendants.
_____/

Case No. 2:20-CV-10568

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

THE UNIVERSITY'S RESPONSE TO
PLAINTIFF'S EMERGENCY MOTION

COUNTERSTATEMENT OF ISSUE PRESENTED

Plaintiff's counsel has filed nearly 50 cases on behalf of different clients in this District alone. More cases from other survivors are still to come. This State is under public-health emergency orders. Yet Plaintiff seeks to depose a witness in this case—with whom counsel has not spoken—in two weeks' time, all before the University's motion to dismiss is resolved and before either a discovery conference or any court conference has been had. Under these circumstances,

> Has Plaintiff's counsel shown the good cause necessary to issue a deposition subpoena to Mr. Easthope?
>
> Plaintiff answers: Yes
>
> The University answers: No
>
> This Court should answer: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

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

Gen. Ret. Sys. of the City of Detroit v. Onyx Capital Advisors, LLC, 2010 WL 2231885 (E.D. Mich. June 4, 2010)

Lashuay v. Delilne, 2018 WL 317856 (E.D. Mich. Jan. 8, 2018)

Edmo v. Idaho Dep't of Correction, No. 1:17-CV-00151-BLW, 2020 WL 1907560, at *2 (D. Idaho Apr. 17, 2020)

Manual on Complex Litigation (4th ed.) § 11:1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The University does not oppose a deposition of Thomas Easthope, the University's former Vice President of Student Life.[1] And it does not necessarily oppose it happening before a Rule 26 discovery conference. But the University *does* oppose discovery that is potentially duplicative, inconsistent, and unnecessarily costly for all parties. Rushing into a deposition of Mr. Easthope—a witness who is not the University's to produce and with whom counsel has not spoken—on Plaintiff's counsel's breakneck schedule risks just that. All of this is even before considering that this "emergency" motion comes in the middle of an actual public-health emergency. Plaintiff's motion should be denied.

The ordinary rule is that discovery takes place after the parties make a plan for it and work out that plan with the Court. *See* Fed. R. Civ. P. 26(d). This process lets the parties avoid duplicative efforts, protect confidentiality and privacy, and schedule discovery in an orderly way—issues that surely need to be addressed here.

Taking a deposition in two weeks' time—before the University's motion to dismiss is resolved, a discovery conference, or any court conference—is extreme and unwarranted, particularly in this complex set of cases. Even more so when Plaintiff stresses that the deposition will be a critical part of this litigation. Plaintiff's

[1] The University of Michigan is an improper defendant. The Board of Regents of the University of Michigan is the body corporate with the authority to be sued under law. *See* Mich. Comp. Laws § 390.4.

counsel has filed nearly 50 cases on behalf of different clients in this District alone. It makes good sense to have a court conference—even if not a formal Rule 16 conference—before rushing into discovery in just one of those cases.

Such cross-case coordination is necessary not only to align all the cases filed by Plaintiff's counsel, but also the many not-yet-filed cases from survivors not represented by counsel to this Plaintiff. The University is committed to ensuring fairness to all survivors. That can only happen effectively with a court conference before the current parties launch into discovery.

The University is moving expeditiously to make that conference happen. Weeks ago, it filed a motion to consolidate, which is now fully briefed and would put the parties on track for such a court conference. When the University initially proposed consolidation and a litigation-management plan, Plaintiff's counsel said that he wished to take Mr. Easthope's immediate deposition to aid in settlement discussions. But Plaintiff's counsel's rationale has changed; now professing to be concerned about Mr. Easthope's age, Plaintiff's counsel wishes to take a deposition for the purpose of preserving Mr. Easthope's testimony, in the middle of the COVID-19 emergency gripping this State. Plaintiff's counsel does not assert that Mr. Easthope is in poor health, let alone provide evidence of such, to support the "emergency."

Given Mr. Easthope's age, the parties can certainly prioritize Mr. Easthope's deposition. But that does not mean that Mr. Easthope's testimony will be lost if not preserved within the 14-day timeline that Plaintiff's counsel urges. Indeed, the current public-health crisis makes the hurry to depose Mr. Easthope all the more impractical. Exposing Mr. Easthope to others is not an option. The parties will thus need to coordinate with him (or his counsel) a virtual non-party deposition, which will be cumbersome and require time to plan. *See* Fed. R. Civ. P. 45(d)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.").

The University thus proposes that the Court (1) grant the University's pending motion to consolidate these cases; (2) conduct an initial case-management conference at the Court's convenience; and (3) subject to his availability, permit a deposition of Mr. Easthope within 45 days of that conference.[2]

[2] The University is immune from suit on nearly all of Plaintiff's claims under the doctrine of sovereign immunity. The University will agree to Mr. Easthope's deposition in the spirit of cooperation, but by doing so, the University does not waive immunity. The University has expressly raised sovereign immunity in its motion to dismiss. *See Nair v. Oakland Cty. Community Mental Health Auth.*, 443 F.3d 469, 476 (6th Cir. 2006).

BACKGROUND

A. Factual Background

This case is one of nearly 50 filed by Plaintiff's counsel on behalf of individuals making claims against the University based on allegations of sexual misconduct by Robert Anderson. *See* Ex. A (table of cases). The first two complaints were filed on March 4, 2020, and in the weeks since, similar complaints have been filed on behalf of 45 other Doe-MCs. *Id*. Some of the complaints have already been amended. *See, e.g.*, Am. Compl., ECF No. 13, *Doe MC-19 v. University of Michigan* (E.D. Mich. No. 20-CV-10679). The University accepted service in the earliest cases, and waived service in the rest. The cases are currently assigned to ten different judges in this District. Other attorneys have announced that they have been retained by survivors but are not pursuing lawsuits at this point. *See, e.g.*, https://www.mlive.com/news/ann-arbor/2020/04/former-university-of-michigan-football-players-reported-sexual-abuse-by-doctor-to-three-trainers-lawsuits-say.html (last visited April 28, 2020). And some attorneys have filed notices of intent to sue with the Michigan Court of Claims that list federal causes of action.

B. Efforts to consolidate the complaints and requests for early depositions

In an early effort to proactively manage this increasingly complex litigation, undersigned counsel proposed to Plaintiff's counsel the following plan: (1) the

parties jointly seek an order from the Court consolidating all cases into a single master docket; (2) the Plaintiffs file a master long-form complaint with common allegations within 30 days of the Court entering that Order; (3) the parties appear before the Court for a conference to determine the scope and contents of short-form complaints, the University's time and method of response, and any other issues relevant to progressing the matter. ECF No. 14, Mot. to Consolidate. The University made this proposal to avoid duplicative and inconsistent rulings and work. *Id*. at 5–7. Plaintiff's counsel agreed to the proposals for consolidation and filing of a master long-form complaint but did not agree to an early case-management conference. Given the complexities that will remain until that conference, undersigned counsel filed a motion to consolidate on April 3, 2020.

Separately but relatedly, the University had earlier sought Plaintiff's counsel's agreement for additional time to respond to the earliest-filed complaints. *See* ECF No. 16-8. Plaintiff's counsel agreed to some extension, but conditioned full agreement on the University agreeing to early depositions of ***both*** Mr. Easthope and University of Michigan Police Detective Mark West. *Id*.[3] Plaintiff's counsel urged that these depositions would "assist us in settling the case(s)." *Id*. On April 15, Plaintiff's counsel renewed this request solely as to Mr. Easthope, seeking his

[3] Unless otherwise noted, all emphases and alterations are added, and all internal quotation marks, citations, and footnotes are omitted.

deposition within 30 days. On April 16, Plaintiff's counsel sent a draft motion, indicating for the first time that he was concerned about Mr. Easthope's age. Without explanation, Plaintiff's counsel also moved up the timeline for a court-ordered deposition from 30 days to 14 days.

Undersigned counsel attempted to work with Plaintiff's counsel, agreeing to the notion of an early deposition and asking for two measures necessary to advance these cases in an orderly fashion: first, "a 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 [the University's] motion" to consolidate, and second, for the parties to find a mutually agreeable date for Mr. Easthope's deposition "in the next 60 days." Ex. B (Apr. 16, 2020 Email from C. Bush to M. Cox).

Plaintiff's counsel called the request for a conference "phony," insisted that Mr. Easthope be deposed "within two weeks of service of [a] subpoena," and demanded that the University respond to all his clients' complaints by May 15, 2020. Ex. C (Apr. 16, 2020 Email from M. Cox to C. Bush). He gave the University just a few overnight hours to agree to these demands or face a motion.

The undersigned nevertheless tried again to reach an agreement on the morning of April 17, 2020, within the time limit imposed by Plaintiff's counsel. Ex. D (Apr. 17, 2020 Email from C. Bush to M. Cox). The undersigned explained

that the University seeks an orderly process that "is a fair one for *all* plaintiffs," and that under the local rules, "[o]n consolidation, even though we agree, Judge Borman and the other judges in the district with cases would need to agree to the consolidation." *Id*. (emphases in original). The undersigned clarified that counsel had not been in contact with Mr. Easthope, *id*., nor has anyone from the University's General Counsel's Office.[4] The University therefore requested again that the parties ask for a short conference with the Court and work together on a date for Mr. Easthope's deposition.

Plaintiff's counsel never responded to the University's last proposal. Instead, Plaintiff's counsel filed this motion, labeling it an emergency. Plaintiff's counsel also filed a second suit against the University in state court on behalf of this Plaintiff (but not his other Doe clients), *Doe MC-1 v. University of Michigan*, No. 20-379-NO (Washtenaw Cty. Cir. Ct.), and also filed a substantively identical, *ex parte* motion to take Mr. Easthope's deposition out of time. Ex. E (Emerg. Mot.).

C. Current Procedural Posture

The University's first responsive pleading to the earliest complaints is due May 3, 2020. Plaintiff's counsel has declined to grant any further extension. The

[4] The University has hired the law firm of WilmerHale to conduct an independent investigation and to produce a public report on these matters. *See* https://record.umich.edu/articles/u-m-hires-wilmerhale-to-handle-robert-e-anderson-investigation/ (last visited Apr. 28, 2020).

University's first responsive pleadings to the latest-filed federal complaints are not due until June 12, 2020.[5] Plaintiff's counsel has offered no proposal for, or acknowledgement of the need for, the coordination of discovery, the means of protecting private information in discovery, the overall timing of discovery, or any discovery-related topic—other than Plaintiff's counsel's serial requests for immediate depositions in this single case.

No status conference is set before this Court, but Judge Lawson has set status conferences in his five cases. *See e.g.*, ECF No. 12, *Doe MC-4 v University of Michigan et al.*, No. 20-CV-10582 (setting status conference for May 11, 2020). The University's motion to consolidate all of these cases and to set a status conference before this Court to discuss how to manage the cases is now fully briefed.

LEGAL STANDARD

"Expedited discovery is not the norm." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000). "The Federal Rules of Civil Procedure generally require a discovery conference under Rule 26(f) prior to the commencement of discovery." *Plumbers Local 98 Defined Benefit Pension Fund v. Oakland Contracting Co.*, 2019 WL 5068471 at *1 (E.D. Mich. Oct. 9, 2019). However, under Fed. R. Civ. P. 26(d), the Court may enter an order

[5] Plaintiff's counsel requested waivers of service for the latest wave of complaints earlier today. Once those waivers are executed, the University's response to those complaints will be due on June 30, 2020.

permitting discovery in advance of a scheduling conference. Fed. R. Civ. P. 26(d) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized . . . by court order."); *see also* Fed. R. Civ. P. 30(a). In this District and many others, courts grant such orders only upon a showing of "good cause." *McCluskey v. Belford High School*, 2010 WL2696599, *1 (E.D. Mich. June 24, 2010); *see* 8A Fed. Prac. & Proc. Civ. § 2046.1 (3rd ed. 2010) ("Although the rule does not say so, it is implicit that some showing of good cause should be made to justify such an order."). "But courts tend to find good cause at this very early stage only in narrow circumstances, such as where a party seeks information related to the issues of identity, jurisdiction, or venue." *Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp.*, 296 F.R.D. 1, 2 (D.D.C. 2013).

Plaintiff bears the "burden of showing good cause or need in order to justify deviation from the normal timing of discovery." *Gen. Ret. Sys. of the City of Detroit v. Onyx Capital Advisors, LLC*, 2010 WL 2231885, at *3 (E.D. Mich. June 4, 2010). And good cause is assessed based on the circumstances of *this* case, at *this* moment in time. *See, e.g.*, *Merrill Lynch*, 194 F.R.D. at 624 (considering the "reasonableness of the request" for expedited discovery to prepare for a preliminary injunction hearing "in light of all of the surrounding circumstances"). Courts have noted that expedited discovery requests should be "limited" in scope, and that a request to depose someone about "any and all information necessary for Plaintiffs to establish

their cause of action" may not be appropriately limited. *Bug Juice Brands, Inc. v. Great Lakes Bottling Co.*, 2010 WL 1418032, at *2 (W.D. Mich. Apr. 6, 2010).

In dealing with these sorts of requests, some courts have looked to the five factors laid out in *Lashuay v. Delilne*, 2018 WL 317856 (E.D. Mich. Jan. 8, 2018): "(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made." *Id*. at *4.

ARGUMENT

I. Plaintiff lacks good cause for a deposition within 14 days from a court order granting the motion.

As with the University's motion to consolidate, the parties start on common ground. The University is not opposed to Plaintiff deposing Mr. Easthope prior to a Rule 26 conference to preserve his testimony. What the University is opposed to, however, is a deposition of Mr. Easthope before the parties and Court have had the opportunity to adequately plan some course for this litigation. Coordinating numerous, related-yet-individualized cases requires care and a plan. That is why 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.) § 11:11. By consolidating cases before a single

judge and setting an early status conference, the "common issues … susceptible to common proof" can "be discovered and litigated efficiently and fairly, through motions or otherwise, in coordinated or consolidated proceedings." *Id.* § 22.311.

These cases, filed anonymously by survivors of sexual abuse, involve important considerations of privacy and fairness that must be carefully discussed and agreed upon prior to discovery.[6]

- How will the parties and Court protect the anonymity and privacy of plaintiffs?
- What considerations must be given to the privacy of non-plaintiffs?
- If depositions proceed, whose lawyers should have the opportunity to attend and participate and under what conditions?
- Will depositions be taken in all pending cases—federal and state?
- Will counsel for claimants who have not yet brought suit be invited to participate?
- Should dispositive motions or the like be decided before discovery proceeds, so that the depositions can be appropriately cabined to live issues?

These questions require discussion among the parties and the Court. Indeed, without some basic coordination, Mr. Easthope could be subject to deposition after deposition concerning the same essential facts—or otherwise, other survivor's counsel would be reliant on this Plaintiff's counsel's questioning.

[6] Plaintiff's counsel has yet to identify any of his clients, including Plaintiff here.

Even before answering these questions, the parties and the Court need to address other basic issues: the process for adding additional allegations or parties, the coordination of cases brought (or not) by other counsel, and whether and when the parties will pursue alternative resolution. The University is committed to finding a process that treats *all* survivors fairly. That cannot happen if discovery begins in a single case in the absence of any sort of litigation plan.

Plaintiff urges that Mr. Easthope's deposition must proceed in just days because Mr. Easthope is 87 years old. But age alone is not enough to justify the requested "deviation from the normal timing of discovery" under Rule 26(d). *Onyx Capital*, 2010 WL 2231885, at *3; *accord, e.g.*, *Doe 1 v. Miles*, 2019 WL 201567, at *1 (D. Utah Jan. 15, 2019) (denying request for expedited discovery where "Plaintiffs' only basis for requesting [it] … is the allegation that [the witnesses] are of advanced age"); *Michael v. Estate of Kovarbasich by & Through Marano*, 2015 WL 13757325, at *2 (N.D.W. Va. Apr. 10, 2015) ("Plaintiffs' assertion that Mr. Layne's advanced age necessitates an expedited deposition is insufficient, as Plaintiffs presented no indication that Mr. Layne is either physically or mentally infirm."); *Cashland Inc. v. Cashland Inc.*, 2016 WL 6916776, at *1 n.4 (W.D. Okla. Jan. 14, 2016) (refusing early deposition of 71-year old diagnosed with prostate cancer); *Waters, Cafesjian Family Found., Inc. v. Waters*, 2012 WL 12925068, at *2 (D. Minn. June 27, 2012) ("Simply relying on the mere fact of Mr. Cafesjian's

age alone to support a request for expedited discovery does not demonstrate good cause.").

Plaintiff provides no justification for taking Mr. Easthope's deposition on an emergency basis in a matter of days, as opposed to several weeks from now, after the parties have adequately coordinated with the Court.

Indeed, the timing of Plaintiff's motion belies its urgency—if Plaintiff's counsel thought it necessary to depose Mr. Easthope ***immediately***, he could have filed this motion upon filing his complaint, more than six weeks ago.

The other premise underlying Plaintiff's counsel's motion is equally unavailing. Plaintiff's counsel states that the University's "General Counsel's Office – if not even UM's outside counsel – *must have* already interviewed Easthope many times." ECF No. 16 at 11; *see also id.* at 19. This is simply not true. Plaintiff's counsel was told on April 17, 2020 that the undersigned counsel had not spoken to Mr. Easthope, *see* Ex. D, and the University's General Counsel's Office has similarly not spoken to Mr. Easthope about these matters. Mr. Easthope is a third party,[7] and Plaintiff's counsel has not produced any good cause to justify his request to depose Mr. Easthope out of time, let alone on a claimed emergency basis.

The *Lashuay* factors also weigh against this emergency request:

[7] It is because Mr. Easthope is *not* represented by the University's counsel that it was permissible for Plaintiff's counsel to reach out to him as he did. *See* ECF No. 16-11; Mich. R. Prof. Conduct 4.2.

1. There is no preliminary injunction pending. Indeed, this motion was not brought until six weeks after Plaintiff filed his complaint.

2. Plaintiff has suggested no limits be placed on this deposition, notwithstanding that, among other legal defenses, the University is immune from virtually all of Plaintiff's claims. *See supra* n.2.

3. The purpose of preserving testimony is not improper, but Plaintiff has not shown that this purpose cannot be effectuated in a matter of weeks, not days. *See supra.*

4. The burden is clear. Mr. Easthope may not even be aware he is the subject of these dual attempts before two courts to obtain his deposition while the State is still under an actual emergency public-health order from Governor Whitmer. And the University has no authority to produce him for deposition, much less to do so within two weeks, all while the University is grappling with its own COVID-19-related issues.

5. This is well in advance of when discovery would typically proceed. The University has just today filed its initial responsive pleading to Plaintiff's soon-to-be-supplanted complaint. In fact, Plaintiff's request is well in advance of the cases he cites that ordered expedited discovery. *See infra*.

The *Lashuay* factors confirm that Plaintiff lacks the good cause he bears the burden of showing to justify his extraordinary request—especially in the face of reasonable attempts to cooperate by the University and a *bona fide* emergency in the form of COVID-19. *See Tween Brands Inv., LLC v. Bluestar All.*, LLC, 2015 WL 5139487, at *3 (S.D. Ohio Sept. 1, 2015) ("[T]he Court must weigh the need for the discovery against the prejudice to the responding party."); *see Lashuay*, 2018 WL 317856, at *3 ("good cause may be found where the plaintiff's need for expedited discovery outweighs the possible prejudice or hardship to the defendant").

Plaintiff's cases do not help him. *McNulty v. Reddy Ice Holdings, Inc.*, 2010 WL 3834634 (E.D. Mich. Sept. 27, 2010), was a case that had been ***pending for two years*** with a parallel criminal investigation. This Court was deciding whether to permit discovery in light of the government's parallel investigation—not in light of Rule 26's timing and scheduling requirements. *In re Chiquita Brands Int'l, Inc.*, No. 07-CV-60821, 2015 WL 12601043 (S.D. Fla. Apr. 7, 2015), had similarly been ***pending for years***, and the court had ruled on a motion to dismiss, before the plaintiffs sought discovery. In both cases, the basic case management tasks had been achieved, and the courts were balancing the need for discovery against other interests. Neither involved, as here, a request for immediate discovery prior to any structure or plan—or even a responsive pleading.

Similarly, *Penn Mutual Life Ins. Co v. United States*, 68 F.3d 1371, 1375 (D.C. Cir. 1995), and *Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967) are inapposite. *Penn Mutual* involved Rule 27, which governs pre-suit requests for discovery where a party anticipates that it will be a party to litigation but is unable to bring the case to court. *See* Fed. R. Civ. P. 27(a)(1). And the petitioner in *Texaco* sought mandamus to take a deposition after the trial court stayed civil proceedings indefinitely until the conclusion of a parallel criminal action.

