SO ORDERED.
SIGNED this 27th day of November, 2023

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

AARON W. LEHNERT

Debtor

Case No. 3:23-bk-30080-SHB
Chapter 7

JOHN P. NEWTON, TRUSTEE

Plaintiff

v.

SHANNON RENEE (LEHNERT) ROESNER

Defendant

Adv. Proc. No. 3:23-ap-03021-SHB

MEMORANDUM AND ORDER ON AMENDED MOTION TO COMMENCE DISCOVERY & AMENDED MOTION TO EXTEND DEADLINE TO RESPOND TO COMPLAINT

Before the Court are Defendant's Amended Motion to Commence Discovery ("Rule 26(d) Motion") and Amended Motion to Extend Deadline to Respond to Complaint ("Motion to

Enlarge Time"). [Docs. 13, 14.[1]] Defendant seeks to commence discovery even before responding to Plaintiff's Complaint, contending that the "complaint asserts §548 avoidance claims grounded in both constructive and actual fraud without setting forth specific facts supporting the conclusion of the debtor's actual intent to hinder, delay and defraud." [Doc. 14 at ¶ 1.]

Federal Rule of Civil Procedure 26(d), made applicable here by Federal Rule of Bankruptcy Procedure 7026, provides that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."

> Although there is no binding authority on point, unpublished decisions from this and other district courts within this circuit have applied a good cause standard in determining whether or not to permit expedited discovery. *See, e.g., Giltnane v. Tennessee Valley Auth.*, No. 3:09–cv–14, 2009 U.S. Dist. LEXIS 6734, 2009 WL 230594 (E.D. Tenn. Jan. 30, 2009); *Arista Records, LLC v. Does 1–4*, No. 1:07–cv–1115, 2007 U.S. Dist. LEXIS 85652, 2007 WL 4178641 (W.D. Mich. Nov. 20, 2007); *Whitfield v. Hochfield*, No. C1–02–218, 2002 U.S. Dist. LEXIS 12661, 2002 WL 1560267 (S.D. Ohio July 2, 2002). "[A] party seeking expedited discovery in advance of a Rule 26(f) conference has the burden of showing good cause for the requested departure from usual discovery procedures." *Qwest Commc'n Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003). "Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). Good cause is often found in cases alleging infringement, unfair competition, or where evidence may be lost or destroyed with time. *See, e.g., id.*; *Qwest Commc'n*

[1] Defendant's Rule 26(d) Motion does not comply with E.D. Tenn. LBR 7007-1(a) because it was not accompanied by a brief setting for the facts and the law supporting the motion. Also, neither motion complies with E.D. Tenn. LBR 7007-1(c) because they bear the incorrect passive-notice legend. Finally, because the Local Rules do not authorize to filing of a reply brief, Defendant, without leave of Court, improperly filed Defendant's Reply to Plaintiff's Response to Amended Motion to Commence Discovery [Doc. 17]" (the "Reply"),which is a verbatim recitation of the Rule 26(d) Motion except for two additional paragraphs concerning Plaintiff's counsel's "promise" to provide information without formal discovery in a September email (notably, before the initial motion was filed on October 11, 2023). [Doc. 21 at ¶¶ 8-9.] Although the Reply should have been an amended Rule 26(d) Motion and notwithstanding the failure to comply with the Local Rules, the Court will address the merits of Defendant's motions.

> *Int'l, Inc.*, 213 F.R.D. at 419; *Warner Bros. Records, Inc. v. Does 1–4*, No. 2:07–cv–0424 TC, 2007 U.S. Dist. LEXIS 48829, at *2–3, 2007 WL 1960602 (D. Utah July 5, 2007). The scope of the discovery request is also relevant to whether or not good cause exists. *See, e.g., Qwest Commc'n Int'l, Inc.*, 213 F.R.D. at 420. Finally, the trial court retains broad discretion in establishing the timing of discovery. Fed. R. Civ. P. 26(d)(2).

Caston v. Hoaglin, No. 2:08-CV-200, 2009 WL 1687927 at *2 (S.D. Ohio June 12, 2009); *see also Lozano v. Does I-X*, No. 2:22-CV-3089, 2022 WL 4111208, at *1 (S.D. Ohio Aug. 12, 2022).

Defendant's Rule 26(d) Motion does not mention "good cause." [*See* Doc. 14.] Instead, Defendant argues that Plaintiff agreed to commence discovery but has failed to follow through. Rule 26(d) allows the parties to *stipulate* to early discovery, but if one of the parties does not actually agree, the Court will not require early discovery under Rule 26(d) except on a showing of good cause. *See Michigan Motor Techs., LLC v. Bayerische Motoren Werke AG*, No. 22 CV 3804, 2023 WL 4683428, at *5 (N.D. Ill. July 21, 2023) ("A stipulation is an agreement between the parties, not something the Court can require the parties to accept.).

Defendant's Rule 26(d) Motion might be read to imply that good cause exists because the Complaint asserts claims grounded in fraud "without setting forth specific facts supporting the conclusion of the debtor's actual intent to hinder, delay and defraud." [Doc. 14 at ¶ 1.] To the extent that the Complaint fails to allege sufficient facts to comply with Federal Rule of Civil Procedure 9(b) (made applicable here by Federal Rule of Bankruptcy Procedure 7009),[2]

[2] The Court notes that some courts have indicated that "the pleading standard under Rule 9(b) is relaxed where a bankruptcy trustee is pleading a fraudulent transfer claim." *Perkins v. Bamberger (In re Carton)*, Adv. Proc. No. 22-1272-VFP, 2023 WL 8057870, at *3 (Bankr. D.N.J. Nov. 20, 2023) (citing *In re Oakwood Homes Corp.*, 325 B.R. 696, 698 (Bankr. D. Del. 2005). Also, although the Sixth Circuit has not yet spoken on the issue, "as it relates to constructive fraud, 'the great majority of cases hold that since a cause of action based on constructive fraud does not require proof of fraud, the heightened pleading requirements of Rule 9(b) are not applicable.'" *Id.* (quoting *Silverman v. Actrade Cap., Inc. (In re Actrade Fin. Techs. Ltd.)*, 337 B.R. 791, 801 (Bankr. S.D.N.Y. 2005); *see also Bavely v. Croucher (In re Chambers)*, Adv. No. 20-1009, 2020 WL 8184302, at *7 (Bankr. S.D. Ohio Sept. 18, 2020); *Spradlin v. Pryor Cashman LLP (In re Licking River Mining, LLC)*, 565 B.R. 794, 814 (Bankr. E.D. Ky. 2017); *Russell v. Little (In re Anderson)*, Adv. No. 10-5081, 2010 WL 4959948 (Bankr. E.D. Tenn. Dec. 1, 2010) (Parsons, J.).

Defendant's remedy is to file a motion to dismiss under Rule 12(b)(6).

ORDER

The Court, accordingly, directs the following:

1. Because Defendant has not shown good cause for the Court to order discovery to commence other than in the ordinary course, Defendant's Rule 26(d) Motion [Doc. 14] is DENIED.

2. Because Plaintiff, having filed no response to the Motion to Enlarge Time, apparently does not oppose an extension of time for Defendant to answer or otherwise respond to the Complaint, Defendant's Motion to Enlarge Time [Doc. 13] is GRANTED IN PART AND DENIED IN PART.

3. In consideration of the fact that Defendant's responsive pleading was initially due on or before October 5, 2023, and that the deadline had already expired by the time that Defendant initially filed the motion to extend the deadline to respond on October 11, 2023 [s*ee* Docs. 3, 9], Defendant shall file her responsive pleading on or before December 15, 2023.

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