UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

CITY OF DETROIT, MICHIGAN

Chapter 9
Case No. 13-53846-swr
Hon. Steven W. Rhodes

RESPONSE OF THE RETIRED DETROIT POLICE MEMBERS ASSOCIATION TO STATE OF MICHIGAN'S MOTION TO QUASH AND FOR PROTECTIVE ORDER

The Retired Detroit Police Members Association ("RDPMA"), by and through its attorneys, Strobl & Sharp, P.C., without acknowledging the jurisdiction of this Court, the constitutionality of the City of Detroit's ("Debtor" or "Detroit") Chapter 9 bankruptcy filing, or the eligibility of Detroit to relief under Chapter 9 of the Bankruptcy Code, hereby submits its response to the Motion to Quash and for Protective Order (the "Motion") filed by the State of Michigan, Governor Rick Snyder, Treasurer Andrew Dillon, the Governor's Transformation Manager Richard L. Baird, Department of Treasury Legal Counsel Frederick Headen, and Auditor General Thomas McTavish (collectively, the "State"), and states as follows,

1. Pursuant to this Court's scheduling order of August 2, 2013 (the "August 2 Scheduling Order")[Docket No. 280], on August 19, 2013, RDPMA, along with 108 other creditors, filed its Objection to the City of Detroit's Chapter 9 Petition [Docket No. 520] (the "RDPMA's Eligibility Objection").

2. On August 23, 2013, also pursuant to the Court's August 2 Scheduling Order, the RDPMA filed and served, *inter alia*, a request for production of documents on the State of Michigan [Docket No. 596] seeking documents directly relevant to the RPDMA's Eligibility Objection (the "RDPMA Discovery").

3. Pursuant to the August 2 Scheduling Order, responses to the RDPMA Discovery are due September 13, 2013.

4. On August 26, 2013, the Court entered its Order Regarding Eligibility Objections, Notices of Hearings, and Certifications Pursuant to 28 U.S.C. § 2403(a) and (b) (the "August 26 Order") [Docket No.642].

5. The August 26 Order, identifies seven (7) objections asserted by various creditors, including the RDPMA, based, in the Court's determination, solely on legal issues and five (5) objections that require a resolution of genuine issues of material fact.

6. The August 26 Order further limits discovery to those objections requiring a resolution of genuine issues of material fact.

7. The Court identified the RDPMA as having raised four (4) of the five (5) objections requiring factual development for which discovery was permitted.

8. Late in the afternoon on Friday, August 30, 2013, at approximately 3:45 p.m., Mark Donnelley of the Michigan Department of Attorney General ("Donnelley") contacted counsel for the RPDMA asking counsel if, in light of the August 26 Order, the RDPMA would withdraw the RDPMA Discovery.

9. Despite counsel's representation that she would review the discovery over the weekend with the RDPMA and determine which, if any, requests could be withdrawn, and which requests could be narrowed in light of the August 26 Order, Donnelly indicated that a motion would be filed seeking to quash, in total, the RDPMA Discovery.

10. Approximately one hour after its first contact with counsel for the RDPMA, the State filed a Motion to Quash and for Protective Order [Docket No 699].

11. The State seeks to quash the RDPMA Discovery arguing that it is beyond the scope of discovery permitted under the August 26 Order.

12. Specifically, the State argues the following:

a. Document Requests 4,5,6,7,8 and 11 – 22 are irrelevant;

b. Document Requests 13, 14, 15, 16, 21 and 22 are more appropriately directed to the City of Detroit;

c. Document Requests 1, 2, 3, 9 and 10 are outside the scope of discovery because they seek information relative to the appointment of the emergency manager; and

d. The Court's expedited discovery schedule makes the production of the requested documents unduly burdensome.

Legal Standards

13. The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad. Lewis v. ACB Bus. Servs., 135 F. 3d 389, 401 (6th Cir. 1998). Parties may obtain discovery on any matter that is not privileged and is relevant to any party's claim or defense if it is reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P 26(b)(1). "Relevant evidence" is "evidence having **any tendency** to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.R.Evid. 401 (emphasis added).

14. Admittedly, the scope of discovery is not unlimited. "District courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Geryhound Lines, Inc.,* 474 Fed.3d 288, 305 (6th Cir. 2007).

15. Rule 26(c) allows the Court to issue protective orders for good cause shown to protect a party or person from annoyance, embarrassment, oppression, or undue burden or

expense, including that the disclosure or discovery not be had or that the disclosure or discovery be limited to certain matters. Fed. R. Civ. P. 26(c). The burden of establishing good cause for a protective order rests with the movant. *See Nix v. Sword*, 11 Fed. App'x 498, 500 (6th Cir.2001) (copy attached as **Exhibit B**), see also, *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). "To show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987) (citations omitted); *Napier v. County of Washtenaw*, 2013 U.S. Dist. LEXIS 49311 (E.D. Mich., April 5, 2013) (copy attached as **Exhibit C**).

16. To determine whether a burden is undue, Rule 26(b)(2)(C)(iii) specifically provides that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues." Fed.R.Civ.P 26(b)(2)(C)(iii). Matters involving public policy issues ":may have importance far beyond the monetary amount involved." *US v. Blue Cross Blue Shield of MI*, 2012 U.S. Dist. LEXIS 141355 (E.D. Mich., October 1, 2012)(citing Fed.R.Civ.P 26 (Advisory Committee Notices, 1983 Amendment, Subdivision (b)) (copy attached as **Exhibit D**).

17. A court only entertains an unduly burdensome objection to discovery when the responding party demonstrates how discovery of the document is overly broad, burdensome, or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden. *Convertino v. United States DOJ*, 565 F. Supp. 2d 10, (D.D.C. 2008).

18. Moreover, before restricting discovery, the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it, and

taking into account society's interest in furthering "**the truth seeking function**" in the particular case before the court. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir, 2002)(emphasis added).

The Discovery Requests of the RDPMA are Reasonable, Relevant and Not Unduly Burdensome

19. Without admitting that any of its discovery requests are outside the scope of discovery, irrelevant or unduly burdensome, for purposes of its Eligibility Objection and the pending Discovery, the RDPMA is prepared to withdraw Requests No. 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, and 22. Attached as **Exhibit A** is an Amended Request for Production of Documents with the remaining seven document requests.

20. The remaining requests for production are as follows:

> **REQUEST NO. 1:** Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager ("Orr"), or any agent, employee or counsel on his behalf to or from Richard D. Snyder, Governor of the State of Michigan (hereinafter "Snyder") or any agent, employee or counsel on his behalf regarding, referring or relating to the Chapter 9 Bankruptcy Petition filed in this matter on or about July 17, 2013, whether such correspondence or other communication was before or after the date the Petition was filed in this matter.
>
> **REQUEST NO. 2:** Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager ("Orr"), or any of his employees, agents, staff, servants and attorneys to or from Andrew "Andy" Dillon, Treasurer of the State of Michigan (hereinafter "Dillon") or any or any of his employees, agents, staff, servants and attorneys regarding, referring or relating to the Chapter 9 Bankruptcy Petition filed in this matter on or about July 17, 2013, whether such correspondence or other communication was before or after the date the Petition was filed in this matter.
>
> **REQUEST NO. 3:** Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager ("Orr"), or any of his employees, agents, staff, servants and attorneys to or from Bill Schuette, Attorney General of the State of Michigan (hereinafter "Schuette") regarding, referring or relating to the Chapter 9 Bankruptcy Petition filed in this matter on or about July 17, 2013, whether

such correspondence or other communication was before or after the date the Petition was filed in this matter.

REQUEST NO. 4: Please provide for inspection and copying any and all reports or memoranda of meetings of any agent of the State of Michigan with Kevin Orr, Emergency Financial Manager, or his employees, agents, staff, servants and attorneys regarding, referring or in any way relating to the Petition filed in this matter.

REQUEST NO. 7: Please provide for inspection and copying any and all documents analyzing which was the appropriate or best time to file the Chapter 9 Petition in this matter, including the impact the various possible times for filing such Petition would have on all the various creditors of the City of Detroit, including, but not limited to RDPMA.

REQUEST NO. 8: Please provide for inspection and copying any and all documents in possession of the State of Michigan, or any of its employees, agents, staff, servants and attorneys regarding any and all possible alternatives to filing a Chapter 9 Bankruptcy Petition.

REQUEST NO. 9: Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager, or any agent, employee or counsel on his behalf to or from Snyder or any agent, employee, staff member, servant or attorney on his behalf regarding the possible appointment of Kevin Orr as Emergency Manager of the City of Detroit and prior to such appointment.

REQUEST NO. 18: Please provide for inspection and copying any and all documents, including internal memoranda prepared by Snyder, Dillon or Schuette, their employees, agents, staff, servants and attorneys regarding possible alternatives to a Chapter 9 filing prior to the filing of the Petition in this matter.

21. Requests No. 1, 2, 3 and 4 request copies of communication in the custody and/or possession of the State between the Emergency Manager and the State regarding the filing of the Chapter 9 Petition; which directly relate to the factual issues identified in paragraphs 8, 9, 10 and 12 of the August 26 Order.

22. Request No. 7 requests copies of documents in the custody and/or possession of the State regarding the timing of the filing of the Chapter 9 Petition in this matter, which directly relate to the factual issues identified in paragraphs 8, 9, 10 and 12 of the August 26 Order..

23. Requests No. 8 and 18 request copies of documents in the custody and/or possession of the State regarding the alternatives to filing a Chapter 9 Petition that were considered, which directly relate to the factual issues identified in paragraphs 8, 9, 10 and 12 of the August 26 Order.

24. Request No. 9 requests copies of documents between the State and the Emergency Manager regarding his appointment, which directly relate to the factual issues identified in paragraphs 8, 9, 10 and 12 of the August 26 Order.

25. The State has objected to Requests 1, 2, 3 and 9 on the grounds that these requests should are beyond the scope of discovery.

26. The State has objected to Requests 7, 8, and 18 on the grounds that they are irrelevant and outside the scope of the August 26 Order.

27. The filing of a Chapter 9 Petition is clearly a matter of public concern. Therefore, the scope of discovery in this matter is, and should be, very broad, even in light of limitations in the August 26 Order.

28. The State is clearly involved in the Chapter 9 filing process.

> If, in the judgment of the emergency manager, no reasonable alternative to rectifying the financial emergency of the local government which is in receivership exists, then the emergency manager may recommend to the governor and the state treasurer that the local government be authorized to proceed under chapter 9. **If the governor approves of the recommendation**, the governor shall inform the state treasurer and the emergency manager in writing of the decision, with a copy to the superintendent of public instruction if the local government is a school district. The governor may place contingencies on a local government in order to proceed under chapter 9. Upon receipt of the written approval, the emergency manager is authorized to proceed under chapter 9. This section empowers the local government for which an emergency manager has been appointed to become a debtor under title 11 of the United States Code, 11 USC 101 to 1532, as required by section 109 of title 11 of the United States Code, 11 USC 109, and empowers the emergency manager to act exclusively on the local government's behalf in any such case under chapter 9.

M.C.L § 141.1558 (emphasis added).

29. Consequently, the information in the custody of the Governor, his agents and employees, is directly related to the factual issues in this matter, including the good faith filing requirement of Section 921(c) of the Bankruptcy Code. The communication between the emergency manager prior to his appointment, the expectations of the State upon his appointment, and the communication and information provided to the State after his appointment, but prior to the filing are directly relevant to the genuine issues of fact.

30. The relevance standard for discovery is also very broad. The RDPMA need merely establish that the documents requested have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid.401.

31. Certainly, the communication between the State and the Emergency Manager, the State's internal determinations regarding the need for a Chapter 9 filing by the City and the documents and communication regarding alternatives to the filing, a requirement for a good faith filing under Section 921(c), are relevant to the factual issues in this matter and within the scope of discovery, even under the August 26 Order.

The State has Failed to Meet its Burden of Proof

32. The burden of proof to quash the discovery or for the entry of a protective order squarely rests with the State.

33. The State has merely provided conclusory statements that the discovery requested by the RDPMA will be burdensome.

34. The State has not provided any affidavit or supporting evidence regarding the specific cost or burden producing the requested documents will require, nor has it identified any injury it will suffer if the requested discovery is enforced.

