UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SKY ANGEL U.S., LLC, Plaintiff, v. NATIONAL CABLE SATELLITE CORPORATION d/b/a/ C-SPAN, Defendant.	)	Civil Action No. 1:12-cv-01834-RC

OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT LIMITED DISCOVERY PRIOR TO A RULE 26(f) CONFERENCE

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Sky Angel asks the Court to allow it to take six depositions prior to amending its complaint so that it can answer the following question: Did some unknown members of C-SPAN's Board of Directors hatch a plan to disadvantage Sky Angel for the benefit of their cable company employers in violation of Section One of the Sherman Act, and if so, which ones did it?

But the Federal Rules of Civil Procedure and the precedents interpreting those rules prohibit discovery of this sort. None of the very limited exceptions to this rule—for example, where a key witness is on his or her death bed and may not survive until the regular discovery period—apply to this case.

This Court dismissed Plaintiff Sky Angel's Complaint on June 3, 2013 because it did not contain plausible allegations of an antitrust conspiracy. Mem. Op., Dkt. No. 10. In advance of its deadline for filing an amended complaint, Sky Angel has filed a Motion seeking leave to conduct pre-complaint discovery in the form of six oral depositions. Plaintiff's Motion for

Leave to Conduct Limited Discovery Prior to a Rule 26(f) Conference, Dkt. No. 11. Plaintiff's Motion for pre-complaint discovery rests on the premise that it must uncover who did what and when in the lead-up to C-SPAN's termination of the parties' programming agreement. *See* Statement of Points and Authorities of Plaintiff Sky Angel In Support of Its Motion for Leave to Conduct Limited Discovery Prior to a Rule 26(f) Conference at 2 ("Pltf. Mem."), Dkt. No. 11-1. The Federal Rules of Civil Procedure, however, prohibit Sky Angel from seeking discovery before it has demonstrated a colorable claim through a sufficiently plausible complaint. Plaintiff does not get pre-complaint discovery—in the guise of "limited discovery prior to the Rule 26(f) conference"—to determine whether or not a cause of action exists. Plaintiff's attempt to gain pre-complaint discovery must fail, as it does not satisfy the requirements in this Circuit (or elsewhere) under Rules 27 or 26.

Under Rule 27, the rule that governs Sky Angel's request for pre-complaint depositions, "depositions to perpetuate testimony" are permitted before a complaint is filed only under extremely limited circumstances. In order to meet this narrow standard, a plaintiff must demonstrate that the perpetuation of testimony would prevent a failure or delay of justice as a result of the desired testimony's loss—for example, by the imminent death of a witness. Sky Angel cannot demonstrate any risk of loss of the testimony requested. As this Court has held unequivocally, Rule 27 is not a vehicle for a plaintiff to engage in pre-suit discovery to determine whether a cause of action exists.

In its Motion, however, Plaintiff has mischaracterized its request for pre-complaint discovery as a request for "Pre-Rule 26(f) Conference discovery." But, even under that standard—which is not the applicable standard for pre-complaint depositions as sought here—Sky Angel's request cannot be granted. Rule 26 permits litigants to obtain discovery prior

to attending the Rule 26(f) conference on the limited, non-merits-related issues of identity, jurisdiction, and venue. None of these preliminary, non-merits issues are the subject of Sky Angel's request. Sky Angel, in its own words, seeks to determine "the nature and circumstances" of C-SPAN's alleged conduct and uncover persons authorizing, ratifying, initiating or implementing that conduct. Pltf. Mem. at 7. Sky Angel's request for six merits depositions is beyond the scope of Rule 26 at this stage of litigation.

The reasons that Sky Angel presents in support of its request for pre-complaint discovery—basically, a desire to know if its suspicions of conspiracy are true—are ordinary and apply to every civil lawsuit; no plaintiff would *not* have these uses for pre-complaint depositions.