In either situation, the party seeking the deposition was unsure when litigation might commence. *See Texaco*, 383 F.2d at 609 (litigation contingent on end of

criminal action at "undeterminable" date); *In re Town of Amenia*, 200 F.R.D. 200, 202 (S.D.N.Y. 2001) ("An indeterminate length of time may pass before the anticipated litigation is commenced and progresses to the discovery stage."). Not so here. In fact, it's practically the ***opposite*** situation. Litigation has started and the parties need only form an orderly plan for conducting it. The University does not seek an "indeterminate" delay of Mr. Easthope's deposition; it agrees that the deposition should occur, and merely wishes to do some basic planning before going ahead. *Accord Michael*, 2015 WL 13757325, at *3 (finding plaintiff had established good cause for a pre-Rule-26(f)-conference deposition of a witness to events in the 1970s, but only after "some point in time" more than 180 days after the order).

II. The COVID-19 pandemic makes it particularly inappropriate to rush to depose Mr. Easthope.

Further complicating Plaintiff's demand for a near-immediate deposition is the significant disruption caused by COVID-19. The first of these cases was filed just days before the State-mandated shutdown orders took effect and others have followed during the shutdown. As required by Governor Whitmer's orders, the University and its counsel here implemented efforts to help prevent the spread of the disease, including limiting travel and visitors at facilities, and shifting the workforce and course delivery online, with only essential workers reporting to their offices.[8]

[8] *See* Statement on U-M's Response to the COVID-19 Pandemic at March 2020 Board of Regents Meeting (available at https://bit.ly/3cnVyEX).

These efforts reduce (and sometimes eliminate) access to equipment, documents and information, and personnel necessary to properly and efficiently litigate this case, especially given its early status and complex procedural structure. During this time, the University and its counsel will not have physical access to witnesses, files, and equipment. Meanwhile, COVID-19 has required University employees—including in-house counsel—to devote enormous energies to addressing new challenges presented by the spread of the disease, the orders resulting from it, and the new reality of a university campus with no students and a health system beset by responding to the urgent needs of its community.

Planning and preparing for a remote deposition during this extraordinary time will be a complicated endeavor and will take time, negotiation, and agreement to execute. At this point, neither the undersigned counsel nor (apparently) Plaintiff's counsel have been in touch with Mr. Easthope—or any counsel he individually may have. We hope we can presume that Plaintiff's counsel is not seeking an in-person deposition, as that would contravene the Governor's clear social-distancing guidelines. And if the deposition is to proceed remotely, it is unclear whether Mr. Easthope has access to technology necessary to execute such a deposition, or how the deposition would occur if he does not. *See, e.g.*, *Edmo v. Idaho Dep't of Correction*, No. 1:17-CV-00151-BLW, 2020 WL 1907560, at *2 (D. Idaho Apr. 17, 2020) ("[T]he COVID-19 pandemic and resultant stay-at-home orders would

currently prevent Plaintiff's counsel from performing any in-person depositions at this time, and would potentially prevent deponents from being available to appear – even by way of video deposition.").

An order to take Mr. Easthope's deposition in 14 days may be unachievable, or at the very least will set off an avoidable logistical scramble. Even the simple task of serving the Rule 45 subpoena necessary to obtain Mr. Easthope's deposition would require personal service, *see Blankenship v. Superior Controls, Inc.*, 2014 WL 12659919, at *2 (E.D. Mich. Oct. 2, 2014), violating the Governor's admonition to maintain social distance.

III. The parties should proceed with a case management conference and there determine when Mr. Easthope's deposition should go forward.

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

a. The Court denies Plaintiff's motion without prejudice;

b. The Court grants the University's motion to consolidate, and the parties work with the Court to get filed cases transferred to this Court; and

c. The Court sets a status conference to discuss the issues raised by the parties in this motion and determine when a deposition of Mr. Easthope should go forward.

CONCLUSION

For these reasons, Plaintiff's emergency motion should be denied without prejudice for renewal after the parties and the Court have had the opportunity to discuss the structure and procedure of this case.

Respectfully submitted,

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Dated: May 1, 2020

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 only),

Defendants.
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Case No. 20-CV-10568

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

INDEX OF EXHIBITS

Exhibit No.	Description
A	Table of Cases
B	April 16, 2020 Bush Email
C	April 16, 2020 Cox Email
D	April 17, 2020 Bush Email
E	State Court Motion
F	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. Tarnow	Yes
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. Borman*	Yes
4/3/2020	*Doe MC-34*	20-CV-10868	J. Borman*	Yes
4/2/2020	*Doe MC-35*	20-CV-10859	C.J. Hood	
4/6/2020	*Doe MC-36*	20-CV-10875	C.J. Hood	

Date filed	Plaintiff	E.D. Mich. No.	Judge (* denotes reassigned)	Suppl. Juris. Declined
4/7/2020	*Doe MC-38*[1]	20-CV-10888	J. Borman*	Yes
4/7/2020	*Doe MC-39*	20-CV-10889	J. Lawson	
4/25/2020	*Doe MC-41*	20-CV-10889	J. Lawson	
4/27/2020	*Doe MC-43*	20-CV-10889	J. Davis	Yes
4/27/2020	*Doe MC-44*	20-CV-10889	C.J. Hood	
4/27/2020	*Doe MC-45*	20-CV-10889	J. Leitman	
4/27/2020	*Doe MC-46*	20-CV-10889	J. Goldsmith	Yes
4/27/2020	*Doe MC-47*	20-CV-10889	J. Edmunds	
4/27/2020	*Doe MC-48*	20-CV-10889	J. Goldsmith	Yes
4/30/2020	*Doe MC-49*	20-CV-11056	J. Cleland	
4/30/2020	*Doe MC-51*	20-CV-11061	J. Cleland	

[1] No complaints have been filed for John Does MC-37, 40, 42, or 50.

Exhibit B

From: Bush, Cheryl
Sent: Thursday, April 16, 2020 4:37 PM
To: Michael Cox; Jackie Cook; David Shea
Cc: Douglas, Stephanie; Linkous, Derek; Williams, Michael
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

THE MIKE COX LAW FIRM PLLC

Michael A. Cox
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17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48154
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Office: 734-591-4002
Facsimile: 734 591-4006

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

> Mike,
>
> Thank you for continuing to work with us on finding a way forward.
>
> Back in March (in the email below), you offered us an extension to July 2 to respond to your complaint. You conditioned that offer on, among other things, an immediate deposition of Mr. Easthope. You felt the deposition "would greatly assist us in settling the case(s)."
>
> As our recent motion to consolidate explained, we think that conducting discovery in dozens of cases on an ad hoc basis is not the right approach for anyone and not a productive way to work toward settlement.
>
> Instead, we believe that the best way to resolve this and other case-management issues in these numerous cases is with a status conference with the Court. That ensures that everything progresses in an orderly fashion and mitigates any concerns of unfair treatment among the survivors, both your clients and others. It also avoids duplicative, inconsistent, and needlessly costly discovery in the various cases.
>
> We therefore cannot agree to a deposition of Mr. Easthope at this time. The deposition should not move forward until the Court or Rule 26(d)(1) say it should.
>
> Thank you,
>
> Cheryl

Cheryl A. Bush
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Troy, MI 48084
Tel/Fax: 248.822.7801 | Cell: 248.709.1683
V-card | Email | www.bsplaw.com

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

Cheryl:

I. 30 Extra Days

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

II. 60 or More Extra Days

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

Your client has had unilateral and unfettered access to relevant documents and witnesses for 19 months – since July 18, 2018 – while keeping information about Anderson's abuse a secret from the public, the Legislature, alumni, and most importantly, the victims. According to Detective West, the UM General Counsel has been conducting an internal investigation since then (citing AGC Attorney Winiarski's investigative activities, for example, in his report). And when the Board of Regents was advised about the investigation (perhaps as early as the summer of 2018) Ambassador

Weiser had personal knowledge verifying the accusations were valid and true that I am sure he shared with other Board members, knowledge the Board kept secret for 19 months. Plaintiffs are now 20 months behind your client on discovery; it is only fair, in the context of this litigation, that Plaintiffs be allowed limited discovery at this time. Otherwise, we are operating blindly and in a vacuum.

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

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

Thanks, Mike

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Livonia, MI 48154

mc@mikecoxlaw.com

Office: 734-591-4002

Facsimile: 734 591-4006

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

Cheryl and Derek:

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

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

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

Thanks, Mike Cox

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mc@mikecoxlaw.com

Office: 734-591-4002

Facsimile: 734 591-4006

Exhibit C

From: Michael Cox <mc@mikecoxlaw.com>
Sent: Thursday, April 16, 2020 7:28 PM
To: Bush, Cheryl; Jackie Cook; David Shea
Cc: Douglas, Stephanie; Linkous, Derek; Williams, Michael; Michael Cox
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

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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:

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- 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

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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>
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Subject: RE: The actual (or rough, subject to typos) brief.

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I'm talking with my client.

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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.

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Cc: Douglas, Stephanie <douglas@bsplaw.com>; Linkous, Derek <linkous@bsplaw.com>
Subject: Re: Second request to depose Mr. Easthope and request for concurrence

Mike,

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

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

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

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

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

Thank you,

Cheryl

bsp LAW

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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:

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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

Michael A. Cox

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Livonia, MI 48154

mc@mikecoxlaw.com

Office: 734-591-4002

Facsimile: 734 591-4006

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

Cheryl and Derek:

On March 19th, we asked your agreement to permit us to depose Mr. Easthope regarding his knowledge of Dr. Anderson's acts, among other things, as alleged in our complaint(s). That was asked in the context of your asking us for

a delay in filing your response to our complaint(s). You did not agree. Nonetheless, in the interests of comity and collegiality, we still granted your request for more time.

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

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

Thanks, Mike Cox

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Michael A. Cox

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Livonia, MI 48154

mc@mikecoxlaw.com

Office: 734-591-4002

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Exhibit D

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

Cheryl A. Bush
Founding Member | Bush Seyferth PLLC
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Troy, MI 48084
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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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Michael A. Cox
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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

THE MIKE COX LAW FIRM PLLC

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Exhibit E

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

Michael A. Cox (P43039)
Jackie J. Cook (P68781)
THE MIKE COX LAW FIRM, PLLC
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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,

The Mike Cox Law Firm, PLLC

By /s/ Michael A. Cox
Michael A. Cox (P43039)
Jackie J. Cook (P68781)
Attorneys for Plaintiff
17430 Laurel Park Drive North, Suite 120E
Livonia, MI 48152
Dated: April 17, 2020 Telephone: (734) 591-4002

Shea Law Firm PLLC

By /s/ David J. Shea
David J. Shea (P41399)
Attorneys for Plaintiff
26100 American Dr., Ste. 200
Southfield, MI 48034
Telephone: (248) 354-0224
Dated: April 17, 2020 david.shea@sadplaw.com

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

Michael A. Cox (P43039)
Jackie J. Cook (P68781)
THE MIKE COX LAW FIRM, PLLC
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Livonia, MI 48152
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26100 American Dr., Ste. 200
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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,

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[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 F

2014 WL 12659919
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

G. Wesley BLANKENSHIP, Plaintiff,
v.
SUPERIOR CONTROLS, INC., et al., Defendants.

Case No. 13-12386
|
Signed 10/02/2014

Attorneys and Law Firms

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Mark McGowan, Michael J. Barton, Megan Piper McKnight, Plunkett & Cooney, Bloomfield Hills, MI, for Defendants.

ORDER DENYING MOTION TO COMPEL (Dkt. 138)

Michael Hluchaniuk, United States Magistrate Judge

A. Procedural History

***1** On July 30, 2014, defendants (collectively, SCI) filed a motion to compel a response to the subpoena issued to non-party Symbrium. (Dkt. 138). This matter was referred to the undersigned for hearing and determination on August 6, 2014. (Dkt. 142). Plaintiff filed a response on August 19, 2014. (Dkt. 143). SCI filed a reply on August 26, 2014. (Dkt. 148). As directed by the Court, the parties filed their joint statement of resolved and unresolved issues on September 5, 2014. (Dkt. 152). Pursuant to notice, the Court held a hearing on September 16, 2014. (Dkt. 153). SCI filed a supplemental brief that same day. (Dkt. 159). For the reasons set forth below, the Court **DENIES** SCI's motion to compel.

B. Factual Background and Parties' Arguments

On May 13, 2014, SCI issued a Subpoena to Symbrium, a North Carolina corporation. (Dkt. 138, Ex. A). The subpoena seeks documents reflecting total sales from Symbrium from the date of formation to the present, documents regarding purchases from Factory Systems, and communications that refer or relate to SCI or RedViking. (Dkt. 138, Ex. A, p. 10). According to SCI, plaintiff is an officer of Symbrium and "maybe" the President of Symbrium, according to his deposition testimony. (Dkt. 138, Ex. B, at p. 315:5-8). SCI served the subpoena on plaintiff and Symbrium through sending it to his counsel in the present matter, Daniel Quick, via email. (Dkt. 138, Ex. C). SCI also mailed the subpoena to plaintiff's wife, Alicia Blankenship, via certified mail (Dkt. 138, Ex. D) at the home address of her and the plaintiff, which address is also listed in State records as the principal office of Symbrium. According to the deposition testimony of plaintiff, his wife is the 100% shareholder of Symbrium. (Dkt. 138, Ex. B at pp. 314:6-7, 315:1-3). In late June, 2014, the United States Postal Service (USPS) returned the subpoena directed to Ms. Blankenship to SCI's counsel as "UNCLAIMED." The USPS had attempted to deliver it on May 17, May 22 and June 3. (Dkt. 138, Ex. D). On July 1, 2014, SCI (through counsel) asked plaintiff's counsel to voluntarily comply with the subpoena. (Dkt. 138, Ex. E). According to SCI, no response was received to the July 1, 2014 correspondence, thus necessitating this motion.

According to plaintiff, SCI has *not* properly served the subpoena. Mrs. Blankenship is the registered agent of Symbrium, as well as its President. (Dkt. 143, Symbrium Articles of Incorporation, Ex. A). Plaintiff asserts that SCI does not allege that they served Mrs. Blankenship via certified mail, but that they "attempted to mail the subpoena" to her. According to plaintiff, there is no evidence, however, that Mrs. Blankenship ever received the subpoena. Indeed, the certified mail receipt produced by SCI states only that the subpoena was "unclaimed," and not that Mrs. Blankenship refused to accept to delivery. (Dkt. 138, Ex. D). Notably, as plaintiff points out, the address on the subpoena and the copy of the envelope attached "unclaimed" notice is not the same address as that indicated on the website for the North Carolina Secretary of State. [1] Plaintiff maintains that SCI cites no basis for this contention and have not produced a valid proof of service in support of its motion. *See* Fed.R.Civ.P. 45(b)(4).

***2** Plaintiff also contends that SCI's attempt to serve Symbrium through plaintiff's counsel is flawed. First, Plaintiff is not the registered agent for Symbrium, nor is he the President, as SCI misstates in its brief. According to plaintiff, a simple business entity search on North Carolina's Secretary of State website would have revealed that plaintiff is neither of these. Given that Mrs. Blankenship is the registered agent and President of Symbrium, plaintiff maintains that it is improper for SCI to attempt to serve plaintiff with a subpoena issued to Symbrium in the first instance. Second, plaintiff asserts that service on plaintiff through his counsel in this case is insufficient to effect service because plaintiff is suing

SCI in his personal capacity as a shareholder of SCI, and not as an agent of Symbrium. According to plaintiff, a subpoena to produce documents issued to a corporation must be served directly on the corporation. *See* 9A Wright & Miller, Federal Prac. & Proc. 3d § 2454 (noting that subpoenas under Fed.R.Civ.P. 45 must be served directly on an individual, and service on attorney is insufficient). According to plaintiff, he is not Symbrium, Symbrium is not a party to this lawsuit, and counsel for plaintiff does not represent Symbrium on these matters. Therefore, there are multiple layers of error with respect to SCI's attempt to serve Symbrium through plaintiff's counsel in this case. Accordingly, plaintiff contends that service on plaintiff's counsel of a subpoena issued to Symbrium cannot constitute service on Symbrium.

C. Analysis and Conclusion

1. Service of the Subpoena

As noted by District Judge David M. Lawson in *OceanFirst Bank v. Hartford Fire Insurance Company*, 794 F.Supp.2d 752 (E.D. Mich. 2011), the majority of lower courts have held that Rule 45 requires personal service. *Id.* at 753-54 (citing cases). Judge Lawson also pointed out that many courts permit alternate service, where personal service could not be effectuated, so long as the means of delivery was designed to reasonably insure actual receipt of the subpoena. *Id.* at 754 (citing cases). Judge Lawson concluded that there was some justification for interpreting Rule 45 to allow service of a subpoena by alternate means, given that the text of the rule does not unequivocally require delivery by hand-to-hand exchange; instead, service "requires delivering a copy" of the subpoena to the witness. *Id.* Moreover, Judge Lawson pointed out that the method of delivery required by Rule 45 is not specified. *Id.* And, when hand-to-hand delivery is required, the rules generally indicate that requirement by designating "personal" service. *Id.* citing, Fed.R.Civ.P. 4(e)(2)(A) (specifying that a summons may be served on an individual in the United States by "delivering a copy of the summons and of the complaint to the individual *personally*") (emphasis added); Fed.R.Civ.P. 4(f)(2)(C)(i) (same with respect to serving an individual in a foreign country); *see also Doe v. Hersemann*, 155 F.R.D. 630, 631 (N.D. Ind. 1994) ("If 'delivering ... to such person,' as stated in Rule 45(b)(1), required personal, in-hand service, then 'personally' in Rule 4(e)(1) would be pure surplusage.").

Based on the foregoing, Judge Lawson concluded that Rule 45 "allow[s] service of a subpoena by alternate means once the party seeking evidence demonstrates an inability to effectuate service after a diligent effort. The alternate means must be reasonably calculated to achieve actual delivery." *OceanFirst Bank*, 794 F.Supp.2d at 754. Notably, such alternate means is only permissible after the party has attempted personal service and has demonstrated that the attempted personal service was diligent. *Id.* at 755. This Court agrees with Judge Lawson's analysis and reasoning.

The next question in this case is whether SCI made personal service on Symbrium. To answer this question, the Court must decide what constitutes "personal service" of a corporation under Rule 45. This is not addressed in Rule 45 itself. Finding no authority in the Sixth Circuit on this issue, the Court turns to out of circuit authority. In *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 262 F.R.D. 293, 305-306 (S.D.N.Y. 2009), the court observed that, in the Second Circuit, courts filled this gap in Rule 45 by relying on the service of process requirements on corporations set out in Federal Rule of Civil Procedure 4. *Id.*, citing *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46 (2d Cir. 1985) (applying Fed.R.Civ.P. 4 to determine whether subpoenas were served properly on two corporations); *Khachikian v. BASF Corp.*, 1994 WL 86702, at *1 (N.D.N.Y. 1994) ("In situations such as the present one in which personal service must be made on a corporation ...Rule 45(b) provides no guidance as to what constitutes such service. Therefore, courts have looked to Rule 4(d)(3) of the Federal Rules of Civil Procedure."); *In re Pappas*, 214 B.R. 84, 85 (Bankr. D. Conn. 1997) ("Because Rule 45 does not specify what constitutes personal service upon a corporation, courts look to Fed.R.Civ.P. 4 for guidance."); 9 James Wm. Moore *et al.*, Moore's Federal Practice (3d ed. 2009) ¶ 45.21[1] ("When a subpoena is to be served on a corporation ... or other artificial entity, the concept of 'personal' service is somewhat obscured, because the entity is not a 'person' on whom service can be directly made. Accordingly, service of a subpoena on an artificial entity may be made by using the analogous method for service of process on that entity under Rule 4."). In the absence of contrary authority in the Sixth Circuit, the Court finds the reasoning of these cases persuasive.

***3** The Court now turns to the requirements of Rule 4 for service on a corporation. Rule 4(h), which allows service of process on a corporation (1) by delivering a copy of the summons and complaint to an officer, managing or general

agent, or other agent authorized by appointment or law to receive process, and if the agent is authorized by statute and the statute so requires, by mailing a copy to the defendant; or (2) in the manner set forth in Rule 4(e)(1), which permits service by following state law "in the state where the district court is located or where service is made." Fed.R.Civ.P. 4(e)(1). It is clear that SCI did not comply with Rule 4(h)(1)(B) because there is no claim of actual "delivery" of the subpoenas, as opposed to mail delivery, to either Mrs. Blankenship or plaintiff.