35. In light of the August 26 Order, the RDPMA has narrowed it document requests. The documents requested are reasonable and relevant in light of the factual issues set forth in the August 26 Order.

WHEREFORE, the RDPMA requests that this Honorable Court deny the State's Motion and compel the State to produce the documents requested in the Amended Request For Production of Documents Directed to the State of Michigan Attached as **Exhibit A**, and grant such further and additional relief as deemed appropriate..

Respectfully Submitted,

STROBL & SHARP, P.C.

/s/ Lynn M. Brimer

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Dated: September 9, 2013
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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

CITY OF DETROIT, MICHIGAN

Chapter 9
Case No. 13-53846-swr
Hon. Steven W. Rhodes

CREDITOR, RETIRED DETROIT POLICE MEMBERS ASSOCIATION'S AMENDED FIRST REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED TO THE STATE OF MICHIGAN

RETIRED DETROIT POLICE MEMBERS ASSOCIATION ("RDPMA"), by and through its attorneys, Strobl & Sharp, P.C., submits the following Amended First Request for Production of Documents, electronically stored information and tangible things directed to the State of Michigan. The answers must be served upon the undersigned attorney on or before the date set by the Court. The answer should be signed and sworn to by the person making the answers to these Requests. However, the answers should include information obtained by and available to said party and all agents, servants, employees, representatives, private investigators or others who are in possession or may have information for or on behalf of said party. These Requests shall be deemed continuing and supplemental answers shall be required immediately upon receipt thereof, if said party directly or indirectly obtains further or different information from the time the Answers are served to the time of Trial.

DEFINITIONS

For the purpose of these Requests and answers thereto, the following definitions shall apply:

1. "Document" means any paper or other writing and any item of graphic material, however recorded or reproduced, including all drafts, copies or other preliminary material which are different in any way from the executed or final document, regardless of whether designated "confidential", "privileged", or otherwise restricted, wherever located, whether an original or a

copy, including but not limited to agreements, contracts, financial statements, invoices, minutes, work sheets, work papers, summaries, and other written records or recordings of any conferences, meetings, visits, interviews, or telephone conversations, financial and statistical data, analyses, surveys, transcripts of testimonies, statements, interviews, affidavits, press releases, memoranda, drafts, memo pads, notes, indices, tabulations, graphs, reports, papers, records, interoffice communications, files, electronic data processing cards, tapes, printouts, papers or other recordings, CD-ROMs, tables, compilations, catalogues, telegrams, letters, photographs, diaries, calendars, drawings, data-reports, printed matter, correspondence, communications received or sent, books, brochures, advertising, circulars, mailings and publications; and any copy containing thereon or having attached thereto any alterations, notes, comments or other material shall be deemed a separate document from the original or any other copy not containing such material within the foregoing definition.

2. "Person" shall mean the plural as well as the singular and shall include any natural person, and any firm, association, partnership, joint venture, business trust, corporation, governmental or public entity, department, agency, office, or any other form or legal entity.

3. "You" or "Your" shall mean and include the State of Michigan, its elected officials, employees, agents, staff, servants and attorneys and shall also include Emergency Financial Manager Kevin Orr and his employees, agents, staff, servants and attorneys, as well as all attorneys and employees of the office of the Michigan Department of Attorney General, and any other related or affiliated entity, as well as all officers, employees, members, agents and representatives acting on behalf of such entities.

4. To "identify" a document (as hereinabove defined) or any other thing means to state its type (*e.g.*, letter, memorandum, periodical) or otherwise describe it, and in addition supply the following information with respect thereto, where applicable:

(a) the identity of the person who prepared it;

(b) the identity of the person who signed it or in whose name it was issued;

(c) the identity of the person to whom it was addressed or distributed;

(d) the nature and substance of the writing with sufficient particularly to enable it to be identified;

(e) the date, and if it bears no date, its approximate date;

(f) its physical location, the name and address of its custodian or custodians, and when it came into your possession or control, if such is the case;

(g) if any such document was, but is no longer in your possession or subject to your control, "identify" includes a description of what disposition was made of it and the identity of the person who presently has custody of it; and

(h) the specific portions of such document, if less than all of such document, which relates to, supports or is relied upon with reference to the subject of the specific inquiry.

5. To "identify" or provide the "identity" of a person or entity, please provide the following:

As to an individual, state his or her

(a) full and customarily used name;

(b) present or last known residence and business address; and

(c) present or last known employer and position(s) held with that employer.

As to an entity or any person other than an individual, state

(a) its legal name and any other names used by it;

(b) the form or manner of its organization (*e.g.*, partnership, corporation, etc.); and

(c) its address and principal place of business.

6. To "identify" a verbal communication shall mean to state with respect thereto:

(a) the identity of each person who participated in the communication and the name of each person who was present at the time it was made;

(b) by whom each such person was employed and whom each such person represented or purported to represent making such communication;

(c) the date when such communication took place;

(d) the place where such communication took place.

(e) what each person said, or if not known, the substance thereof; and

(f) the identification of each document pertaining to such verbal communication.

7. To "identify" a place, geographical area or location shall mean to state the number, street, municipality, state or province and country if without the United States wherein such place or geographical area is located.

8. "Communication," unless otherwise modified, shall mean both verbal communication and communication by document (as hereinabove defined).

9. "To "describe," "describe in detail," "state," or "state in detail" shall mean to relate as completely as possible each and every act, omission, incident, event, condition, circumstance or thing relating directly or indirectly to the subject matter of the description, including all pertinent dates, and without limiting the foregoing, to:

(a) identify all documents directly or indirectly related thereto;

(b) identify all communications directly or indirectly related thereto;

(c) identify all persons directly or indirectly related thereto; and

(d) identify all locations applicable to any events, incidents, conditions, circumstances or things directly or indirectly related thereto.

10. "Date" means the exact day, month and year if ascertainable or, if not, the closest approximation that can be made thereto by means of, if necessary, location in relationship to other events.

INSTRUCTIONS

1. Each answer given in response to a Request shall identify the number of the Request and, if relevant, any subpart being responded to.

2. Each of the Requests is intended to be a continuing request and it is demanded that in the event at a later date you obtain any additional facts or form any conclusions, opinions, or intentions different from those set forth in your answers, you shall amend your answers to these Requests promptly and sufficiently in advance of any trial to set forth such facts, conclusions, opinions, or intentions.

3. If you know of the existence, past or present, of any document described in any request for production but are unable to produce such document because it is not presently in your possession, custody or control, you shall so state and shall identify such document in response to the request for production in question. Further, you shall:

(a) specify the nature of the document (such as, for example, a letter, telegram, memorandum, etc.).

(b) state the date, if any, appearing on the document or, if none, the date that such document was prepared.

(c) identify each person, if any, who was an addressee thereof, whether or not the name of such person appears on the document.

(d) state whether the document is still in existence.

(e) identify each person who presently has possession, custody or control of the document.

(f) identify each person who has read or examined all or any portion of the document.

(g) state the reason or reasons for the preparation of the document.

(h) state the location or locations where the document was prepared.

(i) if the document was at any time transmitted by one person to another, state their names and the location of the person transmitting the document at the time of transmittal and the location of the person receiving same at the time of receipt.

(j) describe in general the subject matter of the document.

4. If relevant, state in detail each fact upon which you base your contention that a document is protected by the attorney-client privilege and/or the work product doctrine.

5. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun so used, and vice versa; and in similar fashion, the use of the masculine form of a pronoun shall be construed to also include within its meaning the feminine form of the pronoun, and vice versa; and in a similar fashion, the use of any tense of a verb shall be construed to also include within its meaning all other tenses of the verb so used.

FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager ("Orr"), or any agent, employee or counsel on his behalf to or from Richard D. Snyder, Governor of the State of Michigan (hereinafter "Snyder") or any agent, employee or counsel on his behalf regarding, referring or relating to the Chapter 9 Bankruptcy Petition filed in this matter on or about July 17, 2013, whether such correspondence or other communication was before or after the date the Petition was filed in this matter.

RESPONSE:

REQUEST NO. 2: Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager ("Orr"), or any of his employees, agents, staff, servants and attorneys to or from Andrew "Andy" Dillon, Treasurer of the State of Michigan (hereinafter "Dillon") or any or any of his employees, agents, staff, servants and attorneys regarding, referring or relating to the Chapter 9 Bankruptcy Petition filed in this matter on or about July 17, 2013, whether such correspondence or other communication was before or after the date the Petition was filed in this matter.

RESPONSE:

REQUEST NO. 3: Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager ("Orr"), or any of his employees, agents, staff, servants and attorneys to or from Bill Schuette, Attorney General of the State of Michigan (hereinafter "Schuette") regarding, referring or relating to the Chapter 9 Bankruptcy Petition filed in this matter on or about July 17, 2013, whether such correspondence or other communication was before or after the date the Petition was filed in this matter.

RESPONSE:

REQUEST NO. 4: Please provide for inspection and copying any and all reports or memoranda of meetings of any agent of the State of Michigan with Kevin Orr, Emergency Financial Manager, or his employees, agents, staff, servants and attorneys regarding, referring or in any way relating to the Petition filed in this matter.

RESPONSE:

REQUEST NO. 5: Please provide for inspection and copying any and all documents analyzing which was the appropriate or best time to file the Chapter 9 Petition in this matter, including the impact the various possible times for filing such Petition would have on all the various creditors of the City of Detroit, including, but not limited to RDPMA.

RESPONSE:

REQUEST NO. 6: Please provide for inspection and copying any and all documents in possession of the State of Michigan, or any of its employees, agents, staff, servants and attorneys regarding any and all possible alternatives to filing a Chapter 9 Bankruptcy Petition.

RESPONSE:

REQUEST NO. 7: Please provide for inspection and copying any and all correspondence or other written communication, whether hard copy, electronic or otherwise, between Kevin Orr, Emergency Manager, or any agent, employee or counsel on his behalf to or from Snyder or any agent, employee, staff member, servant or attorney on his behalf regarding the possible appointment of Kevin Orr as Emergency Manager of the City of Detroit and prior to such appointment.

RESPONSE:

REQUEST NO. 8: Please provide for inspection and copying any and all documents, including internal memoranda prepared by Snyder, Dillon or Schuette, their employees, agents, staff, servants and attorneys regarding possible alternatives to a Chapter 9 filing prior to the filing of the Petition in this matter.

RESPONSE:

Respectfully Submitted,

STROBL & SHARP, P.C.

By: */s/ Lynn M. Brimer*
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Dated: September 9, 2013
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EXHIBIT B

JOHN NIX, As Conservator & Executor of the Estate of John R. Master and individually; REBEKAH DEAMON; RICHARD KLEIN, Plaintiffs-Appellants, v. JACK SWORD, CAROLE SWORD, MICHAEL DOBRONOS, LYDIA DOBRONOS, MICHAEL HERYAK, AND MARLETTA HERYAK, Defendants-Appellees.

No. 00-3033

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

11 Fed. Appx. 498; 2001 U.S. App. LEXIS 11328

May 24, 2001, Filed

NOTICE: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: On Appeal from the United States District Court for the Northern District of Ohio. 94-00849. Nugent. 12-03-99.

DISPOSITION: AFFIRMED.

COUNSEL: For JOHN H. NIX, Plaintiff - Appellant: Harold Pollock, Harold Pollock Co., Cleveland, OH.

For JACK G. SWORD, CAROLE H. SWORD, Defendants - Appellees: David M. Maistros, Chagrin Falls, OH.

For MICHAEL DOBRONOS, LYDIA DOBRONOS, Defendants - Appellees: Anthony J. Damelio, Glen H. Garrett, Ziegler, Metzger & Miller, Cleveland, OH.

JUDGES: Before: MARTIN, Chief Judge; MOORE, Circuit Judge; TARNOW, * District Judge.

* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

[*499] **I. Introduction**

PER CURIAM. On April 22, 1994, John Master, John Nix, Rebekah Deamon and Richard Klein ("Plaintiffs") filed this action alleging: (1) illegal [**2] wiretapping in violation of the Federal Wiretap Act, *18 U.S.C. §§ 2511-2520*, and Federal Communications Act of 1934, *47 U.S.C. § 605*; (2) illegal wiretapping in violation of *Ohio Revised Code §§ 2933.51 - 2933.65*; (3) conspiracy to invade privacy and invasion of privacy through the recording of private telephone communications; (4) illegal wiretapping and conspiracy to conceal such wiretapping in violation of the Ohio Corrupt Activity Act, *O.R.C. § 2923.32*, and R.I.C.O., 18 U.S.C. § 1964; and (5) intentional infliction of emotional distress.

