UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

EMANI LOVE, et al.,

Plaintiffs,

v

RUTH JOHNSON,

Defendant.

NO. 2:15-cv-11834

HON. NANCY EDMUNDS

MAG. ELIZABETH A. STAFFORD

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---/

DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND REQUEST FOR IMMEDIATE CONSIDERATION

For the reasons below, Defendant Ruth Johnson, by counsel, moves pursuant to Fed R. Civ. P. 26 for a protective order directing that the deposition of Secretary of State Ruth Johnson not take place. In support of her motion, Defendant Johnson states:

1. On February 17, 2016, Plaintiffs issued and transmitted to Defendant a notice for Ruth Johnson to appear for a deposition on March 17, 2016.

2. Courts have recognized that high-ranking government officials are not generally subject to depositions unless they have personal knowledge of the matter and the party seeking the deposition demonstrates that the information sought cannot be obtained elsewhere.

3. Defendant Ruth Johnson is the elected Secretary of State and the single head of the Department of State, a constitutional principal department under Mich. Const. art. V, § 2-3.

4. Discovery in this matter has produced no evidence that Secretary Johnson was herself directly involved in the development, implementation, or approval of the challenged policy on changing sex

designation for drivers' licenses (DL) or state-issued personal identification cards (PID's).

5. All information so far instead shows that the challenged policy was developed by lower level staff.

6. Plaintiffs have no evidence connecting the Secretary herself to the development of the challenged policy.

7. The proposed deposition of the Secretary of State appears driven by non legal ends instead of the pursuit of admissible evidence.

8. Compelling the Secretary of State's appearance for this deposition would constitute an undue burden.

9. Pursuant to LR 7.1(a), concurrence in the relief requested in this motion was sought on February 22, 2016 and again on March 4, 2016. Concurrence was refused.

For these reasons and the reasons stated more fully in the accompanying brief, Defendant Ruth Johnson respectfully requests that this Honorable Court issue a protective order under Fed. R. Civ. P. 26 preventing Plaintiffs from taking the deposition of the Secretary of State, together with any other relief the Court determines to be appropriate under the circumstances. Alternatively, if this Court

determines that discovery should be sought from Defendant Johnson, Defendant request that discovery be obtained by deposition by written questions under Fed. R. Civ. P. 31, and only after this Court decides Defendant's motion for judgment on the pleadings based on mootness.

Respectfully submitted,

Bill Schuette
Attorney General

s/Erik A. Grill
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Dated: March 10, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

EMANI LOVE, et al.,

Plaintiffs,

v

RUTH JOHNSON,

Defendant.

NO. 2:15-cv-11834

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---/

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should a protective order preventing the deposition of the Secretary of State be issued where the Secretary lacks personal knowledge and the Plaintiffs have not demonstrated that the information sought cannot be obtained elsewhere?

   Defendant answers: "Yes."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Federal Rule of Civil Procedure 26.

Jackson v. City of Detroit, Case No. 05-74236, 2007 U.S. Dist. LEXIS 55730 (August 1, 2007).

United States of America v. Poindexter, 732 F.Supp. 142, 143 (D.D.C. 1990).

In re President George W. Bush, 287 S.W.3d 899 (Tx. App, 2009).

United States v. Fromme, 405 F. Supp. 578, 582 (E.D. Cal. 1975).

Deukmejian v. Superior Court of Marin County, 191 Cal. Rptr. 905 (Ca App, 1983).

Monti v. Vermont, 151 Vt. 609, 613, 563 A.2d. 629 (Vermont, 1989).

Fitzpatrick v. Secretary of State, 176 Mich. App. 615; 440 N.W.2d 45 (1989).

Hamed v. Wayne County, 271 Mich. App. 106, 110-111; 719 N.W.2d 612 (2006).

STATEMENT OF FACTS

Plaintiffs issued a notice for the deposition of Secretary of State Ruth Johnson to take place on March 17, 2016. (Exhibit A, Deposition Notice). Ruth Johnson is the elected Secretary of State and the single head of the Department of State. Mich. Const. art. V § 3.

Plaintiffs have undertaken extensive document discovery in this case, but have uncovered no evidence that the Secretary of State herself was involved in the development, implementation, or approval of the policy described in Plaintiffs' complaint. No witnesses have attested that the Secretary was directly involved in changing the policy. There is no evidence of any kind evincing the personal involvement of the Secretary of State in this matter.

Instead, Plaintiffs' counsel has demanded the Secretary of State appear for deposition based on her overall responsibility for the policies of the Department of State. (Exhibit B, Derksen E-mail, February 18, 2016). Plaintiffs' counsel also suggests that a letter from Mike Wartella stating that "Secretary Johnson has asked" him to respond on her behalf, represents her direct involvement—despite the obvious appointment of Mr. Wartella to speak in her stead. (Exhibit B, Derksen

E-mail, February 18, 2016). Finally, Plaintiffs' counsel referred to documents obtained from a lobbyist group, purporting to represent Secretary Johnson's personal views *before becoming Secretary of State*, and stated that they wished to take her deposition to explore why the Secretary held such views and whether they were related to the challenged policy. (Exhibit B, Derksen E-mail, February 18, 2016). Again, there is no evidence that the Secretary participated in any way in the drafting of the policy, let alone that any alleged prior views might have influenced the direction of the policy written by lower level staff.

ARGUMENT

I. A protective order preventing the deposition of the Secretary of State should be issued because the Secretary lacks personal knowledge and the Plaintiffs have not demonstrated that the information sought cannot be obtained elsewhere.