Thus, the Court must determine if the subpoena was properly served under state law. It appears from the language of Rule 4(e)(1) that SCI could have served the subpoena pursuant to Michigan (the state in which this district is located) or North Carolina (where service was made, or attempted to be made). The pertinent portions[2] of Michigan Court Rule 2.105(D), which governs service of corporations, provides as follows:

> D) Private Corporations, Domestic and Foreign. Service of process on a domestic or foreign corporation may be made by
>
> (1) serving a summons and a copy of the complaint on an officer or the resident agent; [or]
>
> (2) serving a summons and a copy of the complaint on a director, trustee, or person in charge of an office or business establishment of the corporation and sending a summons and a copy of the complaint by registered mail, addressed to the principal office of the corporation;
>
> * * *

Mich. Ct. R. 2.105. As District Judge Robert H. Cleland has explained, Michigan law allows service on a corporation "by serving a summons and a copy of the complaint on an officer or the resident agent ***personally*** or, alternatively, by serving a summons and a copy of the complaint on a director, trustee or person in charge of the office as well as sending a summons and a copy of the complaint by registered mail." *Vasher v. Kabacinski*, 2007 WL 295006, *2 (E.D. Mich. 2007) (emphasis added). And, as District Judge Victoria A. Roberts has held, the "deliberate distinction" between subsection (D)(1) and subsection (D)(2) "suggests that the Michigan Supreme Court did not intend that the term 'serving' be interpreted as synonymous with 'mailing.' " *State Farm Fire & Cas. Co. v. Hamilton Beach/Proctor-Silex, Inc.*, 2007 WL 127909, *4 (E.D. Mich. 2007). Indeed, Michigan Court Rule 2.105(D)(1), does not permit service *by mail* on the registered agent, as made clear by reading subsection (D)(1) in conjunction with subsection (D)(2), which includes a registered mail provision. Here, it is clear that SCI did not comply with either method for serving a corporation under Michigan law as no personal delivery was made under either option.

There are several options for serving corporations under North Carolina law:

> (6) Domestic or Foreign Corporation.—Upon a domestic or foreign corporation by one of the following:
>
> ***4** a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.
>
> d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

See N.C.R.Civ.P. 4. Just as under Michigan law, there is a distinction between "delivery" and "mail" such that they are obviously two distinct methods of service. Since no "delivery" was made in this case, options (a) and (b) were plainly not satisfied. There is also no suggestion that SCI followed option (d). As to option (c), even assuming that plaintiff is a proper agent or officer for service for Symbrium, SCI did not comply with option (c), which requires service by certified or registered mail, not email service on the attorney for plaintiff in which he is not the corporate representative for Symbrium.[3] As to the attempted service by certified mail on Mrs. Blankenship, it does not appear that the correct

address was used or that the mailing was completed, given that the subpoena was returned as "unclaimed." SCI has not established that it actually used the correct address or that fact that the subpoena was "unclaimed" means that Mrs. Blankenship was somehow evading service of the subpoena. Under these circumstances, service of the subpoena under North Carolina law was not proper and does not satisfy North Carolina law.

SCI has simply shown no reasonably diligent efforts to properly serve a proper agent of Symbrium with the subpoena in this case. Indeed, without an attempt to properly serve the subpoena as required under Federal, Michigan, or North Carolina law, the Court concludes that SCI's attempts were not reasonably diligent. Moreover, SCI did not request permission from the Court to use an alternate method of service after establishing that it had undertaken such reasonably diligent attempts. *See OceanFirst Bank, supra.* Thus, the Court concludes that the subpoena was not properly served on Symbrium.

2. Timeliness of the Subpoena

***5** SCI issued the subpoena on the day before discovery in this matter closed. According to Judge Hood's scheduling order, all discovery "shall be completed by" March 14, 2014. (Dkt. 34). In this Court's view, this means discovery must be initiated such that it can be completed by the close of discovery. Obviously, the issuance of a subpoena the day before discovery closes does not comply with this interpretation of the scheduling order. SCI points out that both parties were conducting significant discovery after the deadline had passed. (Dkt. 159). It is not clear from these submissions whether this discovery was originally initiated such that is *could* have been completed before the discovery deadline or whether the parties simply agreed to permit such discovery after the passage of the deadline. The parties are, of course, free to continue to conduct discovery if they agree to do so and the District Judge has no objection. However, the parties obviously did *not* specifically agree to permit the untimely subpoena to Symbrium. Therefore, in the absence of evidence that the subpoena was issued such that it could be complied with before the close of discovery, the Court finds that it was untimely issued under the scheduling order.

For these reasons, SCI's motion to compel is **DENIED**. In the view of the Court, the remaining arguments regarding relevance of the requests and whether Symbrium has waived other objections to the subpoena need not be addressed.

IT IS SO ORDERED.

The parties to this action may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). A party may not assign as error any defect in this Order to which timely objection was not made. Fed.R.Civ.P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. Pursuant to Local Rule 72.1(d)(2), any objection must be served on this Magistrate.

All Citations

Not Reported in Fed. Supp., 2014 WL 12659919

Footnotes

1 On the North Carolina Secretary of State website, the office address for Symbrium is listed as 6837 Cool Pond Rd, Raleigh, NC 27613. The address listed on the subpoena and copy of the envelope attached to unclaimed USPS receipt is 6836 Cool Pond Rd, Raleigh, NC 27613. (Dkt. 138-2; 138-5). However, the address on the unclaimed receipt itself is correct. (Dkt. 138-5, Pg ID 4492). It is not clear to which address delivery was, in fact, attempted.

2 Mich. Ct. R. 2.105(D)(3) and (D)(4), which are not applicable here, govern service on corporations that have ceased doing business, failed to keep up their organization by the appointment of officers, whose term of existence has expired, or who ave failed to appoint and maintain a resident agent or file a certificate of that appointment.

3 The Court is not persuaded that SCI was required to serve plaintiff's attorneys in this case and otherwise would be running afoul of the rules of professional conduct barring contact with a represented party. Plaintiff is not acting as the corporate representative of Symbrium in this case and there is no evidence that plaintiff's attorneys in this case represent Symbrium on this matter or any other matter. SCI's position would essentially bar contact with plaintiff by any lawyer on any matter because he is represented by a lawyer *in this case.* Nothing in the rules of professional conduct suggest that they were intended to be quite so broad. *See* M.R.P.C. 4.2 ("In representing a client, a lawyer shall not communicate about the

subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

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

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

BUG JUICE BRANDS, INC. and
Joseph J. Norton, Plaintiffs,
v.
GREAT LAKES BOTTLING CO., Defendant.

No. 1:10–cv–229.
|
April 6, 2010.

Attorneys and Law Firms

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ORDER DENYING MOTION FOR EXPEDITED DISCOVERY

PAUL L. MALONEY, Chief Judge.

***1** On March 5, 2010, Plaintiff Bug Juice Brands and Plaintiff Norton filed a trademark infringement claim against Defendant Great Lakes Bottling. Plaintiffs contend their "Bug Juice" brand of drinks has been infringed by Defendant's "Jungle Juice" brand of drinks. On March 22, 2010 Plaintiffs filed a motion for a preliminary injunction. (Dkt. No. 5.) Plaintiffs also seek expedited discovery (Dkt. No. 21) prior to a hearing on their motion for injunctive relief. Because the motion for preliminary injunction and motion for expedited discovery were filed *ex parte,* this court ordered (Dkt. No. 24) Plaintiffs to serve the motions on Defendant and provided Defendant with an opportunity to file a response. Plaintiffs filed a certificate of service establishing that Defendant had been served with the motions. (Dkt. No. 29.) Defendant filed its response to the motion for expedited discovery. (Dkt. Nos. 30 and 31.)

ANALYSIS

Under the Federal Rules of Civil Procedure, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except under limited circumstances including when authorized by court order. FED. R. CIV. P. 26(d)(1). With an exception not applicable here, a party must obtain leave of the court to depose any person before the time specified in Rule 26(d). FED. R. CIV. P. 30(a)(1)(A)(iii). District courts have authorized expedited discovery prior to a Rule 26 conference upon a showing of good cause. *See e.g. Arista Records, LLC v. Does 1–4,* No. 1:07–cv–1115, 2007 WL 4178641, at * 1 (W.D.Mich. Nov.20, 2007) (Maloney, D.J.) (collecting cases published in the Federal Rules of Decision). This court, and others, have held that parties "have been able to establish good cause in situations where the moving party alleges infringement." *Arista Records,* 2007 WL 4178641, at *1 (citing *Qwest Commc'n Int'l, Inc. v. Worldquest Networks, Inc.,* 213 F.R.D. 418, 419 (D.Colo.2003); *see Pod-ners, LLC v. N. Feed & Bean of Lucerne Ltd. Liability Co.,* 204 F.R.D. 675, 676 (D.Colo.2002). District courts have also granted motions for expedited discovery where the moving party seeks a preliminary injunction. *See Qwest Commn'c.,* 213 F.R.D. at 419; *Pod-ners,* 204 F.R.D. at 676; *Ellswork Assoc., Inc. v. United States,* 917 F.Supp. 841, 844 (D.D.C.1996). To justify departing from the normal discovery regimen, however, the discovery request should be "limited." *See Qwest Commc'n,* 213 F.R.D. at 420 (denying the expedited request as overly broad); *Philadelphia Newspapers, Inc. v. Gannett Satellite Info. Nework, Inc.,* No. Civ. A. 98–cv–2782, 1998 WL 404820, * 2–* 3 (E.D.Pa. July 15, 1998) (same). *C.f. Lemkin v. Bell's Precision Grinding,* No. 2:08–cv–278, 2009 WL 1542731, at * 2 (S.D.Ohio June 2, 2009) (granting Plaintiff's motion for expedited discovery limited to the narrow issue of personal jurisdiction which would be necessary to respond to Defendant's motion to dismiss on the same issue); *Arista Records,* 2007 WL 4178641, at * 3 (granting Plaintiff's motion for expedited discovery in order to determine the identity of individuals who had been assigned specific internet access control numbers assigned by Michigan State University to its students); *Energentics Sys. Corp. v. Adv. Cerametrics, Inc.,* No. CIV. A. 95–7956, at * 2 (E.D.Pa. Mar. 15, 1996) (granting Plaintiff's motion for expedited discovery limited to the production of documents and answers to interrogatories related to a preliminary injunction hearing, including any patents or patent applications filed during a three-year period or following the three year period).

***2** Plaintiffs seek expedited discovery to depose Defendant and to have Defendant produce certain documents. Plaintiffs seek leave of the court to depose Defendant under FED. R. CIV. P. 30(b)(6). Contrary to Plaintiffs' assertion, the scope of the proposed deposition is neither "limited" nor specific to the pending motion for a preliminary injunction. In their proposed order, Plaintiffs would depose Defendant on various matters, including "all facts relating to GLB's decision to adopt and use the JUNGLE JUICE mark and trade dress for fruit flavored children's beverages," "all facts relating to GLB's promotion, advertising and marketing of fruit flavored children's beverages under the JUNGLE JUICE mark and trade dress since August 2009," and "all facts relating to GLB's sale and distribution of fruit flavored children's beverages under the JUNGLE JUICE mark and trade dress since August 2000." (Dkt. No. 22–2 Schedule A to Exhibit A to Brief in Support.) Plaintiffs also seek leave of the court to have Defendant produce documents under Fed.R.Civ.P. 34. In their proposed order, Plaintiffs would have Defendant produce documents on various matters, including "all documents relating to GLB's decision to adopt and use the JUNGLE JUICE mark and trade dress for fruit flavored children's beverages," "a copy of each printed and/or electronic advertisement, promotional brochure, flyer or internet website which has been used by GLB to market JUNGLE JUICE fruit flavored children's beverages bearing the JUNGLE JUICE mark and trade dress since August 2009," and "all documents referring to relating to [sic] GLB's conception and date of first use of the mark JUNGLE JUICE and all trademark search reports relating to said mark." (Dkt. No. 22–3 Schedule A to Exhibit B to Brief in Support.)

Plaintiffs are not entitled to the relief sought. The discovery requests are not narrow in scope and are not limited to issues necessary for the resolution of the motion for injunctive relief. Rather, the discovery requests broadly seek any and all information necessary for Plaintiffs to establish their cause of action. Although Plaintiffs have suggested the requested discovery items need to be preserved (*see Pod-ners,* 204 F.R.D. at 676 (granting a motion for expedited discovery because the beans at issue were commodities subject to sale, resale, consumption or use with the passage of time)), Plaintiffs have not demonstrated or otherwise established that any of the requested information is at risk of destruction.

For these reasons, Plaintiffs' motion for expedited discovery (Dkt. No. 21) is **DENIED.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 1418032

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Only the Westlaw citation is currently available.
United States District Court, W.D. Oklahoma.

CASHLAND INC. et al., Plaintiffs,
v.
CASHLAND INC. et al., Defendants.

No. CIV-15-800-W
|
Signed 01/14/2016

Attorneys and Law Firms

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ORDER

LEE R. WEST, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on the Motion to Dismiss or, in the Alternative, for a More Definite Statement filed by two defendants, Cash America International, Inc. ("Cash America") and Cashland Financial Services, Inc. ("Cashland Financial"), pursuant to Rules 12(b)(2), 12(b)(6), 12(e) and 9(b), F.R.Civ.P. Plaintiffs Cashland Inc.,[1] Cashland Holdings, LLC,[2] and Cashland Online, LLC,[3] have responded in opposition, and the movants have filed a reply. Based on the record, the Court makes its determination.[4]

***2** This lawsuit concerns two registered trademarks: CASHLAND (Registration No. 2,683,331) and CASH $LAND (Registration No. 3,293,760).[5] On April 11, 2002, an Ohio corporation identified as Cashland, Inc. ("Cashland, Inc."),[6] requested that the mark CASHLAND be registered in the United States Patent and Trademark Office ("USPTO"). In the registration application, Lee Schear, the corporation's president, explained that Cashland, Inc.,

> ha[d] adopted and [was] ... using th[at] service mark ... for financial services, namely loan services and short term loans, check cashing and check advance services, money order services and money wiring and transfer services.

Doc. 28-1 at 4. Schear further stated that this "mark was first used with th[ose] services [and in interstate commerce] on March 1, 1989," id., and he declared that "to the best of his[ ] knowledge and belief, no other person, firm, corporation or association ha[d] the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely to cause confusion ...." Id. at 5. CASHLAND was registered on February 4, 2003. See Doc. 16-1.

On July 31, 2003, Cashland, Inc., assigned "all right, title and interest in and to the [m]ark [CASHLAND (Reg. No. 2,683,331)], together with the goodwill of the business symbolized by the [m]ark, and the [r]egistration[,]" Doc. 16-4 at 6, to Cashland Financial. See Declaration of J. Curtis Linscott (September 9, 2015) at 2-3, ¶ 9 (hereafter "Linscott Declaration")(Cashland Financial is not original registration applicant); id. at 3, ¶ 10 (through assignment, Cashland Financial owns entire interest in registered trademark CASHLAND as well as goodwill therein).

On March 10, 2006, Cashland Financial requested that the mark CASH$LAND be registered in the USPTO. In the registration application, Daniel J. Clay, Cashland Financial's vice president, stated that Cashland Financial was using the mark with certain financial services:

> namely, temporary loans, loan financing; consumer lending services; commercial lending services; check cashing; check processing services; money order services; and electronic funds transfer[s.]

Doc. 28-2 at 4. Clay further stated that this "mark was first used at least as early as 06/01/1998, and first used in commerce at least as early as 09/01/1998[.]" Id. He declared that "to the best of his[ ] knowledge and belief no other person, firm, corporation, or association ha[d] the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely ... to

cause confusion ....” Id. at 5. CASH$LAND was registered on September 18, 2007. See Doc. 16-2.

In their complaint, the plaintiffs have alleged that they collectively have used the mark CASHLAND “for financial services for around 30 years,” Doc. 1 at 2, ¶ 4, and they have sought cancellation of the two foregoing registrations on the grounds that in submitting their registration applications to the USPTO, the defendants [7] engaged in fraud. Among other relief, the plaintiffs have sought a declaratory judgment regarding the rights of the parties with respect to the use of CASHLAND as a trademark. Finally, the plaintiffs have alleged that their business reputations have been harmed by the defendants' actions, and in particular, by their “failure to prevent customer confusion[,]” id. at 9, ¶ 25, and they have prayed for monetary damages.

***3** The plaintiffs have alleged in support of their causes of action

(1) that they “operat[e] 12 brick and mortar stores throughout Oklahoma[,]” id. at 4,¶ 9;

(2) that since 2008, they have maintained a website that explains their services and identifies their locations;

(3) that in March 2010, they began offering online financial services in Oklahoma, and in 2014, began offering these same services in New Mexico and Missouri;

(4) that they filed for, and received, in Oklahoma a state trademark for CASHLAND (Registration No. 28034) on May 13, 1996;

(5) that their initial registration expired in 2006, and they re-registered the CASHLAND mark (Registration No. 12,361,215) in Oklahoma on June 4, 2012;

(6) that they filed for, and received, in Oklahoma a second state trademark-CA$HLAND ONLINE (Registration No. 12,386, 640)-on January 2, 2013; and

(7) that on January 10, 2013, they filed for a federal trademark registration for CA$HLAND ONLINE, but the USPTO refused their application on the grounds that there would be a “likelihood of confusion with [the defendants'] ... marks since the marks create the same overall commercial impression, the services are closely related, and the parties generally share the same trade channels.” Doc. 1 at 5, ¶ 12.

The plaintiffs have alleged that shortly before their request for the second registered state trademark and their attempted registration for the federal trademark in January 2013, the defendants notified them by letter dated “November 27, 2012, of alleged confusion with [the defendants'] ... registered marks.” Id. ¶ 13. The plaintiffs have further asserted in their complaint

(1) that in March 15, 2013, the defendants advised the plaintiffs, again by letter, that since the plaintiffs' state registration had lapsed, “the subsequent state registration [for the mark CASHLAND] obtained in June 2012 was subordinate to the ... [the defendants'] federal trademark registrations ...,” id. at 6, ¶ 15;

(2) that on June 24, 2015, the defendants once more contacted the plaintiffs by letter and asserted “that only the locations in existence and having continuous use prior to April 11, 2002 were allowed ...,” id. ¶ 16;

(3) that the defendants, while “effectively conced[ing] that [the plaintiffs] ... may continue to use CASHLAND in Oklahoma,” id. ¶ 15, have “claimed to have the exclusive right to use the mark in all the remaining territories throughout the United States[,]” id. ¶ 16, based on the defendants' contention that they “have had an online presence since at least 2000 using CASHLAND as a trademark and before [the plaintiffs'] ... online presence[,]” id.; and

(4) that the defendants have “objected to any and all uses of the CASHLAND mark by [the plaintiffs] ... outside the state of Oklahoma, online or otherwise, and [have] demanded immediate corrective actions.” Id.

Dismissal is first sought by Cash America and Cashland Financial under Rule 12(b)(2), supra, on the grounds that the Court lacks in personam jurisdiction over them. [8] The Court has the discretion to decide which procedure to use to resolve this issue, e.g., Federal Deposit Insurance Corp. v. Oaklawn Apartments, 959 F.2d 170, 174 (10th Cir. 1992): “[f]acts regarding jurisdictional questions may be determined by reference to affidavits, by a pretrial evidentiary hearing, or at trial when the jurisdictional issue is dependent upon a decision on the merits.” Id. (citations omitted). While the plaintiffs always have “the burden of establishing personal jurisdiction,” id. (citations omitted), that “burden varies depending upon the pretrial procedure employed by the ... [C]ourt.” Id. (citations omitted).

***4** After reviewing the instant record, the Court has concluded that the issue of personal jurisdiction should be resolved based on the pleadings and the parties' affidavits and other written materials. Accordingly, "the plaintiff[s] need only make a prima facie showing,'" id. (quoting Behagen v. Amateur Basketball Association, 744 F.2d 731, 733 (10th Cir. 1984)), and while their "burden is light." Wenz v. Memery Crystal, 55 F.3d 1503, 1505 (10th Cir. 1995)(citation omitted), the plaintiffs must make this showing as to each defendant. E.g., Calder v. Jones, 465 U.S. 783, 790 (1984)(each defendant's contacts with forum must be assessed individually); Rush v. Savchuk, 444 U.S. 320, 332 (1980) (personal jurisdiction requirements "must be met as to each defendant").

The jurisdictional allegations in the complaint regarding "contacts" focus on letters the plaintiffs received in November 2012, March 2013 and June 2015 from the "defendants." The plaintiffs have alleged that the first letter notified them of "confusion with [the defendants'] ... registered marks," Doc. 1 at 5, ¶ 13, and of "two issues that needed to be addressed in order to avoid [that] confusion[:] ... the '$' replacing the 'S' in CASHLAND and the green color scheme on [the plaintiffs'] ... webpage." Id. at 5-6, ¶ 13.

The March 2013 letter, according to the plaintiffs, "noted that [the plaintiffs'] ... state mark had expired in 2006[, and] ... that the subsequent state registration obtained in June 2012 was subordinate to [the defendants'] ... federal trademark registrations ...." Id. at 6, ¶ 15. The June 2015 letter "assert[ed] that only the [plaintiffs'] locations in existence and having continuous use prior to April 11, 2002, were allowed because the use of the CASHLAND [mark] was geographically frozen at least as early as the ... date ... [the defendants'] federal trademark applications [were filed]." Id. ¶ 16. In that same letter, the defendants, again according to the plaintiffs, "objected to any and all uses of the CASHLAND mark by [the plaintiffs] ... outside ... of Oklahoma, online or otherwise, and demanded immediate corrective actions." Id.

In addition to the allegations in the plaintiffs' pleading, the Court has considered the parties' affidavits, declarations and other written materials, and to the extent "the parties [have] present[ed] conflicting [sworn documents] ..., all factual disputes [will be] ... resolved in the plaintiff[s'] favor, and the plaintiff[s'] prima facie showing [will be] ... sufficient notwithstanding the contrary presentation by the moving part[ies]." Behagen, 744 F.2d at 733 (citations omitted).

Because neither the Lanham Act, 15 U.S.C. § 1051 et seq., nor the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., provides for nationwide service of process, the Court must apply the law of this state in deciding whether dismissal as the movants have requested is warranted under Rule 12(b)(2), supra. In Oklahoma, a court may exercise jurisdiction over nonresident defendants such Cash America and Cashland Financial in the absence of their consent only (1) if the court is statutorily authorized to do so, and (2) if its exercise of jurisdiction is consistent with the due process clause of the fourteenth amendment to the United States Constitution. E.g., Rambo v. American Southern Insurance Co., 839 F.2d 1415, 1416 (10th Cir. 1988).

Because the applicable Oklahoma statute provides that

> [a] court of this state may exercise jurisdiction on any basis consistent with the Constitution[s] of this state and ... the United States,

12 O.S. § 2004(F), the foregoing two-part test has "collapse[d] into a single due process analysis[,]" Rambo, 839 F.2d at 1416: due process requires each nonresident defendant to "have certain minium contacts with ... [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)(quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))(other citations omitted); e.g., Walden v. Fiore, 134 S. Ct. 1115 (2014).

***5** Whether due process is satisfied in a given case depends upon "the quality and nature," Hanson v. Denckla, 357 U.S. 235, 253 (1958), of a nonresident defendant's " 'contacts, ties, or relations,' " Burger King Corporation v. Rudzewicz, 471 U.S. 462, 472 (1985)(quoting International Shoe, 326 U.S. at 319)(footnote omitted), with the forum state, and it is those " 'contacts, ties, or relations' " that must be evaluated, and not the unilateral acts of the plaintiffs or a third party. [9] E.g., Walden, 134 S. Ct. at 1122 (plaintiff cannot be only link between defendant and forum; defendant's conduct must form necessary connection with forum); Hanson, 357 U.S. at 253 (unilateral acts of those who claim some relationship with nonresident defendant cannot satisfy requirement of contact with forum). The Court must focus on "the relationship

among the defendant, the forum, and the litigation ....” Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

There are two types of in personam jurisdiction the Court may exercise: “specific” and “general.” The plaintiffs have argued that the Court has both specific and general jurisdiction over Cash America and Cashland Financial.

“Specific jurisdiction” is comprised of two prongs, and the Court may, consistent with due process, assert specific jurisdiction over a nonresident defendant (1) “if th[at] defendant has ‘purposefully directed’ [its] ... activities at residents of the forum,” Burger King, 471 U.S. at 472 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)), and (2) if “the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.” Id. at 472-73 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984))(footnote omitted). The “aim of [the] ‘purposeful direction’ doctrine ... [is] to ensure that an out-of-state defendant is not bound to appear to account for merely ‘random, fortuitous, or attenuated contacts’ with the forum state.” [10] Dudnikov v. Chalk v. Vermilion Fine Arts, Inc., 514 F.3d 1063, 1071 (10th Cir. 2008)(citing Burger King, 471 U.S. at 475). [11]

To demonstrate its lack of contacts with this state, Cashland Financial, the owner of all rights and interest in the registered trademark CASH$LAND (Reg. No. 3,293,760) and the owner, by assignment, of all rights and interest in the registered trademark CASHLAND (Reg. No. 2,683,331), has submitted the declaration of its executive vice president and secretary, J. Curtis Linscott. Linscott has stated

(1) that Cashland Financial, a wholly-owned subsidiary of Cash America, was incorporated under the laws of the state of Delaware on May 20, 2003, and “is one of the leading providers of specialty financial services, such as pawn loans, the sale of second-hand merchandise, cash advance/short-term loans and check-cashing services[,]” Declaration of J. Curtis Linscott (September 9, 2015) at 2, ¶ 6 (hereafter “Linscott Declaration”);

***6** (2) that on July 1, 2003, Cashland Financial registered to do business in the state of Ohio as a foreign corporation and that its principal place of business, including its administrative offices, is in Fort Worth, Texas;

(3) that all corporate officers and directors have lived and worked either in Ohio or in Texas, that all corporate-level decisions are made in those two states and that Cashland Financial’s specialty financial services are offered only to customers in Ohio and the state of Indiana; [12]

(4) that although Cashland Financial “maintain[s] a website that is publicly accessible, customers cannot procure Cashland[ ] [Financial's] specialty financial services through the website[,]” id. ¶ 7; and

(5) that “the website [only] provides visitors with information about Cashland[ ] [Financial's] specialty financial services and the locations of [its] ... stores ... in ... Ohio and Indiana.” Id.

The movants have also submitted the declaration of Austin D. Nettle, Cash America's vice president-finance and treasurer. He has averred

(1) that Cash America was incorporated under the laws of the state of Texas on October 4, 1984, and that its principal place of business, including its administrative offices, is also in Fort Worth-the site where all corporate-level decisions for Cash America are made;

(2) that “Cash America is one of the leading providers of specialty financial services, such as pawn loans, the sale of second-hand merchandise, cash advance/short-term loans and check-cashing services, in the United States,” Declaration of Austin D. Nettle (September 9, 2015) at 2, ¶ 4 (hereafter “Nettle Declaration”);

(3) that together with its subsidiaries, Cash America “operates approximately 900 stores and employs approximately 6,000 people ...” id.; [13] but

(4) that “less than 2% [of its stores and employees] (specifically, fourteen stores and 110 employees) are located in the state of Oklahoma[,]” id. ¶ 5; and

(5) that “for the six-month period ending June 30, 2015, the revenue generated from the Oklahoma stores constitute[d] less than 2% of Cash America's total revenue.” Id. ¶ 6.

The record also contains the affidavit of Nels Bentson submitted by the plaintiffs. Bentson is the plaintiffs' founder and a current officer, and he has asserted

(1) that Cash America has “[m]ultiple ... locations [in Oklahoma that] are in very close proximity ... to [the

plaintiffs'] ... locations[,]" Affidavit of Nels Bentson (September 30, 2015) at 2, ¶4 (hereafter "Bentson Affidavit");

(2) that "customers often shop both companies' nearby locations to compare terms for proposed transaction[s,]"id.; and

(3) that "Cash America and [the plaintiffs] ... daily compete head-to-head." Id.

As examples of the "companies' nearby locations," id., in Oklahoma, Bentson has cited the following as examples:

(1) two of the plaintiffs' Oklahoma City locations-1901 N.E. 23rd Street and 1424 W. Britton Road—are, respectively, are only 0.3 miles and 1.5 miles from two of Cash America's Oklahoma City locations-1604 N.E. 23rd Street and 10700 N. Western Avenue, id.; and

***7** (2) one of the plaintiffs' Tulsa locations—6229 E. 21st Street-is only 2.1 miles from Cash America's Tulsa location-1130 S. Memorial Drive. E.g., id.

The plaintiffs have argued that the "[m]ovants' specific contacts with Oklahoma related to [the] [p]laintiffs' claims subject them to specific personal jurisdiction ...." Doc. 28 at 13. In particular, they have contended that the "[m]ovants used CASHLAND marks in a way such that harm was caused to [the] [p]laintiffs in Oklahoma," id., and that because the movants' use of the marks continued "after notification ... that harm was being suffered in Oklahoma," id., and because the movants have "refused to work with [the] [p]laintiffs to ameliorate [that] harm ...[,] [the] [m]ovants ... expressly aimed their conduct at [the] [p]laintiffs in Oklahoma." Id.

In considering whether either movant has purposefully directed its activities toward Oklahoma, the Court "must examine [both] the quantity and quality of [each] [d]efendant['s] contacts with [Oklahoma] ...." OMI Holdings, Inc. v. Royal Insurance Co., 149 F.3d 1086, 1092 (10th Cir. 1998). In doing so, the Court has considered the "effects test" of Calder v. Jones, 465 U.S. 783 (1984), on which the plaintiffs have relied. Purposeful direction is established under Calder if the plaintiffs show that the defendant under consideration committed "(a) an intentional action ..., that was (b) expressly aimed at the forum state ..., with (c) knowledge that the brunt of the injury would be felt in th[at] ... state ...." Dudnikov, 514 F.3d at 1071.

The plaintiffs have muddled any jurisdictional inquiry by referring to the three defendants as "Cash America" both in their pleading and papers. That alone warrants dismissal under Rule 12(b)(2), supra. Personal jurisdiction must be assessed separately as to each defendant.[14] The plaintiffs may not rely on collective jurisdictional contacts; each defendant individually must possess sufficient minimum contacts with the forum to warrant the Court's exercise of specific jurisdiction. E.g., Rush, 444 U.S. at 331-32 (considering "defending parties" together and aggregating their forum contacts for purposes of personal jurisdiction analysis is "plainly unconstitutional").

While the record shows that Cash America has "[m]ultiple ... locations[,]" Bentson Affidavit at 2, ¶ 4, in Oklahoma, e.g., Doc. 16 at 24 (Cash America operates "fourteen brick-and-mortar stores in Oklahoma"), there is no showing that Cashland Financial has a physical presence in this state. Moreover, despite the plaintiffs' argument that three letters in four years constitute "repeated contacts," Doc. 28 at 7, the Court finds these letters fail to " 'create a substantial connection with the forum ....' " OMI Holdings, 149 F.3d at 1092 (quotation omitted). Cf. Dudnikov, 514 F.3d at 1072 (assuming without deciding that it would be unreasonable to found jurisdiction solely on cease-and-desist letter); id. (quoting Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1361 (Fed. Cir. 1998)("patent holder would not 'subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement'"))(emphasis deleted). Finally, since the plaintiffs have failed to disclose the corporate author of the letters-the identity of which they should know as the recipient of those letters, the plaintiffs have not shown for purposes of Calder which defendant, if any, committed "an intentional action ... expressly aimed at the forum state ...." Dudnikov, 514 F.3d at 1071.

***8** The second prong of the specific jurisdiction test requires "a nexus between [each] [d]efendant's forum-related contacts and the [p]laintiff[s'] cause[s] of action." OMI Holdings, 149 F.3d at 1095 (citation omitted). That is to say, as to a particular defendant, the plaintiffs must show that "the litigation results from alleged injuries that 'arise out of or relate to' ... [that defendant's] activities [in the forum state]." Burger King, 471 U.S. at 472-73 (quoting Helicopteros Nacionales. 466 U.S. at 414)(footnote omitted).

Even assuming that Cash America may have " 'purposefully availed' itself of the privilege of conducting activities,"

Dudnikov, 514 F.3d at 1071 (citation omitted), [15] in the forum by its operation of fourteen stores in this state, the plaintiffs' alleged injuries do not " 'arise out of or relate to' " Burger King, 471 U.S. at 472-73 (quoting Helicopteros Nacionales, 466 U.S. at 414)(footnote omitted), those activities. The plaintiffs have claimed in their complaint that their injuries [16] instead were allegedly caused by the fraudulent procurement of the registered trademarks and/or by the failure to prevent the confusion that results from customers' online searches. See Doc. 1 at 9. [17] Accordingly, the Court finds the plaintiffs have failed to satisfy their burden of establishing the first and/or the second prongs of the specific jurisdiction test and thus, have failed to make a prima facie showing that would permit the Court to exercise specific jurisdiction over either Cash America or Cashland Financial.

As stated, "[t]he 'minimum contacts' standard [announced in International Shoe] may be met in two ways." OMI Holdings, 149 F.3d at 1090; e.g., Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523, 1532 (10th Cir. 1996). The second way-"general" jurisdiction-involves those " 'instances in which the [defendant's] continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against [the defendant] ... on causes of action arising from dealings entirely distinct from those activities.' " Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011)(quoting International Shoe, 326 U.S. at 318).

Thus, "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation." Helicopteros Nacionales, 466 U.S. at 414 (footnote and citations omitted). Having determined that the Court may not exercise specific jurisdiction over either movant, the Court must consider whether it may exercise general jurisdiction over one or both.

***9** In doing so, the Court has " 'impose[d] a more stringent minimum contacts test[.]' " OMI Holdings, 149 F.3d at 1091 (quotations omitted). This is a "high burden." Benton v. Cameco Corp., 375 F.3d 1070, 1081 (10th Cir. 2004). A defendant's "commercial contacts ... must be of a sort 'that approximate physical presence' in the state." Shrader v. Biddinger, 633 F.3d 1235, 1243 (10th Cir. 2011)(quotation omitted); [18] e.g., Goodyear Dunlop, 131 S. Ct. at 2853-54 (for corporation, paradigm forum for exercise of general jurisdiction is "one in which corporation is fairly regarded as at home"). [19]

To demonstrate their lack of " 'continuous corporate operations within ... [this] [S]tate[,]' " Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014)(quoting International Shoe, 326 U.S. at 318), Cashland Financial and Cash America have again relied on the declarations of Linscott and Nettle. Linscott has asserted

(1) that Cashland Financial has its principal place of business, including its administrative offices, in Texas;

(2) that all corporate officers and directors have lived and worked either in Ohio, where Cashland Financial is registered to do business, or in Texas;

(3) that all corporate-level decisions are made in these two states; and

(4) that Cashland Financial's specialty financial services are offered only to customers in Ohio and Indiana.

Nettle has averred

(1) that Cash America has its principal place of business, including its administrative offices, where all corporate-level decisions are made, in Texas-the state of its incorporation;

(2) that although Cash America, together with its subsidiaries, "operates approximately 900 stores and employs approximately 6,000 people ...," Nettle Declaration at 2, ¶ 5, "less than 2% [of its stores and employees] (specifically, fourteen stores and 110 employees) are located in the state of Oklahoma[,]" id.; and

***10** (3) that "for the six-month period ending June 30, 2015, the revenue generated from the Oklahoma stores constitute[d] less than 2% of Cash America's total revenue." Id. ¶ 6.

In response, the plaintiffs have argued that collectively the defendants' have "broad and systematic contacts [20] with Oklahoma, subjecting them to general personal jurisdiction in Oklahoma[:] [o]perating **14** stores, generating millions in revenues ... is ample evidence of sufficient contacts with Oklahoma ..." Doc. 28 at **14**. [21] Again, the plaintiffs have impermissibly relied on the defendants' collective contacts.

First, even if the Court were to find that Cash America's operation of fourteen stores suggests that this defendant has sufficient business contacts with this state to "approximate physical presence," Shrader, 633 F.3d at 1243, the plaintiffs have made no similar showing as to Cash Financial.

Second, the Court disagrees that Cash America's "brick-and-mortar presence" in Oklahoma is sufficient under extant case law. In Daimler, the United States Supreme Court held that "[w]ith respect to a corporation, the place of incorporation and principal place of business are 'paradigm[ ] ... bases for [the Court's exercise of] general jurisdiction.' " 134 S. Ct. at 760 (quotation omitted). Cash America is incorporated under Texas law and has its principal place of business in that state. And while Cash America may also be subject to general jurisdiction in a forum other than Texas, Cash America's contacts with that other forum must be, as extant case law requires, "so substantial and of such a nature as to render [Cash America] ... at home in that [s]tate." Id. at 760 n.19.

The plaintiffs have not shown that Cash America is any more "at home" in Oklahoma than it is "at home" in any other state where a Cash America store might be located. The Supreme Court held in Daimler that "[g]eneral jurisdiction ... calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." 134 S. Ct. at 762 n.20. Cash America "operates approximately 900 stores," Nettle Declaration at 2, ¶ 5, which according to the plaintiffs are located "in 20 states." Doc. 1 at 3, ¶ 7. Only fourteen of those 900 stores are in Oklahoma, and "for the six-month period ending June 30, 2015, the revenue generated from th[ose] ... stores constitute[d] less than 2% of Cash America's total revenue." Nettle Declaration at 2, ¶ 6.

***11** In Daimler, the Supreme Court found that if the defendant's activities-which included extensive retail sales and a "brick-and-mortar" presence—"sufficed to allow adjudication of ... [claims unrelated to the forum]," 134 S. Ct. at 761, jurisdiction "would presumably be available in every other [s]tate in which [the defendant's] ... sales are sizeable." Id. As the Supreme Court observed, "[a] corporation that operates in many places can scarcely be deemed at home in all of them." Id. at 762 n.20 (citation omitted). Accordingly, the Court finds that the plaintiffs have not made a prima facie showing of general jurisdiction over either Cash America or Cashland Financial. [22]

Despite the absence of personal jurisdiction over these defendants, the Court has examined their remaining arguments in support of dismissal and, in doing so, has considered whether Cash America and Cashland Financial's challenge under Rule 9(b), supra, to the plaintiffs' first cause of action has merit. In that claim for relief, the plaintiffs have requested cancellation of the registrations of the CASHLAND and CASH$LAND marks because those marks were procured through fraud. E.g., 15 U.S.C. § 1119 (court may order cancellation of registrations); id. § 1064 (registration may be cancelled if registration obtained fraudulently).

"[T]he burden of proving fraudulent procurement of a registration is heavy," Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 942 (10th Cir. 1983)(citation omitted), and "[a]ny deliberate attempt [by a defendant] to mislead the ... [USPTO] must be established by clear and convincing evidence." Id. (citations omitted).

To succeed on their claim, the plaintiffs must plead and ultimately establish

> (1) [a] ... false representation regarding a material fact; (2) the registrant's knowledge or belief that the representation is false (scienter); (3) the intention to induce action or refraining from action in reliance on the misrepresentation; (4) reasonable reliance on the misrepresentation; and (5) damages proximately resulting from such reliance.

San Juan Products, Inc. v. San Juan Pools of Kansas, Inc., 849 F.2d 468, 473 (10th Cir. 1988)(citation omitted). The Court finds the plaintiffs have failed to satisfy their burden under Rule 9(b), supra, [23] because they not only have failed to show that Cash America was a registrant that made an allegedly false representation, but also have failed to aver with sufficient specificity elements (1), (2) and/or (3) as to both defendants.

***12** In an attempt to meet Rule 9(b)'s heightened pleading standard, the plaintiffs have alleged that the defendants collectively "applied for the federal registration[s]." Doc. 1 at 8, ¶ 21. The record [24] shows otherwise. See Doc 28-1 (registration applicant identified as Cashland, Inc.); Doc.

28-2 (registration applicant identified as Cashland Financial Services, Inc.).

The plaintiffs have also alleged in their complaint that they and the defendants' (unnamed) predecessor together with unnamed others "around the country," Doc. 1 at 4, ¶ 8, were co-franchisees "of a now-defunct franchisor," id. at 8, ¶ 21, and that the defendants collectively therefore implicitly "knew other franchisees existed when they applied for the federal registration[s, and yet they] ... chose to ignore that information and file for ... trademark application[s] without disclosing other franchisees' uses...." Id. (emphasis added). The plaintiffs have contended that "the deliberate omission in the trademark application[s] of information regarding other franchisees was material to the USPTO in granting the registration[s] ...." Id.

As stated, to prevail, the plaintiffs must show that the false representation regarded a material fact and that the registrant in question intended to induce the USPTO to act in reliance on that misrepresentation. " '[I]n the trademark context, a material misrepresentation arises only if the registration should not have issued if the truth were known to the [USPTO] examiner.' " San Juan Products, 849 F.2d at 473 (quotation omitted)(footnote deleted). In their complaint, the plaintiffs have only speculated that information regarding other franchisees was known to a registrant or that the undisclosed information was material; accordingly, the complaint fails to sufficiently allege for purposes of Rule 9(b), supra, that if the plaintiffs' existence and their alleged use of the marks had been reported that such information would have resulted in the disallowance of the requested registrations.