This suit arose from events surrounding John Master's intent to develop a tract of land adjacent to his home. Plaintiffs accused Jack and Carole Sword and Michael and Lydia Dobronos ("Defendants") of wiretapping his phone in an attempt to subvert the development.

Throughout the course of litigation, the district court issued several discovery rulings, including a protective order as to Congressman Martin Hoke. Subsequently, the district court granted summary judgment in favor of Jack and Carole Sword and Michael and Lydia Dobronos. Plaintiffs challenge the district court's decisions [**3] limiting discovery and granting summary judgment.

The Plaintiffs filed a timely notice of appeal. On appeal, they argue that the district court erred on a number of grounds: 1) the court abused its discretion by improperly restricting the scope of discovery; 2) the court erroneously granted summary judgment without allowing further discovery; and 3) the court erred by granting summary judgment, because a genuine issue of material fact precluded such disposition.

For the following reasons, this Court AFFIRMS the district court's decisions.

II. Discussion

The Plaintiffs' arguments can be divided into two categories. Plaintiffs contest: 1) the district court's determinations regarding discovery, especially the protective order as to Congressman Hoke; and 2) the district court's grant of summary judgment.

A. Discovery Arguments

We review a district court's decision to grant a protective order for abuse of discretion. *See Coleman v. American Red Cross, 979 F.2d 1135, 1138 (6th Cir. 1992).* [*500]

Plaintiffs argue that the district court abused its discretion by restricting the scope of discovery throughout the entire lawsuit. In their briefs, however, Plaintiffs [**4] not only fail to specify which discovery decisions they are contesting but also fail to cite to the record. Plaintiffs' notice of appeal provides some guidance though, listing only three discovery decisions as issues on appeal. These decisions include the district court's (1) May 7, 1997 order denying them access to the insurance communications of Michael and Marletta Heryak; (2) June 5, 1997 order denying them access to the insurance communications of Jack and Carole Sword; and (3) February 13, 1996, and June 14, 1999 orders granting and upholding Martin Hoke's motion for a protective order. As this circuit has repeatedly recognized, an appellant who "chooses to designate specific determinations in its notice of appeal" may raise only such determinations on appeal; therefore, we review only the three discovery decisions listed in Plaintiffs' notice of appeal. *Crawford v. Roane, 53 F.3d 750, 752 (6th Cir. 1995)* (citation and quotation omitted).

We easily dispose of Plaintiffs' first two challenges to the district court's discovery rulings. First, because Plaintiffs voluntarily dismissed the Heryaks from this appeal with prejudice, we need not review the district court's [**5] May 7, 1997 order denying access to the Heryaks' insurance communications. Second, because Plaintiffs failed even to present arguments to us regarding the district court's June 5, 1997 order denying access to the insurance documents of Michael and Lydia Dobronos, we deem that argument waived. *See McPherson v. Kelsey, 125 F.3d 989, 995-96 (6th Cir. 1997).*

Finally, we affirm the district court's orders granting and upholding former Congressman Hoke's motion for a protective order. Although the district court erred in its imposition of the burden of establishing good cause for the protective order on the nonmovant, we conclude that the district court did not abuse its discretion by granting a protective order. *Rule 26 of the Federal Rules of Civil Procedure* permits courts to issue a protective order, if justice requires and to protect individuals from "annoyance, embarrassment, oppression, or undue burden or expense" *Fed. R. Civ. P. 26(c).* The burden of establishing good cause for a protective order rests with the movant. *See General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973).* "To show good cause, a movant for a protective order [**6] must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Avirgan v. Hull, 118 F.R.D. 252, 254 (D.D.C. 1987)* (citations omitted).

We find that the district court did not abuse its discretion by granting a protective order. In support of his motion for a protective order, Congressman Hoke submitted an affidavit stating that it would be difficult for

him to schedule a deposition, because of his legislative duties; he had no personal knowledge about the alleged wiretapping; he was not related to an agent working on the case, who had the same last name; and he never discussed this lawsuit with any of the Defendants in this case.

Plaintiffs cited the following reasons in support of deposing Congressman Hoke: (1) Congressman Hoke's relationship with the Brookside residents; (2) his involvement in the cellular telephone industry; (3) small contributions to the Congressman's campaign during the pendency of the lawsuit by Sword; (4) the Dobronoses' role in hosting for a party for the Congressman; and (5) an alleged familial relationship between the Congressman and the FBI [**7] agent, who conducted the initial investigation of alleged wiretapping.

[*501] Plaintiffs request this Court to find that the district court abused its discretion merely based on the extent of the relationship between the Congressman and the resident-Defendants. We refrain from doing so. The district court balanced the concerns of Congressman Hoke to be protected from annoyance, embarrassment and undue burden against the Plaintiffs' right to discovery. We find that the district court did not abuse its discretion in this regard.

B. Summary Judgment

We review a district court's order granting summary judgment *de novo*, using the same test as the district court. *See Crawford v. Roane, 53 F.3d 750, 753 (6th Cir. 1995)*. Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. All facts and inferences must be construed in the light most favorable to the party opposing the motion. *53 F.3d at 753*.

Plaintiffs argue that the district [**8] court erred in granting summary judgment to the Defendants for three reasons: (1) necessary third-party discovery had not been completed; [1] (2) there were genuine issues of material fact; and (3) Carol Sword had improperly invoked her *Fifth Amendment* right against self-incrimination, thereby preventing Plaintiffs from obtaining discovery necessary to defeat summary judgment. We find Plaintiffs' argument unpersuasive.

1 The conclusion that the limitation on discovery was not an abuse of discretion, *supra*, disposes of this portion of the issue.

The Plaintiffs argue that the deposition testimony of Arlene Hill creates a genuine issue of fact. Hill was originally one of the neighbor/defendants in this action. After reviewing Hill's testimony, we conclude that it does not create any genuine issues of fact. While Hill testified that she knew of the tapes, she also testified that she did not know if the Swords and Dobronoses were involved in making the tapes or knew of the tapes prior to this lawsuit. Even viewing [**9] this testimony in the light most favorable to the Plaintiffs, no material issue of fact is raised.

Plaintiffs also made a number of unsupported allegations against the Dobronoses which fail to raise an issue of material fact.

Finally, Plaintiffs argued that a material issue of fact is raised by Carole Sword's invocation of her *Fifth Amendment* privilege in a related case, Mr. Sword's termination of his deposition in the related case, and the fact that their attorneys were in possession of the tapes. But Carole Sword exercised her *Fifth Amendment* privilege during a separate defamation claim. The context of her use of the privilege renders Plaintiffs' argument without merit. Further, the Plaintiffs had the opportunity to depose the Swords, but chose not to exercise this option. The Plaintiffs' failure to depose party witnesses when they had ample time and opportunity fails to raise a dispute as to material fact.

We conclude that the summary judgment was properly granted.

III. Conclusion

For the reasons stated above, this Court AFFIRMS the judgment of the district court.

EXHIBIT C

Rodney Napier, Plaintiff, vs. County of Washtenaw, a Municipal Corporation and public body, Sgt. [FNU] Jackson, in his individual capacity, Officer Scott Campbell, in his individual capacity, jointly and severally, Defendants.

Civil Action No.: 11-CV-13057

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2013 U.S. Dist. LEXIS 49311

April 5, 2013, Decided
April 5, 2013, Filed

COUNSEL: [*1] For Rodney Napier, Plaintiff: Miriam R. Nemeth, LEAD ATTORNEY, Goodman & Hurwitz P.C., Detroit, MI; Julie H. Hurwitz, Kathryn Bruner James, Goodman and Hurwitz, P.C., Detroit, MI; William H. Goodman, Goodman and Hurwitz, Detroit, MI.

For Washtenaw, County of, Jackson, Sgt., Scott Campbell, Officer, Defendants: Cynthia L. Reach, Reach Law Firm, Ann Arbor, MI.

JUDGES: MONA K. MAJZOUB, UNITED STATES MAGISTRATE JUDGE. District Judge Stephen J. Murphy, III.

OPINION BY: MONA K. MAJZOUB

OPINION

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL [23] AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER [19], AND DENYING PLAINTIFF'S MOTION TO COMPEL, FOR ORAL ARGUMENT, AND FOR AN EXPEDITED HEARING [36] AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER [34]

This matter comes before the Court on Defendants' Motion for Protective Order (docket no. 19), Plaintiff's Motion to Compel All Documents and Things in Response to His First Request for Production of Documents (docket no. 23), Defendants' Motion for Protective Order and to Extend Certain Deadlines (docket no. 34), and Plaintiff's Motion to Compel Production of Witnesses, for Oral Argument on All Pending Motions, and for an Expedited Hearing on These Motions [*2] (docket no. 36). The Parties have filed Responses and Replies to each others' Motions (docket nos. 24, 29, 33, 38, 40, and 41.) The Parties then filed Joint Statements of Resolved and Unresolved Issues with regard to the outstanding motions. (Docket nos. 31 and 43.) The parties have fully briefed the motions; the Court has reviewed the pleadings and dispenses with oral argument pursuant to *Eastern District of Michigan Local Rule 7.1(f)(2)*. [1] The Court is now ready to rule pursuant to *28 U.S.C. § 636(b)(1)(A)*.

1 Therefore, although Plaintiff requests oral argument and an expedited hearing on these motions, the Court will deny those requests as moot.

I. Background

Plaintiff filed this action under *42 U.S.C. § 1983*

alleging a *Fourth Amendment* violation for the use of excessive force and supervisory liability, a *Fourteenth Amendment* violation for impeding his access to the court and his due process rights, and a state-law claim for assault and battery. (*See* docket no. 6.) Plaintiff's claims arise out of an alleged assault cause by Defendant Campbell while Plaintiff was in custody at the Washtenaw County Jail. (*Id.*) In short, Plaintiff claims that Defendant Campbell used excessive force while [*3] he was in custody; that Defendant Jackson is liable for a failure to properly supervise, train, or discipline Defendant Campbell; that Defendant Washtenaw "established, promulgated, implemented, and maintained the . . . customs, policies, or practices" that caused the violation; and that Defendant Washtenaw allowed Defendant Jackson to deliberately destroy evidence that would have supported Plaintiff's claims. (Docket no. 24 at 1-2.)

The Parties have fully set forth (several times in their various motions, responses, and replies) the factual history of discovery in this matter as it relates to the instant motions, and there appears to be no factual dispute with regard to the events in question. In relevant part, Plaintiff sent his First Request for Production and First Set of Interrogatories to Defendants on March 13, 2012. (*See* docket no. 23 at 2.) Approximately one week after Defendants' responses were due, Defendants contacted Plaintiff and requested an extension until May 4, 2012. (*See id.* at 3.) Plaintiff informed Defendants that they would agree to the extension, but he expected Defendants to provide "complete responses without objections, pursuant to [*Fed. R. Civ. P.] 33(b)(2)* [*4] and *34(b)(2)(A)*." (Docket no. 23-4 at 1-2; docket no. 23-5.)

On May 7, 2012, Defendants provided several responses to Plaintiff's discovery requests. (*See* docket no. 23 at 3.) And on May 17, 2012, Defendant Washtenaw served its Responses to Plaintiff's First Request for Production. (*See id.*) Plaintiff asserts that Defendant improperly objected to the requests, arbitrarily narrowed the scope of some of the requests, and improperly refused to produce certain documents without a protective order that Plaintiff believes is unjustified. (*Id.* at 4.) After several months of continuous communication between counsel, Defendants filed their Motion for Protective Order, asking the Court to enter their proposed protective order over Plaintiff's objections. (Docket no. 19.) Plaintiff followed by filing his Motion to Compel, arguing that a more limited protective order is appropriate and that Defendants must also produce the remaining requested documents. [2] (Docket no. 23.)

> 2 Plaintiff filed his Motion on September 25, 2012. (Docket no. 23.) Pursuant to *E.D. Mich. L.R. 7.1(e)(2)*, Defendants were required to file their response by October 9, 2012. Defendants filed their response on October 29, 2012. [*5] (Docket no. 29.) Plaintiff argues that the Court should strike Defendants' response.

While the Parties waited for the Court's decision, they attempted to continue with discovery in this matter. However, because "the materials [at issue in their outstanding motions] go to the heart of the factual issues in Plaintiff's complaint and are critical for the depositions of Defendants," Defendants refused to appear for their noticed depositions. (*See* docket no. 43 at 2.) Thus, Defendants filed their (second) Motion for Protective Order, asking the Court to limit Defendants' depositions to issues outside the scope of the disputed documents and asking the Court to extend the deadline for dispositive motion filing. (Docket no. 34.) Plaintiff then filed a (second) Motion to Compel, asking the Court to compel Defendants' depositions, acquiescing with Defendants' request to extend the motion filing dates, and asking for reasonable costs and attorney fees. (Docket no. 36.)

II. Governing Law

A. Discovery Standard

The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad. *Lewis v. ACB Bus. Servs., 135 F.3d 389, 402 (6th Cir. 1998)*. Parties may obtain discovery on any [*6] matter that is not privileged and is relevant to any party's claim or defense if it is reasonably calculated to lead to the discovery of admissible evidence. *Fed.R.Civ.P. 26(b)(1)*. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Fed.R.Evid. 401*. But the scope of discovery is not unlimited. "District courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir. 2007)*.

Rules 33 and *34* allow a party to serve interrogatories

and requests for production of documents on an opposing party. *Fed.R.Civ.P. 33, 34.* A party receiving these types of discovery requests has thirty days to respond with answers or objections. *Fed.R.Civ.P. 33(b)(2), 34(b)(2)(A).* If the receiving party fails to respond to interrogatories or RFPs, *Rule 37* provides the party who sent the discovery the means to file a motion to compel. *Fed.R.Civ.P. 37(a)(3)(B)(iii)* and *(iv).* If a court grants a *Rule 37* [*7] motion to compel, then the court must award reasonable expenses and attorney's fees to the successful party, unless the successful party did not confer in good faith before the motion, the opposing party's position was substantially justified, or other circumstances would make an award unjust. *Fed.R.Civ.P. 37(a)(5)(A).*

B. Protective Order

Rule 26(c) allows the Court to issue protective orders for good cause shown to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including that the disclosure or discovery not be had, or that the disclosure or discovery be limited to certain matters. *Fed.R.Civ.P. 26(c).* The party seeking a protective order has the burden of showing that good cause exists for the order. *Nix v. Sword, 11 Fed. App'x 498, 500 (6th Cir.2001).* To show good cause, the movant must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on conclusory statements. *Id.*

III. Analysis

In their various motions and responses, Plaintiff and Defendants set forth numerous issues and arguments. Through their Joint Statement filed on October 31, 2012, the Parties have somewhat narrowed [*8] the remaining issues. (*See* docket no. 31.) While the Parties frame their unresolved issues in the form of nine questions set forth over eight pages, the Parties are, essentially, asking the Court to determine (1) whether the Court will consider Defendants' arguments in light of their late responses; (2) whether Defendants are entitled to a protective order and, if so, whether the scope of that order should include the right to file documents under seal; (3) whether Plaintiff is entitled to the production of the documents requested in his Request For Production (RFP) Nos. 1(a), 5, 6, 9, and 16, under a protective order; (4) whether Plaintiff is entitled to the documents that he requested in RFP Nos. 4, 7, 8, and 10; (5) whether Defendants have the right to redact information from the documents produced in response to RFP No. 14; and (6) whether Plaintiff is entitled to reasonable costs and attorneys fees in bringing these motions. (*See* docket no. 31.)

A. The Court will consider a Defendants' Response to Plaintiff's Motion to Compel despite Defendants' late filing.

Defendants filed their Response to Plaintiff's Motion to Compel (docket no. 29) on October 29, 2012; Defendants' Response [*9] was due on October 9, 2012, pursuant to *E.D. Mich. L.R. 7.1(e)(2).* Plaintiff argues that Defendants' Response should, therefore, be stricken, and Defendants should be required to produce all of the documents that Plaintiff has requested. (*See* docket no. 33 at 2.) Defendants assert that "their *Response* should be considered by this Court because it essentially encompasses the similar arguments as those set forth in their *Motion for Protective Order.*" (Docket no. 31 at 3.)

It is axiomatic that Defendant's Motion for Protective Order (docket no. 19) and Plaintiff's Motion to Compel (docket no. 23) are intertwined. Thus, to the extent that Defendants' Response encompasses the arguments set forth in their Motion, the Court must consider the portions of Defendants' Response that apply to RFP Nos. 1(a), 5, 6, 8, 9, and 16.

Defendants' Response, however, goes beyond the scope of their Motion for Protective Order; Defendants also raise arguments related to RFP Nos. 4, 7, 10, and 14. With regard to RFP No. 4, the Court will consider Defendants' argument as it raises a possible statutory bar against production of the requested documents. Assuming, arguendo, that Defendants are correct, the Court [*10] will not order them to violate a statute because they were late in filing a response. With regard to RFP No. 7, Defendants argue that no such materials exist. Plaintiff requests an affidavit stating the same; therefore, the Court will consider Defendants' argument in the interest of expediency. With regard to RFP Nos. 10 and 14, the Court will reluctantly consider Defendants' argument because it raises concerns over the privacy rights of non-party officers. Again, assuming, arguendo, that Defendants are correct, the Court would be remiss to invade the privacy rights of non-party individuals without considering Defendants' argument simply because Defendants filed a late response.

B. While Defendants waived their right to object to Plaintiff's First Request for Production, the Court will

entertain some of Defendants' objections.

Plaintiffs also assert that Defendants waived their right to object to any of the requested production when they failed to file a timely response under *Fed. R. Civ. P. 34*. (Docket no. 23 at 26-27.) "As a general rule, failure to object to discovery requests within the thirty days provided by *Rules 33* and *34* constitutes a waiver of any objection." *Carfagno v. Jackson Nat'l Life Ins., Co., No. 99-118, 2001 U.S. Dist. LEXIS 1768, 2001 WL 34059032, at *1 (W.D. Mich. Feb. 13, 2001)* [*11] (citations and internal quotation marks omitted). But this is not a bright-line rule; "courts will examine the circumstances of each case, including the reason for tardy compliance, prejudice to the opposing party, and the facial propriety of the discovery requests, to determine whether enforcement of the waiver is equitable." *Id.*

Defendants' objections, in general, are two-fold. Defendants object to the scope of production based on statutory limitations, the privacy rights of the Defendant officers, and the privacy rights of non-party individuals. The Court finds that waiving these objections based on Defendants' tardiness in responding to Plaintiff's Request for Production would be inequitable. Therefore, the Court will consider Defendants' objections to the extent that they raise questions of statutory compliance or matters of privacy. However, to the extent that Defendants argue that certain discovery requests are irrelevant, overbroad, or unduly burdensome, the Court will not entertain these objections.

C. Defendants' Motion for Protective Order, and Plaintiff's Motion to Compel

Plaintiff asserts that he is entitled to all of the requested discovery because it is "relevant and likely [*12] to lead to admissible evidence." (Docket no. 31 at 3.) Plaintiff does, however, acknowledge that a limited protective order is appropriate to alleviate any privacy concerns of the individual officers involved or any third-party officers. (*Id.*) Defendant asserts that some of the information Plaintiff requests is not discoverable; some of the information is discoverable but must only be produced pursuant to a protective order; and that any protective order must limit availability and knowledge of the documents to the attorneys of record, their support staff, and experts and witnesses. (*See* docket no. 19-2 at 2.) Defendant also argues that any information subject to the protective order should be filed under seal pursuant to *E.D. Mich. L.R. 5.3*. (*Id.*) Defendants have submitted a proposed protective order. (Docket no. 19-2.) Plaintiffs have suggested that a protective order requires only the redaction of any personal information and a provision limiting the use of these documents to the instant case. (*See* docket no. 24; docket no. 31.) Due to the privacy interests involved, the Court will grant Defendants' Motion for Protective Order, in part, but will limit the scope of the Order. Because [*13] each RFP (or group of RFPs) raises a disparate issue, the Court will address the scope of the protective order and the Parties' arguments related to each.

1. Request for Production No. 1(a)

Plaintiff's RFP No. 1(a) requests:

> The complete file and all documents within your possession, custody, or control . . . in any way related to the detention of Plaintiff Napier in the Washtenaw County Jail on or about July 16, 2008 through July 18, 2008, including but not limited to . . . [t]he entire internal affairs investigation regarding the incident giving rise to this lawsuit between Defendant Officer Scott Campbell and Plaintiff Napier.

(Docket no. 31 at 5 (omissions in original).) Plaintiff asserts that he is entitled to this information and that he is willing to stipulate to a protective order that redacts any of the officers' personal information. (Docket no. 24 at 8.) Defendant asserts that the information must be filed under seal to comply with the confidentiality requirements of the Michigan Employee Right to Know Act (ERKA), *M.C.L. § 423.509*. (Docket no. 19 at 9-10.)

Defendants argue, with regard to the internal-affairs investigation, that the application of *Section 423.509* appears to be [*14] a matter of first impression. (*See* docket no. 19 at 9.) While the Court has addressed this question in light of *M.C.L. §§ 423.506* and *423.507*, finding that disciplinary reports, letters of reprimand, and other records of disciplinary action are not privileged documents, *Horton v. 48th Dist. Court, No. 05-072356, 2006 U.S. Dist. LEXIS 23990, 2006 WL 1064263 at *2 (E.D. Mich. Feb. 21, 2006)* (Feikens, J.), *section 423.509* requires a criminal-justice agency to keep a separate, confidential file for any matter involving "the investigation of an alleged criminal activity or the violation of an agency rule by the employee." *Mich.*

Comp. Laws. Ann § 423.509 (2) (West 2012).

In support of their argument, Defendants draw the Court's attention to *Newark Morning Ledger Co. v. Saginaw County Sheriff, 204 Mich. App. 215, 514 N.W.2d 213 (Mich. App. 1994)*. The parties' arguments in *Newark Morning Ledger Co.* centered around whether disclosure of an internal-affairs investigation was appropriate under the Freedom of Information Act (FOIA). The plaintiff requested access to 14 years worth of internal-affairs records, and the court looked to the ERKA to determine the Legislature's intended treatment of investigatory records. *Id. at 217*. The court determined [*15] that "the Legislature intended that access to those records be severely restricted." *Id.* The court reasoned that "[t]he Legislature would not have denied an employee access to documents that were readily available to the public pursuant to the FOIA." *Id.*

Plaintiff argues that this case is inapposite because *Newark Morning Ledger Co.* is a FOIA case decided under Michigan law, and the instant issue is a discovery matter decided under the Federal Rules of Civil Procedure and the principles of *42 U.S.C. § 1983*. (Docket no. 24 at 17.) As Plaintiff asserts, "[t]here is strong public policy in favor of public access to judicial proceedings," and "[s]ealing court records . . . is a drastic step." (*Id.* at 13 (internal quotations omitted).) Moreover, in *Section 1983* actions, the argument for suppression of documents must meet the traditional discovery requirements and must also satisfy the unique and important interest in allowing "[e]ach citizen to 'act[] as a private attorney general'" against a violation of individual liberties. (*Id.* at 13-14.) "The Court must balance the public's common law right of access against the interests favoring nondisclosure." *Sami v. Detroit Med. Ctr., No. 12-12660, 2012 U.S. Dist. LEXIS 128186, 2012 WL 3945532, at *2 (E.D. Mich. Sept. 10, 2012)* [*16] (Lawson, J.).

