UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NICHOLAS SPAETH,

Plaintiff,

v.

MICHIGAN STATE UNIVERSITY COLLEGE OF LAW,

JOAN W. HOWARTH, DEAN, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW,

CURATORS OF THE UNIVERSITY OF MISSOURI, d/b/a UNIVERSITY OF MISSOURI SCHOOL OF LAW,

BRADY J. DEATON, CHANCELLOR, UNIVERSITY OF MISSOURI,

DIRECTORS OF THE HASTINGS COLLEGE OF LAW, d/b/a HASTINGS COLLEGE OF THE LAW,

FRANK H. WU, CHANCELLOR AND DEAN, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

GEORGETOWN UNIVERSITY,

BOARD OF REGENTS, STATE OF IOWA, d/b/a UNIVERSITY OF IOWA, COLLEGE OF LAW,

SALLY MASON, PRESIDENT, UNIVERSITY OF IOWA,

BOARD OF REGENTS, UNIVERSITY SYSTEM OF MARYLAND, d/b/a UNIVERSITY OF MARYLAND SCHOOL OF LAW, and

Civil Action No: 1:11-cv-01376-ESH

WALLACE D. LOH, PRESIDENT, UNIVERSITY OF MARYLAND,	)
	)
	)
Defendants.	)

DEFENDANT MICHIGAN STATE UNIVERSITY COLLEGE OF LAW'S RENEWED MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO SEVER AND TRANSFER VENUE

Defendant Michigan State University College of Law ("MSU Law"), pursuant to Fed. R. Civ. P. 12(b)(6), respectfully requests that the Court dismiss Count I of the Amended Complaint. As set forth in the accompanying Memorandum of Points and Authorities, Plaintiff has failed to allege facts sufficient to make a plausible claim that MSU Law discriminated against him based on his age when it declined to offer him an interview and thereafter a teaching position. Furthermore, Plaintiff's requests for "other compensatory" and exemplary damages should be dismissed because those remedies are not available under the Age Discrimination in Employment Act ("ADEA").

In the alternative, pursuant to Fed. R. Civ. P. 21 and 28 U.S.C. § 1404(a), MSU Law requests that the claim against it be severed from those against the other law schools and individual defendants, and the case against it be transferred to the Western District of Michigan, Southern Division. Plaintiff's claims against MSU Law arose from a separate and distinct occurrence than those giving rise to his claims against the other law schools. MSU Law made its decision not to offer Plaintiff an interview independently. Indeed, Plaintiff has not even alleged concerted action amongst the defendants. The Western District of Michigan is a proper venue, and considerations of convenience and the interest of justice weigh in favor of transfer to that venue.

Pursuant to LCvR 7(m), counsel for Defendant conferred with counsel for Plaintiff regarding severance and change of venue. Plaintiff does not consent to the relief sought by this motion.

WHEREFORE, premises considered, Defendant respectfully requests that its motion be granted. A memorandum of points and authorities and proposed order are attached.

Dated: November 21, 2011

Respectfully submitted,

/s/ John M. Simpson

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NICHOLAS SPAETH, **Plaintiff,** **v.** **MICHIGAN STATE UNIVERSITY COLLEGE OF LAW,** **JOAN W. HOWARTH, DEAN, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW,** **CURATORS OF THE UNIVERSITY OF MISSOURI, d/b/a UNIVERSITY OF MISSOURI SCHOOL OF LAW,** **BRADY J. DEATON, CHANCELLOR, UNIVERSITY OF MISSOURI,** **DIRECTORS OF THE HASTINGS COLLEGE OF LAW, d/b/a HASTINGS COLLEGE OF THE LAW,** **FRANK H. WU, CHANCELLOR AND DEAN, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,** **GEORGETOWN UNIVERSITY,** **BOARD OF REGENTS, STATE OF IOWA, d/b/a UNIVERSITY OF IOWA, COLLEGE OF LAW,** **SALLY MASON, PRESIDENT, UNIVERSITY OF IOWA,** **BOARD OF REGENTS, UNIVERSITY SYSTEM OF MARYLAND, d/b/a UNIVERSITY OF MARYLAND SCHOOL OF LAW, and**	**Civil Action No: 1:11-cv-01376-ESH**