Moreover, while the Tenth Circuit has noted that a registrant arguably has "a duty of truthfulness," San Juan Products, 849 F.2d at 473,[25] any " 'rights of a junior user must be clearly established and must be in an identical mark or one so similar as to be clearly likely to cause confusion,' " Id. (quotation omitted). "[F]raud is not lightly to be presumed[,]" id. at 474 (quotation omitted),[26] and the instant complaint fails to sufficiently allege that the registrants of the marks at issue knew in 2002 and 2006 that the rights of any other user in these same or similar marks were clearly established. SeeBonaventure Associates v. Westin Hotel Co., 218 U.S.P.Q. 537, 1983 WL 51970 *3 (TTAB 1983)(statement of applicant that no other person "to the best of his knowledge" has the right to use mark does not require applicant to disclose those persons whom he may have heard or noticed are using the mark if he believes that the rights of such others are not superior to his).

***13** The defendants have also sought dismissal of the plaintiffs' third cause of action[27] under Rule 12(b)(6), supra, and in determining whether the plaintiffs have met their "obligation to provide the 'grounds' of ... [their] 'entitle[ment] to relief[,]' " Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)(citation omitted), the Court has used those standards set forth by the Supreme Court in Twombly and Ashcroft v. Iqbal, 556 U.S. 662 (2009).

The Supreme Court has held in accordance with Rule 8, F.R.Civ.P., that a complaint need not contain "heightened fact pleading of specifics," Twombly, 550 U.S. at 570, or "detailed factual allegations," id. at 555 (citations omitted), but it must contain "enough facts to state a claim to relief that is plausible on its face." Id. at 570. The United States Court of Appeals for the Tenth Circuit has stated that Twombly imposes a "burden ... on the plaintiff[s] to frame a 'complaint[28] with enough factual matter (taken as true) to suggest' that [they are] ... entitled to relief." Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008)(quoting Twombly, 550 U.S. at 556). The allegations in the plaintiffs' complaint must therefore "be enough that, if assumed to be true, ... [they] plausibly (not just speculatively) ha[ve] a claim for relief [against Cash America or Cashland Financial]." Id. (footnote omitted).

The Court's task at this stage is to determine whether "there are well-pleaded factual allegations," Iqbal, 556 U.S. at 679, in the challenged pleading; if so, the "[C]ourt should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id.[29] "A claim has facial plausibility when the plaintiff pleads factual content that allows the [C]ourt to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citations omitted).

In this connection, a complaint " 'must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.' " Bryson v. Gonzales, 534 F.3d 1282, 1286 (10th Cir. 2008)(quotation and further citation omitted). While "[t]he nature and specificity of the allegations required to state a plausible claim will vary based on context," Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1215 (10th Cir. 2011)(citations omitted), neither " 'naked assertion[s]' devoid of 'further factual enhancement,' " Iqbal,

556 U.S. at 678 (quoting Twombly, 550 U.S. at 557), nor "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory allegations, ... suffice." Id. (citation omitted). "[T]he Twombly/Iqbal standard recognizes a plaintiff should have at least some relevant information to make the claim[ ] plausible on ... [its] face." Khalik v. United Air Lines, 671 F.3d 1188, 1193 (10th Cir. 2012). Twombly and Iqbal "demand[ ] more than an unadorned, the-defendant-unlawfully-harmed-me accusation," Iqbal, 556 U.S. at 678 (citations omitted), and more than "mere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' ...." Kansas Penn Gaming, 656 F.3d at 1214 (quoting Twombly, 550 U.S. at 555). If the plaintiffs' factual allegations "are 'merely consistent with' a defendant's liability," Iqbal, 556 U.S. at 678 (quotation omitted), or "do not permit the [C]ourt to infer more than the mere possibility of misconduct," id. at 679, the plaintiffs "ha[ve] not 'show[n]' ... 'that ... [they are] entitled to relief.' " Id. (quotation omitted). Applying these standards to the complaint, the Court has examined the plaintiffs' allegations as a whole, construed them and all reasonable inferences drawn therefrom in the plaintiffs' favor and accepted them as true at this stage to determine whether the plaintiffs have "nudged their claim[ ] across the line from conceivable to plausible." Twombly, 550 U.S. at 57.

In support of their third cause of action, the plaintiffs have contended in particular

(1) that their "mark and business reputation have been damaged by [the defendants'] ... failure to prevent customer confusion[,]" Doc. 1 at 9, ¶ 25, because they (the plaintiffs) "receive[ ] complaint calls from unhappy ... customers [of the defendants] on an almost daily basis[,]" id.; and

(2) that the defendants' "customers search online and find [the plaintiffs] ... website ...," id., and "in an attempt to alleviate the confusion, [the plaintiffs have] ... gone as far as to put [the following] ... disclaimer on their website[:] ... Cashland Holdings, LLC is not affiliated with Cashland of Ohio, or any Cash America Co. To Contact Cashland of Ohio, Click Here."Id. at 10, ¶ 25.

The plaintiffs have further asserted that they have been "harmed by [these] customer complaints for which [the plaintiffs] ... ha[ve] no responsibility[,]" id., and "that ... [the defendants have] cho[sen] not to fix the problem because they benefit from not having to deal with unhappy customers and bad reviews." Id.

"[T]he burden rests on the plaintiffs to provide fair notice of the grounds for th[is] claim[ ] ... against each of the defendants." Robbins, 519 F.3d at 1250. The plaintiffs' use of the collective term "defendants" both in their pleading and their response, with no distinction as to what acts are attributable to which corporate defendant, makes it difficult to determine what each defendant actually did or did not do. As the Tenth Circuit has found, Twombly requires plaintiffs to "do more than generally use the collective term 'defendants.' " VanZandt v. Oklahoma Department of Human Services, 276 Fed. Appx. 843, 849 (10th Cir. 2008)(citation omitted)(cited pursuant to Tenth Cir. R. 32.1); e.g., Burnett, 706 F.3d at 1240 (complaint is deficient if it attributes actions to group of collective defendants).

As to this particular claim for relief, the instant plaintiffs have again complained about the defendants' collective failure "to fix the problem," Doc. 1 at 10, ¶ 25, and "prevent [further] customer confusion." Id. at 9, ¶ 25. Such broad accusations not only fail to provide adequate notice to each defendant of what that defendant is alleged to have done or failed to have done, but also preclude the Court from "draw[ing] the reasonable inference that [each] ... defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted).

According, the Court, based on the foregoing,

(1) DENIES the plaintiffs' Motion for Leave to Conduct Discovery [Doc. 25] filed on October 1, 2015;

(2) GRANTS the Motion to Dismiss [Doc. 16] filed on September 9, 2015, by defendants Cash America and Cashland Financial;

***15** (3) deems MOOT these defendants' alternative Motion for a More Definite Statement [30] [Doc. 16] filed on September 9, 2015; and

(4) DISMISSES this matter without prejudice for lack of personal jurisdiction, or assuming arguendo that such jurisdiction exists, for failure to satisfy the pleading standards of Rule 9(b), supra, and Rule 12(b)(6), supra.

All Citations

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Footnotes

1 Plaintiff Cashland Inc. is an Oklahoma corporation that became Cashland, LLC, on June 19, 2014, "while retaining a majority interest in [co-plaintiff] Cashland Holdings, LLC, formed March 11, 2003." Doc. 1 at 2, ¶ 3.

2 Cashland Holdings, LLC, is "family-owned and operate[s] companies based in Oklahoma [that] provid[e] financial services ...." Id. The "first store opened circa 1988," id., and the number of stores has grown to twelve.

3 Cashland Online, LLC, a family-owned limited liability company, was formed on March 18, 2010. It provides financial services online to customers in Oklahoma and surrounding states.

4 The plaintiffs have urged the Court to permit discovery under Rule 30(a)(2)(A)(iii), F.R.Civ.P., and allow them to take "up to two ... depositions," Doc. 25 at 2, before the Court rules on the pending motion. Rule 30(a)(2)(A)(iii), supra, provides that "[a] party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2) [, F.R.Civ.P.,] ... if the parties have not stipulated to the deposition[s] and the party seeks to take the deposition[s] before the time specified in Rule 26(d), [supra,] unless the party certifies in the notice, with supporting facts, that the deponent[s are] ... expected to leave the United States and be unavailable for examination in this country after that time[.]"

One potential deponent is Lee Schear. The plaintiffs have identified Schear, who is alleged "to be circa 63 years old[,]" Doc. 25 at 5, as the "founde[r] [of] the company that was bought by the [d]efendants[.]" Id. at 4. They have contended that Schear's deposition at this stage would "clear up one of the central issues in this case: under what circumstances did [the] [d]efendants start using CASHLAND as a trademark?" Id. The plaintiffs have further contended that Schear's "early deposition would go a long way toward furthering the[ ] objectives[of Rule 1, F.R.Civ.P., namely, 'the just, speedy, and inexpensive determination of every action']." Doc. 25 at 4.

The plaintiffs have also argued the grant of leave to conduct Schear's deposition would permit the attendance of the plaintiffs' founder, Nels Bentson, who is 71 years old and being treated for prostate cancer. See Affidavit of Nels Bentson (September 30, 2015) at 1, ¶ 1; id. at 2, ¶ 3. The plaintiffs have argued that Bentson's "assistance during any depositions would be invaluable[.]" Doc. 25 at 5.

The plaintiffs have not suggested that any potential deponent is leaving the United States and would therefore be unavailable for deposition in this country; accordingly, to that extent, Rule 30(a)(2)(A)(iii), supra, provides no basis for the relief they have requested. To the extent, if any, this rule applies to those circumstances when there is a need for an early perpetuation deposition due to a deponent's health or age, butseeRule 27, F.R.Civ.P., the plaintiffs have not submitted any evidence that an early deposition is medically necessary; rather, they have only speculated that expedited discovery would be advantageous in this case.

5 In their complaint, the plaintiffs have referred to this trademark as CA$HLAND. See Doc. 1 at 1, ¶ 1. The registered mark is CASH$LAND. See Doc. 28-2.

6 The plaintiffs have identified one of the three defendants as Cashland, Inc., a Delaware corporation formed in October 1986. See Doc. 1 at 2, ¶ 5. Cashland, Inc., is not a movant and appears to be in default. See Doc. 8. Seealso Doc. 16 at 6 (Cashland, Inc., "may be defunct and/or mistakenly named as a defendant").

7 In their complaint, the plaintiffs not only have referred to themselves collectively, see Doc. 1 at 2, ¶ 4, but also have referred to the defendants in the aggregate. Seeid. at 3, ¶ 7 ("Cashland, Inc.; Cashland Financial Services Corp. [sic]; and Cash America International, Inc.... referred to collectively as 'Cash America.' ").

8 As stated, the plaintiffs have moved for permission to engage in discovery, and as they have argued, in most instances, " '[w]hen a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion.' " Sizova v. National Institute of Standards & Technology, 282 F.3d 1320, 1326 (10th Cir. 2002)(quoting Budde v. Ling-Temco Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975)). "[A] refusal to grant discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant." Id. (citations omitted). Prejudice occurs "where 'pertinent facts bearing on the question of jurisdiction are controverted ... or where a more satisfactory showing of the facts is necessary.' " Id. (quoting Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977)(further quotation and citation omitted)).

The plaintiffs have asked for an additional sixty days to conduct limited paper discovery (ten document requests) and to conduct discovery depositions, see Doc. 25, on the grounds such discovery is necessary "to explore the source of [the] [d]efendants' Oklahoma revenue and the likelihood that such revenue is taken from [the] [p]laintiffs' location[s] given the proximity of several of their competing locations." Id. at 5 (citation omitted). The potential deponents for purposes of jurisdictional discovery are Schear and J. Curtis Linscott, whose declaration, the plaintiffs have claimed, "ha[s] inconsistencies[.]" Doc. 25 at 3.

The plaintiffs, however, have failed to "identify any contested factual issues that merit further inquiry [and that are pertinent to the movants' contacts with the forum] before the Court rules on the threshold issue of whether personal jurisdiction exists over Cash America and Cashland [Financial]." Doc. 27 at 11. The plaintiffs have neither satisfactorily described what documents are necessary, nor adequately explained why depositions are required to demonstrate the defendants' "minimum contacts" in Oklahoma. There is no dispute regarding the identity of the registration applicants, Cash America's operation of stores in Oklahoma or Cashland Financial's maintenance of an informational website. Accordingly, the plaintiffs have not met their burden in establishing their entitlement to jurisdictional discovery and, in its discretion, the Court denies the plaintiffs' request for the same.

9 To the extent, if any, the plaintiffs have relied on telephone calls from the defendants' customers, the Court has disregarded the same. SeeWalden, 134 U.S. at 1122 (relationship with forum must arise out of contact that defendant himself creates with form); Burger King, 471 U.S. at 475 (jurisdiction is proper only where contacts proximately result from actions by defendant himself that create "substantial connection" with forum state).

10 E.g., Walden, 134 S. Ct. at 1123 (due process requires a defendant be haled into court in forum based on his own affiliation with state, not based on "random, fortuitous, or attenuated" contacts he makes by interacting with other persons affiliated with state)(citation omitted).

11 The first element of the Court's specific jurisdiction analysis "can appear in different guises. In the tort context, [the Court may] ... ask whether the nonresident defendant 'purposefully directed' its activities at the forum state; in contract cases, ... [the Court may] ask whether the defendant 'purposefully availed' itself of the privilege of conducting activities ... in the forum state." Dudnikov, 514 F.3d at 1071 (citations omitted).

12 The plaintiffs have alleged in their complaint that Cashland Financial has "close to 200 locations in Ohio and surrounding states." Doc. 1 at 3, ¶ 6.

13 See Doc. 1 at 3, ¶ 7 (plaintiffs have alleged in complaint that Cash America "purports to provide specialty financial services to individuals in the United States at more than 900 locations in 20 states").

14 SeeKeeton, 465 U.S. at 781 n.13 (jurisdiction over parent corporation does not automatically establish jurisdiction over wholly-owned subsidiary); Good v. Fuji Fire & Marine Insurance Co., 271 Fed. Appx. 756, 759 (10th Cir. 2008)(for purposes of personal jurisdiction, parent company has separate corporate existence and is treated separately from subsidiary in absence of circumstances justifying disregard of corporate entity)(cited pursuant to Tenth Cir. R. 32.1); Benton v. Cameco Corp., 375 F.3d 1070, 1081 (10th Cir. 2004)(activities of one corporate entity cannot be imputed to another for purpose of assessing general business contacts absent allegations of agency or alter ego).

15 See n.11 supra.

16 E.g., Walden, 134 S. Ct. at 1125 (Calder made clear that mere injury to forum resident is not sufficient connection; injury is jurisdictionally relevant only insofar as it shows that defendant has formed contact with the forum state); id. (proper question under Calder is not where plaintiff experienced particular injury or effect, but whether defendant's conduct meaningfully connects him to forum).

17 Although certain circuits have stated "that the determination of specific personal jurisdiction is a claim-specific inquiry, meaning that a conclusion that [a] ... court has personal jurisdiction over one defendant as to a particular claim does not necessarily mean that the court has personal jurisdiction over that same defendant as to other claims by the same plaintiff," Grynberg v. Ivanhoe Energy, Inc., 490 Fed. Appx. 86, 92 n.4 (10th Cir. 2012)(citing Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 274-75 (5th Cir. 2006); Remick v. Manfredy, 238 F.3d 248, 255 (3rd Cir. 2001))(cited pursuant to Tenth Cir. R. 32.1), the Tenth Circuit has not yet adopted this view.

18 In Shrader, the Tenth Circuit held that "[t]he maintenance of a website does not in and of itself subject the owner or operator to personal jurisdiction ... simply because it can be accessed by residents of the forum state." 633 F.3d at 1243. And while "most courts would agree that operating a website selling products to residents of a state can subject the seller to general jurisdiction in that state," id. (emphasis deleted), such determination "depend[s] on the nature and degree of commercial activity with the forum state." Id. (citations omitted).

In this case, only one defendant-Cash Financial-"maintain[s] a website that is publicly accessible[.]" Linscott Declaration at 2, ¶ 7. "[C]ustomers [however] cannot procure Cashland[ ] [Financial's] specialty financial services through the website[,]" id.; rather, the site only "provides visitors with information about Cashland[ ] [Financial's] specialty financial services and the locations of [its] ... stores ... in ... Ohio and Indiana." Id. Under these circumstances, the Court finds Cash Financial's operation of a website does not subject this defendant to general jurisdiction in this state.

19 In deciding whether general jurisdiction has been established, the Court may consider

(1) whether the corporat[e defendant under consideration] solicits business in the state through a local office or agents; (2) whether th[at] corporation sends agents into the state on a regular basis to solicit business; (3) the extent to which

> the corporation holds itself out as doing business in the forum state, through advertisements, listings or bank accounts; and (4) the volume of business conducted in the state by the corporation.

Trierweiler, 90 F.3d at 1533 (citation omitted).

20 SeeDaimler, 134 S. Ct. at 761 (inquiry under Goodyear Dunlop is not whether foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic;" rather, inquiry is whether that corporation's " 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State' ").

21 The plaintiffs have submitted a document that lists unrelated litigation in Oklahoma state courts involving entities named, inter alia, "Cash America Pawn," "Cash American Pawn and Bargain," Cash America Inc. of Oklahoma, "Cash America Financial Services, Inc." and "Cash America International, Inc.," see Doc. 28-3, and they have argued that the defendants' participation, if any, in the listed lawsuits is proof that the defendants have sufficient minimum contacts with this forum. Absent any supporting authority for this position advanced by the plaintiffs or any explanation by them that jurisdiction is warranted because overlapping issues of fact or law exist between the case-at-bar and the other suits, the Court finds the defendants' participation, if any, in those matters provides no basis for the Court's exercise of general jurisdiction over either movant.

22 Because the Court has determined that the plaintiffs have not met their burden of establishing the movants' minimum contacts with Oklahoma, the Court has not considered the five factors articulated by the Tenth Circuit in OMI Holdings to determine "whether the exercise of personal jurisdiction over the defendant[s] offends 'traditional notions of fair play and substantial justice.' " 149 F.3d at 1091 (quotation omitted); e.g., id. at 1095-98.

23 To satisfy the particularity requirements of Rule 9(b), supra, the plaintiffs must set forth in their complaint " 'the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.' " Koch v. Koch Industries. Inc., 203 F.3d 1202, 1236 (10th Cir. 2000)(quotation omitted). " 'At a minimum, Rule 9(b) requires that a plaintiff set forth the "who, what, when, where and how" of the alleged fraud.' " United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 726-27 (10th Cir. 2006) (quotation omitted).

The Court agrees that the plaintiffs have sufficiently alleged the "when" (April 2002 and March 2006), the "how" and "where" (the registration applications) and the "what" (Doc. 28-1 at 5 (declarant "to the best of his[ ] knowledge and belief [believes] no other person, firm, corporation or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely ... to cause confusion"); Doc. 28-2 at 5 (declarant "to the best of his[ ] knowledge and belief [believes] no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely ... to cause confusion")) of the alleged fraud. Under the instant circumstances, such allegations, however, are not enough.

24 To determine if factual allegations satisfy Rule 9(b), supra, the Court generally reviews only the text of the complaint and does not consider matters outside the pleadings. The plaintiffs, however, have requested that the Court take judicial notice of certain public filings; accordingly, the plaintiffs cannot claim any prejudice because the Court has considered those filings and the information contained therein or because the Court has determined that these same documents undermine the plaintiffs' claims. Seealso n.29 infra.

25 In applying for registration of a trademark, the applicant must

> Verif[y] ... and specify that ... to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive ....

15 U.S.C. § 1051 (3)(D).

26 SeeIn re Bose Corp., 580 F.3d 1240, 1243 (Fed. Cir. 2009)(absent requisite intent to mislead USPTO, even material misrepresentation does not qualify as fraud under the Lanham Act warranting cancellation).

27 The plaintiffs have titled their "second cause of action" "Determination of the Correlative Rights," see Doc. 1 at 8, and have asked "the Court [to] determine the correlative rights of each party with respect to use of the CASHLAND trademark after addressing the cancellation of the federal registration." Id. at 9, ¶ 23. To the extent, the plaintiffs have sought a declaratory judgment under the Declaratory Judgment Act ("Act"), 28 U.S.C. § 2201 et seq., the Court is mindful that the "[A]ct involves procedural remedies; it does not confer any 'substantive rights' or create a cause of action." Cheyenne and Arapaho Tribes v. First Bank & Trust Co., 560 Fed. Appx. 699, 708 (10th Cir. 2014)(citation omitted)(cited pursuant to Tenth Cir. R. 32.1).

And while declaratory judgment is a potential remedy in trademark cases for those parties "who [are] ... uncertain of [their] ... rights and who desire[ ] an early adjudication thereof without having to wait until [their] ... adversary should decide to bring suit[,]" 6 McCarthy on Trademarks and Unfair Competition § 32:50 (4th ed.), the Court finds in the absence of an actionable claim in this case that this remedy is not available.