Even if a plaintiff could obtain pre-complaint discovery under Rule 26 on a mere showing of "good cause," as Sky Angel suggests, Sky Angel still would not be entitled to discovery on these facts. Plaintiff lacks good cause to seek these depositions for the following reasons: (1) even without these depositions, Sky Angel states that it intends to amend its complaint using other information "already in plaintiff's possession," Pltf. Mem. at 11; (2) Sky Angel does not have a general right to information in C-SPAN's possession at the pre-complaint stage; (3) Sky Angel's proposed deponent list is itself clear evidence that Sky Angel wishes to engage in pure merits discovery; (4) Sky Angel provides no reasons why pre-complaint discovery is more efficient than regular-course discovery; (5) Sky Angel does not allege that the deponents will be unavailable at a later date; and (6) even if Sky Angel met one of the narrow exceptions to the blanket prohibitions on discovery at this early date, there are less burdensome means to obtain the information sought. For these reasons, the Court should deny Plaintiff's Motion.

ARGUMENT

I. PLAINTIFF IMPROPERLY SEEKS PRE-COMPLAINT DISCOVERY.

A plaintiff may not use pre-complaint discovery as "a method… to determine whether a cause of action exists; and, if so, against whom action should be instituted." *Bond v. United States*, 286 F.R.D. 16, 23 (D.D.C. 2012). This is because, as the D.C. Circuit has explained, "[t]he federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding [discovery] from others." *Millennium TGA, Inc. v. Comcast Cable Commc'ns*, 286 F.R.D. 8, 14 (D.D.C. 2012) (citing *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) and *Nu Image, Inc. v. Doe 1-23,322*, 799 F. Supp. 2d 34, 36-37 (D.D.C. 2011)) (internal citations omitted). A plaintiff whose "complaint is deficient under *Rule 8*… is not entitled to discovery, cabined or otherwise." *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) (also explaining that the "doors of discovery" are not unlocked for a plaintiff "armed with nothing more than conclusions"); *see also Daniel v. Fulwood*, 893 F. Supp. 2d 42, 45-46 (D.D.C. 2012) (same).

In order to move on to the discovery phase of litigation, a plaintiff must first survive a motion to dismiss under Rule 12(b)(6). "The very purpose of [Rule 12(b)(6)] is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery." *Konah v. District of Columbia*, 815 F. Supp. 2d 61, 71 (D.D.C. 2011) (denying plaintiff discovery requested in the complaint).

A. The Applicable Rule Governing Pre-Suit Depositions is Rule 27, Not Rule 26.

Plaintiff Sky Angel has filed a Motion seeking leave to conduct limited discovery prior to the Rule 26(f) conference under Fed. R. Civ. P. 26(b)(1). As a threshold matter, and as discussed in greater detail below, discovery under Rule 26 applies only after a plaintiff has survived a motion to dismiss. Here, Sky Angel seeks *pre-complaint* discovery in the guise of

pre-conference discovery. Rule 26 is inapplicable to Sky Angel's request because there is no operative complaint in this case; rather, Fed. R. Civ. P. 27 governs Sky Angel's motion for leave to take six depositions prior to filing an amended complaint because this Court dismissed Sky Angel's initial complaint. For this reason alone, the requested relief should be denied.

Sky Angel's request for six pre-complaint depositions falls far short of the high standard for relief under Fed. R. Civ. P. 27. Rule 27 allows for "depositions to perpetuate testimony" before an action is filed; however, Rule 27 petitions are granted in only very limited circumstances. This Court may issue an order permitting a deposition before an action is filed pursuant to Rule 27 only "if the court is satisfied that the perpetuation of testimony may prevent a failure or delay of justice." *Kunimoto v. Lehman,* 1996 U.S. Dist. LEXIS 15784 at *4 (D.D.C. Oct. 16, 1996). To satisfy the court that the testimony is needed to protect against a failure or delay of justice, the great weight of authority requires the petitioner to show that there is "a risk of loss of the desired testimony." *Id.* at *5 (collecting cases). "The common situation in which a Rule 27 deposition is appropriate is where there is a risk that a witness will be unavailable at the time of trial, either because of age or infirmity." *Id.* at *6.