WALLACE D. LOH, PRESIDENT, UNIVERSITY OF MARYLAND,	)
	)
	)
Defendants.	)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MICHIGAN STATE UNIVERSITY COLLEGE OF LAW'S RENEWED MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO SEVER AND TRANSFER VENUE

Defendant Michigan State University College of Law ("MSU Law" or "Defendant") pursuant to Fed. R. Civ. P. 12(b)(6) and 21, and 28 U.S.C. § 1404(a), hereby respectfully submits its Memorandum of Points and Authorities in Support of its Renewed Motion to Dismiss, or, in the Alternative, to Sever and Transfer Venue.

I. INTRODUCTION

Plaintiff Nicholas Spaeth originally sued MSU Law under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, alleging that MSU Law improperly declined to offer him an interview, and thereafter a teaching position, because of his age. After MSU Law filed its motion to dismiss the original complaint, Plaintiff filed an Amended Complaint, adding as defendants MSU Law's dean, Joan W. Howarth, and five other law schools and four of their alleged representatives with "final authority" regarding hiring. During the 2010 hiring cycle, Plaintiff "applied" to 172 law schools, received two interviews, and received no job offers. Amended Complaint (11/07/11) ("Am. Compl.") (Docket Entry ("DE") 10) at ¶¶ 18, 28, 29. From these statistics and Plaintiff's own self-serving belief that his credentials are beyond compare[1], he concludes that the only possible reason he could not have been selected is because

[1] Plaintiff seems to believe that his experiences as Managing Editor of the Stanford Law Review and as a Supreme Court clerk qualify him to teach any and every law school course. Plaintiff claims that had MSU Law, Georgetown, University of Iowa, and University of Maryland "considered Plaintiff's application based on his qualifications . . . [they] would have hired him ***for any one of the teaching positions***" they ultimately filled. Am. Compl. ¶¶ 94, 194, 226, 252 (emphasis added). Those schools hired instructors to teach the following broad range of courses: contracts, corporate income taxation, partnership taxation, administrative law, the regulatory state, criminal procedure, sports law, taxation, tax policy, regulation, international law, civil procedure, patent law,

MSU Law (and all of the other defendants) discriminated against him based on his age. Plaintiff's age discrimination claim against MSU Law is not plausible. The Amended Complaint has no factual allegations that create a reasonable inference that age discrimination was the determining factor in MSU Law's decision not to offer Plaintiff an interview. As MSU law pointed out in its motion to dismiss the original complaint, Plaintiff's recitation of his experiences in his pleadings is irrelevant. The only relevant information about Plaintiff's interests and qualifications are those Plaintiff presented to MSU Law at the time of his application. When Plaintiff filled out the self-described "mandatory" application form, which specifically asked for his teaching interests and qualifications, Plaintiff revealed that he was not qualified – ***he was neither interested in nor willing to teach courses for which MSU Law hired instructors***. Plaintiff's own mandatory application form, to which he refers in the Amended Complaint, therefore, demonstrates that MSU Law's decision to decline to offer him an interview is vastly more consistent with a legal policy of hiring candidates interested in available positions than an illegal decision motivated by age discrimination. Because a plaintiff must show that he was qualified for the position merely to establish a prima facie case, Plaintiff will never be able to meet his burden of proving that age discrimination was the "but for" reason he was not offered an interview.

Further, Plaintiff's claims for "other compensatory" and exemplary damages must be dismissed because those remedies are not available under the ADEA. In his original complaint, Plaintiff sought "emotional distress," "other compensatory," and "punitive" damages. Despite the fact that MSU Law demonstrated in its motion to dismiss that none of these is a proper remedy under the ADEA, *see* DE 7 at 19-20, Plaintiff continues to seek improper damages by

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securities regulation, complex litigation, and anti-discrimination law. Am. Compl. ¶¶ 69, 77, 86, 167, 176, 185, 199, 208, 216, 228, 236, 244.

maintaining his claim for "other compensatory" damages and by changing the word "punitive" to "exemplary." Am. Compl. Prayer for Relief, D and E.

