STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

OPEN SYSTEMS TECHNOLOGIES DE, LLC,

Plaintiff,

vs.

TRANSGUARD INSURANCE COMPANY OF AMERICA; and CHAMPAGNE LOGISTICS,

Defendants.
_____/

Case No. 14-01405-CKB

HON. CHRISTOPHER P. YATES

ORDER GRANTING DEFENDANTS' REQUEST TO TAKE *DE BENE ESSE* DEPOSITION OF NON-PARTY WITNESS KEVIN COLTON

On June 8, 2016, the Court and counsel engaged in an emergency telephone conference concerning a request by Defendants Transguard Insurance Company of America and Champagne Logistics to conduct a videotaped *de bene esse* deposition of non-party witness Kevin Colton via Skype prior to the commencement of trial on June 20, 2016. The defendants seek to conduct a *de bene esse* deposition of Colton because he currently resides in Florida and the Court's powers to secure his testimony at trial are limited. The plaintiff's objections are twofold: (1) a discovery deposition of Colton took place in September 2014, so his testimony is already preserved; and (2) with less than two weeks before the start of trial, conducting another deposition will impinge upon valuable trial-preparation time.

"A *de bene esse* deposition, as distinguished from a discovery deposition, is generally taken to preserve testimony." Surgical Institute of Michigan, LLC v State Farm Mutual Automobile Ins Co, No 321778, slip op at 2 (Mich App Oct 22, 2015) (unpublished decision). According to MCR 2.301(C), "[a]fter the time for completion of discovery, a deposition of a witness taken solely for

the purpose of preservation of testimony may be taken at any time before commencement of trial without leave of the court." The defendants have requested the Court's permission to conduct the *de bene esse* deposition of Kevin Colton over the plaintiff's objection.

Pursuant to MCR 2.308(A), "[d]epositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence." As a general rule, depositions are considered hearsay under MRE 801(c) and accordingly are inadmissible under MRE 802, but MRE 804 states:

> (b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * * * * *
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> (5) *Deposition Testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
>
> For purposes of this subsection only, "unavailability of a witness" also includes situations in which:
>
> (A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition[.]

Therefore, under MRE 804(b)(5), deposition testimony is not barred by the hearsay rule if: (1) the person deposed is unavailable as a witness; (2) the deposition was taken in compliance with law; and (3) in the course of the same proceeding or another proceeding, the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by examining the witness. Here, the witness is plainly unavailable because Colton resides in Florida. Nevertheless, the Court must decide whether allowing a *de bene esse* deposition to be taken twelve days before trial is "in compliance with law."

The plaintiff insists that a *de bene esse* deposition serves no purpose here because counsel had the opportunity to conduct a discovery deposition in September 2014, so the defendants have the option of reading that deposition into evidence at trial. For three reasons, the Court disagrees. First, the fact that one deposition has already occurred does not preclude the Court from permitting a second *de bene esse* deposition, especially when the case is "'newly poised'" by the time of trial. Adas v William Beaumont Hosp, No 318397, slip op at 12 (Mich App Nov 17, 2015) (unpublished decision). This case is "newly poised" because the plaintiff recently voluntarily dismissed all of its claims against Colton, whose status changed from a defendant to a non-party by virtue of that development on May 20, 2016. Second, because Colton was a named party, the defendants had an expectation that he would appear at trial, and therefore be available to testify live during trial. Had the plaintiff not voluntarily dismissed Colton from the case exactly one month before the start of trial, no deposition would be necessary as a substitute for live testimony. Third, the Court sees no prejudice in permitting the defendants to conduct a brief *de bene esse* deposition of Colton via Skype on a mutually agreed date before the commencement of trial on June 20, 2016. Although the plaintiff complains that a *de bene esse* deposition will take time away from trial preparation, the defendants have agreed to conduct the deposition via Skype to avoid the time and expense of traveling to Florida. Therefore, IT IS ORDERED that the defendants may conduct a *de bene esse* deposition of Kevin Colton via Skype on a mutually agreed upon date.

IT IS SO ORDERED.

Dated: June 9, 2015

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge