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November 29, 2010

VIA HAND DELIVERY
Hunterdon County Superior Court
Justice Center
65 Park Avenue
Flemington, New Jersey 08822
Attn: Civil Division Office

Re: Estate of Scott Davies v. Accessible Vans & Mobility, LLC., et als.
Docket No: HNT-L-309-07

Dear Sir/Madam:

Enclosed please find:

1. Certification in Opposition to Cross-Motion
2. Reply of Brief

Kindly file and return copy to our office.

Very truly yours,

SHELLEY L. STANGLER, ESQ.

cc: The Hon. Judge Peter Buchsbaum
Joseph Gurski, Esq.
William J. Riina, Esq.
Tom Egan, Pro Se.
Peter Orville, Esq.
Margaret Davies

SHELLEY L. STANGLER, P.C.
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PHONE (973) 379-2500 FAX (973) 379-0031
Attorney for Plaintiff

MARGARET DAVIES, as Administratrix of the Estate of SCOTT DAVIES, and MARGARET DAVIES Individually, **Plaintiffs,** **-vs-** **ACCESSIBLE VANS & MOBILITY, LLC, VAN CONVERSIONS OF LEHIGH VALLEY, INC., ACCESS UNLIMITED, TOM EGAN, JOHN DOES 1-10 (as yet unidentified persons), ABC BUSINESS ENTITIES 2-10 (as yet unidentified commercial entities),** **Defendant.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: HUNTERDON COUNTY** **DOCKET NO: HNT-L-309-07** **CIVIL ACTION** **CERTIFICATION OF MAILING**

To: Hunterdon County Superior Court
Hunterdon County Justice Center
65 Park Avenue
Flemington, New Jersey 08822
Attn: Civil Division Office

I hereby certify that the original and two (2) copies of the within Notice of Motion were filed with the Clerk of the Superior Court, Hunterdon County at the Courthouse, 65 Park Avenue, Flemington, New Jersey 08822 and a copy served upon:

Hardin, Kundla, McKeon & Poletto
673 Morris Avenue
PO Box 730
Springfield, NJ 07081-0730
Attn: Joseph Gurski, Esq.
Attorneys for defendant Van Conversions d/b/a Access Vans & Mobility of PA

Wilson, Elser, Moskowitz, Edelman and Dicker, LLP
33 Washington Street, 18th Floor
Newark, NJ 07102-5003
Attn: William J. Riina, Esq.
Attorneys for Defendant Van Conversions of Lehigh Valley, Inc.

within the applicable period required by the Court Rules.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: _____
SHELLEY L. STANGLER, ESQ.

Dated: November 29, 2010

brief in connection with Plaintiff's Motion for *ad interim* relief (See Reply brief for discussion).

3. Attached hereto as Exhibit B is a true copy of relevant excerpts of the September 27, 2010 testimony of Thomas Egan, the bankrupt defendant.

4. Following Egan's September 27, 2010 deposition, deponent contacted defense counsel for VCI, William Riina, Esq., to request that he arrange for the continued deposition of Egan.

5. Mr. Riina objected – not because he no longer desired to take Egan's deposition, but because he argued it was Plaintiff's notice, and that Plaintiff thus should be forced to undertake the arrangements to compel the continuance of the deposition. Mr. Rinna noted that if Plaintiff did not see to it that Defendant had the opportunity to cross –examine and question defendant Egan, that she would be precluded from using the deposition at trial under the Civil Rules providing for use of such testimony when the declarant is unavailable. As the Court is aware, Egan is outside the jurisdiction of the State of New Jersey jurisdiction, necessitating the Letters of Commission requested in the motion.

6. After Egan refused to return phone calls or e-mails and it became clear that Letters of Commission and motion practice in New York for issuance of a subpoena would be required, Plaintiff filed the instant motion. Now defense counsel moves to disallow the Letters of Commission and to preclude the attempt to complete the deposition, which will require additional discovery time.

EXHIBIT A

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MAR 25 2010

March 24, 2010

VIA LAWYERS SERVICE
Hon. Peter A. Buchsbaum, J.S.C.
Hunterdon County Justice Center
65 Park Avenue
Flemington, New Jersey 08822

Re: Davies vs. Accessible Vans & Mobility, LLC, et al.
Docket No. HNT-L-309-07
Our File No. 07392.00087
Motion returnable April 1, 2010

Dear Judge Buchsbaum:

This Firm represents Defendant Van Conversions of Lehigh Valley, Inc. ("Defendant") in connection with the above-referenced matter. Currently pending before the Court is Plaintiff's motion for an Order, pursuant to R. 4:69-3[1], for ad interim relief. Specifically, Plaintiff seeks a stay of these state court proceedings based on the bankruptcy filing by Co-Defendant, Tom Egan, d/b/a Access Unlimited ("Egan"). Kindly accept this letter, in lieu of a more formal submission, as Defendant's position regarding Plaintiff's motion.