Plaintiff's argument, however, is why Defendants' reference to *Newark Morning Ledger Co.* is precisely on point. The ERKA dictates that an employee cannot see the internal affairs investigation related to his own file. And as the *Newark Morning Ledger Co.* court stated, "A person wishing to be hired by a law enforcement agency would be reluctant to work for such an agency if every complaint by disgruntled prisoners . . . were to be made public information." *Newark Morning Ledger Co., 514 N.W.2d at *218*. Moreover, while the *Neward Morning Ledger Co.* court remanded the matter for a more detailed balancing of interests with the possibility of a proposed redaction as a compromise, the court noted that "[h]ad plaintiff requested the internal affairs records pertaining to a particular individual, redaction would serve no purpose." *Id.*

Here, Plaintiff is not requesting the records under the FOIA as a matter of public interest; Plaintiff's public interest argument stems from a general public policy in favor access to judicial proceedings. Thus, while Plaintiff characterizes his request in terms of public policy and individual liberty interests, discovery requests are made in an effort [*17] to uncover information "that is relevant to any party's claim or defense," not in an effort to force public disclosure of sensitive documents or for the public good. *See Fed. R. Civ. P. 26(b)*. Moreover, in addition to their ERKA argument, Defendants assert that public disclosure of internal-affairs investigations, in general, would chill the candor of officers who report violations. (Docket no. 19 at 9-10.) Thus, Defendants argue, a protective order with a sealing provision "provides Plaintiff's counsel with full disclosure without sacrificing the integrity of the internal investigation process . . . and without violating the [ERKA]." (*Id.* at 10.)

The Court agrees with Defendant with regard to this RFP. While the public has a right of access to judicial records, and while Plaintiff has a right to the documents that he has requested, these rights are mutually exclusive and can be easily distinguished. The Court finds that any chilling of the internal investigation process, or any decision that would dissuade an officer from reporting policy violations by his fellow officers, would cause greater harm to the public than would sealing the single investigation file requested by Plaintiff [*18] for use in his personal civil-rights claim *if* the document is ever filed with the Court. Therefore, the Court will grant Defendant's Motion for Protective Order in this regard. The Court will order that Defendants and Plaintiff submit a proposed protective order within 7 days that requires redaction of any personal and confidential information from such documents; that limits the use of such documents to this litigation; that limits the availability and knowledge of the documents to the attorneys of record, their support staff, and their experts and witnesses, including Plaintiff; that allows for the use of such documents if this matter proceeds to trial; and that requires such documents to be filed under seal pursuant to *E.D. Mich. L.R. 5.1* if the documents are filed with the

Court. [3]

> 3 This provision does not give the Parties an unabridged right to file discovery materials with the Court. The Parties are still required to abide by *Fed. R. Civ. P. 5(d)(1)* and *E.D. Mich. L.R. 26.2(a)* with regard to filing discovery materials with the Court.

With regard to the remaining documents at issue in RFP No. 1(a), that is, any files related to Plaintiff's detention that are not part of the internal [*19] investigation, the Court finds that a more limited protective order is appropriate. Thus, to the extent that any other documents exist, the Court will order the Parties to include in the protective order a provision requiring the redaction of any personal and confidential information from any such documents.

The Court will further order Defendants to produce all documents responsive to this request within 21 days of this order.

2. Request for Production No. 4.

Plaintiff's RFP No. 4 requests:

> The complete inmate file of Plaintiff Rodney Napier, including but not limited to all documentation and records of medical and/or psychological evaluations and/or treatment, disciplinary, and/or misconduct reports, intake records, and/or transfer records.

(Docket no. 31 at 6.) Defendants provided all of the responsive documents except Plaintiff's LEIN information, which Defendant asserted, "has been removed and remains available for inspection but not reproduction due to statutory requirements." (*See* docket no. 23 at 5.)

The Parties do not dispute the relevance of these documents. Instead, Defendants assert that Michigan's Criminal Justice Information Services Policy Council Act, *M.C.L. § 28.214*, prohibits [*20] public dissemination of LEIN information. (Docket no. 29 at 5.) Specifically, the Act makes it a criminal offense to provide LEIN information "to a private entity for any purpose . . . unless authorized by rule or law." *Mich. Comp. Laws Ann. § 28.214(2)-(3)*. In support of their position, Defendants look to *People v. Elkhoja, 251 Mich. App. 417, 651 N.W.2d 408, 427-28 (Mich. Ct. App. 2002)* (Sawyer, J., dissenting) (reasoning adopted in *People v. Elkhoja, 658 N.W.2d 153 (Mich. 2003))*, in which Judge Sawyer recognized that a court order is not a rule or law authorizing such dissemination (because such a rule would be based on circular logic): "the trial court [does not have] the authority to order release of the information [merely] because it entered an order to release the information." (*Id. at 428.*)

Nevertheless, in *Dupuie-Jarbo v. Twenty-Eighth Dist. Court, No. 10-10548, 2010 U.S. Dist. LEXIS 70703, 2010 WL 2813343, at *2 (E.D. Mich. July 14, 2010)* (Cleland, J.), this Court found that *Fed. R. Civ. P. 26(b)(1)* was a "rule" that provides the Court with the authority to compel the production of any relevant materials. Thus, notwithstanding the *Elkhoja* court's decision, Judge Cleland ordered production of LEIN reports under *Rule 26 (b)(1)*. [*21] This Court will, likewise, order Defendants to produce the LEIN report in question within 21 days of this order. [4]

> 4 In *Dupuie-Jarbo*, Judge Cleland also ordered that the LEIN reports (and other documents) for the third-party individuals be produced with limited access to the attorneys of record. *Dupuie-Jarbo, 2010 U.S. Dist. LEXIS 70703, 2010 WL 2813343, at *2-3*. Here, however, Plaintiff has requested his own LEIN report, which Defendants already have in their possession, custody, or control. Thus, there are no privacy concerns at issue in this discovery request, so the Court will order production of the LEIN report without a protective order.

3. Request for Production Nos. 5, 6, 7, 8, 9, 10, and 14

Plaintiffs RFP Nos. 5, 6, 7, 8, 9, 10 , and 14 request as follows:

> [#5] The complete personnel file of Defendant officers, including but not limited to all documentation and records of psychological evaluations, commendations, promotions, disciplinary reports, reports of misconduct, investigations and dispositions of all citizen complaints, and internal disciplinary investigations.

[#6] All documents within your possession, custody, or control relating to Defendant officers who have been terminated, suspended, removed, laid [*22] off, reduced in rank, reprimanded, disciplined, criminally prosecuted, or warned concerning any activities whatsoever within their capacity as correction officers.

[#7] Any and all documentation, including full and complete citations, of all other court actions, civil or criminal, in which any of Defendant officers are or were named parties.

[#8] The complete file regarding each and every citizen complaint, disciplinary action, internal investigation, and any other claims of misconduct against Defendant officers, whether initiated externally or through the filing of a citizen complaint or civil lawsuit, or internally as the result of disciplinary or code of conduct violations, including but not limited to incident reports, witness statements, citizen complaint forms, investigation records, dispositions and discipline, anything and everything in your possession, custody, or control pertaining to any and all claims against any or all of the officers.

[#9] Any and all documentation of training that Defendant officers received by or through Defendant County from their respective dates of hire up to and including July 18, 2008, including but not limited to: (a) use of force; (b) documenting [*23] prisoner complaints; and (c) preserving surveillance videos. Such documentation should include, but not be limited to, handbooks, manuals, handouts, audio/visual materials, and certificates of completion, acknowledgment forms or other documentation confirming the participation of Defendant officers in any such training.

[#10] Any and all documents pertaining to any and all claims or complaints against Defendant County and/or any Washtenaw County Jail correction officers, from January 1, 2004 through July 18, 2008, including but not limited to incident reports, witness statements, investigations and dispositions pertaining to all citizen complaints, civil lawsuits, criminal prosecutions against any officer(s), disciplinary actions, internal investigations, anything and everything in your possession pertaining to the filing and investigation of said claims or complaints arising from the following claims: a. Excessive force and/or assault and battery by and officer; and b. Destruction of evidence regarding a prisoner complaint.

[#14] All documents in your possession, custody or control that audit, monitor, track, and/or summarize internal investigations, disciplinary actions, citizen complaints, [*24] and/or lawsuits pertaining to Washtenaw County Jail and/or any of its correction officers from January 1, 2004 to present, including but not limited to periodic or annual summaries of alleged officer misconduct or early warning systems regarding claims of excessive force and/or assault and battery by an officer.

(*See* Docket no. 31 at 5-7.) Plaintiff has agreed to a limited protective order redacting any personal information, such as social security numbers, family members' information, phone numbers, and home addresses. (Docket no. 24 at 19.) Defendants argue that a protective order with an attorneys-eyes-only provision and a sealing provision is necessary to protect the officers' privacy and insure their safety. (Docket no. 19 at 10-12.) With the exception of Plaintiff's request for "internal disciplinary investigations" (for the reasons articulated *supra*), the Court finds that redacting personal and confidential information in the documents will sufficiently protect the privacy interests at issue. Therefore, the Court will order the Parties to include in their proposed protective order a provision requiring the redaction of any personal or confidential information from documents subject [*25] to production under these

RFPs. Any information related to the internal investigations must be produced according to the confidentiality provisions set forth above.

This, however, does not end the Court's inquiry. Defendants argue that Plaintiff's requests are overbroad in that they seek information on events that occurred after the incident in question (docket no. 19 at 13-15; docket no. 29 at 6-7). Defendants also appear to have attempted to limit their production to claims including "unreasonable or excessive use of force" or "failure to train, supervise, discipline or failure to preserve evidence." (*See* docket no. 23 at 31 (citing Def. Resp. to Pl. RFP No. 8.) Plaintiff argues that Defendant's narrowing of substance and narrowing of time is improper. (Docket no. 23 at 31-34.)

As noted, the Court will not entertain Defendants' objections with regard to relevance or overbredth. Nevertheless, the Court has the broad discretion to narrow discovery to relevant matters reasonably calculated to lead to the discovery of admissible evidence. Moreover, the Court addressed similar requests by Plaintiff's counsel in *Marmelshtein v. City of Southfield*, No. 07-15063, DKT #157 (E.D. Mich Apr. 25, [*26] 2012). In *Marmelshtein*, the Court found that the plaintiff's requests were overbroad and burdensome but that the plaintiff was entitled to some of the requested documents. Likewise, the Court finds that Plaintiff's requests here are overbroad in that they seek information not reasonably calculated to lead to the discovery of admissible evidence. For example, misconduct unrelated to the claims at issue in this matter is not discoverable. Additionally, the Court finds that subsections (a) - (e) are overbroad in that they lack any time limitations for the documents requested. Therefore, the Court will order Defendants to produce:

> a. [#5] Defendant officers' personnel files, including but not limited to all documentation and records of psychological evaluations, commendations, promotions, disciplinary reports, reports of misconduct, investigations and dispositions of all citizen complains, and internal disciplinary investigations related to acts concerning unreasonable or excessive use of force; failure to train, supervise, or discipline; or failure to preserve evidence from January 1, 2004, to present.
>
> b. [#6] All documents within Defendants' possession, custody, or control relating to [*27] Defendant officers who have been terminated, suspended, removed, laid off, reduced in rank, reprimanded, disciplined, criminally prosecuted, or warned within their capacity as correction officers, from January 1, 2004, to present, but such documents will be limited to acts concerning unreasonable or excessive use of force; failure to train, supervise, or discipline; or failure to preserve evidence.
>
> c. [#7] Any and all documentation, including full and complete citations, of all other court actions, civil or criminal, from January 1, 2004, to present, in which any of Defendant officers are or were named parties.
>
> d. [#8] The complete file regarding each and every citizen complaint, disciplinary action, internal investigation, and any other claims of misconduct against Defendant officers, from January 1, 2004, to present, whether initiated externally or through the filing of a citizen complaint or civil lawsuit, or internally as the result of disciplinary or code of conduct violations, including but not limited to incident reports, witness statements, citizen complaint forms, investigation records, dispositions and discipline, anything and everything in your possession, custody, or control [*28] pertaining to any claims against any or all of the officers related to acts concerning unreasonable or excessive use of force; failure to train, supervise, or discipline; or failure to preserve evidence.
>
> e. [#9] Any and all documentation of training that Defendant officers received by or through Defendant County from January 1, 2004, up to and including July 18, 2008, including but not limited to: (a) use of force; (b) documenting prisoner complaints; and (c) preserving

> surveillance videos. And as requested, such documentation should include, but not be limited to, handbooks, manuals, handouts, audio/visual materials, and certificates of completion, acknowledgment forms or other documentation confirming the participation of Defendant officers in any such training.
>
> f. [#10] Any and all documents pertaining to any and all claims or complaints against Defendant County and/or any Washtenaw County Jail correction officers, from January 1, 2004, through July 18, 2008, including but not limited to incident reports, witness statements, investigations and dispositions pertaining to all citizen complaints, civil lawsuits, criminal prosecutions against any officer(s), disciplinary actions, internal [*29] investigations, anything and everything in your possession pertaining to the filing and investigation of said claims or complaints arising from unreasonable or excessive use of force; failure to train, supervise, or discipline; or failure to preserve evidence.
>
> g. [#14] All documents in your possession, custody or control that audit, monitor, track, and/or summarize internal investigations, disciplinary actions, citizen complaints, and/or lawsuits pertaining to Washtenaw County Jail and/or any of its correction officers from January 1, 2004, to present, including but not limited to periodic or annual summaries of alleged officer misconduct or early warning systems regarding claims of unreasonable or excessive use of force; failure to train, supervise, or discipline; or failure to preserve evidence.