Pursuant to Rule 26(c), upon motion by a party from whom discovery is sought, "[t]he court may. . . issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Defendant Secretary of State Ruth Johnson seeks a protective order against having her deposition taken in this matter.

The Eastern District has previously recognized the "undue burden falling on public officials resulting from compulsion to attend depositions." *Jackson v. City of Detroit*, Case No. 05-74236, 2007 U.S. Dist. LEXIS 55730, *2 (E. D. Mich. August 1, 2007)(unpublished, copy attached as Exhibit C). In *Jackson*, the Eastern District also recognized the substantial body of case law standing for the proposition that "high-ranking government officials are not generally subject to depositions unless they have *some* personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." *Id* at *3. Notably, the Court in *Jackson* granted the protective order without prejudice to the possibility of the deposition occurring later—after plaintiffs utilized alternative discovery tools and upon a petition to the court showing that the information can only be adequately discovered through a deposition. *Jackson* at *10.

And in *Jameson v. Oakland County*, No. 10-10366, 2011 U.S. Dist. LEXIS 6312 (E.D. Mich. Jan. 24, 2011)(unpublished, copy attached as Exhibit D), the Eastern District again held that depositions of high-ranking officials are available only in limited circumstances:

> Because a high-ranking official has both substantial demands on his time and a duty to serve the public, such an

> official should be subject to deposition only after: (1) a litigant seeking his deposition has exhausted other sources that might yield the information sought, and (2) a showing by the litigant that the official is likely to possess that information.

Jameson, at *3 (citing *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) and *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999).

Courts in numerous other jurisdictions have unequivocally held that requiring a highly-placed, executive branch government official to personally appear to give testimony at a deposition should only be done in the rarest of circumstances. In *United States of America v. Poindexter*, 732 F. Supp. 142, 143 (D.D.C. 1990), the Court was asked to decide whether former President Ronald Reagan could be subpoenaed to testify as a witness in the criminal case against his National Security Advisor, John Poindexter. The Court found that when courts had historically required Presidents to testify, they did so in a way that was least damaging or onerous to the President. *Poindexter*, 732 F. Supp. at 146. Armed with that historical perspective, the Court established a two-prong test to be used when determining whether a current or former President could be required to testify in a case. First, a court

must be satisfied that the testimony would be material, based on a meticulousness standard. *Poindexter*, 732 F. Supp. at 147. Second, the testimony must be necessary because it is "a more logical and more persuasive source of evidence than alternatives that might be suggested." *Poindexter*, 732 F. Supp. at 147. The Court in *Poindexter* was satisfied that President Reagan's testimony would be material after a meticulous review of the type of information the defendant was seeking, as evidenced by the defendant's submittal of the specific questions he intended to ask the former President. *Poindexter*, 732 F. Supp. at 148-150.

Applying the standard laid out in *Poindexter*, the Texas Court of Appeals overturned a trial court's order compelling the deposition of former President George W. Bush. In *In re President George W. Bush*, 287 S.W.3d 899 (Tx App. 2009), the court held that the real parties in interest did not meet the first prong of the *Poindexter* test since they "did not provide sufficient information for the trial court to have found materiality by a meticulous standard." *In re President George W. Bush*, 287 S.W.3d at 903. The trial court was not able to properly determine whether former President Bush's testimony would be material because

it did not require the real parties in interest to submit the question they intended to ask the former President for the court's review. *In re President George W. Bush*, 287 S.W.3d at 904.

But, in *United States v. Fromme*, 405 F. Supp. 578, 582 (E.D. Cal. 1975), a federal district court issued a subpoena to then President Gerald Ford requiring his testimony in a criminal case, because he was the most percipient witness to his attempted assassination. The fact that this was such a unique and unprecedented case seemed to compel the court to issue the subpoena and hold that "where the President himself is a percipient witness to an alleged criminal act, the President must be amenable to subpoena as any other person would be." *United States v. Fromme*, 405 F. Supp. at 582. But it is important to note that while the court did, after a hearing and much deliberation on the question, issue the subpoena, it also recognized the burden on a sitting President in requiring him to appear in court to testify. Thus, the court allowed him to testify by video deposition at a place and time of his choosing. *United States v. Fromme*, 405 F. Supp. at 583.

These long-standing legal principles have also been applied to cases involving the testimony of high-ranking executive officials at the

state level. In *Deukmejian v. Superior Court of Marin County*, 143 Cal. App. 3d 632 (Cal. App. 1983), the governor of California was ordered by a trial judge to testify in a case concerning conditions at San Quentin Prison. The California Court of Appeals quashed the order, ruling that the party seeking the governor's testimony did not make a sufficient showing of the need for his testimony, nor did it show any prejudice, injustice, or other compelling reasons why the deposition of the governor should be taken. *Deukmejian,* 143 Cal. App. At 633 (citing *California State Bd. of Pharmacy v. Superior Court*, 78 Cal. App. 3d 641, 644-645; 144 Cal. Rptr. 320 (Cal. App. 1978)).

Also, in *Monti v. Vermont*, 563 A.2d. 629, 632 (Vt. 1989), the Supreme Court of Vermont held that a trial court abused its discretion in denying the governor's motion for a protective order against the taking of her oral deposition, when it failed to balance the potential prejudice or injustice to the litigant against the public interest that high-ranking officials not be hampered or distracted in important duties cast upon them by law. The court stated the appropriate standard for a court to apply when deciding such a motion as:

> the party requesting the deposition [must] make a particularized showing of the need for the deposition, i.e.