[1] We note that this Rule would appear to apply to actions in lieu of prerogative writs, and is not applicable here.

company. Testimony of corporate officers, William Blaser and Jack Donovan were scheduled and had to be adjourned because of the February snowstorm. These individuals are the appropriate witnesses to testify concerning the entity issues.

Should the Court extend the discovery deadline, or enter a stay of the discovery, it is essential that Defendant be given an opportunity to respond to any expert reports produced by the plaintiff. Accordingly, we respectfully request that the Court include in any Order, a provision that defendant Van Conversions of Lehigh Valley, Inc. be afforded an opportunity 1) to conduct a complete expert inspection of the truck and the Easy Reach seat, to include appropriate testing, 2) to produce both liability and damage expert reports within 45 days, following receipt of plaintiff's experts' reports, and 3) that we be given an opportunity to conduct experts' depositions. These provisions were originally provided in the Court's Order of November 20, 2009.

Thank you for Your Honor's courtesies. Should the Court have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorneys for Defendant Van Conversions of Lehigh Valley, Inc.

By: _____
William J. Rivna

WJR/cwm
cc: Clerk, Hunterdon County Justice Center (via Lawyers Service)
Shelley L. Stangler, Esq. (via Lawyers Service)
Joseph Gurski, Esq. (via Lawyers Service)
Peter Orville, Esq. (via regular mail)

EXHIBIT B

I have to check and it's not something I can answer right now.

MR. RIINA: Okay. And if you are available, though, you've expressed an interest in starting later in the day rather than at 10?

THE WITNESS: Absolutely, yes.

MR. RIINA: Can we do something at 2 so that -- giving some consideration for the fact that the three attorneys in the case are three hours away --

THE WITNESS: You will have to overnight, yeah.

I will get back to you on that and I will try to make it as late as I possibly can. I understand your situation.

MS. STANGLER: You should be working directly with his firm on that.

MR. RIINA: To reschedule.

THE WITNESS: To reschedule, okay.

MR. RIINA:

(Witness excused at 4:30 p.m.)

CERTIFICATION

I, JENNIFER A. GOFKOWSKI, Court Reporter and Notary Public in and for the State of New York, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same and that the foregoing is a true and correct copy of same and the whole thereof.

_____

JENNIFER A. GOFKOWSKI

Dated: September 27, 2010

3. During the pendency of the third bankruptcy case, Case No. 03-67588-6-dd ("Bankruptcy 3"), Davies filed suit in the Superior Court of New Jersey seeking damages arising out of the death of Scott Davies, a 44 paraplegic man. Davies was employed as a sales manager by Defendants Van Conversions of Lehigh Valley, Inc. and/or Accessible Vans & Mobility, LLC (together, "Van Conversions") of Norristown, PA.

4. On June 14, 2005, at age 44, Davies was found by his fiancé dead in the driver's seat of his vehicle. Following an autopsy, the medical examiner determined the cause of death to be acute positional asphyxiation due to seat belt entanglement in the seat and electronic chair device known as the Easy Reach Chair (the "Chair").

5. Plaintiff contends that the Chair was improperly designed, manufactured and installed in that the electrical circuits or proximity switches malfunctioned such that the Chair was unable to raise or lower properly, and further malfunctioned such that the Chair over-rotated, leading to plaintiff's entanglement in the seatbelt and subsequent asphyxiation.

6. Decedent's estate filed this wrongful death and negligence complaint on May 9, 2007 in the State Court action. The complaint against Egan is premised upon products liability; the claims against Van Conversions are predicated on negligent installation of the Chair (*See* Complaint, attached to Davies' prior motion to lift the automatic stay as Exhibit "A" (on file with the Court)).

7. Due to Bankruptcy 3 proceedings involving Egan, plaintiff was not able to obtain any discovery regarding the manufacture, distribution and sale of the Chair by Egan, including whether Egan supplied the Chair as opposed to designing and/or

15. On September 17, 2010, counsel for all parties in the State Court action travelled to Binghamton, New York for Egan's deposition. Egan testified at his deposition regarding the manufacture, purchase and sale of the Chair.

16. During his deposition, Egan identified various categories of documents that might contain vital information, such as (1) the specification document for the Chair's electrical system, which was identified at the deposition; (2) records showing service, maintenance or repair calls for limit or proximity switches prior to June 13, 2005 or thereafter; (3) documents relating to sales or parts of limit or proximity switches including the magnets and any other component parts on the Chair; and (4) logs or notes regarding training given to any employee of Van Conversions regarding installation and assembly of the Easy Reach Chair.