Here, Sky Angel has not filed a Rule 27 petition because it does not seek to "perpetuate testimony," which is the only type of pre-complaint discovery allowed under the Federal Rules. Sky Angel seeks these pre-suit depositions in order to investigate liability—whether or not there has been a violation in the first place—rather than to perpetuate testimony. *See* Pltf. Mem. at 2 ("…Sky Angel seeks leave to conduct limited discovery…for the sole purpose of identifying the "plurality of actors" and the means by which they authorized C-SPAN to block Sky Angel for carrying its programming"). But it is well established that Rule 27 is not an avenue for merits discovery, and such a request for pre-complaint depositions is improper. *Penn. Mut. Life Ins.*

Co. v. United States, 68 F.3d 1371, 1376 (D.C. Cir. 1995) (stating "a Rule 27(a) deposition may not be used as a substitute for discovery"). Rule 27 may not be used by a litigant, such as Sky Angel, as "a method of discovery to determine whether a cause of action exists; and, if so, against whom action should be instituted." *Bond*, 286 F.R.D. at 23 (internal citations omitted); *see also Biddulph v. United States*, 239 F.R.D. 291, 293 (D.D.C. 2007) (denying a Rule 27 petition where petitioner's interest is "in assessing the viability of various causes of action in advance of filing a complaint"); *Lucas v. Judge Advocate General*, 245 F.R.D. 8, 9 (D.D.C. 2007); *In re Boland*, 79 F.R.D. 665, 668 (D.D.C. 1978); *Petition of Gurnsey*, 223 F. Supp. 359, 360 (D.D.C. 1963).

B. Plaintiff is Not Entitled to Discovery under Rule 26.

i. Plaintiff May Not Seek Discovery Before Surviving a Motion to Dismiss.

Plaintiff proclaims that under Rule 26(b)(1), "for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Pltf. Mem. at 6. But Plaintiff ignores that this standard applies only to normal-course discovery, which can only occur after a plaintiff has survived a motion to dismiss and the Rule 26(f) conference has occurred. *See* Fed. R. Civ. P. 26(d)(1). It does not apply to Sky Angel's extraordinary request for pre-complaint depositions. The cases echoing Rule 26(b)(1)'s broad scope cited by Sky Angel relate to circumstances in which the plaintiff has *survived* a motion to dismiss, and are therefore inapposite here. *See, e.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (discussing discovery post-Rule 26(f) conference); *Pleasants v. Allbaugh*, 208 F.R.D. 7, 8 n.1, 11 (D.D.C. 2002) (stating that "a party may obtain discovery as to matters that are relevant to any claim or defense" following denial of a motion to dismiss).

Moreover, although the scope of discovery under Rule 26 is broad, it is not without limits. Neither the Federal Rules nor this Circuit permits boundless discovery even in the normal course. Where, as here, the request "amount[s] to nothing more than a fishing expedition[,]" courts must deny discovery. *See Bastin v. Fannie Mae*, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (explaining that the district court did not abuse its discretion in denying a discovery request where, like here, the plaintiff was unable to offer anything other than "rank speculation" to support its contention that a board was somehow engaged in illicit conduct).

Sky Angel relies on one sentence (from the background section) in *Kendall v. Visa,* 518 F.3d 1042 (9th Cir. 2008), for the proposition that it should be allowed to take six depositions to determine whether a cause of action exists. Plaintiff's reliance is misplaced. Plaintiffs in *Kendall* filed a complaint against Visa, Mastercard, and several banks. In response to the complaint, Visa and Mastercard served answers and the bank defendants filed a motion to dismiss. *Kendall v. Visa U.S.A., Inc.*, No. 04-04276 (N.D. Cal. Nov. 19, 2004), Dkt. Nos. 12, 15, 19. In granting the bank defendants' motion to dismiss on March 29, 2005, the Court made no reference to allowing plaintiffs leave to take depositions before filing an amended complaint. Dkt. No. 63. Plaintiffs never filed a motion for leave for pre-conference discovery. Thirty days later, plaintiffs filed an amended complaint. Dkt. No. 64. The case record indicates that the Court allowed the depositions of two Visa and Mastercard employees after these defendants answered the complaint. Tr. of Proceedings Held on Mar. 18, 2005, Dkt. No. 65. However, undersigned counsel cannot find any indication from the district court record that plaintiffs conducted pre-complaint discovery before filing their amended complaint. Moreover, no case has cited *Kendall* for the proposition that pre-complaint merits discovery should be granted.