> that it is **necessary** to prevent prejudice or injustice to the party requesting it.

Monti, 151 Vt. at 632. (emphasis added)

Michigan state courts have similarly held that in order to take testimony of a high-ranking state official, the party seeking the testimony must show a compelling need for it. If the party does establish such a compelling need, the deposition may only be permitted when the information sought cannot be obtained from a lesser-ranking officer or obtained through some other discovery method. *Fitzpatrick v. Secretary of State*, 176 Mich. App. 615; 440 N.W.2d 45 (Mich. 1989), *lv den* 433 Mich. 877 (1989). In the *Fitzpatrick* case, the plaintiff also sought to take the deposition of the Michigan Secretary of State. The Secretary filed a motion for protective order on the grounds that the deposition would not serve any legitimate purpose; that the Secretary of State had no personal knowledge of the facts in the matter; and that the deposition would only annoy, harass, and oppress the Secretary of State. The trial court denied the motion, but the Court of Appeals reversed, holding:

> **Department heads and other similarly high-ranking officials should not be compelled to personally give testimony by deposition unless a clear showing is**

> **made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it,** *California State Bd of Pharmacy, supra; Wirtz v Local 30, Internat'l Union of Operating Engineers*, 34 FRD 13, 14 (SD NY, 1963); *State v Beloit Concrete Stone Co*, 103 Wis 2d 506; 309 NW2d 28 (1981), **or absent other compelling reasons,** *California State Bd of Pharmacy, supra; Deukmejian v Superior Court of Marin Co*, 143 Cal App 3d 632, 633; 191 Cal Rptr 905 (1983). **In determining whether a department head should be compelled to testify, a court must look at whether the information sought to be elicited can be obtained from a lesser ranking official,** *Writz, supra*, p 14; *Halperin v Kissinger*, 196 U.S. App DC 285, 302-303, n 120; 606 F2d 1192 (1979), aff'd memorandum 452 U.S. 713; 101 S Ct 3132; 69 L Ed 2d 367 (1981); *Halderman, supra*, p 64, **or whether it can be obtained by using another discovery mechanism**, *Sykes v Brown*, 90 FRD 77, 78 (ED Pa, 1981); *Kyle, supra*, p 231; *Capitol Vending Co v Baker*, 36 FRD 45, 46 (D DC, 1964); *United States v Northside Realty Associates, Inc*, 324 F Supp 287, 295 (ND Ga, 1971).

Fitzpatrick, 176 Mich. App. at 617-618. (Emphasis added). The court then concluded:

> The Secretary of State in the State of Michigan is a constitutional office. Const 1963, art 5, § 21. The Secretary of State is the head of the Department of State, MCL 16.126; MSA 3.29(26), and is the chief election officer of the state, MCL 168.21; MSA 6.1021. Therefore, there is no doubt that defendant Secretary of State is the head of a department and a high-ranking official. We cannot discern any injustice or prejudice which would result to plaintiff if the Secretary of State was not compelled to testify in this case. Nor can we discern any compelling reasons which would support our requiring him to testify.

Fitzpatrick, 176 Mich. App. at 618-19.

The Michigan Court of Appeals revisited and clarified its holding in *Fitzpatrick* in the case of *Hamed v. Wayne County*, 271 Mich. App. 106, 110-111; 719 N.W.2d 612 (2006) *rev'd on other grounds*, 490 Mich. 1 (2011), holding:

> High-ranking public officials may not be compelled to provide deposition testimony unless or until a preliminary showing is made that the deposition is necessary to obtain relevant information that cannot be obtained from any other discovery source or mechanism, i.e., that such a deposition is essential to prevent prejudice or injustice. The purpose of this heightened scrutiny is to strictly limit the intrusions that would burden the public official's efforts to advance the effective and efficient operation of the public agency.

Applying these principles to this case, there is no demonstrated need for the Secretary of State's deposition testimony. There has been no evidence—despite document production and review—that the Secretary of State was herself directly involved in the development of this policy. There is no indication that the Secretary of State has any personal knowledge of the development of this particular policy. Moreover, Plaintiffs have already scheduled the depositions of the lower-level staff who were involved in the development of the policy, and they will be more than capable of explaining why and how the policy was created.

Plaintiffs' demand for the Secretary of State's deposition is premised entirely on their suspicions and beliefs. They have not connected their suspicions with any demonstration that the Secretary actually has any personal knowledge, or that the information they seek cannot be obtained through other means or through other witnesses. By their own admission, Plaintiffs seek this deposition in order to ask the Secretary about her personal views or beliefs—not the development of any particular policy. But the Secretary's personal views are irrelevant to their claims about their right to privacy. Simply put, deposing the Secretary of State can only be understood as a fishing expedition. This is precisely the reason such depositions are not permitted, and Plaintiffs have not met the standard for taking testimony of a high-ranking executive branch government official. The Secretary of State is, therefore, entitled to a protective order. In the unlikely event that Plaintiffs are ever able to demonstrate that the Secretary has information essential to this case that cannot be obtained elsewhere, they could petition this Court at that time to permit the deposition.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendant Ruth Johnson respectfully requests that this Honorable Court issue a protective order under Fed. R. Civ. P. 26(c) prohibiting the deposition of the Secretary of State, together with any other relief the Court determines to be appropriate under the circumstances.

Respectfully submitted,

Bill Schuette
Attorney General

s/Erik A. Grill
Denise C. Barton (P41535)
Kevin Himebaugh (P53374)
Jeanmarie Miller (P44446)
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(P64713)

Dated: March 10, 2016

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

s/Erik A. Grill
Denise C. Barton (P41535)
Kevin Himebaugh (P53374)
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Defendant.

NO. 2:15-cv-11834

HON. NANCY EDMUNDS
MAG. ELIZABETH A. STAFFORD

INDEX OF EXHIBITS

Exhibit A	Deposition Notice
Exhibit B	Mr. Derksen's E-mail, February 18, 2016
Exhibit C	*Jackson v. City of Detroit*, Case No. 05-74236, 2007 U.S. Dist. LEXIS 55730, *2 (E. D. Mich. August 1, 2007)
Exhibit D	*Jameson v. Oakland County*, No. 10-10366, 2011 U.S. Dist. LEXIS 6312 (E.D. Mich. Jan. 24, 2011)

EXHIBIT A

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

EMANI LOVE, et al.

Plaintiffs,

Case No. 15-cv-11834

v.

Hon. Nancy G. Edmunds

RUTH JOHNSON, in her official capacity as the Secretary of State of Michigan,

Defendant.

_____/

AMENDED NOTICE OF 30(b)(6) DEPOSITION

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Plaintiffs, by and through their attorneys, will take the deposition upon oral examination of Defendant Ruth Johnson, in her official capacity as the Secretary of State of Michigan, by and through one or more of the persons designated by Defendant to testify on Defendant's behalf, with respect to the topics set forth in Schedule A hereto. The person or persons so designated shall testify as to information known or reasonably available to Defendant.

This deposition will take place at 525 W. Ottawa St., Lansing, MI 48933 on March 17, 2016, commencing at 9:00 a.m., or at such other time(s) and place(s) as the parties may agree, before a notary public or other person authorized to administer oaths.

The deposition will continue from day to day until completed or otherwise adjourned. This examination shall be recorded by stenographic and/or videographic means.

Dated: March 8, 2016

By: */s/ Michael F. Derksen*

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Michael F. Derksen, an attorney, hereby certify that on March 8, 2016, I caused a copy of the foregoing to be served via U.S. First Class mail upon the following:

Erik A. Grill
Michigan Dept. of Atty. Gen.
Public Employment, Elections and Torts Division
P.O. Box 30736
Lansing, MI 48909-8236

By: */s/ Michael F. Derksen*

SCHEDULE A

DEFINITIONS & INSTRUCTIONS

1. The term "You," "Your," or "Defendant" shall mean Defendant Ruth Johnson in her official capacity as the Secretary of State of Michigan and shall include all of the Michigan Secretary of State Office's former and current agents, officers, employees and representatives.

2. The term "Driver's License Policy" or "Policy" shall refer to the policy set forth in the Driver's License Manual that Defendant implemented under which the State of Michigan will not change the sex designation on a driver's license or state identification card (the designation of "M" or "F") unless the person requesting the change produces an amended birth certificate supporting the change (the designation as "M" or "F", or "male" or "female").

3. The term "License" shall refer to a Michigan driver's license or state identification card.

4. The term "Driver's License Manual" refers to the document attached as Exhibit A to the Defendant's Motion to Dismiss (Dkt. No. 16-2).

5. The term "State" shall refer to the State of Michigan.

6. The term "Communication" or "Communications" means the transmittal of information in the form of facts, ideas, inquiries or otherwise.

7. The term "Document" means all materials within the full scope of Federal Rule of Civil Procedure 34 including without limitation all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts of the following items, whether printed or recorded (through a sound, video, computer, digital, optical, or magnetic recording system) or reproduced by hand: contracts, agreements, Communications, writings, correspondence, telegrams, facsimiles, memoranda, records, reports, books, summaries, records of telephone conversations, recordings of voicemails, summaries or records of personal conversations or interviews, diaries, calendars, forecasts, statistical statements, work papers, e-mails, instant messages, web-pages, electronic bulletin boards, ledgers, drafts, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultant's reports, appraisals, reports or summaries of negotiations, brochures, pamphlets, circulars, trade letters, press releases, notes, marginal notations, bills, invoices, checks, photographs, tape recordings, microfilm, microfiche, floppy diskettes, lists, journals, advertisements, file folders, computer tapes and hard drives, source code, object code or other computer language or recording, and any other writing of whatever description however produced or reproduced, within Your possession,

custody or control, including without limitation Documents within the files of Your attorneys, consultants, accountants or agents.

8. "Person" or "Persons" shall be construed to include, without limiting the generality of its meaning, natural persons, groups of natural persons, corporations, partnerships, associations, joint ventures, and any other incorporated or unincorporated business, government, public or social entities. Whenever reference is made to a Person, it includes any and all of such Person's principals, employees, agents, consultants, and other representatives.

9. The terms "concerning" and "concern" shall be construed to include: relate to, relating to, in connection with, relevant to, referring to, constituting, pertaining to, recording, evidencing, memorializing, embodying, setting forth, reflecting, showing, disclosing, reporting, describing, discussing, evaluating, considering, reviewing, explaining, analyzing, and summarizing.

10. The words "and" and "or" shall be construed either conjunctively or disjunctively.

11. The singular form of a word is to be construed to include the plural, and the plural form of a word includes the singular.

12. The use of a verb in the present tense shall be construed as the use of a verb in the past tense and *vice versa*.

TOPICS FOR DEPOSITION

1. The genesis of the Driver's License Policy and the history leading up to its drafting and approval.

2. The rationale, purposes, and reasons for Your implementation of the Driver's License Policy.

3. The Persons involved in Your decision to implement the Driver's License Policy.

4. The Documents that You considered, or that otherwise relate to, Your decision to implement the Driver's License Policy.

5. Any alleged connection between he Driver's License Policy and any Michigan statute.

6. Your asserted interest in ensuring that the sex on a License matches the person's biological status, physical description or attributes, or anatomy.

7. Your decision to refuse to accept U.S. Passports as documentation for changing the sex designation on a License.

8. The reasons for your review of the policies of other states and federal government agencies for changing the sex designation on a driver's license or other identification document and Your decision to not adopt a policy comparable to one of the states or federal government agencies that allows persons to change the sex designation on their License by producing a sworn statement or letter from

a medical provider confirming a person's change from male to female, or female to male.

9. Your policy for determining what sex designation will be placed on the licenses of transgender individuals applying for their first License, including your policy applicable to transgender persons whose License will be their first license or state identification document ("ID") in any state or country as well as your policy applicable to persons who held a license or state ID in another state or country prior to moving to the State and are seeking their first Michigan License.

10. Your Communications with the Campaign for Michigan Families or any other individual or entity concerning changing the sex designation on Licenses.

11. Any instances of fraud related to or resulting from changes to the sex designation on a License.

12. Your answers to Plaintiffs' interrogatories and requests to admit in this proceeding.

EXHIBIT B

Grill, Erik (AG)

From: Derksen, Michael F. <mderksen@proskauer.com>
Sent: Thursday, February 18, 2016 11:14 AM
To: Barton, Denise (AG); John Knight; Grill, Erik (AG); Jay Kaplan (jkaplan@aclumich.org) (jkaplan@aclumich.org)
Cc: Long, James (AG); Miller, Jeanmarie (AG); Himebaugh, Kevin (AG); Gilford, Steven R.; Dan Korobkin (dkorobkin@aclumich.org); Anderson, Jacki L.
Subject: RE: Love v. Johnson

Denise-

Secretary Johnson, under Michigan law, is responsible for the policies of the Department of State. How she has personally exercised that responsibility with respect to the policy regarding gender changes for transgender people is relevant to the issues in this case.

The documents produced in this case indicate that the Secretary had firsthand knowledge of the establishment of this policy. One need not look further than the January 10, 2012 letter from Mr. Wartella to the ACLU, which explicitly states that "Secretary Johnson has asked" that Mr. Wartella respond on her behalf. Additionally, Secretary Johnson was copied on that letter.

Furthermore, based on the documents produced by the Campaign for Michigan Families, which we provided to you, Secretary Johnson stated during her campaign that transgender people should not be able to change the gender on their driver's licenses under any circumstances. Other persons within the Department cannot provide the necessary information as to why Secretary Johnson took this position prior to her taking office and the degree to which her campaign promises are related to the policy adopted after her election, which made it impossible for many transgender people to change the gender on their licenses.

If the date stated in the notice is not acceptable, please provide some dates that would be. Thanks,

Mike

Michael F. Derksen
Attorney at Law

Proskauer
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EXHIBIT C

Jackson v. City of Detroit

United States District Court for the Eastern District of Michigan, Southern Division

August 1, 2007, Decided; August 1, 2007, Filed

Case No. 05-74236

Reporter
2007 U.S. Dist. LEXIS 55730; 2007 WL 2225886

JAMIE JACKSON, personal representative of the Estate of James A. Stone, Deceased, Plaintiff, v. THE CITY OF DETROIT, et. al., Defendant.

Counsel: [*1] For Jamie Jackson, Personal Representative of the Estate of James A. Strong, Deceased, Plaintiff: Robert Morris, Jr., LEAD ATTORNEY, Robert E. Morris Assoc., Farmington Hills, MI, Towana Tate, LEAD ATTORNEY, Farmington Hills, MI.

For City of Detroit, Ella Bully-Cummings, Chief, Michelle Baker, Investigator, Defendants: Jacob Schwarzberg, LEAD ATTORNEY, Detroit City Law Department, Detroit, MI.

Judges: DENISE PAGE HOOD, United States District Judge.

Opinion by: DENISE PAGE HOOD

Opinion

DECISION AND ORDER REGARDING CERTAIN DISCOVERY

I. INTRODUCTION

This matter is before the Court on Defendant's Motion for Protective Order to Prevent the

Deposition of City of Detroit Police Chief Ella-Bully Cummings, filed June 28, 2007. Plaintiff filed a Response on July 13, 2007. [1]

II. FACTS

The instant case concerns the death of James A. Stone while incarcerated at Detroit Police Second Precinct on August 9, 2005. Plaintiff Jamie Jackson, Personal Representative of the Estate of James A. Stone, brings the instant action against the City of Detroit and various officers in their individual and official capacities, alleging: Violation of the Federal Constitution Against Defendants City [*2] of Detroit, Chief Ella Bully-Cummings and Inspector Fred McClure (Count I); State Law Gross Negligence (Count II); Intentional Infliction of Emotional Distress (Count III); Wrongful Death (Count IV); Violation of the Fourth, Eighth and Fourteenth Amendments and under 42 U.S.C. § 1983 as against the individual defendant officers (Count V).