17. The deposition began at 10:00 a.m. and concluded at 4:30 p.m., and counsel only took a 20 minute lunch break (See transcript of Egan's deposition testimony ("Egan Tr."), cover page and 232:21-25, attached hereto as Exhibit "A").

18. Due to myriad issues surrounding the design and manufacture of the Chair, as well as the identity of the purchaser, Defense counsel did not have the opportunity to depose Egan on any issue whatsoever.

19. At the conclusion of the day's proceedings, Egan agreed to cooperate and complete his deposition. (Egan Tr. at 233:8-234:19, Exhibit "A"). The parties were supposed to come back to Binghamton the following week. However, Egan balked and refused to attend.

20. Both plaintiff and defense counsel have attempted to obtain the continued cooperation of Mr. Egan without success.

21. By letter dated October 1, 2010, the undersigned wrote to Mr. Egan requesting certain additional documents and asking to schedule his continued deposition for October 5, 2010. (A true copy of my October 1, 2010 letter is attached as "C).

22. Egan failed to respond to the October 1, 2010 letter.

23. The undersigned thereafter telephoned Mr. Egan on numerous occasions in an effort to obtain dates for his continued deposition. Mr. Egan failed to return any of the undersigned's telephone calls.

24. On October 11, 2010, the undersigned received an email from Mr. Egan requesting information and stating he would attend a deposition at the end of November or early December. Between October 11, 2010 and October 18, 2010, the undersigned sent Mr. Egan three e-mails, and called him on numerous occasions in an effort to arrange a date certain for his continued deposition and delineate the scope of written discovery. (True copies of the e-mails exchanged between October 11, 210 and October 18, 2010 are attached hereto as Exhibit "D").

25. Since October 11, 2010, Mr. Egan has failed to respond to my correspondence, e-mail and/or telephone calls.

26. On October 20, 2010, an employee of Van Conversions, Luanne Kemmerer, was deposed. Kemmerer testified that Egan falsified certain documents produced in discovery by producing copies of invoices allegedly issued to Van Conversions, but addressed to another company's place of business. (*See* relevant excerpts of the transcript of Luanne Kemmerer's deposition testimony ("Kemmerer Tr.") at 82:5-87:2, attached hereto as Exhibit "E").

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November 29, 2010

VIA HAND DELIVERY
The Hon. Judge Peter A. Buchsbaum
Hunterdon County Superior Court
Justice Center, 2nd Floor
65 Park Avenue
Flemington, New Jersey 08822

Re: Estate of Scott Davies v. Accessible Vans & Mobility, LLC., *et al.*
Docket No: HNT-L-309-07
MOTION FOR A COMMISSION, TO AMEND COMPLAINT AND EXTEND DISCOVERY

Dear Judge Buchsbaum:

Please allow this letter to serve in lieu of a more formal brief in (a) opposition to the cross-motion of Defendant, Van Conversions, Inc., to preclude the testimony, documents or discovery responses adduced through Tom Egan and/or Access Unlimited; and (b) in reply to the opposition of Defendant, Van Conversions, Inc. to Plaintiff's motion for (i) a commission for an out of state subpoena on Tom Egan, individually, and as the corporate designee of Access Unlimited; (ii) to compel discovery of defendant, Van Conversions, Inc., (iii) to amend the Complaint to add Adrian Sitoski and Douglas Nothstein as defendants; and (iv) to extend discovery.

I. Defendant's Cross Motion to Preclude Evidence Adduced through Egan and/or Access Unlimited

The ostensible reason offered by Defendant, Van Conversions, Inc. ("VCI"), for seeking to preclude any further testimony from Tom Egan and Access Unlimited

(together, "Egan") is that "the deadline for factual discovery has concluded…[T]o permit additional factual testimony by the manufacturer of the product at issue following completion of the expert reports will only lead to confusion." VCI Brief at 20. Reference to VCI's own exhibits, however, shows that the deadline for completing depositions is not until December 30, 2010. (*See* VCI Exhibit "F").

The real reason for seeking to prevent any further testimony by Egan is simple: ***VCI seeks to prevent its principal, William Blaser, from being impeached, and Egan's testimony favors plaintiff's position in this case***. In response to Supplemental Interrogatory No. 9, William Blaser certified that Davies had purchased the Chair, not VCI. (*See* Certification of Shelley Stangler dated November 9, 2010 ("Stangler Cert. I", Exhibit "G," Response to Supplemental Interrogatory No. 9). VCI's March 19, 2010 responses to Plaintiff's Notice to Produce likewise state that it had no documents relating to the purchase of the Chair, because VCI did not purchase the Chair (*See* Id., Exhibit "H," Response No. 23). Egan thereafter produced the "smoking gun," to wit, an Invoice identifying VCI as the purchaser (Id., Exhibit "I"). Because Egan's testimony is necessary to authenticate the Invoice in question, to avoid destroying Blaser's credibility, VCI seeks to preclude any evidence introduced through Egan. Because Davies' voice has been silenced, only the Invoice can now speak for him. Without such evidence, Blaser will be allowed to testify unhampered by the physical evidence.

More surprising is the fact that, when Plaintiff initially moved this Court to enter an Order for *ad interim* relief staying state court proceedings pending the outcome of a motion for relief from stay to take discovery of Egan, VCI took the position that it did not oppose Plaintiff's motion (See Certification of Shelley Stangler dated November 29, 2010 ("Stangler Cert. II"), Exhibit "A" (letter brief submitted on behalf of VCI at p. 2). By Order dated April 1, 2010, this Court granted the *ad interim* relief. VCI was noticed on the motion for relief from stay to take discovery of Egan, and likewise did not oppose that motion, which was granted by Order of the Bankruptcy Court dated May 17, 2010. (See Stangler Cert. I, Exhibit "A"). Having taken the position that VCI does not oppose taking discovery of Egan and having prevailed before this Court on that position, VCI is now estopped from changing its position. *See* Guido v. Duane Morris LLP, 202 N.J. 79, 94-95 (2010) (where a party has prevailed on a litigated point, such party is bound by its

earlier representation); Ramer v. New Jersey Transit Bus Operations, 335 N.J. Super 304, 311-312 (App. Div. 2000) (judicial estoppel should be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice and to protect the integrity of the judicial process).

It is important to note that Plaintiff's counsel finished examining Egan at 4:25 p.m. Egan was available until 5:00 p.m. Thus, although counsel for VCI had 35 minutes to begin his cross-examination, he made it quite clear that he preferred to continue the deposition at a later time, and was not waiving VCI's right to complete cross-examination of Egan:

> Mr. Riina: And I think while we could certainly get as much done in the next 35 minutes as possible, it's certainly not even going to scratch the surface with respect to the cross that I need to complete.
>
> So we've agreed that Mr. Egan will make himself available for another dates [sic] so that we can complete the deposition.
>
> And I just want to make sure that there's no misunderstanding that I am not in any way waiving my right to a complete cross-examination of Mr. Egan.
>
> Ms. Stangler: No, of course not.

(Stangler Cert. II), Exhibit "B" (Egan Tr. at 232:21-233:20)). It is thus clear from the record that VCI's counsel had the opportunity to cross-examine Egan on September 27, 2010, but chose not to.

Following Egan's September 27, 2010 deposition, Plaintiff's counsel contacted Mr. Riina to request that he arrange for the continued deposition of Egan. (Stangler Cert. II, ¶ 4). Mr. Riina objected – not because he no longer desired to take Egan's deposition, but because he argued it was Plaintiff's notice, and that Plaintiff thus should be forced to undertake the arrangements. (Stangler Cert. II, ¶ 5). After Egan refused to return phone calls or e-mails and it became clear that Letters of Commission would need to be obtained, along with further motion practice in New York with a subpoena effectuating Egan's compliance (Stangler Cert. II, ¶ 6). Now VCI turns around and seeks to prevent Plaintiff from using Egan's testimony at trial.

The fact that VCI now seeks to forego *its right* to cross-examine Egan altogether should not, however, affect *Plaintiff's right* to introduce Egan's testimony as an "unavailable" witness. Litigation is not a see-saw, wherein parties can adopt inconsistent

positions at will. At the conclusion of Egan's deposition, had Mr. Riina stated that he was waiving his right to cross-examine Egan, then there would have been no question that Plaintiff could use Egan's testimony at the time of trial. The fact that VCI has now altered its position should not alter Plaintiffs rights.

Rule 4:16-1(c) allows a party to use deposition testimony of an unavailable person "for any purpose, against any other party who was present or represented at the taking of the deposition or who had reasonable notice thereof... provided, however, that the absence of the witness was not procured or caused by the offering party." Here, VCI had notice of, was present and was represented at Egan's deposition, and had the opportunity to begin cross-examination. By filing the motion for a commission to afford VCI the opportunity to cross-examine Egan, Plaintiff has done all that is required of her. If VCI now elects to forego this opportunity to cross-examine Egan, it cannot now prevent Plaintiff from using Egan's transcript.

VCI's argument that Egan's continued deposition should be barred because "[l]iability expert reports ... shortly will be served" (VCI brief at 20) is weak. Even if expert reports had been exchanged, they could always be amended to address any information that VCI dredges up through its cross-examination.

As to the argument that Egan's "testimony should have been completed in sufficient time to enable the experts to evaluate and consider it in the context of this case," (VCI Brief at 20), VCI ignores the fact that its counsel was just as capable of filing a motion for relief from stay with the Bankruptcy Court as was Plaintiff.

From the outset of this case, VCI has been playing shell games as to the identity of (i) Egan's employer, (ii) the identity of the Chair purchaser, (iii) the identity of the persons who installed the Chair; and (iv) the identity of the persons who repaired the Chair. Now, after forcing Plaintiff to file a motion for VCI's benefit to permit VCI to depose Egan, VCI turns around and now opposes the motion. The legal tactic should not be countenanced by the Court.

Due to the extraordinary nature of VCI's conduct, this Court should exercise its equitable powers to compel VCI to pay for the costs incurred by Plaintiff in connection with that part of the motion that seeks a commission for the purpose of permitting VCI to take Egan's deposition.

II. Plaintiff's Reply to Defendant VCI's Opposition to the Motion for Leave to file a Second Amended Complaint

There is an identity of interests among VCI, Nothstein and Sitoski. Either Nothstein and Sitoski are individually liable for installing and/or repairing the Chair, or VCI is vicariously liable to the actions of Nothstein and Sitoski in installing and/or repairing the Chair. Because liability arises out of the identical conduct, it is inconceivable that discovery would in any way diverge depending on whether the employer or employee is named in the suit. In fact, had VCI not elected to hide Nothstein and Sitoski behind its skirts by failing to identify these employees as the Chair installer/repairer when expressly asked to do so, Plaintiff would not be in this position.

In this regard, it should be noted that VCI's comments about dates and notice to the Court by plaintiff is incorrect. At the very earliest, Plaintiff could not have learned of the potential claims against these potential parties until Nothstein's deposition, which took place eight (8) months prior to filing the motion to amend. Nothstein testified that he adjusted the limit switch "that Monday *at work* in the morning." (Stangler Cert. I, Exhibit "J" (Nothstein Tr. at 123:9-11) (emphasis added)). Thus, based on such testimony, Plaintiff had no basis for naming Nothstein, individually. It was not until after Sitoski himself was deposed on October 20, 2010 – 20 days prior to filing the motion to amend, that Plaintiff had a sufficient factual basis for substituting these employees for "John Doe" defendants.

VCI argues that Plaintiff allowed the Court to enter into a Consent Order on October 12, 2010, without "advis[ing] the Court or defense counsel that there was even the possibility that she would be filing the instant motion [for leave to amend]." Brief at 13. In fact, the Consent Order with the proposed discovery dates was forwarded to the Court for signature under cover of letter dated October 4, 2010 (See Stangler Cert. II, Exhibit "C"). Sitoski was not deposed until October 20, 2010 – 16 days after the proposed Consent Order was submitted, and eight (8) days after the Consent Order was signed. Thus, Plaintiff was not "silent" as to her intent to amend, as VCI argues – rather, Sitoski's deposition revealed that he clearly had the greatest recall with regard with the

details of the installation and repairs to the Chair and, until said deposition plaintiff did not have a sufficient factual basis for substituting these parties.

Viviano v. CBS, Inc., 101 N.J. 538 (1986) is instructive. There, the New Jersey Supreme Court recognized that, particularly in the context of industrial accident cases, where the cause of the accident may be the machine or any one or more of its "myriad components," or negligent maintenance or repair, "the need to submit claims promptly to judicial management must be tempered by the policy favoring the resolution of claims on their merits." Id. at 547-548. Thus, although plaintiff had dropped the "John Doe" designation in connection with an earlier amendment to the complaint, the Court permitted the filing of sixth amended complaint to substitute a John Doe defendant. "Compliance with the Rules of Practice is essential for an orderly legal system, but our goal is not so much rigid compliance with the letter of the Rules as it is the attainment of substantial justice. The Rules of Practice are not an end unto themselves, but a means of serving the ends of justice." Id. at 550-551.

Although Davies was not killed on the job, the facts of this case similarly arise out of the malfunction of a complex piece of machinery. The arguable delay in naming the individual defendants is being asserted by the very party that caused the delay. Thus, the attainment of substantial justice under these facts cannot be accomplished without allowing the substitution of Nothstein and Sitoski for the John Doe defendants.

Finally, with respect to the statute of limitations, under *Rule* 4:26-4, where a defendant is sued in a fictitious name capacity, the complaint may be amended after the statute of limitations has run to substitute the defendant's true name, and the complaint will relate back to the date of initial filing. Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111 (1973).

III. Plaintiff's Reply to Defendant VCI's Opposition to Motion to Compel Documents

On November 29, 2010, Plaintiff served responses to VCI's "wrongful death" interrogatories and notice to produce. Counsel for VCI has likewise supplied Plaintiff with copies of Davies' employment file during the continued deposition of William Blaser, and thus Plaintiff withdraws her request for these documents.

Plaintiff, however, continues to seek responses to Request Nos. 23 (records regarding installation, maintenance and repair of the Chair), 24 (records regarding purchase and sale of the Chair), 28 (contracts regarding purchase, sale and installation), 32 and 33 (documentation regarding employees who repaired or maintained the Chair, such as time cards showing whether Sitoski and Nothstein were paid overtime in connection with any work on the Chair), and any other documents that relate to the Chair, to enable the finder of fact to assign liability to VCI or individual defendants.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that (i) a Motion for a Commission for Egan's deposition be issued, (ii) if Egan is not deposed, that Plaintiff be permitted to introduce his September 27, 2010 testimony at the time of trial together with any documents produced by Egan, (iii) Plaintiff be permitted to file a second Amended Complaint, (iv) that VCI be compelled to produce documents, (v) that discovery be extended in accordance with the proposed form of Order; and (vi) that VCI be sanctioned for filing a cross-motion to prevent Egan's testimony from being used at the time of trial.

Respectfully submitted,

SHELLEY L. STANGLER, ESQ.

cc: Joseph A. Gurski, Esq.
William J. Riina, Esq.
Peter A. Orville, Esq.
Tom Egan

The Law Offices Of

SHELLEY L. STANGLER, P.C.

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SHELLEY L. STANGLER
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Dear Judge Buchsbaum:

Please allow this letter to serve in lieu of a more formal brief in (a) opposition to the cross-motion of Defendant, Van Conversions, Inc., to preclude the testimony, documents or discovery responses adduced through Tom Egan and/or Access Unlimited; and (b) in reply to the opposition of Defendant, Van Conversions, Inc. to Plaintiff's motion for (i) a commission for an out of state subpoena on Tom Egan, individually, and as the corporate designee of Access Unlimited; (ii) to compel discovery of defendant, Van Conversions, Inc., (iii) to amend the Complaint to add Adrian Sitoski and Douglas Nothstein as defendants; and (iv) to extend discovery.

I. Defendant's Cross Motion to Preclude Evidence Adduced through Egan and/or Access Unlimited

The ostensible reason offered by Defendant, Van Conversions, Inc. ("VCI"), for seeking to preclude any further testimony from Tom Egan and Access Unlimited

(together, "Egan") is that "the deadline for factual discovery has concluded…[T]o permit additional factual testimony by the manufacturer of the product at issue following completion of the expert reports will only lead to confusion." VCI Brief at 20. Reference to VCI's own exhibits, however, shows that the deadline for completing depositions is not until December 30, 2010. (*See* VCI Exhibit "F").

The real reason for seeking to prevent any further testimony by Egan is simple: ***VCI seeks to prevent its principal, William Blaser, from being impeached, and Egan's testimony favors plaintiff's position in this case***. In response to Supplemental Interrogatory No. 9, William Blaser certified that Davies had purchased the Chair, not VCI. (*See* Certification of Shelley Stangler dated November 9, 2010 ("Stangler Cert. I", Exhibit "G," Response to Supplemental Interrogatory No. 9). VCI's March 19, 2010 responses to Plaintiff's Notice to Produce likewise state that it had no documents relating to the purchase of the Chair, because VCI did not purchase the Chair (*See* Id., Exhibit "H," Response No. 23). Egan thereafter produced the "smoking gun," to wit, an Invoice identifying VCI as the purchaser (Id., Exhibit "I"). Because Egan's testimony is necessary to authenticate the Invoice in question, to avoid destroying Blaser's credibility, VCI seeks to preclude any evidence introduced through Egan. Because Davies' voice has been silenced, only the Invoice can now speak for him. Without such evidence, Blaser will be allowed to testify unhampered by the physical evidence.

More surprising is the fact that, when Plaintiff initially moved this Court to enter an Order for *ad interim* relief staying state court proceedings pending the outcome of a motion for relief from stay to take discovery of Egan, VCI took the position that it did not oppose Plaintiff's motion (See Certification of Shelley Stangler dated November 29, 2010 ("Stangler Cert. II"), Exhibit "A" (letter brief submitted on behalf of VCI at p. 2). By Order dated April 1, 2010, this Court granted the *ad interim* relief. VCI was noticed on the motion for relief from stay to take discovery of Egan, and likewise did not oppose that motion, which was granted by Order of the Bankruptcy Court dated May 17, 2010. (See Stangler Cert. I, Exhibit "A"). Having taken the position that VCI does not oppose taking discovery of Egan and having prevailed before this Court on that position, VCI is now estopped from changing its position. *See* Guido v. Duane Morris LLP, 202 N.J. 79, 94-95 (2010) (where a party has prevailed on a litigated point, such party is bound by its

earlier representation); Ramer v. New Jersey Transit Bus Operations, 335 N.J. Super 304, 311-312 (App. Div. 2000) (judicial estoppel should be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice and to protect the integrity of the judicial process).