The general and broad scope of Rule 26 does not apply to pre-complaint discovery. It does not allow Sky Angel to investigate its claims or develop facts related to a cause of action before filing an amended complaint.

ii. Plaintiff Does Not Qualify for the Narrow Exception Allowing for Limited Discovery on Identity, Jurisdiction, and Venue.

A plaintiff does not proceed to discovery until after both surviving a motion to dismiss *and* attending a Rule 26(f) conference. There is, however, a narrow exception adopted by courts allowing plaintiffs limited discovery on the non-merits-related issues of identity, jurisdiction, and venue. Attempting to develop a cause of action or to investigate potential claims for the purpose of framing an amended complaint, as Sky Angel seeks to do here, does not qualify under this limited exception. Plaintiff's request, which relates to the complaint's merits, is in no way analogous to any of the circumstances in which courts have granted limited discovery on the issues if identity, jurisdiction, or venue before a Rule 26(f) conference.

1. Identity

Early discovery may be allowed on the narrow issue of identity where a *prima facie* claim has otherwise been pleaded, and the only task at hand is to discover the legal name of an identified defendant. Identity refers to the names of people, not descriptions of conduct. *See, e.g., AF Holdings LLC v. Does 1-1,058,* 286 F.R.D. 39 (D.D.C. 2012) (allowing plaintiff to serve subpoenas to obtain limited identifying information consisting of the: "name, current and permanent address, telephone number, e-mail address, and Media Access Control (MAC) Address" that corresponds to particular Internet Protocol ("IP") addresses); *Hard Drive Prods. v. Does 1 - 1,495*, 892 F. Supp. 2d 334, 336 (D.D.C. 2012) (explaining that where the plaintiff alleged specific conduct against "John Doe" defendants, the information required to identify them consists of "name, address, telephone number, email address, and media access control

address" and "no more"); *Collins v. Doe*, 2011 U.S. Dist. LEXIS 140913 (N.D. Cal. Dec. 7, 2011) (same).

For example, in *Youngblood v. Family Dollar Stores, Inc.*, 2011 U.S. Dist. LEXIS 52821 (S.D.N.Y. Jan. 5, 2011), a case cited by Sky Angel as "analogous," the plaintiffs merely requested a list of names of those employed by defendant as store managers for purposes of their Rule 23 class certification motion. *Id.* Plaintiffs had already demonstrated a *prima facie* case in their complaint long before the class certification phase of litigation. Plaintiffs' request in *Youngblood* bears no resemblance to Sky Angel's request. The *Youngblood* plaintiffs neither asked for nor were granted permission to take pre-complaint discovery related to an unknown subset of a fully identified group.

Identity discovery is frequently used in online piracy cases, which exemplify the very narrow use of the tool in only those cases where a *prima facie* case already exists. In such cases, the complaint, containing specific factual allegations of wrongdoing by specific defendants, is filed against Doe defendant(s) because the plaintiff can only identify the defendant(s) by an IP address. These IP addresses are unique to individual people (or rather, computers registered to individual people) and it is impossible for a plaintiff, *e.g.*, a motion picture company which owns the rights to a movie, to determine the corresponding names. The plaintiff company can, however, identify which IP address did what action and otherwise meet the requirements of Rule 8. *See, e.g., AF Holdings LLC*, 286 F.R.D. at 50 (allowing plaintiff to issue subpoenas where the Complaint contained *prima facie* allegations of copyright infringement, plaintiff could only identify defendants by their IP addresses, and complying with the subpoenas would not impose an undue burden upon the entity from which the information was requested); *Collins*, 2011 U.S. Dist. LEXIS 140913 (allowing plaintiff to serve subpoenas to determine names, addresses,

telephone numbers, and e-mail addresses where the plaintiff alleged specific conduct against these Doe defendants, but could only identify them by IP addresses).