28 Although a plaintiff may rely on statements in a response to clarify allegations in a complaint if those allegations are unclear, a plaintiff may not use a response to bolster allegations in a complaint or to cite facts that have not been pled. E.g., Pegram v. Herdrich, 530 U.S. 211, 230 n.10 (2000). Accordingly, the Court has disregarded any alleged facts in the plaintiffs' response that are not found in the complaint.

29 " 'The [C]ourt's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff[s'] complaint alone is legally sufficient to state a claim for which relief may be granted.' " Swoboda v. Dubach, 992 F.2d 286, 290 (10th Cir. 1993)(quotation omitted)(emphasis deleted). That is to say, "the sufficiency of a complaint must rest on its contents alone." Gee v. Pacheco, 627 F.3d 1178, 1186 (10th Cir. 2010) (citation omitted).

Exceptions to this rule occur when a complaint incorporates documents by reference, e.g., id. (citations omitted), when submitted documents referred to in the complaint are central to the plaintiffs' claims and the authenticity of those documents is not in dispute, e.g., id. (citation omitted), and when matters exist of which a court should take judicial notice. E.g., id. (citation omitted); Thomas v. Metropolitan Life Insurance Co., 2008 WL 4619822 *5 (W.D. Okla. 2008)(courts routinely consider public filings at motion to dismiss stage). In those limited instances, the Court is not required to restrict itself to examination of the allegations in the challenged pleading.

Accordingly, because the plaintiffs have referred to the registration applications and related documents in their complaint and because these documents are central to their claims, are public filings and/or are documents of which the Court may take judicial notice, the Court is permitted to consider, and has examined, the same. E.g., Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004).

30 Rule 12(e), supra, provides in pertinent part that "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." As set forth herein, the Court has considered the movants' argument that the plaintiffs' repeated use of "general allegations [that] lump[ ] all three defendants makes it impossible for [d]efendants to discern what allegations, if any, concern which defendant[,]" Doc. 16 at 30, in addressing whether the plaintiffs have satisfied Rule 9(b)'s heightened pleading standard and Rule 12(b)(6)'s plausibility standard.

End of Document

2019 WL 201567
Only the Westlaw citation is currently available.
United States District Court, D. Utah, Central Division.

Jane DOE 1, Jane Doe 2, Jane Doe 3, Jane Doe 4, John Doe 1, and John Doe 2, Plaintiff,
v.
Richard MILES and Brenda Miles, Defendants.

Case No. 1:18CV00121-JNP-BCW
|
Signed 01/15/2019

Attorneys and Law Firms

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MEMORANDUM DECISION AND ORDER DENYING MOTION TO FOR LEAVE TO TAKE EARLY DEPOSITIONS

Brooke C. Wells, United States Magistrate Judge

***1** This matter was referred to the undersigned by District Judge Jill N. Parrish pursuant to 28 U.S.C. § 636(b)(1)(A).[1] Pending before the court is Plaintiffs' *Alternative Motion for Leave to Take Early Depositions* (the motion).[2] Having considered the parties' memoranda and relevant standards, the court finds the requested leave is not warranted. Accordingly, the motion is DENIED.

BACKGROUND

This action arises from allegations of abuse perpetrated through a satanic, ritualistic sex ring in Bountiful, Utah in the mid-1980s. In October 2018, Defendants filed a motion to dismiss arguing the Plaintiffs' claims are statutorily barred, and that subsequent amendments cannot retroactively revive the claims.[3] Currently the Utah Supreme Court is reviewing the statute of limitations issue in *Mitchell v. Roberts*, No. 20170447-SC (Utah S. Ct.).[4] The dispositive motion is pending before the district judge, not the undersigned. In December 2018, Plaintiff filed the "Alternative Motion for Leave to Take Early Depositions," currently before this court.

DISCUSSION

Pursuant to Rule 30(a)(2)(A)(iii), "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)[.]"[5] Rule 26(d) provides that "a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)[.]"[6] Here, defendants responded to the Plaintiff's Complaint with a Motion to Dismiss.[7] Thus, it appears the parties have not conferred as per Rule 26(f) since no proposed Attorney Planning Report and/or Scheduling Order appear on the record.

Rule 26(b)(1) and (2) provide the court broad discretion in altering the standard sequence of discovery. However, the party seeking expedited discovery in advance of a Rule 26(f) conference bears the burden of showing good cause for departing from the usual discovery procedures.[8] Good cause exists "where a party seeks a preliminary injunction ... or where the moving party has asserted claims of infringement and unfair competition."[9] Good good cause is also found "where physical evidence may be consumed or destroyed with the passage of time."[10]

None of these factors are at play here. Plaintiffs' only basis for requesting expedited discovery is the allegation that both Russell M. Nelson and Craig Smith "are of advanced age." Without offering any supporting evidence, Plaintiffs offer the conclusory allegation that failure to allow the expedited discovery will risk "irrepairable prejudice by a delay."[11] Again, there is nothing on the record to corroborate these claims. Conclusory allegations are not enough to establish "good cause." As such, this court has no choice but to DENY Plaintiffs' motion for leave to take early depositions.

ORDER

***2** For the reasons set forth above the Court DENIES Plaintiffs' Short Form Discovery Motion [ECF No. 16].

All Citations

Not Reported in Fed. Supp., 2019 WL 201567

Footnotes

1 ECF No. 8.
2 ECF No. 16. Plaintiffs' motion is styled as an "alternative" motion conditioned upon the district court's "delaying a decision on Defendants' Motion to Dismiss." The undersigned is not reviewing the dispositive motion. Thus, any issues regarding delay of the dispositive motion were not considered in the court's analysis.
3 ECF No. 4.
4 ECF No. 15.
5 Fed.R.Civ.P. 30(a)(2)(A)(iii).
6 Fed.R.Civ.P. 26(d).
7 ECF No. 4.
8 *See Pod–Ners, LLC v. Northern Feed & Bean of Lucerne, LLC*, 204 F.R.D. 675, 676 (D.Colo.2002).
9 *Qwest Commc'n Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003).
10 *Id.*
11 ECF No. 16.

2020 WL 1907560
Only the Westlaw citation is currently available.
United States District Court, D. Idaho.

Adree EDMO, Plaintiff,
v.
IDAHO DEPARTMENT OF CORRECTION; Henry Atencio; Jeff Zmuda; Howard Keith Yordy; Corizon, Inc.; Scott Eliason; Murray Young; Richard Craig; Rona Siegert; Catherine Whinnery; and Does 1-15, Defendants.

Case No. 1:17-cv-00151-BLW
|
Signed 04/17/2020

Attorneys and Law Firms

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Dylan Alexander Eaton, J. Kevin West, Bryce C. Jensen, Parsons Behle & Latimer, Brady James Hall, Moore Elia Kraft & Hall, LLP, Boise, ID, for Defendants Corizon Incorporated, Scott Eliason, Murray Young, Catherine Whinnery.

ORDER GRANTING DEFENDANTS' JOINT MOTION TO STAY

B. Lynn Winmill, U.S. District Court Judge

INTRODUCTION

***1** Pending before the Court is Defendants' Joint Motion to Stay this litigation pending the resolution of Defendants' appeal to the Supreme Court of the United States of America. Dkt. 272. Plaintiff does not oppose the stay, but requests the stay include limited exceptions necessary to preserve critical evidence. Dkt. 274 at 2. After careful consideration, the Court will exercise its discretion to issue a stay.

STANDARD OF LAW

"A district court has discretionary power to stay proceedings in its own court." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). In deciding whether issue a stay of litigation pending appeal, the Court must weigh "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *4 CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

DISCUSSION

As set forth above, the parties agree to a stay of this litigation pending resolution of Defendants' appeal to the Supreme Court. Plaintiff, however, argues that a balancing of the hardships inquiry requires that the stay order include allowance for "target discovery" and an evidence retention order. Dkt. 274 at 4. Specifically, that the order:

> 1) permit Plaintiff to depose three individual Defendants and one key witness who have moved to other correctional systems or retired; 2) require Defendants to provide Plaintiff ongoing access to her custody and medical records; and 3) ensure preservation of relevant documentary and electronic evidence regardless of Defendants' default retention practices.

Id. at 2.

Since the inception of this lawsuit, three defendants and one key witness have either moved out of the state of Idaho, or retired from IDOC or Corizon. Dkt. 223-1. Plaintiff's claims include allegations that the three defendants "were personally

involved in violating her rights, and so their testimony is particularly important to her claims." Dkt. 274 at 7. Plaintiff asserts that, because deponents have either changed jobs or retired, the potential for their memories of the events and circumstances surrounding the claims to fade is high. Plaintiff argues an order allowing for these depositions during the pendency of Defendants' appeal to the Supreme Court is necessary to preserve critical evidence. Additionally, Plaintiff asserts that there is a danger some evidence, in the form of electronically stored information, may be destroyed during the pendency of the appeal due to Defendants' document retention policies.

Defendants oppose Plaintiff's request to perform the depositions during a stay, asserting Plaintiff has failed to show she will be harmed by the Court granting a stay in full. Dkt. 272 at 6–10; Dkt. 275 at 3. In reply, Defendants also cite the ongoing COVID-19 pandemic as reason for the Court to deny Plaintiff's request to conduct these four depositions. Dkt. 275 at 3. According to Defendants, one of the individuals to be deposed lives in Salt Lake City, and also spends some time in Ketchum, Idaho. *Id.* Defendants' counsel also points to the factor that Plaintiff's lead counsel works in San Francisco, California, a location where residents are currently under stay in place orders. *Id.* Defendants assert that, "deposing these witnesses would require out of state travel and could endanger the health of counsel, the witnesses, and the public." *Id.*

***2** First, the Court will require Defendants to retain all evidence that is discoverable under the broad scope of Federal Rule of Civil Procedure 26(b)(1). Any document retention policy that would ordinarily result in the Defendants' destruction or deletion of such evidence must be suspended until the conclusion of this lawsuit.

Second, the Court will require Defendants to continue to allow Plaintiff ongoing access to her custodial and medical records—as the case is ongoing, so is the need for Plaintiff's access to relevant records.

Third, the Court will order this matter stayed without allowance for the four depositions Plaintiff seeks to take during the pendency of the appeal. Plaintiff argues that, because the four deponents have either changed employment and moved out of state or retired, there is somehow greater risk than usual that they will forget information. However, a change in a deponent's personal life, absent potential for the deponent to abscond to another country, to die, or to lose the ability to remember due to a disability or generative disease, carries no greater risk of loss of evidence than that encompassed in the ordinary case of the passage of time. *See Herbalife Int'l of Am. Inc. v. Ford*, 2008 WL 11491587, at *2 (C.D. Cal. Mar. 12, 2008).

Plaintiff relies in part on *Clinton v. Jones* to support her argument that the delay in taking the depositions will result in prejudice due to potential loss of evidence. 520 U.S. 681, 707–08 (1997). In *Jones*, the appellate court found, and the Supreme Court later affirmed, that it was an abuse of the trial court's discretion to issue a stay of the trial until the conclusion of President William Jefferson Clinton's presidency. *Id.* The Supreme Court's decision on the issue was published in May 1997. President Clinton's second term of office expired in January 2001—nearly four years later. Here, Defendants have already submitted the issue to the Supreme Court for consideration. The Court and the parties will know whether the Supreme Court takes up the appeal within months, or even weeks, of this order. As such, the delay at issue is not analogous. Further, as noted by Defendants, the COVID-19 pandemic and resultant stay-at-home orders would currently prevent Plaintiff's counsel from performing any in-person depositions at this time, and would potentially prevent deponents from being available to appear – even by way of video deposition.

Additionally, in weighing the possibility of prejudice resulting from a stay issued without ongoing discovery, the Court notes that the primary and most pressing claim in this matter has been adjudicated by this Court. *See Order of Dec. 13, 2018*, Dkt. 149. Finally, the stay order will not apply to or impact the Court's enforcement of its October 2019 presurgical order. *See Presurgical Order*, Dkt. 225. As the Court detailed in discussions with counsel during the February 26, 2020 status conference, the presurgical order stands. *See* Dkt. 271-3 at 19–20. Defendants must continue to comply with the order by providing all necessary presurgical treatments while the Supreme Court considers whether to take up the appeal.

ORDER

IT IS ORDERED THAT

1. Defendants' Motion to Stay (Dkt. 272) is **GRANTED.**

2. Defendants must preserve all relevant evidence, including electronically stored information subject to

routine document retention removal practices, during the duration of this case.

***3** 3. Defendants must continue to provide Plaintiff with presurgical treatment consistent with the Court's October 2019 presurgical order. [1]

All Citations

Slip Copy, 2020 WL 1907560

Footnotes

1 To this end, the Court notes Defendants' status update of April 6, 2020 regarding unavoidable delays to some presurgical treatment due to COVID-19 closures. As soon as the closures are no longer in effect, the necessarily delayed presurgical treatment must immediately recommence.

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

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

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

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

and

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

KENNETH A. MARRA, United States District Judge

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

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

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

I. Background

The plaintiffs, Columbian nationals and family members of banana-plantation workers, trade unionists, political organizers, social activists and other civilians killed by terrorists in Columbia during the 1990s through 2004 —including members of the Autodefensas Unidas de

Colombia ("AUC") paramilitary organization—brought this action against defendants Chiquita Brand International, Inc. and Chiquita Fresh North America, LLC (cumulatively "Chiquita") alleging that Chiquita funded, armed and otherwise supported the AUC in order to produce bananas in an environment free from labor opposition and social disturbances, knowing the AUC to be a violent terrorist organization, in violation of Colombian law, U.S. law and international law prohibiting crimes against humanity, extrajudicial killing, torture, war crimes and other abuses. [1]

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

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

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

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

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

II. Discussion

A. Request to Perpetuate Testimony

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

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

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

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

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

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

Having done so, the court finds, first, as to plaintiffs' request to perpetuate the deposition testimony of the three paramilitary witnesses, that good cause is shown. Plaintiffs have made a strong showing that the proposed deponents are individuals with both the incentive and capacity to disappear after their release from Columbian prison. As to Roldan Perez, identified as the chief of security for the Castano family that ran the AUC, and who previously testified to having direct knowledge of the financial arrangements between Chiquita and the AUC, plaintiffs show that he has confessed to the murder of Carlos Castano Gil, former chief of the AUC, and therefore has a strong incentive to go underground after he is released from prison to avoid retaliation from Castano supporters. To illustrate the reality of this prisoner's incentive

to abscond, plaintiffs show that since demobilization of the AUC in 2007, approximately 1,600 Colombian paramilitary persons have been murdered, while countless others have simply disappeared from public view.

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

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

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

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

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

Defendants do not present any competent evidence linking any of plaintiffs' counsel in this case to any (non-expert) witness payment activity. However, they do present a redacted memorandum from "T. Collingsworth" to "Chiquita ATS Plaintiffs' Counsel," produced in supplementary discovery proceedings before this division, *Drummond Co. v Collingsworth*, Case No. 14-MC-81189 (S.D. Fla. 2014), [DE 696 Ex. A], entitled "CHIQUITA: Ethics of Paying Witness's Legal Fees." Defendants also supply the affidavit of Attorney Paul Wolf, one of the plaintiffs' attorneys in this proceeding, who avers that he has personally participated in meetings with ATS plaintiffs' counsel in this case during which payments to paramilitary witnesses were discussed [DE 662-4; ¶¶ 19-21, 23-24]

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

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

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

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

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

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

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

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

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

B. Requests for Judicial Assistance

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

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

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

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

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

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

In this case, plaintiffs have made a sufficient showing that the three paramilitary witnesses possess knowledge relevant to the plaintiffs' claims in these cases, and that they reside in

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

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

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

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

III. Decretal Provisions

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

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

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

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

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

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

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

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

All Citations

Not Reported in Fed. Supp., 2015 WL 12601043

Footnotes

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

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

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

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

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

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

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

Attorneys and Law Firms

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

THOMAS L. LUDINGTON, United States District Judge

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

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

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

I.

A.

Lashuay's amended complaint alleges that, on July 9, 2014, Lashuay suffered third degree burns on 49% of his body because of an explosion in Otsego County, Michigan. Am. Compl. at 10, ECF No. 4. Lashuay was treated at the Hurley Hospital Burn Unit in Flint Michigan for many weeks. *Id.* On October 16, 2014, Lashuay was released from Hurley Hospital and into the custody of the Michigan Department of Corrections. *Id.* He remained in MDOC custody until September 1, 2016, when he was released on parole. *Id.*

***2** Lashuay's claims arise out of the MDOC's alleged deliberate indifference to his medical needs upon his release from Hurley Hospital. He contends that, when released into

MDOC custody, "Hurley hospital recommended additional skin grafts and surgery to release contractures caused by the burns, with a re-visit at their Burn Unit in 2 weeks to evaluate for planned surgeries." *Id.* at 10–11.

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

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

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

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

B.

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

***3** Dr. Keith Papendick, the "Regional Medical Director for Corizon Health and/or the MDOC," was responsible for "approving or denying specialty services, such as physical therapy, assistive or therapeutic devices, surgical consult and surgery" to MDOC patients. *Id.* at 5. Scott Weaver was responsible for "providing physical therapy services to inmate patients" at DWH. *Id.* at 6. Danielle Alford "saw Plaintiff upon admission to DWH and indicated in her care plan that Plaintiff would provide his own wound care." *Id.* at 6–7. Dr. Terence Whiteman saw Lashuay when initially incarcerated and "approved Plaintiff being required to provide his own wound care." *Id.* at 7. Lynn Larson "was involved in responding to Plaintiff's requests for recommended surgery and following upon on or noting the responses thereto by other Defendants." *Id.* at 8. Dr. Muhammad Rais "oversaw Plaintiff's care beginning 7/8/15 ... until his release from MDOC custody." *Id.* William Borgerding "denied Plaintiff pain and burn care medications." *Id.* And Defendant Corizon Health, Inc., "employed or contracted with some or all of the individual medical providers named as Defendants." *Id.* at 9.

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

II.

A.

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

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

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

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

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

No. 4:12-CV-266 CEJ, 2012 WL 1320147, at *2 (E.D. Mo. Apr. 17, 2012) (citing *Qwest Comm. Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003)).

B.

Lashuay's request for expedited discovery is focused solely on identifying the two John Does mentioned in his amended complaint. He asks that the Court permit him to "immediately take a F.R.Civ.P. 30(b)(6) deposition and issue subpoenas

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

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

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

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

III.

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

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

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

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

All Citations

Not Reported in Fed. Supp., 2018 WL 317856

Footnotes

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

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

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2015 WL 13757325
Only the Westlaw citation is currently available.
United States District Court, N.D. West Virginia.

Michael D. MICHAEL, as the Administrator of the Estate of Jack D. Michael; Judith A. Kuhn, as the Administratrix for the Estate of Paul F. Henderson, et al., Plaintiffs,

v.

The ESTATE OF Alex KOVARBASICH, BY AND THROUGH Albert F. MARANO, Sheriff of Harrison County as Administrator for the Estates of Alex Kovarbasich; Consolidation Coal Company, a Delaware Company, Defendants.

Civil Action No. 1:14-cv-212
|
Signed 04/10/2015

Attorneys and Law Firms

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William E. Robinson, Dinsmore & Shohl LLP, Charleston, WV, Alex M. Greenberg, Dinsmore & Shohl LLP, Morgantown, WV, for Defendants.

ORDER/OPINION

JOHN S. KAULL, UNITED STATES MAGISTRATE JUDGE

***1** This matter is before the Court pursuant to Plaintiffs' "Motion to Preserve Evidence and Promptly Perpetuate the Testimony of Larry Layne and Request for Immediate Hearing," filed on April 6, 2015. (Docket No. 51.) Defendant Consolidation Coal Company ("CCC") filed a response in opposition on April 8, 2015. (Docket No. 54.) This matter was referred to the undersigned by United States District Judge Irene M. Keeley on March 11, 2015. (Docket No. 36.) On April 8, 2015, the parties appeared via telephone for a hearing on Plaintiffs' motion.

I. Relevant Procedural History

On November 6, 2014, Plaintiffs filed a Complaint against Defendants in the Circuit Court for Marion County, West Virginia, alleging a single cause of action for " 'fraud, concealment and nondisclosure' arising from the deaths of Plaintiffs' decedents and others killed 46 years ago in a November 20, 1968 explosion at the 'Consol No. 9 Mine' in Farmington, West Virginia." Defendants removed the case to this Court on December 11, 2014. (Docket No. 1.)