It is important to note that Plaintiff's counsel finished examining Egan at 4:25 p.m. Egan was available until 5:00 p.m. Thus, although counsel for VCI had 35 minutes to begin his cross-examination, he made it quite clear that he preferred to continue the deposition at a later time, and was not waiving VCI's right to complete cross-examination of Egan:

> Mr. Riina: And I think while we could certainly get as much done in the next 35 minutes as possible, it's certainly not even going to scratch the surface with respect to the cross that I need to complete.
>
> So we've agreed that Mr. Egan will make himself available for another dates [sic] so that we can complete the deposition.
>
> And I just want to make sure that there's no misunderstanding that I am not in any way waiving my right to a complete cross-examination of Mr. Egan.
>
> Ms. Stangler: No, of course not.

(Stangler Cert. II), Exhibit "B" (Egan Tr. at 232:21-233:20)). It is thus clear from the record that VCI's counsel had the opportunity to cross-examine Egan on September 27, 2010, but chose not to.

Following Egan's September 27, 2010 deposition, Plaintiff's counsel contacted Mr. Riina to request that he arrange for the continued deposition of Egan. (Stangler Cert. II, ¶ 4). Mr. Riina objected – not because he no longer desired to take Egan's deposition, but because he argued it was Plaintiff's notice, and that Plaintiff thus should be forced to undertake the arrangements. (Stangler Cert. II, ¶ 5). After Egan refused to return phone calls or e-mails and it became clear that Letters of Commission would need to be obtained, along with further motion practice in New York with a subpoena effectuating Egan's compliance (Stangler Cert. II, ¶ 6). Now VCI turns around and seeks to prevent Plaintiff from using Egan's testimony at trial.

The fact that VCI now seeks to forego *its right* to cross-examine Egan altogether should not, however, affect *Plaintiff's right* to introduce Egan's testimony as an "unavailable" witness. Litigation is not a see-saw, wherein parties can adopt inconsistent

positions at will. At the conclusion of Egan's deposition, had Mr. Riina stated that he was waiving his right to cross-examine Egan, then there would have been no question that Plaintiff could use Egan's testimony at the time of trial. The fact that VCI has now altered its position should not alter Plaintiffs rights.

Rule 4:16-1(c) allows a party to use deposition testimony of an unavailable person "for any purpose, against any other party who was present or represented at the taking of the deposition or who had reasonable notice thereof... provided, however, that the absence of the witness was not procured or caused by the offering party." Here, VCI had notice of, was present and was represented at Egan's deposition, and had the opportunity to begin cross-examination. By filing the motion for a commission to afford VCI the opportunity to cross-examine Egan, Plaintiff has done all that is required of her. If VCI now elects to forego this opportunity to cross-examine Egan, it cannot now prevent Plaintiff from using Egan's transcript.

VCI's argument that Egan's continued deposition should be barred because "[l]iability expert reports ... shortly will be served" (VCI brief at 20) is weak. Even if expert reports had been exchanged, they could always be amended to address any information that VCI dredges up through its cross-examination.

As to the argument that Egan's "testimony should have been completed in sufficient time to enable the experts to evaluate and consider it in the context of this case," (VCI Brief at 20), VCI ignores the fact that its counsel was just as capable of filing a motion for relief from stay with the Bankruptcy Court as was Plaintiff.

From the outset of this case, VCI has been playing shell games as to the identity of (i) Egan's employer, (ii) the identity of the Chair purchaser, (iii) the identity of the persons who installed the Chair; and (iv) the identity of the persons who repaired the Chair. Now, after forcing Plaintiff to file a motion for VCI's benefit to permit VCI to depose Egan, VCI turns around and now opposes the motion. The legal tactic should not be countenanced by the Court.

Due to the extraordinary nature of VCI's conduct, this Court should exercise its equitable powers to compel VCI to pay for the costs incurred by Plaintiff in connection with that part of the motion that seeks a commission for the purpose of permitting VCI to take Egan's deposition.

II. Plaintiff's Reply to Defendant VCI's Opposition to the Motion for Leave to file a Second Amended Complaint

There is an identity of interests among VCI, Nothstein and Sitoski. Either Nothstein and Sitoski are individually liable for installing and/or repairing the Chair, or VCI is vicariously liable to the actions of Nothstein and Sitoski in installing and/or repairing the Chair. Because liability arises out of the identical conduct, it is inconceivable that discovery would in any way diverge depending on whether the employer or employee is named in the suit. In fact, had VCI not elected to hide Nothstein and Sitoski behind its skirts by failing to identify these employees as the Chair installer/repairer when expressly asked to do so, Plaintiff would not be in this position.