In one of the cases cited by Sky Angel, *Nu Image*, 799 F. Supp. 2d 34, for example, plaintiff filed a complaint against Doe, alleging specific actions in which defendant Doe engaged. Plaintiff did not seek information about defendant's conduct. Rather, plaintiff merely requested discovery consisting of a list of names that correspond to the IP addresses already in plaintiff's possession so that plaintiff could associate a natural person with the known IP address. In initially granting plaintiff's request, the court specifically considered the fact that the plaintiff made a *prima facie* showing that defendant infringed plaintiff's copyright. *Id.* at 44; *Nu Image*, No. 11-00301 (D.D.C. Feb. 17, 2011), Dkt. No. 5.

Here, by contrast, there is no *prima facie* case; the depositions sought by Sky Angel are intended to determine *whether* a violation has occurred. Plaintiff improperly attempts to categorize his request for information as "sole[ly]" for the "purpose of identifying" individuals. Pltf. Mem. at 2. Plaintiff admits, however, that the alleged wrong doers whose "identities" need to be uncovered are particular members of C-SPAN's Board and these individuals were already identified by name in Sky Angel's Complaint and Motion. S*ee* Compl. ¶36 and Pltf. Mem. at 2, 5. Sky Angel does not need to conduct discovery to obtain the names of C-SPAN's Board members; it has already listed them in its own papers.

Additionally, Plaintiff, by its own admission, is seeking information beyond a list of names or "identities": it is requesting to depose the listed individuals on broad merits issues of liability. *See, e.g.,* Pltf. Mem. at 2 ("identifying the means by which the [sic] C-SPAN's Board of Directors authorized C-SPAN to block Sky Angel from carrying it's programming."). In

short, there is no ambiguity in Sky Angel's request: it is seeking merits discovery on the question of liability. This is not "identity" discovery of the sort addressed in the cases.

Moreover, when a plaintiff is seeking discovery on a Doe defendant's identity, the plaintiff's likelihood of withstanding a motion to dismiss is one factor considered by the court. *See Collins v. Doe*, No. 11-02766 (N.D. Cal. Aug. 24, 2011), Dkt. No. 8; *see also Artista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 7 (D.D.C. 2008) (noting that plaintiff's failure to demonstrate likelihood of success on the merits before obtaining discovery could counsel against allowing discovery). Here, Plaintiff's complaint has already been dismissed and Plaintiff has not filed an amended complaint. Sky Angel provides no reason to believe that an amended complaint would fare any better.

2. Jurisdiction and Venue

Sky Angel relies on jurisdictional and venue discovery cases in its Motion, but it does not seek discovery on jurisdiction or venue, which are specific, narrow issues not generalizable to other matters. *See, e.g., FC Inv. Grp. L.C. v. IFX Markets Ltd.*, 529 F.3d 1087, 1094 (D.C. Cir. 2008) (allowing the plaintiff limited discovery on venue); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983) (denying jurisdictional discovery); *Exponential Biotherapies, Inc. v. Houthoff Buruma N.V.*, 638 F. Supp. 2d 1, 11 (D.D.C. 2009) (discussing jurisdictional discovery). Jurisdictional discovery deals with the preliminary question of whether or not a court possesses jurisdiction to address the case at hand. But this Court has already determined that it has jurisdiction. Mem. Op. at 10. And C-SPAN has not suggested that venue is improper in this Court. None of the issues on which Sky Angel seeks pre-complaint depositions deal with jurisdiction or venue, and therefore cases dealing with jurisdictional and venue discovery are inapposite.

iii. "Good Cause" is Not the Applicable Standard, and In Any Case Plaintiff Fails to Demonstrate Good Cause for Discovery.

Even under the Rule 26 standard for pre-conference discovery on the narrow issues of identity, jurisdiction, and venue invoked by Sky Angel, a plaintiff must demonstrate "good cause" why discovery should be allowed. No court has interpreted "good cause" to mean that a plaintiff may begin taking fact depositions to determine whether a cause of action exists. *See, e.g.*, Pltf. Mem. at 7 ("Plaintiff has good cause... to conduct the requested discovery. The nature of the facts sought to be discovered and their possession uniquely in the hands of the defendant and its corporate Board members threatens to undermine justice…"). Sky Angel fails to demonstrate good cause for the requested pre-complaint discovery because it: (1) does not require the information; (2) is not entitled to information in Defendant's possession at this stage of litigation; (3) has made clear its intention to use the requested depositions to pursue broad merits discovery; (4) has no "efficiency" justification; (5) fails to demonstrate that the deponents will be unavailable at a later date; and (6) imposes a prejudicial burden on C-SPAN.