Defendants are ordered to produce such materials within 21 days of this order. Such production, however, may exclude any privileged documents, including, for example, documents protected by the privilege for psychological and psychiatric records or the deliberative-process privilege.

With regard to some of the requested documents, however, Defendants assert that the information does not exist [*30] or is not in Defendants possession, custody, or control. Defendants cannot provide documents that they do not have. Nevertheless, because the parties could not resolve this issue without Court interference, the Court will order that if after reasonable effort, Defendants cannot locate any documents responsive to a particular request, Defendants must provide Plaintiffs with a sworn declaration describing with specificity the efforts they made to locate documents and declaring after making reasonable effort they cannot locate any documents within their possession, custody, or control that are responsive to the request.

3. Redaction of the List of Court Actions

Defendants provided a highly redacted copy of a list of Court actions in response to RFP Nos. 7, 10, and 14. (*See* docket no. 23-21.) Plaintiff argues that the documents are so heavily redacted that it "do[es] not come close to complying with Plaintiff's discovery requests." (Docket no. 23 at 35.) Defendants argue that is it is "reasonable to redact the names and addresses of non-involved citizens, and those matters not related to [] Plaintiff's claims." (Docket no. 29 at 9 (citing *Shirley v. Eastpointe, 2012 U.S. Dist. LEXIS 61972, *11-12 (E.D. Mich. 2012)* [*31] (Majzoub, M.J.).) Defendants contend that because Plaintiff alleges the use of excessive force, assault and battery, and destruction of evidence, it is reasonable to redact any other matters in the listing. (*Id.* at 9-10.)

In principle, the Court agrees with Defendants. To the extent that the information listed in the redacted report is not related to Plaintiff's claims, it would be reasonable to redact the names and addresses of non-involved citizens. Nevertheless, the document at issue is so highly redacted that the Court cannot determine whether Defendants' redactions are reasonable.

In reviewing the document, it appears that there are two distinct sections: pages 1-7, and pages 8-11. [5] (*See* docket no. 23-21.) In the first section, there are four columns of information: (1) the claim number; (2) the names of the parties; (3) a date of some sort; and (4) the nature of the claim. (*See id* at 1-7.) In the second section, there are 21 columns, labeled A through S, containing similar information broken down in a more detailed fashion. (*See id.* at 8-11.) The Court sees no reason to redact any information other than the names, addresses,

and any other personal information of non-parties. Therefore, [*32] the Court will order Defendants to produce the document with only confidential information redacted; that is, Defendant may not redact claim or complaint numbers, any dates, the nature of the claims or complaints, the resolution of the claims or complaints, the corrective action taken, or any non-personal comments.

> 5 Pages 12-31 appear to be a blown-up version of pages 8-11. (*See* docket no. 23-21.)

4. Request for Production No. 16

Plaintiff's RFP No. 16 requests:

> Access by Plaintiff's counsel and/or their agents, at a date and time that is reasonably acceptable to all parties within the next 30 days, to inspect and photograph Holding Cell 2 in the Washtenaw County Jail where Plaintiff Napier was held on or about July 16, 2008, including video surveillance systems in place in that area.

(Docket no. 31 at 6.) On July 3, 2012, a site inspection occurred, and photographs were taken by Washtenaw's agent. (*Id.* at 2.) Plaintiff has requested copies of the photographs, and Defendant has refused to produce them without a protective order that includes an attorneys-eyes-only provision or a sealing provision. (Docket no. 29 at 11.)

Defendants appears to be primarily concerned with maintaining institutional [*33] security; that is, Defendants do not want pictures of the inside of the Washtenaw County Jail distributed to the public. (*See id.*) Plaintiffs oppose any sealing or attorneys-eyes-only provision, and Plaintiff appears to only be concerned with discovery of the photographs and with the ability to use the photographs at trial. (*See* docket no. 24 at 19-20; docket no. 33 at 5.)

The Court agrees with Defendants that it serves no purpose or public service to provide photographs of the inside of the jail to the public. And as Defendants argue "[m]aintaining internal security is of the utmost concern in a jail or prison setting." (Docket no. 29 at 11.) Therefore, the Court will grant Defendants' Motion for Protective Order with regard to this issue. The Court will order that the Parties submit a proposed protective order that requires that limits use of the photographs to this litigation; that limits the availability and knowledge of the photographs to the attorneys of record, their support staff, and their experts and witnesses, including Plaintiff; that allows for the use of the photographs if this matter proceeds to trial; and that requires the photographs to be filed under seal pursuant [*34] to *E.D. Mich. L.R. 5.1* if they are filed with the Court. [6] The Court will order that Defendants produce the photographs within 21 days of this order.

> 6 This provision does not give the Parties an unabridged right to file discovery materials with the Court. The Parties are still required to abide by *Fed. R. Civ. P. 5(d)(1)* and *E.D. Mich. L.R. 26.2(a)* with regard to filing discovery materials with the Court.

G. Defendant's (second) Motion for Protective Order and Plaintiff's (second) Motion to Compel.

Defendant's Motion for Protective Order (docket no. 34) and Plaintiff's Motion to Compel (docket no. 36) ask the Court to address whether Defendants have the right to refuse production of the materials at issue in their prior motions or to refuse production of Defendants for depositions until after the Court has ruled on the prior motions. The Court has ruled on the prior motions herein; thus, the Parties' Motions are moot in that regard.

The Parties also request that the Court enter a scheduling order extending the deadlines for discovery and dispositive motions. (Docket no. 34 at 7; docket no. 38 at 24.) The Court will enter a new scheduling order in light of this Opinion and Order.

H. Plaintiff [*35] **has not been prejudiced in his ability to prepare for this case due to Defendants' actions.**

Plaintiff argues that Defendants' behavior is obstructionist and that Plaintiff has been prejudiced by Defendants' delays in producing the requested materials. (*See* docket no. 43 at 3.) Plaintiff, therefore, requests reasonable costs and attorneys fees. The Court finds that Plaintiff has not been prejudiced by any of the delays at issue in this matter because the Court will amend the scheduling order accordingly. Moreover, the Court has found many of Defendants' requests for protective order to be meritorious. Because of the privacy interests and the

questions of law involved in this discovery dispute, the Court does not find that Defendants were unjustified in waiting for a ruling before disclosing the requested information. Therefore, the Court will not award Plaintiff attorneys fees.

IT IS THEREFORE ORDERED that Defendants' Motion for Protective Order [19] is **GRANTED IN PART AND DENIED IN PART** as follows:

a. The Parties are ordered to submit within 7 days a proposed protective order that:

i. requires redaction of any personal and confidential information from documents subject to production under [*36] the RFPs at issue in these Motions;

ii. limits the use of internal investigation files or photographs from inside Washtenaw County Jail to use for purposes of this litigation;

iii. limits the availability and knowledge of internal investigation files or photographs from inside Washtenaw County Jail to the attorneys of record, their support staff, and their experts and witnesses, including Plaintiff;

iv. allows for the use internal investigation files or photographs from inside Washtenaw County Jail if this matter proceeds to trial; and

v. requires internal investigation files or photographs from inside Washtenaw County Jail to be filed under seal pursuant to *E.D. Mich. L.R. 5.1* if the documents are filed with the Court.

b. Defendants' Motion for Protective Order is denied with respect to any other request.

IT IS FURTHER ORDERED that Plaintiff's Motion to Compel [23] is **GRANTED IN PART AND DENIED IN PART** as follows:

a. Defendants are ordered to produce within 21 days:

i. all documents responsive to Plaintiff's RFP No. 1(a);

ii. the LEIN report requested in Plaintiff's RFP No. 4;

iii. all of the documents set forth herein at Section III.C.3.a-g, *supra* at 16-17;

iv. the list responsive to Plaintiff's [*37] RFP Nos. 7, 10, and 14 with only confidential information redacted; that is, Defendant may not redact claim or complaint numbers, any dates, the nature of the claims or complaints, the resolution of the claims or complaints, the corrective action taken, or any non-personal comments; and

v. the photographs responsive to Plaintiff's RFP No. 16.

b. Defendants' production pursuant to this Order will be subject to the provisions of the protective order that the Parties are ordered to submit herein.

c. Plaintiff's Motion to Compel is denied with respect to any other request.

IT IS FURTHER ORDERED that Defendants' Motion for Protective Order [34] and Plaintiff's Motion to Compel [36] are **DENIED** as moot in light of this Opinion and Order.

NOTICE TO THE PARTIES

Pursuant to *Federal Rule of Civil Procedure 72(a)*, the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under *28 U.S.C. § 636(b)(1)*.

Dated: April 5, 2013

/s/ Mona K. Majzoub

MONA K. MAJZOUB

UNITED STATES MAGISTRATE JUDGE

EXHIBIT D

United States of America and the State of Michigan, Plaintiffs, vs. Blue Cross Blue Shield of Michigan, a Michigan nonprofit healthcare corporation, Defendant.

Civil Action No.: 10-CV-14155

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2012 U.S. Dist. LEXIS 141355

October 1, 2012, Decided
October 1, 2012, Filed

SUBSEQUENT HISTORY: Motion granted by *United States v. Blue Cross Blue Shield of Mich., 2012 U.S. Dist. LEXIS 146403 (E.D. Mich., Oct. 11, 2012)*

PRIOR HISTORY: *United States v. Blue Cross Blue Shield, 809 F. Supp. 2d 665, 2011 U.S. Dist. LEXIS 89849 (E.D. Mich., 2011)*

COUNSEL: [*1] For United States of America, Plaintiff: David Gringer, U.S. Department of Justice, Antitrust Division, Litigation I Section, Washington, DC; Ryan Danks, U.S. Department of Justice, Antitrust Division(Litigation I), Washington, DC.

For Michigan, State of, Plaintiff: Dee J. Pascoe, MI Department of Attorney General, Social Services, Lansing, MI; Mary Elizabeth Lippitt, Michigan Attorney General, Lansing, MI; Ryan Danks, U.S. Department of Justice, Antitrust Division(Litigation I), Washington, DC; Thomas S. Marks, MI Dept of Atty Gen, Corporate Oversight Division, Lansing, MI.

For Blue Cross Blue Shield of Michigan, Defendant: Alan N. Harris, G. Christopher Bernard, Bodman (Ann Arbor), Ann Arbor, MI; Carl T. Rashid ,Bodman PLC, Detroit, MI; David A. Higbee, Donald Bruce Hoffman, Jonathan H. Lasken, Neil K. Gilman, Todd M. Stenerson, Hunton & Williams LLP, Washington, DC; Farayha J. Arrine, Dickinson Wright PLLC, Detroit, MI; Jason R. Gourley, Bodman LLP, Detroit, MI; Joseph A. Fink, Dickinson Wright, Lansing, MI; Michelle L. Alamo, Michelle R. Heikka, Patrick B. Green, Thomas G. McNeill, Dickinson Wright, Detroit, MI; Rebecca D. O'Reilly, Bodman, Detroit, MI; Robert A. Phillips, Blue Cross [*2] Blue Shield, Detroit, Mi.

For St. John Providence Health System, Borgess Health System, Richard Felbinger, Patrick McGuire, Movants: Keefe A. Brooks, Brooks Wilkins Sharkey & Turco, PLLC, Birmingham, MI; Melissa S. Gorsline, Michael R. Shumaker, Jones Day, Washington, DC; Thomas Demitrack, Jones Day, Cleveland, OH.

For Marquette General Hospital, Portage Health System, McLaren Health Care, Trinity Health, Metro Health Hospital, MidMichigan Medical Center - Midland, Movants: David A. Ettinger, Honigman, Miller, Schwartz and Cohn LLP, Detroit, MI.

For Mackinac Straits Health System, Northstar Health System, War Memorial Hospital, Helen Newberry Joy Hospital & Healthcare Center, Baraga County Memorial Hospital, Bell Memorial Hospital, Schoolcraft Memorial Hospital, Movants: John M. Sier, Kitch, Detroit, MI.

For Pontiac, City of, Interested Party: Jason J. Thompson, Sommers Schwartz, P.C., Southfield, MI.

For Alyson Oliver, Interested Party: Alyson L. Oliver, Rochester, MI.

For The Shane Group, Inc., Interested Party: E. Powell Miller, The Miller Law Firm, Rochester, MI; John E. Tangren - NOT SWORN, Mary Jane Fait, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL.

For Bradley A. Veneberg, [*3] Interested Party: John E. Tangren - NOT SWORN, Mary Jane Fait, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL.

For Jeffrey Connolly, Interested Party: Daniel J. McGlynn, McGlynn Associates, PLC, Troy, MI.

JUDGES: MONA K. MAJZOUB, UNITED STATES MAGISTRATE JUDGE. District Judge Denise Page Hood.

OPINION BY: MONA K. MAJZOUB

OPINION

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL DOCUMENTS RESPONSIVE TO DOCUMENT REQUEST 51 [182] AND GRANTING IN PART AND RESERVING IN PART PLAINTIFF'S MOTIONS TO COMPEL MIDMICHIGAN HEALTH [143] AND COVENANT HEALTHCARE [145/146] TO PRODUCE DOCUMENTS RESPONSIVE TO SUBPOENA

This matter comes before the Court on Plaintiff United States of America's Motion to Compel non-parties MidMichigan Health ("MidMichigan") (Docket no. 143) and Covenant HealthCare ("Covenant") (together "the Hospitals") (Docket nos. 145 and 146) to Produce Documents Responsive to Subpoena, and Plaintiffs United States of America and the State of Michigan's Motion to Compel Defendant's Production of Documents Responsive to Plaintiffs' Document Request 51 (Docket no. 182). MidMichigan (Docket no. 163), Covenant (Docket no. 162) and Defendant (Docket no. 183) filed Responses to Plaintiffs' [*4] respective motions. Plaintiffs filed Replies to each response. (Docket no. 164 (MidMichigan); Docket nos. 166 and 167 (Covenant); Docket no. 184 (Defendant).) The parties to each motion filed joint statements indicating that they had not resolved any of the issues presented. (Docket no. 170 (MidMichigan); Docket no. 171 (Covenant); Docket no. 192 (Defendant).) These motions were referred to the undersigned for decision. (Docket nos. 18, 28, 34.) The Court dispenses with oral argument pursuant to *E.D. Mich. LR 7.1(f)*. The Motions are now ready for ruling.

I. Background

Plaintiffs bring this civil antitrust complaint against Defendant Blue Cross Blue Shield of Michigan alleging that Defendant has reduced competition in the sale of health insurance throughout Michigan by including "most favored nation" clauses ("MFNs") in its contracts with various hospitals. (Docket no. 1 at 1.) Plaintiffs allege that these clauses reduce competition by "(1) reducing the ability of other health insurers to compete with Blue Cross, or actually excluding Blue Cross' competitors in certain markets, and (2) raising prices paid by Blue Cross' competitors and by self-insured employers." (*Id.*)

As part of its initial [*5] investigation in early 2010, Plaintiff served Civil Investigation Demands ("CIDs") on several third parties, including hospitals that had contracted with Defendant. (*See* Docket no. 162 at 1-2; Docket no. 163 at 1-2.) Many of these nonparty hospitals responded to the CIDs in full, but MidMichigan and Covenant responded only with respect to documents related specifically to Defendant; Plaintiff agreed to defer production of documents related to other insurers. (*See* Docket no. 143 at 5 n.2.)

In February 2012, Plaintiff served upon MidMichigan and Covenant the subpoenas at issue in the instant Motions to Compel. (Docket no. 143 at 2; Docket no. 145 at 1.) Plaintiff "seeks documents discussing the hospital[s'] contracting or negotiations with employers and commercial heath insurers other than Blue Cross." [1] (*Id.*) The Hospitals have refused to produce these documents; they assert that the request is unduly burdensome, particularly in light of their nonparty status and the speculative relevance of Plaintiff's request. (Docket no. 162 at 6-7; Docket no. 163 at 7-8.) The Hospitals ask that the Court deny Plaintiff's Motions, but in the alternative, they ask that the Court shift the cost of production [*6] so that Plaintiff bears the burden.

1 During negotiations, Plaintiff had agreed to limit its request to the following:

> (a) with respect to MidMichigan, a search of three custodians' files

> for documents related to insurers Aetna (and its subsidiaries, Cofinity and PPOM), Health Plus, United, and Priority, and employers Dow Chemical and Dow Corning (Docket no. 143 at 3; Docket no. 164 at 3 n.2); and
>
> (b) with respect to Covenant, a search of two custodians' files for documents related to insurers Aetna (and its subsidiaries, Cofinity and PPOM), UnitedHealthcare, Health Plus, Priority, and McLaren (Docket no. 167 at 3 n.2).

The Hospitals each requested that Plaintiff limit its requests to two insurers or employers. (Docket no. 162 at 3; Docket no. 163 at 4.)

Additionally, on May 1, 2012, Plaintiff served Defendant with Plaintiff's Sixth Request for Production of Documents. (Docket no. 182 at 2.) Defendant has refused to produce any responsive documents to Request No. 51 and contends that "The Breadth and Burden of Request 51 Far Outweighs any Purported Relevance" and that Plaintiffs are merely on a fishing expedition. (Docket no. 183 at 2, 4-7.)

II. Discovery Standard

Parties may obtain discovery [*7] on any matter that is not privileged and is relevant to any party's claim or defense if it is reasonably calculated to lead to the discovery of admissible evidence. *Fed.R.Civ.P. 26(b)(1).* "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Fed.R.Evid. 401.* But the scope of discovery is not unlimited. "District courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir. 2007).*

III. Analysis

A. Plaintiffs' Motion to Compel Production of Documents from Defendant [182]

In Document Request No. 51 Plaintiffs requested

> [a]ll documents constituting communications, including any emails, since July 1, 2009, between BCBSM, including BCBSM's inside counsel or outside counsel, and persons other than employees or agents of BCBSM, relating to:
>
> a. The investigation(s) commenced in 2010 by the United States and/or State of Michigan into BCBSM's use of MFN provisions;
>
> b. The investigation(s) [*8] commenced in 2009 by the United States and/or State of Michigan into BCBSM's proposed acquisition of Physicians Health Plan of Mid-Michigan;
>
> c. The lawsuit United States and State of Michigan v. Blue Cross Blue Shield of Michigan, 2:10-cv-14155-DPH-MKM;
>
> d. Any of the private lawsuits filed against Blue Cross Blue Shield of Michigan by the Shane Group et al., 2:10-cv-14360-DPH-MKM; Michigan Regional Council of Carpenters Employee Benefits Fund et al. 2:10-cv-14887-DPH-MKM; or Scott Steele et al., 2:11-cv-10375-DPH-VNM;
>
> e. Any of the private lawsuits filed against Blue Cross Blue Shield of Michigan et al. by the City of Pontiac et al., 2:11-cv-10276-DPH-MKM, or by Frankenmuth Mutual Insurance Company et al., 2:10-cv-14633-LPZ-MAR; or
>
> f. The lawsuit Aetna, Inc., v. Blue Cross Blue Shield of Michigan, 2:11-cv-15346-DPM-MKM.

(Docket no. 182 at 2.) As Defendant sees it:

> Plaintiffs demand a search spanning the

> entire company, with no agreed custodial limitations, and combing through inside and outside counsel's litigation files--far broader than any search countenanced under modern discovery principles. This hunt for a hypothetical needle in by far the largest haystack to date would impose staggering [*9] burdens that far outweigh Plaintiffs' implausible and entirely speculative assertions of relevance.

(Docket no. 183 at 1.)

Plaintiffs argue that the documents in question "will illuminate Blue Cross's defenses to issues such as market definition, market power, and the competitive effects of its MFN clauses." (Docket no. 182 at 5.) Plaintiffs note that these documents "are likely to contain substantial amounts of information concerning the state of the commercial health insurance competition in [various geographic areas]" and that they "will also contribute to a 'complete understanding' of a relevant market." (*Id.* at 5-6 n.5.) Plaintiffs also contend that "communications between Blue Cross and [non-parties] will be an essential means by which the credibility of these potential witnesses can be assessed, . . . any biases can be determined, . . . and any potential influence by Blue Cross over a non-party's testimony may be identified." (*Id.* at 10 (internal citations omitted).)

In support of their assertions, Plaintiffs reference two non-party email communications attached in support of a Motion to Enforce a Document Subpoena filed in another court. [2] In these emails, the non-party stated [*10] to Defendant's counsel that it "has no relationship with BCBS [and] does not compete for business in Michigan." (Docket no. 182 at 8.) Plaintiffs argue that this statement by the non-party hospital "undermine[s] Blue Cross's claims concerning market definition." (*Id.*)

> 2 Plaintiffs also argue that they are entitled to seek this type of information because Defendant issued a similar demand. (Docket no. 182 at 6-7.) Defendant disagrees with Plaintiff's comparison, but even if Plaintiff were correct, the Court is not persuaded by this argument.

Although Plaintiffs' evidentiary examples are sparse, the Court agrees that the documents it seeks are reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, this does not end the Court's inquiry. *Rule 26(b)(2)(C)* provides that discovery must be limited when

> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2)(C)(iii). "[Th]is rule recognizes that many cases in public policy spheres [*11] . . . may have importance far beyond the monetary amount involved." *Fed.R.Civ.P. 26* (Advisory Committee Notes, 1983 Amendment, Subdivision (b)).

If the Court does not limit discovery on this issue, Defendant's burden in response to this single document request is significant. By its plain language, Document Request No. 51 would require Defendant to "search the entire company . . . for any documents reflecting communications by any Blue Cross employee or agent [including inside and outside counsel] with any person not employed by Blue Cross that in any way mentions the investigations or law suits." (Docket no. 183 at 2.) The time and resources necessary to comply with such a request would potentially cripple many businesses.

In view of the staggering burden being placed on Defendant by Document Request No. 51, Plaintiffs' motion for relief is not without merit. Putting aside the scope of the litigation, the large monetary amounts involved, and the parties' significant resources, there are more far reaching implications to be considered. Plaintiffs bring this suit on behalf of the public at large and allege that Defendant violated antitrust laws in a manner that led to higher heath-care [*12] costs to citizens throughout the State of Michigan. The public policy implications in this matter favor extremely broad discovery.

The Court finds that the burden placed on Defendant in responding to Document Request No. 51 in its original form does outweigh the benefit of the information sought. At best, it appears that the requested documents will lead to third-party understanding of relevant markets, Defendant's impressions of Plaintiff's investigation, and some issues related to witness credibility. While relevant, the Court does not believe that this

information-considering the scope of the case-outweighs the burden placed on Defendant. Therefore, the Court will order Defendant to produce documents pursuant to Document Request No. 51, but such production will be subject to certain limitations.

Throughout negotiations, it appears that the Parties have attempted to find some middle ground on this issue, but without success. In their briefs, the Parties allude to the following:

> o Defendant has agreed to produce "[d]ocuments reflecting communications with third parties regarding those third parties' objections to document subpoenas served by Blue Cross." (Docket 183 at 3.)
>
> o Defendant [*13] has already produced (or will produce) documents related to various searches through 35 agreed-to custodians. (*Id.* at 3-4)
>
> o Defendant "has already searched for and produced all documents reflecting communications with third parties that bear on MFNs, hospital negotiations, competition among commercial insurers in Michigan, the 34 alleged markets and, generally, the claims and defenses in this case." (*Id.* at 4.)
>
> o Plaintiff would limit its request to "primarily the correspondence files of [Defendant's] inside and outside counsel" and "the *few* Blue Cross employees-likely already known to counsel-responsible for communicating with non-parties about the MFN lawsuits or investigations." (Docket no. 184 at 3-4.)