In this regard, it should be noted that VCI's comments about dates and notice to the Court by plaintiff is incorrect. At the very earliest, Plaintiff could not have learned of the potential claims against these potential parties until Nothstein's deposition, which took place eight (8) months prior to filing the motion to amend. Nothstein testified that he adjusted the limit switch "that Monday *at work* in the morning." (Stangler Cert. I, Exhibit "J" (Nothstein Tr. at 123:9-11) (emphasis added)). Thus, based on such testimony, Plaintiff had no basis for naming Nothstein, individually. It was not until after Sitoski himself was deposed on October 20, 2010 – 20 days prior to filing the motion to amend, that Plaintiff had a sufficient factual basis for substituting these employees for "John Doe" defendants.

VCI argues that Plaintiff allowed the Court to enter into a Consent Order on October 12, 2010, without "advis[ing] the Court or defense counsel that there was even the possibility that she would be filing the instant motion [for leave to amend]." Brief at 13. In fact, the Consent Order with the proposed discovery dates was forwarded to the Court for signature under cover of letter dated October 4, 2010 (See Stangler Cert. II, Exhibit "C"). Sitoski was not deposed until October 20, 2010 – 16 days after the proposed Consent Order was submitted, and eight (8) days after the Consent Order was signed. Thus, Plaintiff was not "silent" as to her intent to amend, as VCI argues – rather, Sitoski's deposition revealed that he clearly had the greatest recall with regard with the

details of the installation and repairs to the Chair and, until said deposition plaintiff did not have a sufficient factual basis for substituting these parties.

Viviano v. CBS, Inc., 101 N.J. 538 (1986) is instructive. There, the New Jersey Supreme Court recognized that, particularly in the context of industrial accident cases, where the cause of the accident may be the machine or any one or more of its "myriad components," or negligent maintenance or repair, "the need to submit claims promptly to judicial management must be tempered by the policy favoring the resolution of claims on their merits." Id. at 547-548. Thus, although plaintiff had dropped the "John Doe" designation in connection with an earlier amendment to the complaint, the Court permitted the filing of sixth amended complaint to substitute a John Doe defendant. "Compliance with the Rules of Practice is essential for an orderly legal system, but our goal is not so much rigid compliance with the letter of the Rules as it is the attainment of substantial justice. The Rules of Practice are not an end unto themselves, but a means of serving the ends of justice." Id. at 550-551.

Although Davies was not killed on the job, the facts of this case similarly arise out of the malfunction of a complex piece of machinery. The arguable delay in naming the individual defendants is being asserted by the very party that caused the delay. Thus, the attainment of substantial justice under these facts cannot be accomplished without allowing the substitution of Nothstein and Sitoski for the John Doe defendants.

Finally, with respect to the statute of limitations, under *Rule* 4:26-4, where a defendant is sued in a fictitious name capacity, the complaint may be amended after the statute of limitations has run to substitute the defendant's true name, and the complaint will relate back to the date of initial filing. Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111 (1973).

III. Plaintiff's Reply to Defendant VCI's Opposition to Motion to Compel Documents

On November 29, 2010, Plaintiff served responses to VCI's "wrongful death" interrogatories and notice to produce. Counsel for VCI has likewise supplied Plaintiff with copies of Davies' employment file during the continued deposition of William Blaser, and thus Plaintiff withdraws her request for these documents.

Plaintiff, however, continues to seek responses to Request Nos. 23 (records regarding installation, maintenance and repair of the Chair), 24 (records regarding purchase and sale of the Chair), 28 (contracts regarding purchase, sale and installation), 32 and 33 (documentation regarding employees who repaired or maintained the Chair, such as time cards showing whether Sitoski and Nothstein were paid overtime in connection with any work on the Chair), and any other documents that relate to the Chair, to enable the finder of fact to assign liability to VCI or individual defendants.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that (i) a Motion for a Commission for Egan's deposition be issued, (ii) if Egan is not deposed, that Plaintiff be permitted to introduce his September 27, 2010 testimony at the time of trial together with any documents produced by Egan, (iii) Plaintiff be permitted to file a second Amended Complaint, (iv) that VCI be compelled to produce documents, (v) that discovery be extended in accordance with the proposed form of Order; and (vi) that VCI be sanctioned for filing a cross-motion to prevent Egan's testimony from being used at the time of trial.

Respectfully submitted,

SHELLEY L. STANGLER, ESQ.

cc: Joseph A. Gurski, Esq.
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Tom Egan