First, Sky Angel concedes that the six depositions are not necessary in order to amend the complaint. Pltf. Mem. at 11 (stating that even "without the benefit of the requested discovery" Plaintiff will be able "to allege additional information already in plaintiff's possession"). Plaintiff does not have good cause for such an extraordinary measure when, by his own admission, he already possesses information sufficient to amend the complaint. *See AF Holdings*, 286 F.R.D. at 46 (explaining that a party's need for the information requested is a factor when determining whether a subpoena is "undue").

Second, contrary to Plaintiff's assertion, courts have never allowed a plaintiff in this context to take pre-complaint depositions for the purpose of drafting an amended complaint. Pltf. Mem. at 3 ("Leave to conduct limited discovery has been granted… where a defendant may

otherwise benefit from its continued concealment of facts known to exist"). Plaintiffs do not have a general right to information in defendants' possession at any point in litigation. In *Babbitt v. Albertson's, Inc.*, 1992 U.S. Dist. LEXIS 19091 (N.D. Cal. Nov. 30, 1992), a case cited by Sky Angel for the proposition that it is generally entitled to information in the possession of C-SPAN (Pltf. Mem. at 10), the court ordered that the defendant should allow plaintiff access to information sufficient to identify individuals which consisted of a list of names, addresses, telephone numbers, and social security numbers of past and present employees. The Court clearly indicated that a request for additional information, such as personnel files, would likely be viewed as overly burdensome. *See id.* at *16-17 (explaining that defendant's argument that the requested information was unduly burdensome failed because plaintiff had since narrowed the scope of the request to exclude the personnel files).

Third, the deponents requested by Sky Angel do not correspond to the information that Sky Angel purportedly seeks. Sky Angel states that it believes that it "should be afforded the opportunity to conduct limited discovery on *how* C-SPAN's conduct was authorized by its Board, and by whom." Pltf. Mem. at 5. Yet, five of the six requested deponents are not even on C-SPAN's Board.[1/] There is no reason to depose these five individuals if Sky Angel is only seeking information related to the Board's actions. Moreover, two of the requested deponents, Chris Winfrey and Melinda Witmer, are neither C-SPAN employees nor on C-SPAN's Board. They are, as Plaintiff acknowledges, the Chief Financial Officer of Charter Communications and a Vice-President at Time Warner Cable. Pltf. Mem. at 2. There is no apparent nexus between these individuals and Sky Angel's claims. The only explanation for Sky Angel's request is to engage in precisely the type of fishing expedition that the Federal Rules are designed to prevent.

[1/] The names of C-SPAN's Board members are publicly listed on C-SPAN's website and Sky Angel listed those individuals in its complaint.

Fourth, Sky Angel fails to provide any reason why the requested discovery would be "efficient." Plaintiff's argument that it is more efficient to take six depositions before filing an amended complaint is baseless; no doubt every complainant would prefer to have access to a half dozen depositions before filing a complaint, but the Federal Rules prohibit that form of "efficiency."

Plaintiff's reliance on *Potts v. Howard Univ.*, 269 F.R.D. 40 (D.D.C. 2010), is misplaced. *Potts* does not stand for the proposition that discovery should be allowed in place of or before amending a complaint dismissed without prejudice. In *Potts*, the court denied defendant's request under Rule 12(e) for a more definite statement of claims that *survived a motion to dismiss*. Unlike the present case, the *Potts* Court determined that Plaintiff's allegations were sufficient. *Id.* Because the plaintiff in that case would proceed to discovery regardless, the Court found that plaintiff should not be required to amend his complaint. But in this case, there is no operative complaint. The structure of litigation under the Federal Rules cannot be waived simply because a plaintiff prefers it.