III. APPLICABLE LAW AND ANALYSIS

Defendants object, pursuant to Fed. R. Civ. P. 26(c), to the taking of the deposition of Defendant Ella Bully-Cummings, Police Chief of City of Detroit. Pursuant to Rule 26(c) - "Protective Orders", upon motion by a party from whom discovery is sought, the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense". Generally, "a party is entitled to depose a witness on all relevant issues to which the witness has knowledge." *Alliance For Global Justice, et. al. v. District of Columbia*, No. Civ.A.01-00811, 2005 U.S. Dist. LEXIS 15190, 2005 WL 1799553, at *1 (D.D.C. July 29, 2005) (unpublished). However, courts have recognized the undue burden falling on public officials resulting from compulsion to attend depositions. *Id.* (quoting *Springfield T. Ry. Co. v. United Transp. Union & Nat'l Mediation Bd.*, Civ. No. 89-0073, 1989 U.S. Dist. LEXIS 5478, 1989 WL 225031, at *2 (D.D.C. May 18, 1989) [*3] (unpublished). Accordingly, "[t]here is substantial case law standing for the proposition that high-ranking government officials are not generally subject to depositions unless they have *some* personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." *Alliance For Global Justice*, 2005 U.S. Dist. LEXIS 15190, 2005 WL 1799553, at *1 (quoting *Alexander v. F.B.I.*, 186 F.R.D. 1, 4 (D.D.C. 1998) (emphasis in original). When moving for a protective order, the movant must establish good cause "by demonstrating the specific evidence of the harm that would result." 2005 U.S. Dist. LEXIS 15190, [WL] at *1 (quoting *Jennings v. Family Mgmt.*, 201 F.R.D. 272, 275 (D.D.C. 2001). Further, a party

[1] Plaintiff filed an Amended Response on July 15, 2007.

seeking a protective order preventing the deposition of an individual must establish a specific need for protection, as opposed to making conclusory or speculative statements. 2005 U.S. Dist. LEXIS 15190, [WL] at *1 (citing *Alexander*, 186 F.R.D. at 75)

Defendants assert that Plaintiff has received a voluminous amount of discovery, such that Plaintiff's counsel may proceed with the prosecution of his case without the need to take the deposition of Defendant Bully-Cummings. Defendants acknowledge that Defendant Bully-Cummings [*4] is sued in her personal and official capacities, however, they argue that Plaintiff cannot demonstrate that the deposition of Defendant Bully-Cummings will yield information that cannot be obtained from other sources. Specifically, Defendants point out that Defendant Bully-Cummings had no personal contact with decedent James Stone. Defendants argue that Defendant Bully-Cummings performed "narrow activities" in this manner and it would be a waste of time for her to be cross-examined at a deposition.

Defendants further argue that the deposition of Defendant Bully-Cummings would be an "undue burden and annoyance," as it would significantly disrupt her official duties and would also set an unfair and unmanageable precedent. Defendants assert that the court should take judicial notice that "high-level" executives such as Defendant Bully-Cummings "would be prevented from efficiently performing her job, if plaintiff attorneys could, 'cart blanc', take the Police Chief's deposition in cases where she and the City of Detroit are named as defendants." (Defs.' Mot. at 22) (emphasis in original). *See Fitzpatrick v. Secretary of State*, 176 Mich. App. 615, 440 N.W.2d 45 (1989) (holding that "[d]epartment heads [*5] and other similarly high-ranking officials should not be compelled to personally give testimony by deposition unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it or absent other compelling reasons . . . In determining whether a department head should be compelled to testify, a court must look at whether the information sought to be elicited can be obtained from a lesser ranking official . . ." (internal citations omitted); *Union Savings Bank of Patchogue, New York v. Saxon*, 209 F. Supp. 319, 319-320 (D.D.C. 1962) (holding that because plaintiffs allege actions personal to Defendant Comptroller of the Currency, justice and reason require that plaintiff be allowed to take the deposition of defendant, however, limited to the procedural action that is the subject matter of the action). Defendants maintain that Plaintiff cannot make a "clear showing" that taking the deposition of Defendant Bully-Cummings is essential to prevent prejudice or injustice in Plaintiff's case-in-chief. Defendants maintain that "good cause" exists for the issuance of a protective order in the instant case.

Plaintiff argues that [*6] Defendants fail to point to any specific "good cause" stemming from the Rule 26 factors - annoyance, embarrassment, oppression, undue burden or expense. Plaintiff maintains that Defendant Bully-Cummings is personally involved in the matter, as exhibited by the memorandums between her and Commander Morris Wells discussing the details of the case and her personal direction that Commander Wells further investigate the matter. *See* Ex.'s A, B. Plaintiff argues that Defendant Bully-Cummings is the only individual who gave recorded direction to investigate Mr. Stone's death.

Plaintiff points to *Alliance for Global Justice*, wherein the court stated that there were only three ways in which the deposition of the Mayor of the District of Columbia could aid plaintiffs in establishing municipal liability of the District of Columbia for actions taken by police during the demonstrations:

> (1) that, in advance of the demonstrations, the Mayor was presented with the police's intended response to the demonstrators' activities and approved them; (2) that, after they occurred, the Mayor became aware of what the police had done and expressed his approval, thereby ratifying the behavior that the demonstrators [*7] condemn as illegal and unconstitutional; (3) that the police acted in a similar fashion in demonstrations that occurred before or even after the demonstration at issue and the Mayor expressed his approval of their behavior or did nothing to change or modify it.