II. Contentions of the Parties

In their motion, Plaintiffs assert that Larry Layne, who currently resides in Jasper, Alabama, was a federal mine inspector at the No. 9 mine, and that he was involved in the recovery efforts at the mine following the November 20, 1968, explosion. (Docket No. 51 at 2.) Plaintiffs claim that Mr. Layne has "knowledge of the report and the person [1] who reported the bridging of the No. 3 Mod's Run fan alarm system." (Id.) They argue that Mr. Layne is of advanced age (eighty (80)) and it is "imperative that his testimony be perpetuated and preserved." (Id.) Accordingly, Plaintiffs request that the Court "issue an order to permit the taking of Larry Layne's deposition by videotape and by court reporter to perpetuate his testimony." (Id. at 3.) At the hearing, they further argued that they are required to comply with 29 C.F.R. §§ 2.20 et seq., and even if a deposition of Mr. Layne is permitted, they will be long delayed while they try to comply.

***2** In response, CCC states that Plaintiffs' motion "follows closely on the heels of a similar request to take the expedited deposition of Leonard Sacchetti." (Docket No. 54 at 2.) They assert that Mr. Sacchetti's deposition is relevant because "(1) it wholly contradicted Plaintiffs' representations to this Court as to what information Sacchetti's testimony would elicit, and (2) undeniably is the impetus for Plaintiffs' sudden desire to also depose Layne." (Id.) Defendants argue that Plaintiffs have not met the standard for expedited discovery under Fed. R. Civ. P. 26(d)(1). (Id. at 54 at 3, 5.) Specifically, Defendants state that Mr. Layne's advanced age alone does not make the matter suitable for expedited discovery. (Id. at 5.) Furthermore, Defendants argue that "no deposition could reasonably proceed without an opportunity for Defendants to first conduct extensive written discovery concerning Mr. Layne, his relationship to Plaintiffs, prior communications

with Plaintiffs, Defendants, and others concerning the subject matter about which he might testify, and other issues." (Id.)

III. Discussion

Rule 26(d)(1) of the Federal Rules of Civil Procedure provides that "[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."

The 26(f) conference has been delayed because of pending motions to remand and dismiss. There is also a matter challenging the propriety of the appointment of the Sheriff as administrator for the estate of Kovarbasich which is pending in the state court.

Generally, a party seeking expedited discovery must show good cause or reasonableness for doing so. See Dimension Data N. Am., Inc. v. Netstar-1, 226 F.R.D. 528, 531 (E.D.N.C. 2005); see also Pod-Ners, LLC v. N. Feed & Bean of Lucerne Ltd. Liab. Co., 204 F.R.D. 675, 676 (D. Colo. 2002) ("Rule 26(d), Fed. R. Civ. P., allows me to order expedited discovery upon a showing of good cause."). Furthermore,

> [f]actors commonly considered in determining the reasonableness of expedited discovery include, but are not limited to: "(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made."

Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth., 234 F.R.D. 4, 6 (D.D.C. 2006) (quoting In re Fannie Mae Derivative Litig., 227 F.R.D. 142, 143 (D.D.C. 2005)).

Upon consideration of the parties' arguments during the hearing, the Court finds that Plaintiffs' request to expedite Mr. Layne's deposition is unreasonable. First, there is no motion for a preliminary injunction pending. Furthermore, while Plaintiffs assert that the breadth of the discovery is limited to the taking of Mr. Layne's deposition, the fact that Plaintiffs have engaged in prior communications with Mr. Layne would necessitate Defendants conducting substantial written discovery so that both parties are on equal footing at the deposition.[2] Third, Plaintiffs' assertion that Mr. Layne's advanced age necessitates an expedited deposition is insufficient, as Plaintiffs presented no indication that Mr. Layne is either physically or mentally infirm. Age without more in not sufficient. Fourth, given that Mr. Layne resides in Alabama, the burden on Defendants would be substantial, in terms of both time and money spent in preparing for, taking, and traveling for an expedited deposition. However, it is not substantial if Defendants are given adequate time to prepare for such a deposition by conducting discovery. Moreover, Defendants provided no evidence to substantiate such a claim. Given these reasons, the Court concludes that good cause does not exist for granting Plaintiffs' request for an expedited deposition.

***3** However, there is good cause established to take Layne's deposition at some point in time. As set forth herein, Layne allegedly holds knowledge relative to the identity of the electrician who he says reported observing in September 1970 evidence of tampering with the fan alarm system at Mod's Run. The Layne memo raises important questions relative to the claims being made in Plaintiffs' complaint and any statute of limitations defense Defendants have raised. Why the memo and Layne's alleged knowledge is just now being brought to light some 44 plus years after the memo was prepared is a mystery. If there was evidence of tampering with the fan alarm system observed in September of 1970, whether the tampering was before the explosion or after will be an issue of intense scrutiny. Defendants must have a reasonable amount of time to conduct discovery concerning the likely subjects attendant to any deposition of Layne.

Pursuant to F.R.Civ.P. 26 the Court has broad discretion over the conduct of discovery in a civil case. The Court can by-pass the 26(f) pre-disclosure requirement when necessary (see 26(f)(1)).

IV. Conclusion and Order

Accordingly, for the reasons stated herein, the parties may engage in the following limited discovery:

1. Plaintiffs may serve notice of deposition and serve a subpoena *ad testificandum* on Layne for a day certain more than 180 days after the entry date of this Order thereby giving Plaintiffs the opportunity to initiate any process required under 29 C.F.R. §§ 2.20 et seq.

2. Defendants may conduct discovery from Plaintiffs and Plaintiffs may conduct discovery from Defendants relative to the following general topics: facts and records surrounding the creation of the Layne memo of September 1970; the storage and discovery of the same by Plaintiffs or someone on their behalf; the relationship of Layne to any of the Plaintiffs, any of the Defendants, Alex Kovarbasich, Leonard Sacchetti, or counsel representing same at any time before or since the 1968 mine explosion and disaster; identities of all persons and entities who had access to or possession of the Layne memo its creation on or about September 15-18, 1970 until its disclosure on April 6, 2015 when it was attached as Exhibit 1 to Docket No. 51; the facts, records, and photographs surrounding any inspections of the Mods Run Fan System and Alarm Systems immediately prior to and after the mine explosion and disaster of 1968; the facts, records, and photographs surrounding the control of the Mods Run Fan System and Alarm Systems immediately after the mine explosion and disaster of 1968 up to September 15-18, 1970; and the facts, records, and photographs surrounding the attempt to re-energize the electric to the Mods Run Fan System and Alarm System on or about September 15 to 18, 1970. The Court finds that a period of 180 days from the date of entry this Order should be sufficient for the conduct of such discovery.

3. Plaintiffs' "Motion to Preserve Evidence and Promptly Perpetuate the Testimony of Larry Layne and Request for Immediate Hearing" (Docket No. 51) is **DENIED IN PART AND GRANTED IN PART.**

It is so **ORDERED.**

All Citations

Slip Copy, 2015 WL 13757325

Footnotes

1 During the hearing held on April 8, 2015, counsel for Plaintiffs claimed that on Good Friday, 2015, investigators retained in their behalf again interviewed Mr. Layne. Based on that interview, Plaintiffs claim that Mr. Layne may point an accusatory finger at both Kovarbasich and Sacchetti as having conspired to render the fan warning system at Mod's Run inoperable. Plaintiffs acknowledged to the Court on questioning: (1) pointing an accusatory finger at Sacchetti may give them another venue-giving defendant; (2) they did not ask Sacchetti during his deposition if he had anything to do with rendering the fan warning system inoperable; and (3) they did not advise the Court during the hearing on Defendants' motion for appointment of a guardian ad litem or attorney ad litem that there was suspicion that Sacchetti had a role in rendering the fan warning system inoperable thus giving the Court a basis for considering appointing an attorney ad litem. Plaintiffs further stated that they had no affidavit from Mr. Layne and offered no written or recorded statements from the alleged interviews with Mr. Layne.

2 This is particularly true because of Mr. Layne's alleged fingering of Sacchetti because the fans and fan warning system were above ground at Mod's Run; because no official report of the 1968 disaster names either Kovarbasich or Sacchetti as being involved with bridging the leads to the fan warning system at Mod's Run; and the alleged bridging of the leads was not allegedly discovered until 1970, nearly two (2) years past the accident, when they energized the fans. It is understandable that Defendants will want to fully explore the background of the creation, storage and discovery of the Layne hand written memo dated September 18,, 1970. That is the memo in which Layne memorializes the alleged disclosure by someone other than him of the alleged tampering with the fan alarm system. Insofar as it is readable, it states: "On Sept.——, 1970, —— Mod's Run substation was energized for the first time since the explosion of Nov. 27, 1968. The electrician (name withheld by request) reported that while re-energizing the substation he found evidence to indicate that the Femco fan alarm system for Mod's Run fan had been rendered inoperable before the explosion. The fan alarm system had been bridged with jumper wires; therefore when the fan would stop or slow down, there was no way of anyone knowing about it because the alarm signal was bypassed. This information was reported to me Sept 15, 1970."

2010 WL 3834634
Only the Westlaw citation is currently available.

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

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

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

No. 08–CV–13178.
|
Sept. 27, 2010.

Attorneys and Law Firms

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

PAUL D. BORMAN, District Judge.

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

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

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

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

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

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

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

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

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

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

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

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

As a respected jurist noted in an article:

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

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

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

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

SO ORDERED.

All Citations

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

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2019 WL 5068471
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

PLUMBERS LOCAL 98 DEFINED BENEFIT PENSION FUND, et al., Plaintiffs,
v.
OAKLAND CONTRACTING CO. d/b/a/ Oakland Plumbing Company, Inc. & Michael J. Scott, Defendants.

Case No.: 19-12610
|
Signed 10/09/2019

Attorneys and Law Firms

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ORDER DENYING WITHOUT PREJUDICE PLAINTIFFS' MOTION FOR IMMEDIATE DISCOVERY (ECF No. 6)

Michael J. Hluchaniuk, United States Magistrate Judge

I. PROCEDURAL HISTORY

***1** Plaintiffs filed the instant suit on September 5, 2019, alleging that defendants have failed to pay employee fringe benefit contributions pursuant to the parties' Collective Bargaining Agreement. (ECF No. 1). On September 17th, plaintiffs filed an emergency motion for immediate discovery. (ECF No. 6). Chief District Judge Denise Page Hood referred the motion to the undersigned. (ECF No. 7). On October 2, 2019, plaintiff obtained a Clerk's Entry of Default as a result of defendants' failure to answer the complaint. (ECF No. 9). Though the named defendants were served with the pending motion for immediate discovery (*see* ECF No. 6, PageID.26), they have not responded to the motion.

II. ANALYSIS

Plaintiffs seek a Court order pursuant to Fed. R. Civ. P. 26(d) permitting them to conduct early discovery for the purpose of obtaining the information necessary to pursue construction liens or bonds. Specifically, plaintiffs seek to depose, *duces tecum*, the individual defendant, Michael Scott, and/or any agent of defendant Oakland Plumbing to obtain information regarding the identity of projects involving the defendant company and the specific employees and hours worked on those projects. (ECF No. 6, PageID.23). Plaintiffs intend to pursue available liens or payment bonds in the event that defendants are unable to "fulfill their obligation" under the Collective Bargaining Agreement, and to do so, they need certain information. (*Id.* at PageID.24). According to the plaintiffs, "time is of the essence" because there are deadlines that would restrict their ability to make claims if not followed.

Immediate discovery is not warranted in this instance. Plaintiffs are essentially seeking to obtain discovery in aid of execution of a judgment. But, although default has been entered against the defendants, there is no judgment against them as of the date of this Order. If judgment is entered against the defendants, plaintiffs may obtain discovery in aid of the judgment or execution under Fed. R. Civ. P. 69(a)(2), including conducting a creditor's examination, if necessary. *See, e.g.*, *Lewis v. United Joint Venture*, 2011 WL 13201856, at *2 (W.D. Mich. Feb. 24, 2011).

Further, plaintiffs have not demonstrated good cause to allow early discovery. The Federal Rules of Civil Procedure generally require a discovery conference under Rule 26(f) prior to the commencement of discovery. However, under Fed. R. Civ. P. 26(d), the Court may enter an order permitting discovery in advance of a scheduling conference. Fed. R. Civ. P. 26(d) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except ... when authorized ... by court order."). In deciding whether to permit discovery in advance of the Rule 26(f) conference, the Court should evaluate whether good cause exists. *McCluskey v. Belford High School*, 2010 WL 2696599, *1 (E.D. Mich. June 24, 2010) (citing *Diplomat Pharm., Inc. v. Humana Health Plan, Inc.*, 2008 WL 2923426, at *1 (W.D. Mich. July 24, 2008)); 8A Fed. Prac. & Proc. Civ. § 2046.1 (3rd ed. 2010) ("Although the rule does not say so, it is implicit that some showing of good cause should be made to justify an order, and courts presented with requests for immediate discovery have frequently treated the question whether to authorize early discovery as governed by a good cause standard.").

***2** Though plaintiffs argue that time is of the essence because certain lien or bond claims have deadlines, they have not sufficiently demonstrated the need for urgency. Plaintiffs cite M.C.L. § 570.1109(3) as an example of the need for urgency. The statute states that a laborer has until the fifth

day of the second month after fringe benefit payments were due but not paid to file a notice of furnishing to the designee (as defined in the statute) and the general contractor named in the notice of commencement.[1] But, plaintiffs have not demonstrated that the laborers, or union members, are without the means to identify the general contractors on the projects for which they provided labor to timely file a notice of furnishing, unless plaintiffs conduct a deposition.

Plaintiffs also state that certain payment bonds have "timeframes" that must be followed in order to make claims. (ECF No. 6, PageID.24). They intend to pursue construction lien or bond claims on defendants' projects or through direct payments from the general contractors owing amounts to the defendants. (*Id.* at PageID.23). Plaintiffs have not persuaded the Court that there is no other way to quickly obtain the information necessary to pursue available liens or bonds at this time, nor have they cited any other statute or discussed any other deadlines for filing liens or pursuing bonds that are approaching. Even assuming deadlines are fast approaching, presumably the employee members of the union would be able to provide information to plaintiffs about projects on which they provided labor, including the locations of the projects and the number of hours they worked. For these reasons, the motion for immediate discovery is **DENIED WITHOUT PREJUDICE**.

It is also noteworthy that plaintiffs did not seek concurrence before bringing this motion (considering the defendants were not yet in default at the time the motion was filed), as required by Local Rule 7.1(a). Plaintiffs must follow the Local Rules of this District. Failure to do so in future may result in an order striking a motion or pleading.

IT IS SO ORDERED.

The parties to this action may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). A party may not assign as error any defect in this Order to which timely objection was not made. Fed.R.Civ.P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. When an objection is filed to a magistrate judge's ruling on a non-dispositive motion, the ruling remains in full force and effect unless and until it is stayed by the magistrate judge or a district judge. E.D. Mich. Local Rule 72.2.

All Citations

Slip Copy, 2019 WL 5068471

Footnotes

1 Plaintiffs' "time is of the essence" argument is, in part, hollow. In citing M.C.L. § 570.1109(3), they state that the delinquency dates back to April 2018. The statute gives a laborer until the fifth day of the second month after fringe benefit payments were due but not paid to provide a notice of furnishing. For delinquencies dating as far back as April 2018, the two-month deadline has long passed. It is not clear what information plaintiffs could obtain that would allow them still to provide a notice of furnishing.

2015 WL 5139487
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Eastern Division.

TWEEN BRANDS INVESTMENT, LLC, Plaintiff,
v.
BLUESTAR ALLIANCE, LLC, et al., Defendants.

Case No. 2:15-cv-2663
|
09/01/2015

Attorneys and Law Firms

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OPINION AND ORDER

GREGORY L. FROST, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court for consideration of Plaintiff's motion to expedite discovery (ECF No. 3), Plaintiff Tween Brands Investment, LLC's ("Tween") supplemental memorandum in support of its motion (ECF No. 18), Defendant's memorandum in opposition (ECF No. 26), and Plaintiff's reply memorandum (ECF No. 28.) For the reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** the motion.

I. BACKGROUND

A brief background of the facts of this case is necessary to put the parties' dispute in context. This case involves the intellectual property associated with the brand "Limited Too," which is a brand directed at girls approximately seven to fourteen years of age (an age known as "tween"). The Limited Too brand (according to Plaintiff) was developed and originally marketed by the Limited Inc. women's clothing retail group and/or its affiliates (collectively, "the Limited"). In 1999, the Limited licensed the Limited Too trademarks to Tween's predecessor (for ease of reference, Tween and its predecessors are collectively referred to as "Tween").

In 2005, as a licensee of the Limited Too brand, Tween developed and registered a copyrighted daisy design. Although it is unclear from the briefs, Tween appears to have used the design in connection with the Limited Too brand.

Also during this time, although it is unclear exactly when, Tween registered the saying "It's a Girl's World." The registration was abandoned in 2014.

By 2009, Tween was operating 500-plus Limited Too stores pursuant to its license agreement with the Limited. That year, Tween renamed its stores "Justice," which appears to be a spin-off brand owned by Tween. There is no indication in the complaint that Tween uses the daisy design or the "It's a Girl's World" slogan in connection with its Justice brand.

On July 20, 2015, apparently after the license agreement between Tween and the Limited terminated, Defendant Bluestar Alliance, LLC (Bluestar) announced that it had purchased the Limited Too brand trademarks from the Limited. On its website, Bluestar displayed a daisy in connection with the Limited Too logo as well as references to the "It's a Girl's World" saying. Bluestar's website also depicted a photograph featuring five "tween" models (the "Photograph").

On July 28, 2015, Tween sued Bluestar in the lawsuit that is currently before this Court. Tween alleged that the Photograph depicts Justice models wearing Justice clothing. Tween registered a copyright in the Photograph on the same day it filed the lawsuit. Tween also registered copyrights in the clothing designs worn by the five models.

In its complaint, Tween also alleged that Bluestar was infringing on its daisy copyright and that Bluestar was creating market confusion by allowing the website limitedtoo.com to direct users to Tween's website, shopjustice.com. Tween filed a motion for preliminary injunction, as well as a motion for expedited discovery, and asserted that Bluestar's actions were causing irreparable harm. Notably, Tween referenced the "It's a Girl's World" slogan in connection with Bluestar's marketing campaign, but did not take issue with Bluestar's use of the slogan at that time.

***2** The Court held a telephone conference with the parties pursuant to Southern District of Ohio Local Civil Rule 65.1. During that conference, Bluestar acknowledged that it did not own any rights in the Photograph. Bluestar stated that

it obtained the Photograph from a third party known as The Beanstalk Group, LLC ("Beanstalk"), which provided a slide deck to Bluestar in connection with its purchase of the Limited Too trademarks. Bluestar stated that the Photograph was the cover of the slide deck, that it thought it had purchased the Photograph in connection with its purchase of the Limited Too intellectual property, and that it now understood that the Photograph was not part of the purchase. Bluestar stated that it would immediately remove the Photograph from its website. Finally, Bluestar stated that the issue with the website described in the complaint was actually the fault of Tween, which had linked the two websites during the duration of the license agreement. Bluestar stated that the website issue had since been corrected.

The parties then engaged in informal settlement talks and exchanged some initial discovery. After those talks broke down, however, and after a second telephone status conference with the Court, Tween filed an Amended Complaint against Bluestar, Beanstalk, and LTD2 Brand Holdings LLC ("LTD2"). The Amended Complaint reiterates Tween's concerns about Bluestar's use of the Photograph in its initial press release and marketing materials. According to Tween, the picture Bluestar used is slightly different than the photograph Tween published, thereby suggesting that Bluestar obtained the Photograph in an unauthorized manner. Tween does not suggest in its Amended Complaint that Bluestar is still using or displaying the Photograph.

Tween does allege, however, that "The Beanstalk slide deck features multiple photographs commissioned and used by Plaintiff to promote its JUSTICE brand retail stores and products." (ECF No. 17 ¶ 22.) Tween does not identify those photographs or explain whether/ how Bluestar is using them. Tween alleges, however, that an injunction is necessary because "Bluestar has refused to abstain from using the remaining photographs and clothing designs featured in the Beanstalk slide deck that feature Plaintiff's intellectual property." (*Id*. ¶ 27.)

Tween also alleges that, "[u]pon information and belief, Defendants likely have obtained unauthorized access to other works of Plaintiff." (ECF No. 17 ¶ 26.) Tween asserts that an injunction is necessary because upon information and belief, Bluestar must be enjoined immediately from further accessing Tween's materials and from further use of those materials in its impending 'social media and marketing blitz.' " (*Id*. ¶ 27.)

The Amended Complaint also references the daisy design as well as a new claim that Bluestar's use of the "It's a Girl's World" slogan is creating a likelihood of confusion in the marketplace. Although Tween does not directly state whether it used the slogan in connection with the Limited Too brand or with the Justice brand, or dispute that it cancelled the trademark in 2014, Tween attaches to its complaint the following printout from a website called "Ziplocal" that (Tween contends) shows that Tween is still using the slogan in interstate commerce:

(ECF No. 17-12.)