Fifth, in determining whether good cause exists, courts consider whether the information sought will be available in the normal course of discovery. *See, e.g., Hard Drive Prods., Inc. v. Does 1-30*, 2011 U.S. Dist. LEXIS 73159, *6 (E.D. Va. July 1, 2011) (considering a motion for limited expedited discovery on identity before a complaint was dismissed and stating that "[a] majority of District Courts have granted expedited discovery where evidence for an infringement action may no longer be available at a later date"); *Qwest Commc'ns Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003) (allowing early discovery where "physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation"). Since Sky Angel requests depositions instead of documents,

unavailability would require that "the deponent be expected to leave the United States and be unavailable in this country after that time," Fed. R. Civ. P. 30(a)(2)(A)(iii) (explaining when a deposition can be take in advance of the time permitted by Rule 26(d)), or that the deponent is ill, aged, or infirm. Fed. R. Civ. P. 27. Because Sky Angel does not allege that any of the deponents are leaving the country or on their death beds, there is no risk of unavailability.

Finally, the scope of discovery sought by Sky Angel—six depositions—would be broad and burdensome even if sought in the normal course of Rule 26 merits discovery.[2/] Despite Rule 26's generally broad scope, it is not a boundless rule; it contains clearly articulated limits implicated by Sky Angel's request. Rule 26(b)(2)(C) provides that "the court must limit the frequency or extent of discovery otherwise allowed by these rules… if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive… or (iii) the burden or expense of the proposed discovery outweighs its likely benefit…" *See also AF Holdings*, 286 F.R.D. at 46 (courts must limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit"); *Collins v. Doe*, 2011 U.S. Dist. LEXIS 140913 (N.D. Cal. Dec. 7, 2011) (explaining that "good cause" does not exist where plaintiff's need for expedited discovery is outweighed by prejudice to the responding party). Contrary to Plaintiff's assertions, the discovery sought is not "limited" and there are less restrictive means to obtain the information sought if necessary. Plaintiff simply seeks to engage in a fishing expedition because it lacks any basis for its accusations.

[2/] The argument is even more salient with respect to the third parties, Chris Winfrey and Melinda Witmer, that Sky Angel requests to depose. *See Nu Image*, 799 F. Supp. 2d at 36-37 (considering the Court's "duty to prevent undue burden, harassment, and expense of third parties[]" in determining whether to grant jurisdictional discovery).

Even if Plaintiff were entitled to pre-complaint discovery, depositions generally are a cumbersome, time-consuming, and expensive means by which to obtain the requested information. Plaintiff states that there is "no less intrusive means of obtaining the information exists [sic] and no less burdensome alternative is available[.]" Pltf. Mem. at 12. But Plaintiff fails to give any reason why it believes that this is true or any indication that it has considered other means, such as requests for admission, interrogatories, or a subpoena for a small, narrowly-tailored document production. To the contrary, Plaintiff states that the information sought is contained within the subset of documents required to be kept by C-SPAN under the D.C. Code. Pltf. Mem. at 6.

The number of depositions that Sky Angel seeks is also excessive. Fed. R. Civ. P. 26(b)(2)(C)(i) ("the court must limit the… extent of discovery… if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative"); Fed. R. Civ. P. 30(d). Six depositions represent more than half the maximum number of depositions allowed across the life of an entire case by the Federal Rules of Civil Procedure under normal circumstances. Fed. R. Civ. P. 30(a)(2)(A)(i). Moreover, the United States Courts' Standing Committee on Rules of Practice and Procedure is currently considering an amendment to reduce the maximum number of depositions from ten to five. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Memorandum, *Report of the Advisory Committee on Civil Rules* (May 8, 2013). Sky Angel's request would exceed the number of depositions that the Rules Committee believes is necessary for the typical civil case from start to finish.

There is not a single case in the D.C. Circuit granting a plaintiff permission to take one deposition, let alone six, under circumstances similar to this case. Sky Angel's request would be costly and prejudicial to C-SPAN, and should be denied.

CONCLUSION

For the reasons stated herein, Plaintiff's motion should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served, via this Court's CM/ECF system, this 1st day of July, 2013.

/s/ Robert G. Kidwell