Alliance for Global Justice, 2005 U.S. Dist. LEXIS 15190, 2005 WL 1799553, at *3. Plaintiff provides the Court with an in-depth discussion of the ways in which Defendant Bully-Cummings has personal knowledge of the subject matter of the case, the investigation and the inconsistencies in the language, reports and activity logs. (Pl.'s Resp. at 16-22, Ex.'s A, B) Namely, Plaintiff details the specific instructions given by Defendant Bully-Cummings to Commander Wells, as a part of the Final Administrative Review, to conduct a more thorough investigation of the circumstances surrounding Mr. Stone's death and to clarify the apparent inconsistencies in the report, witness statements and the officers' activity logs. In response, Commander Wells provided Defendant Bully-Cummings with references to pages and paragraph numbers in the report, as opposed to any single direct response to Defendant Bully-Cummings concerns. *See Id.* at 18; Ex. B. Plaintiff asserts that "there

[*8] is no other person with the knowledge and information to speak regarding this investigation, its deficiencies, and the past policies and practices that the Department has adopted in similar matters." *Id.* at 20.

Plaintiff maintains that the reasons a deposition, rather than interrogatories, is necessary in this case is that each time another high-ranking official in the Detroit Police Department was deposed, they intentionally had not reviewed the relevant material and thus provided unresponsive answers. Plaintiff asserts that follow-up questions, as allowed by a deposition, are necessary to avoid non-responsive and evasive answers. Plaintiff also points out that, although there was a finding of sustained misconduct against Sergeant David Newkirk for his failure to document prisoner checks while on duty, no disciplinary action has been taken in this regard.

Plaintiff contends that the second two factors in *Alliance for Global Justice* are met with regard to Defendant Bully-Cummings. First, Plaintiff argues that Defendant Bully-Cummings became thoroughly aware of the circumstances surrounding Mr. Stone's death. In line with *Alliance for Global Justice*, Plaintiff argues the officers' and [*9] investigators' actions, in negligently or intentionally conducting a poor investigation, were thereby ratified when Defendant Bully-Cummings ordered closure of the case. Second, Plaintiff argues that since the death of Mr. Stone, the police have acted in a similar fashion, as there are eight documented deaths of prisoners requesting medical attention and the Justice Department is conducting an ongoing investigation of the Detroit jails. Plaintiff further argues that the testimony of Defendant Bully-Cummings is necessary to prevent injustice because many department officials have participated in the cover-up of facts in the instant case.

Plaintiff has made a showing that Defendant Bully-Cummings has some personal knowledge of the facts at issue in the instant case. However, the Court is not persuaded that the information sought could not adequately be discovered through other means, such as interrogatories. Following the Court's discussion with the parties on July 23, 2007, the Court decided that Plaintiff is permitted to propound fifty (50) interrogatories upon Defendant Bully-Cummings. Plaintiff must also designate with particularity the documents, which should not exceed approximately [*10] twelve documents, that Defendant Bully-Cummings should review, prior to responding to the interrogatories.

As such, Plaintiff's Motion for a Protective Order is GRANTED, without prejudice to Plaintiff's right to depose Defendant Bully-Cummings upon petition to the Court. Following the utilization of alternative discovery tools, and upon a showing to the Court that the information can only be adequately discovered through a deposition, Plaintiff may further petition the Court to depose Defendant Bully-Cummings.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for a Protective Order **[Docket No. 39, filed June 28, 2007]** is GRANTED, without prejudice to Plaintiff's right to depose Defendant Bully-Cummings upon further petition to the Court, as noted in the above decision.

IT IS FURTHER ORDERED that Plaintiff is permitted to propound fifty (50) interrogatories upon Defendant Bully-Cummings.

IT IS ORDERED THAT Plaintiff must designate with particularity the documents, which should not exceed approximately twelve documents, that Defendant Bully-Cummings should review, prior to responding to the interrogatories.

DENISE PAGE HOOD

United States District Judge

DATED: August 1, 2007

EXHIBIT D

Neutral
As of: March 10, 2016 11:18 AM EST

Jameson v. Oakland County

United States District Court for the Eastern District of Michigan, Southern Division

January 24, 2011, Decided; January 24, 2011, Filed

Case No. 10-10366

Reporter
2011 U.S. Dist. LEXIS 6312; 2011 WL 219555

MATTHEW A. JAMESON, Plaintiff, v. OAKLAND COUNTY, et al., Defendants.

Subsequent History: Summary judgment granted by *Jameson v. Oakland County, 2011 U.S. Dist. LEXIS 83392 (E.D. Mich., July 29, 2011)*

Prior History: *Jameson v. Oakland County, 2010 U.S. Dist. LEXIS 13675 (E.D. Mich., Feb. 17, 2010)*

Core Terms

deposition, discovery, protective order, high-ranking, depose, vacate, scheduled, deadline, no necessity, reasons, subordinate official, government official, granting a motion, motion seeking, admissible, attorney's, appearing, deponent, Parties, asserts, demands, exhaust, duties, Reply

Counsel: [*1] For Matthew Jameson, Plaintiff: Craig S. Romanzi, Craig S. Romanzi Assoc., Waterford, MI; Heidi A. Tanner, Craig S. Romanzi Assoc. (Waterford), Waterford, MI.

For County of Oakland, Oakland County Sheriff's Department, Michael Bouchard, M Reeves, Det Pankey, Lopez, Deputy Carter, Deputy Wilson, Defendants: Rick J. Patterson, Steven M. Potter, Potter, DeAgostino, O'Dea & Patterson, Auburn Hills, MI.

Judges: ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT H. CLELAND

Opinion

OPINION AND ORDER GRANTING MOTION FOR PROTECTIVE ORDER WITHOUT PREJUDICE TO PLAINTIFF'S ABILITY TO MOVE FOR VACATION AND DIRECTING DEFENDANT SHERIFF MICHAEL BOUCHARD TO FILE AFFIDAVIT

Defendants have filed a motion seeking a protective order that would bar Plaintiff from taking the deposition of Defendant Sheriff Michael Bouchard. For the following reasons, the court will grant the motion, without prejudice to Plaintiff's ability to move the court to vacate the order, and will also order Sheriff Bouchard to file an affidavit setting forth the basis for his claim that his deposition is not necessary.

I. BACKGROUND

In the September 2, 2010, scheduling order, the court set the discovery deadline for January 3, 2011. On December 13, [*2] 2010, Defendants filed the pending motion for a protective order, in which they argue that Plaintiff should not be permitted to depose Sheriff Michael Bouchard because he is a high-ranking official and the information he could provide is available from other potential deponents. In a December 27, 2010, response, Plaintiff notes that high-ranking officials are not entirely immune from deposition. Plaintiff asserts that the deposition of one of Sheriff Bouchard's subordinate officers yielded none of the information sought, and therefore Sheriff Bouchard's own deposition is necessary. In addition, Plaintiff contends that Sheriff Bouchard cannot delegate certain statutory duties, and as the author of certain departmental policies, Sheriff Bouchard's deposition is necessary to unveil certain relevant evidence. Defendants filed a reply on January 12, 2011, which reasserts many of the arguments raised in their motion, and suggests Plaintiff depose Joseph Quisenberry, "[t]he individual in charge of" the unit that conducted the search in question. (Reply 2-3.)

II. STANDARD

In general, the scope of discovery is broad. "Parties may obtain discovery regarding any nonprivileged matter that is relevant [*3] to any party's claim or defense. . . . Relevant

information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Fed. R. Civ. P. 26(b)*. Under *Federal Rule of Civil Procedure 26(c)*, a district court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or nndne bnrden or expense," thereby limiting discovery.

Courts have interpreted *Rule 26(c)* to impose limits on when a high-ranking government official may be snbject to deposition. *Bogan v. City of Boston, 489 F.3d 417, 423 (1st Cir. 2007)* (citing *United States v. Morgan, 313 U.S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)*); *In re United States (Holder), 197 F.3d 310, 313-14 (8th Cir. 1999)*. Because a high-ranking official has both substantial demands on his time and a duty to serve the public, snch an official shonld be subject to deposition only after: (1) a litigant seeking his deposition has exhausted other sources that might yield the information sought, and (2) a showing by the litigant that the official is likely to possess that information. *See Bogan, 489 F.3d at 423*; *Holder, 197 F.3d at 314*. Withont such a rule, high-ranking [*4] officials would be constantly subject to the demands of pending litigation, inhibiting their ability to execute their official duties.

III. DISCUSSION

Sheriff Bouchard is a high-ranking governmental official, and therefore Plaintiff must exhaust other avenues for obtaining the information sought before deposing Sheriff Bouchard. Plaintiff has deposed Officer Richard Craze, an officer allegedly involved in the incident underlying this suit, and asserts that the deposition was fruitless, as Officer Craze responded to many of Plaintiff's questions by denying knowledge. In addition, Plaintiff avers that another deponent, Officer Jason Clark, cancelled his properly noticed deposition just two hours before it was scheduled.

The court finds that while Sheriff Bouchard's deposition is not yet necessary, it may become necessary in the future. Plaintiff must again attempt to depose officers who were present during the search at issue, or officials subordinate to Sheriff Bouchard and to whom those officers report, such as Quisenberry. The court will therefore grant the protective order. If those depositions do not yield information sought that is likely in the possession of Sheriff Bouchard, or [*5] if Defendants do not cooperate in scheduling or appearing for scheduled depositions, Plaintiff may file a motion to vacate the protective order, and Sheriff Bouchard may be ordered to appear for a deposition.

In the meantime, Sheriff Bouchard must file an affidavit in support of his attorney's contention that his deposition is not necessary, setting forth the reasons for snch an assertion.

In this case, the discovery deadline was set for January 3, 2011, a date which has passed while the motion under consideration has been pending. The court will extend the deadline until January 31, 2011, to allow Plaintiff to depose subordinate officers or other persons who might provide the information sought from Sheriff Bouchard. If by that date and after diligent effort Plaintiff has been unable to obtain the information at issne, Plaintiff may move the court to vacate the protective order and to order the deposition of Sheriff Bouchard.

III. CONCLUSION

Accordingly, IT IS ORDERED that Defendant's "Motion for Protective Order Limiting Discovery" [Dkt. # 92] is GRANTED.

IT IS FURTHER ORDERED that Sheriff Bouchard is DIRECTED to file an affidavit in support of his attorney's claim that his deposition [*6] is not necessary in this case, which outlines the reasons for that claim.

Finally, IT IS ORDERED that the discovery deadline is extended until **February 11, 2011**. Plaintiff must file any motion seeking to vacate this order no later than **Fehruary 18, 2011**.

/s/ Robert H. Cleland

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE

Dated: January 24, 2011