Despite the fact that it did not contest in its original complaint Bluestar's use of the slogan "It's a Girl's World," Tween now alleges that the same is causing irreparable harm. Notably, in its Amended Complaint, Tween abandoned its claim that Bluestar (or any Defendant) acted wrongfully in connection with the website issue.

Currently pending before the Court are Tween's motion for preliminary injunction and motion for expedited discovery, which Tween supplemented after it filed its Amended Complaint. In the former motion, Tween asked the Court for an order enjoining Defendants from infringing on the "Copyrighted Works," defined as "the Clothing Designs, Daisy Design, and Photograph." (ECF No. 2-1, at PAGEID # 84.)

***3** Tween's motion for expedited discovery (and supplemental filing in support of that motion) is the subject of this Opinion and Order. The Court will address that motion below.

II. DISCUSSION

A. Standard of Review

Pursuant to Federal Rule of Civil Procedure 26(d), and upon a showing of good cause, the Court may authorize discovery prior to the Rule 26(f) conference of the parties. *Best v. Mobile Streams, Inc.*, No. 1:12-CV-564, 2012 WL 5996222, at *1 (S.D. Ohio Nov. 30, 2012); *Arista Records, LLC v. Does 1–15*, No. 2:07–CV–450, 2007 WL 5254326, at *2 (S.D. Ohio May 17, 2007). Tween bears the burden of establishing good cause for the requested discovery. *Best v. AT&T, Inc.,* No. 1:12-cv-564, 2014 WL 1923149, at *1 (S.D. Ohio May 14, 2014).

Although requests for expedited discovery typically arise in connection with a motion for preliminary injunction, such requests are not automatically granted simply because a motion for preliminary injunction is pending. *See, e.g., American LegalNet, Inc. v. Davis*, 673 F.Supp.2d 1063, 1066 (C.D. Cal. 2009). To the contrary, the Court must weigh the need for the discovery against the prejudice to the responding party. *Arista Records, LLC*, 2007 WL 5254326, at *2 (quoting *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D.Cal.2002)). The Court must consider whether expedited discovery in this particular case is necessary to allow Tween to obtain and present evidence in support of its motion for preliminary injunction.

B. Tween's Requests

In their initial motion, Tween asserts that it needs expedited discovery in order to:

a) identify the Doe Defendants who personally infringed Plaintiff's copyrights and those who supervised the infringement for financial gain;

b) determine the full extent of Defendant's infringing activities and unfair competition;

c) determine what other copyrighted or trademarked works Defendants have already accessed or may have access to; and

d) further document Plaintiff's need for preliminary injunctive relief and respond to any opposition raised by Defendants.

(ECF No. 106, at PAGEID # 106.)

In their supplemental filing in support of that motion, Tween acknowledged that it received certain information from Bluestar following the Rule 65.1 conference, including the fifteen-page slide deck Bluestar received from Beanstalk (which, according to Tween, is "filled with photos showing clothing designs created and sold under the JUSTICE brand" (ECF No. 18, at PAGEID # 204)). Tween also submitted emails stating that Bluestar is willing to agree to not use the Photograph and/or the daisy design, and that Bluestar is willing to agree to not infringe the copyrighted clothing designs depicted in the Photograph.

Unsatisfied, Tween argues that "the information provided by Bluestar...has opened the door to serious questions regarding the intellectual property that Bluestar believes it purchased related to the LIMITED TOO trademarks." (ECF No. 18, at PAGEID # 204.) Regarding the Photograph and the other photographs from the slide deck, Tween does not suggest that Bluetstar is currently using any of the same. Instead, Tween asserts that "Bluestar refused to agree to any language requiring it to refrain from copying Plaintiff's other designs appearing elsewhere in the Beanstalk slide deck or unfairly competing with Plaintiff." (ECF No. 18, at PAGEID # 207.) Tween concludes: "Bluestar's refusal to provide further information or a stipulation backing up their claims that they are not using and will not use Plaintiff's intellectual property, drive home the need to [sic] expedited discovery." (*Id*. at PAGEID # 204.)

***4** Regarding the "It's a Girl's World" slogan, Tween asserts that LTD2 recently filed a trademark application for use of the same. LTD2's applications claim current use of the trademark in commerce. Plaintiff asserts that it is "entitled to know the basis for Defendants' claim that it has a right to use a trademark created by Plaintiff, and the extent of its actual use of Plaintiff's trademark." (*Id*. at PAGEID # 208.)

Put simply, Tween asserts that good cause exists to expedite discovery on the topics of whether Bluestar will attempt to use the clothing designs in the Photograph, photographs from the Beanstalk slide deck that (according to Tween) are Tween's intellectual property, and the extent to which Bluestar is using or plans to use the It's a Girl's World slogan. The Court must

view this request in the context of Tween's pending motion for preliminary injunction (and its claim that it faces irreparable harm), and of the burden on Defendants in participating in expedited discovery.

Tween submitted the following proposed interrogatories, which it intends to serve on Bluestar ("Bluestar Interrogatories"):

1. If you contend that Plaintiff does not own valid copyrights in any of the [daisy design, Photograph, and clothing designs featured in the photograph], identify the bases for that contention, including the identity of any persons with substantive knowledge of those facts, any documents reflecting those facts, and all other evidence you contend supports your position.

2. Describe in detail how the [daisy design, Photograph, and clothing designs featured in the Photograph] were created and/or otherwise used by you, including the source of any images you used to create the Infringing Materials, the date(s) of creation, the identity of each person who contributed to the Infringing Materials and the nature of each person's contribution, the identity of persons with the best substantive knowledge of those facts, and the identity of any documents reflecting those facts.

3. If you contend that you own any rights to any of the [daisy design, Photograph, and clothing designs featured in the photograph], identify the bases for that contention, including the identity of any persons with substantive knowledge of those facts, any documents reflecting those facts, and all other evidence you contend supports your position.

(ECF No. 18-5, at PAGEID # 237–38.) Tween seeks a response to these interrogatories no later than five business days after service of the same.

Tween also submitted the following proposed requests for production to Bluestar, to which it also seeks a response no later than five business days after service ("Bluestar RFPs"):

1. All documents identified in response to Plaintiff's Expedited Interrogatories to Defendant Bluestar Alliance, LLC.

2. All communications regarding the slide deck provided to you by Defendant The Beanstalk Group, LLC.

3. Documents sufficient to show the trademarks, goodwill and related intellectual property purchased by you related to the LIMITED TOO brand.

(ECF No. 18-6, at PAGEID # 241.)

Tween also submitted the following proposed interrogatories and requests for production that it intends to serve on LTD2, again with a proposed five-day response deadline ("LTD2 Requests"):

- Identify all products you have sold or offered for sale under the IT'S A GIRL'S WORLD trademark that is the subject of U.S. Trademark Application Serial Nos. 86701591 and 86701617, including the identity of any persons with substantive knowledge of those facts and any documents reflecting those facts.

***5** • Identify all bases supporting your assertion of first use in commerce of the IT'S A GIRL'S WORLD trademark that is the subject of U.S. Trademark Application Serial Nos. 86701591 and 86701617, including the identity of any persons with substantive knowledge of those facts and any documents reflecting those facts.

- If you played any role in the copying or use of Plaintiff's Copyrighted Materials, describe that role, including the identity of any persons with substantive knowledge of those facts and any documents reflecting those facts.

- [Produce] [d]ocuments sufficient to show your claimed date of first use in commerce of the IT'S A GIRL'S WORLD trademark for each type of goods listed in U.S. Trademark Application Serial Nos. 86701591 and 86701617.

- [Produce] [a] sample or photograph of each type of goods listed in U.S. Trademark Application Serial Nos. 86701591 and 86701617.

- Produce for inspection the originals of the specimens submitted by you in support of U.S. Trademark Application Serial Nos. 86701591 and 86701617.

- [Produce] [a]ll documents identified in response to Plaintiff's Expedited Interrogatories to Defendant LTD2 Brand Holdings, LLC.

- [Produce] [a]ll communications regarding the slide deck provided to you by Defendant The Beanstalk Group, LLC.

- [Produce] [d]ocuments sufficient to show the trademarks, goodwill and related intellectual property purchased by you related to the LIMITED TOO brand.

(ECF Nos. 18-8, at PAGEID # 251–52 & ECF No. 18-9, at PAGEID #254–55.)

Finally, Tween seeks to depose a Rule 30(b)(6) witness from both Bluestar and LTD2. The topics proposed to the witnesses include "[a]ny use by you of designs created and/or sold by Tween" and the relationship between LTD2 and Bluestar. (ECF No. 18-7, at PAGEID # 247 & ECF No. 18-10, at PAGEID # 261.) Tween requests that "30(b)(6) Depositions of Defendants may be taken upon notice of three (3) business days." (ECF No. 18, at PAGEID # 210.)

Defendants respond that the proposed discovery is overbroad. Specifically, Defendants assert that the requests seek information about documents and communications that are irrelevant to Tween's claims in its Amended Complaint, and that a five-day turnaround time is unreasonable given the circumstances. Defendants add that Tween "asks that the Court authorize the service on Bluestar of contention interrogatories about its possible defenses that could not possibly be answered meaningfully at this stage of the litigation, when no discovery from Tween has taken place." (ECF No. 26, at PAGEID # 276.)

C. Analysis

Having considered the parties' arguments with respect to the proposed discovery, the Court reaches the following conclusions about each of the Bluestar Interrogatories, Bluestar RFPs, and LTD2 Requests.

1. Bluestar Interrogatories

No good cause exists to permit Interrogatories No. 1 and 3 on an expedited basis. Although Tween would benefit from knowing the bases for any contention by Defendants that they own the copyrights at issue and/or that Tween does not own the same, the Court agrees with Defendants that the burden of articulating and producing the information sought, in five days and without having conducted any discovery of their own, is unduly burdensome. The Court concludes that the burden of this discovery outweighs the benefit and therefore negates any good cause in support of Tween's position.

***6** Regarding Bluestar Interrogatory No. 2, no good cause supports Tween's request that Bluestar "[d]escribe in detail how the Infringing Materials were **created**...including the source of any images you used to create the Infringing Materials...." (ECF No. 18-5, at PAGEID # 237 (emphasis added).) This request does little to advance Tween's claim that it is being irreparably harmed by Defendants' use of those materials. This request therefore does not outweigh the burden associated with responding to the same on an expedited basis.

Good cause supports Tween's request in the second Bluestar Interrogatory that Bluestar "[d]escribe in detail how the Infringing Materials were...used by you." (*Id.*) This request is directly relevant to Tween's motion for preliminary injunction and, given the narrow confines of the request as modified, outweighs the burden on Bluestar. Although the term "Infringing Materials" is not defined in the document, the Court interprets this term to mean the same as the defined term "Copyrighted Works." Bluestar therefore must respond to Bluestar Interrogatory No. 2, as modified, within five business days of service of the same.

2. Bluestar RFPs

No good cause exists to permit Requests No. 2 and 3 on an expedited basis. Tween's request for "[a]ll communications regarding the slide deck provided to [Bluestar] by [Beanstalk]," (ECF No. 18-6, at PAGEID # 241), is overbroad in the context of Tween's claim that it is being irreparably harmed by Bluestar's use of the Photograph and related materials. The benefit to Tween of receiving this discovery in such a short time period does not outweigh the burden on Bluestar of producing it.

Tween's request for "[d]ocuments sufficient to show the trademarks, goodwill and related intellectual property purchased by you related to the LIMITED TOO brand," (*id.*), is likewise overbroad. Although Tween might receive peace of mind from knowing that it and Bluestar agree about the intellectual property Bluestar purchased from the Limited, this request is simply an attempt to prematurely thwart any infringement issues that might arise in the future. Such a request is improper in the context of emergency litigation. The

Court therefore finds no good cause to require such discovery on an expedited basis.

Good cause supports Bluestar Request No. 1, which seeks documents identified in response to the Bluestar Interrogatories (as modified). Bluestar therefore must produce all documents identified in response to Tween's request to "[d]escribe in detail how the Infringing Materials were...used by you," (ECF No. 18-5, at PAGEID # 237), within five business days of service of the same.

3. LTD2 Requests and Rule 30(b)(6) Deposition

No good cause supports Tween's request to require LTD2 to respond to this discovery on an expedited basis. The question before the Court is whether the requested discovery is necessary in order for Tween to present evidence in support of its motion for preliminary injunction. The motion for preliminary injunction does not mention the "It's a Girl's World" slogan or make any attempt to explain why Defendants' use of the slogan is causing irreparable harm to Tween. (ECF No. 2.) The motion similarly does not mention LTD2. Accordingly, because the LTD2 Requests center entirely on LTD2's registration of the "It's a Girl's World" slogan, there is no good cause to expedite discovery on this issue. The additional requests to LTD2—requesting all communications from Beanstalk and documents sufficient to show all intellectual property purchased from the Limited—fail for the same reasons as those set forth above.

***7** The Court reaches the same conclusion regarding the proposed expedited 30(b)(6) deposition notice to LTD2. Absent any link in the motion for preliminary injunction between LTD2, the "It's a Girl's World slogan," and irreparable harm to Tween, the Court finds no good cause to justify Tween's request.

4. Bluestar 30(b)(6) Deposition Notice

No good cause supports the fourth topic listed on Schedule A of the proposed 30(b)(6) notice to Bluestar ("[t]he relationship between you and LTD2"). The remaining topics, however, (responses to the Bluestar Interrogatories and Bluestar RFPs, "[a]ny use by you of designs created and/or sold by Tween") are relevant to Tween's pending motion for preliminary injunction, to the extent the term "designs" is limited to the specific clothing designs depicted in the Photograph or in related photographs in the slide deck over which Tween claims copyright ownership. With that modification, the Court finds good cause to permit the requested discovery.

Bluestar therefore must make a corporate representative available for a Rule 30(b)(6) deposition on topics 1–3 of Schedule A of the proposed notice upon three business days' notice. Although the Court acknowledges that making a corporate representative available on three business days' notice presents a burden on Bluestar, the Court finds this burden justified given that Bluestar previously believed that it owned the rights to the Photograph and the designs depicted therein.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Tween's motion for expedited discovery. (ECF No. 3.) The Court grants the motion with respect to Bluestar Interrogatory No. 2 (as modified), Bluestar RFP No. 1, and the Rule 30(b)(6) deposition notice to Bluestar, topics 1–3 on Schedule A (as modified). The Court accordingly **ORDERS** that the discovery period shall open immediately with respect to this discovery, that Bluestar shall respond to the permitted discovery within five business days of service of the same, and that Bluestar shall make a representative available for a Rule 30(b)(6) deposition upon notice of three business days. The Court **DENIES** Tween's motion with respect to the remaining issues.

IT IS SO ORDERED.

All Citations

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United States District Court, D. Minnesota.

John Joseph WATERS, Jr., Plaintiff,
v.
The CAFESJIAN FAMILY FOUNDATION, INC., G.L.C. Enterprises, Inc., Gerard Leon Cafesjian, Defendants/Third Party Plaintiffs/ Counterclaimants,
v.
John Jsoeph WATERS, Jr. & Cheri Kuhn Waters. Third Party Defendant/CounterDefendant.

Civ. No. 12–648 (RHK/LIB)
|
Signed 06/27/2012

Attorneys and Law Firms

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ORDER

Leo I. Brisbois, U.S. MAGISTRATE JUDGE

***1** This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(A), upon the motion of the Plaintiff to Conduct Discovery. A hearing on the Motion was conducted on June 4, 2012. For reasons outlined below, the Court DENIES the Plaintiff's motion

I. BACKGROUND

Plaintiff brings a number of claims against Defendants Gerard Leon Cafesjian, G.L.C. Enterprises, Inc., and the Cafesjian Family Foundation, Inc. arising out of an employment relationship. According to the Complaint, Defendant Cafesjian was employed by West Publishing until 1996. (Compl. [Docket No. 1] ¶ 6). After West was sold to Thomson Reuters, Cafesjian created the Cafesjian Family Foundation, Inc. and G.L.C. Enterprises to manage his personal, business, and philanthropic affairs. (Compl. ¶ 19–20). Plaintiff was employed by G.L.C. Enterprises from 1996 through 2009. (Compl. ¶ 22).

Throughout the employment relationship, the Plaintiff asserts that the Defendants failed to pay him compensation owed to him. (Compl. ¶¶ 52–85). On the basis of these facts, the Plaintiff brings a number of claims including breach of contract, promissory estoppel, breach of implied contract, intentional infliction of emotional distress, and negligent infliction of emotional distress.

In response to the Complaint, the Defendants filed an Answer and a Third–Party Complaint against Plaintiff and Cheri Kuhn Waters. (Docket No. 29). Defendant Cafesjian contends that the Plaintiff stole millions of dollars from the Defendants. (Ans. ¶ 1). Defendant Cafesjian learned about the alleged misappropriation funds and instituted an investigation into the activity in February 2011. (Ans. ¶ 161). On the basis of the alleged embezzlement, Defendant Cafesjian asserts a number of claims against the Third–Party Defendants including civil conversion (against Waters and Kuhn), civil theft (against Waters and Kuhn), breach of fiduciary duty (against Waters), constructive trust (against Waters), and fraud and misrepresentation (against Waters).

Presently before the Court is the Plaintiff's motion to expedite the deposition of Defendant Gerard Leon Cafesjian ("Cafesjian"). The Court considers the motion below.

II. STANDARD OF REVIEW

Generally, "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d)(1). However, courts do allow expedited discovery in some cases. See e.g. Antioch v. Scrapbook Borders, Inc., 210 F.R.D. 645 (D. Minn. 2002).

Although the Eighth Circuit has not expressly addressed it, district courts within this circuit generally articulate a "good cause" standard must be met to allow for expedited discovery. See Wachovia Securities v. Stanton, 571 F.Supp.2d 1014, 1049 (N.D. Iowa 2008); Monsanto Co. v. Woods, 250 F.R.D. 411, 413 (E.D. Mo. 2008). Courts applying the good cause standard balance the need for discovery in the administration of justice against the prejudice to the responding party. Id. As such, courts analyze "the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances." Id. However, to be clear, "expedited discovery is not the norm." Merrill Lynch v. O'Connor, 194 F.R.D. 618, 623 (N.D. Ill. 2000).

***2** Courts have noted that "[e]xpedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings." Ellwsworth Assocs., Inc. v. United States, 917 F.Supp. 841, 844 (D. D.C. 1996) (citing Optic–Electronic Corp. v. United States, 683 F.Supp. 269, 271 (D. D.C. 1987)). Other courts have found expedited discovery appropriate in cases where the moving party has asserted claims of infringement and unfair competition. See Energetics Sys. Corp. v. Advanced Cerametrics, Inc., 1996 WL 130991, at *2 (E.D. Pa. 1996). In addition, expedited discovery could be appropriate in cases where physical evidence may be consumed or destroyed. Pod–Ners, LLC v. Northern Feed & Bean of Lucerne, Ltd. Liability Co. 204. F.R.D. 675, 676 (D. Colo. 2002).

III. DISCUSSION

Plaintiff seeks an order from the Court compelling the early deposition of Defendant Gerard L. Cafesjian. (Pl's Mem., p. 1). Plaintiff's sole reason for seeking the expedited discovery is "the age and health" of Cafesjian. Id. Plaintiff also contends that the Plaintiff's case depends heavily upon the deposition of Cafesjian. Id.

While Defendants agree some discovery on an expedited basis may be appropriate, they maintain, however, that at least some document discovery and initial disclosures are first necessary in order to properly prepare for the deposition of Defendant Cafesjian. Moreover, Defendants contend that a showing of good cause for expedited discovery absent an agreement between the parties has not been met in this case because the Plaintiff only states summarily that Mr. Cafesjian is aged and in poor health without providing any particular showing of specific details which would necessitate an early deposition of Defendant Cafesjian.

On the record now before the Court, the Plaintiff has not demonstrated good cause to justify expediting the deposition Gerard Cafesjian. He has provided no facts demonstrating that Mr. Cafesjian will be unavailable for a deposition in the future or that he is seriously ill. Simply relying on the mere fact of Mr. Cafesjian's age alone to support a request for expedited discovery does not demonstrate good cause. The Defendants represented that Mr. Cafesjian is presently in reasonably good health and a recent hospitalization was a minor incident for kidney stones. Nor has the Plaintiff provided any other reason for taking an early deposition of Mr. Cafesjian such as an actually filed and pending motion for a preliminary injunction requiring discovery.

For the reasons discussed above, the Court denies the Plaintiff's motion.

IV. CONCLUSION

NOW, THEREFORE, It is—

ORDERED:

1. Plaintiff's Motion to Conduct Discovery [Docket No. 5] is DENIED.

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