Using these concessions as guideposts, the Court will order Defendant to produce:

> a. all documents constituting communications, including any emails, from July 1, 2009 through May 1, 2012 (the date of the Request for Production), between the 35 agreed-to custodians referenced above and persons other than employees or agents of Defendant, relating to the investigations and cases outlined in Document Request No. 51; this production, however, will be limited to:
>
> > i. documents reflecting [*14] communications with third parties regarding those third parties' objections to documents subpoenas served by Defendant;
> >
> > ii. documents found in accordance with the search terms outlined on pages 3-4 of Docket no. 183 (including the "many, many others" as indicated); and
> >
> > iii. documents reflecting communications that bear on MFNs, hospital negotiations, and competition among commercial insurers in Michigan; and
>
> b. all documents constituting communications, including any emails, from July 1, 2009 through May 1, 2012, between Defendant's counsel (inside and outside) and persons other than employees or agents of Defendant, relating to the investigations and cases outlined in Document Request No. 51; this production will be limited only by the constraints of the original Request for Production.

B. Plaintiff's Motions to Compel Documents from the Hospitals [143 and 145/146]

The United States's Motions do not involve document requests under *Rule 26*; instead, it has issued a subpoena for these documents under *Rule 45*. The Hospitals seek the Court's protection from undue burden and expense under *Rule 45(c)(2)(B)(ii)*. (Docket no. 162 at 1; Docket no. 163 at 1.) A subpoena to a third party under *Rule 45* [*15] is subject to the same discovery limitations as those set out in *Rule 26*. *See*, e.g., *Martin v. Oakland County, No. 06-12602, 2008 U.S. Dist. LEXIS*

*84217, 2008 WL 4647863, at *1 (E.D. Mich., Oct. 21, 2008)* (Pepe, M.J.) (10 citations omitted). *Rule 45(c)(1)* requires that the party issuing a subpoena "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." *Fed.R.Civ.P. 45(c)(1)*. To determine whether a burden is undue, a court must balance the potential value of the information to the party seeking it against the cost, effort, and expense to be incurred by the person or party producing it. *Lowe v. Vadlamudi, No. 08-10269, 2012 U.S. Dist. LEXIS 127586, 2012 WL 2887177, at *2 (E.D. Mich., Sept. 7, 2012)* (Lawson, J.) (citing *American Elec. Power Co., Inc. v. United States, 191 F.R.D. 132, 136 (S.D.Ohio 1999)*; *EEOC v. Ford Motor Credit Co., 26 F.3d 44, 47 (6th Cir.1994))*. That is, the Court must weigh "the likely relevance of the requested material . . . against the burden . . . of producing the material." *Ford Motor Credit Co, 26 F.3d at 47*. Non-party status is also a relevant factor. *Lowe, 2012 U.S. Dist. LEXIS 127586, 2012 WL 2887177, at *2* (citing *N.C. Right to Life, Inc. v. Leake, 231 F.R.D. 49, 51 (D.D.C.2005))*

In their Joint [*16] Statements, the Parties narrow the issues before the Court to the following:

> (1) Are [the Hospitals'] documents that do not expressly refer to the hospital[s'] MFN-plus agreement with Blue Cross Blue Shield of Michigan, but which discuss [the Hospitals'] contracting or negotiations with the commercial health insurers specifically identified by the United States, limited to the two custodians already agreed to by the United States, relevant to the United States' allegations in its law suit alleging that Blue Cross Blue Shield of Michigan's MFN-plus and MFN agreements with Michigan hospitals violate federal and state antitrust laws?
>
> (2) If the documents sought by the United States are relevant, does their relevance outweigh the burden on [the hospitals] of producing those documents?
>
> (3) Is cost-shifting mandatory?
>
> (4) Assuming cost-shifting is not mandatory, should [the hospitals'] cost of review and production of the subpoenaed documents, or its cost of defending the motion, be shifted to the United States?

(Docket no. 170 at 2; Docket no. 171 at 2.) The Court will add the following inquiry:

> (5) If the hospitals' costs related to these subpoenas should be shifted to the United States, to [*17] what extent should they be shifted?

1. Relevance

The Hospitals argue that the requested documents are not relevant because "the benefit to the government is speculative, at best." (Docket no. 162 at 8; Docket no. 163 at 8.) They assert that because the government has failed to contain a specific allegation of negotiations with other insurers where the MFN clause has had an effect, and because the government could use its CID power in advance of filing this instant action to discover such information, the government is merely on a fishing expedition. (*Id.*) Plaintiff, however, notes that when the Hospitals were responding to Plaintiff's pre-complaint CID, Plaintiff voluntarily deferred production of the documents that it now requests. (Docket no. 164 at 2; Docket no. 167 at 2.) Thus, the Hospitals' argument is unavailing, as Plaintiff's decision to defer production of certain documents at the time of its CID cannot now be used against Plaintiff who is seeking the same documents that it was entitled to seek previously.

The Court agrees with Plaintiff that the documents in question are highly relevant to the central issue in this case, that is, whether Defendant's use of MFN clauses had an [*18] anti-competitive effect on the marketplace. The documents that Plaintiff seeks through these subpoenas specifically relate to Defendant's competitors' negotiations with the Hospitals and how those negotiations were impacted by the MFN clauses, even if the documents do not specifically mention Defendant or the MFN clauses. At the very least, these documents are "reasonably calculated to lead to admissible evidence." Therefore, the Court finds that the documents in question are relevant.

2. Balancing Relevance Against Burden

A nonparty seeking to modify a subpoena bears the burden of demonstrating that the discovery sought should

not be allowed. *See Lowe, 2012 U.S. Dist. LEXIS 127586, 2012 WL 2887177, at *2* (citing *Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48 (S.D.N.Y.1996)).* Moreover, the nonparty cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena." *Id.* (citing 9A Wright & Miller, Federal Practice and Procedure § 2463.1, p. 507). Thus, with the Court having found that the documents in question are relevant, the Hospitals bear a particularly heavy [*19] burden in showing that Plaintiff's subpoenas impose an undue burden.

The Hospitals do not contend that they will have any difficulty finding the documents in question. (Docket no. 162 at 7; Docket no. 163 at 8.) Instead, the Hospitals argue that compliance with the subpoena will lead to thousands of easily identifiable documents, but these documents would all have to be reviewed for privilege, which includes preparation of a privilege log. (*Id.*) The Hospitals estimate that it would take internal employees 100 - 150 hours over the course of one-to-three weeks to review the requested documents for responsiveness and privilege. (Docket no. 162 at 6; Docket no. 163 at 6-7.) These documents would then need to be reviewed by counsel for creation of a privilege log. Plaintiff argues that the Hospitals' cost of production is exaggerated and that counsel's privilege review is not necessary because Plaintiff will return or destroy any privileged documents that are produced. (Docket no. 164 at 2; Docket nos. 166 and 167 at 2.)

Plaintiff asserts that "The United States should not be precluded from obtaining these documents now simply because it deferred their production during the pre-complaint [*20] investigation." The Court agrees and further notes that if the Hospitals were parties to this action, the Court would order that the Hospitals produce all of the responsive documents at their own expense. But the Hospitals are not parties to this action, and taking into account the Hospitals' nonparty status-as the court must-the Court finds that compliance with Plaintiff's subpoena may potentially place an undue burden on MidMichigan and Covenant.

3. Cost-Shifting

Rule 45(c) provides that "[t]he issuing court *must* enforce [the subpoena-issuing party's duty to avoid imposing an undue burden on the responding party] and impose an appropriate sanction--which *may* include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply." *Fed.R.Civ.P. 45(c)(1)* (emphasis added) Thus, any order compelling production "must protect a person who is neither a party nor a party's officer from *significant* expense resulting from compliance." *Fed.R.Civ.P. 45(c)(2)(B)(ii)* (emphasis added). This section of *Rule 45* was added to protect nonparties "against significant expense resulting from involuntary assistance to the court." *Fed.R.Civ.P. 45* (Advisory Committee Notes, 1991 Amendment, Subdivision [*21] (c)).

The parties pose the question: "Is cost-shifting mandatory?" (Docket no. 170 at 2; Docket no. 171 at 2.) The Sixth Circuit has not yet provided guidance on this issue, but other courts have. Where a court finds that a nonparty is subject to an undue burden, the court must determine (1) if compliance with the subpoena imposes an expense on the nonparty, and (2) if so, whether that expense is "significant." *Linder v. Calero-Portocarrero, 251 F.3d 178, 182, 346 U.S. App. D.C. 117 (C.A.D.C. 2001).* "If [it is], the court must protect the nonparty by requiring the party seeking discovery to bear at least enough of the expense to render the remainder 'non-significant.'" *Id.* To determine how much cost to shift from the nonparty, the court must balance the equities of the particular case, including "[1] whether the putative nonparty actually has an interest in the outcome of the case, [2] whether it can more readily bear its cost than the requesting party; and [3] whether the litigation is of public importance." *In re Exxon Valdez, 142 F.R.D. 380 (D.D.C. 1992)* (internal citations omitted).

Here, the Hospitals' compliance with Plaintiff's subpoenas will impose an expense, and it appears to the Court that this expense [*22] may be significant. However, the Court requires additional information before it can make this determination. Therefore, the Court will order the Hospitals to provide detailed estimates of the reasonable costs that they will incur to comply with Plaintiff's subpoenas. Upon receipt of this information, the Court will determine if the costs are significant, and if they are, the Court will balance the equities of the case to determine the amount of costs, if any, that should be shifted to Plaintiff. The Court will also order the Hospitals to comply with Plaintiff's subpoena, subject to the limitations set forth below.

IT IS THEREFORE ORDERED that Plaintiffs'

Motion to Compel Production of Documents from Defendant [182] is **GRANTED IN PART** and **DENIED IN PART.** Defendant must respond to Plaintiffs' Request for Production of Documents no later than October 20, 2012, and must produce:

> a. all documents constituting communications, including any emails, from July 1, 2009 through May 1, 2012, between the 35 agreed-to custodians referenced above and persons other than employees or agents of Defendant relating to the investigations and cases outlined in Document Request No. 51; this production, however, [*23] will be limited to:
>
> > i. documents reflecting communications with third parties regarding those third parties' objections to documents subpoenas served by Defendant;
> >
> > ii. documents found in accordance with the search terms outlined on pages 3-4 of Docket no. 183 (including the "many, many others" as indicated); and
> >
> > iii. documents reflecting communications that bear on MFNs, hospital negotiations, and competition among commercial insurers in Michigan; and
>
> b. all documents constituting communications, including any emails, from July 1, 2009 through May 1, 2012, between Defendant's counsel (inside and outside) and persons other than employees or agents of Defendant, relating to the investigations and cases outlined in Document Request No. 51; this production will be limited only by the constraints of the original Request for Production.

IT IS FURTHER ORDERED that Plaintiff's Motions to Compel Documents from the Hospitals [143 and 145/146] are **GRANTED IN PART** and **RESERVED IN PART.** The Hospitals must produce documents responsive to the subpoena no later than October 20, 2012, subject to the following limitations:

> (a) with respect to MidMichigan, a search of three custodians' files for documents [*24] related to insurers Aetna (and its subsidiaries, Cofinity and PPOM), Health Plus, United, and Priority, and employers Dow Chemical and Dow Corning (Docket no. 143 at 3; Docket no. 164 at 3 n.2); and
>
> (b) with respect to Covenant, a search of two custodians' files for documents related to insurers Aetna (and its subsidiaries, Cofinity and PPOM), UnitedHealthcare, Health Plus, Priority, and McLaren (Docket no. 167 at 3 n.2).

IT IS FURTHER ORDERED that the Hospitals must provide to the Court, no later than October 5, 2012, a detailed estimate of the reasonable costs that will be incurred as a consequence of their compliance with Plaintiff's subpoenas.

Dated: October 1, 2012

/s/ Mona K. Majzoub

MONA K. MAJZOUB

UNITED STATES MAGISTRATE JUDGE