Should the Court nevertheless determine that Plaintiff's claim against MSU Law withstands the motion to dismiss, the case against MSU Law should be severed from the claims against the other law schools and the individual defendants and transferred to the Western District of Michigan, Southern Division. Plaintiff has not alleged that the six law school defendants and their respective alleged decision-makers conspired to discriminate against him. Whether each school discriminated against him based on age is an individualized determination based on facts particular to each school's hiring process. This action against MSU Law could have been brought in the Western District of Michigan because that is the district in which it "resides" and in which the "events or omissions" giving rise to the instant claim against it occurred. The balance of convenience of the parties and witnesses and the interest of justice also favor transfer to that forum.

II. FACTUAL BACKGROUND[2]

Plaintiff filed the Complaint in the above-captioned matter against MSU Law on July 28, 2011. DE 1. On October 14, 2011 MSU Law filed its Motion to Dismiss, or in the Alternative, to Transfer Venue. DE 7. Plaintiff filed the instant Amended Complaint on November 7, 2011. DE 10. On November 9, 2011, the Court dismissed MSU Law's pending motion without prejudice as moot. 11/09/2011 Minute Order.

Count One of the Amended Complaint alleges that MSU Law discriminated against Plaintiff based on his age when it did not offer him an interview or a teaching position for the

[2] For purposes of this motion to dismiss only, MSU Law assumes the truth of the actual factual allegations in Plaintiff's Amended Complaint.

2011-2012 academic year. Am. Compl. ¶ 254. Plaintiff was born in 1950. *Id.* ¶ 1. He is a citizen of Missouri. *Id.* ¶ 6. Defendant MSU Law is located in East Lansing, Michigan. *Id.* ¶ 7.

A. Background of Hiring Process

The Association of American Law Schools ("AALS") coordinates hiring for its 172 member law schools. *Id.* ¶¶ 18, 20. Individuals interested in obtaining faculty appointments provide their application information to the AALS through its Faculty Appointments Register ("FAR"). *Id.* ¶ 20. To apply, candidates must fill out the AALS FAR form, which plaintiff identifies as "mandatory". *See id.* ¶ 21. This form requires information about the candidate's education, background, and teaching interests. *Id.* Candidates can also opt to submit a full resume. *See id.* The AALS thereafter provides advertisements for teaching positions to candidates via its "Placement Bulletin" and provides candidates' FAR forms to member law schools. *Id.* ¶¶ 22, 23. Every fall, the AALS sponsors a Faculty Recruitment Conference in Washington, D.C., during which member law schools may interview select candidates. See *id.* ¶ 24.

MSU Law interviewed 24 candidates at the 2010 Faculty Recruitment Conference. *Id.* ¶ 31. Plaintiff was not among the 24 candidates whom MSU Law elected to interview. *Id.* ¶ 68. MSU Law ultimately hired three individuals who had participated in the AALS process for faculty positions. *Id.* ¶¶ 64, 65.

B. MSU Law's Hiring Criteria and Plaintiff's Qualifications

MSU Law's advertisement through the AALS Placement Bulletin noted that it was seeking '"exceptional entry level and lateral candidates in all areas, especially for first year courses and tax.'" *Id.* ¶ 66 (quoting MSU Law's AALS Placement Bulletin).

Plaintiff "applied" to MSU Law by submitting his FAR form through the AALS. *See id.* ¶¶ 20, 21, 28. This form is the only mandatory application material. *See id.* ¶ 21. The form, to which Plaintiff refers in the Amended Complaint at paragraphs 21, 37, and 63, and which is attached hereto as Ex. 1[3], requires candidates to indicate which "subjects [they would] most like to teach," "other subjects [they] may be interested in teaching," and "other subjects [they] would be willing to teach, if asked." Ex. 1 (lines 12, 13, 14). Plaintiff did not list tax in any of those fields. *See id.* Therefore, not only did Plaintiff not demonstrate a desire to teach tax, he did not even indicate that he would be *willing* to teach the course if the law school so requested. In fact, the word "tax" does not appear once on Plaintiff's FAR form. *See* Ex. 1. Plaintiff additionally did not indicate any desire or even willingness to teach the typical first year courses property, contracts, torts, or civil procedure. *See id.*

Instead, Plaintiff indicated that he was most interested in teaching upper level business law courses. The subjects Plaintiff indicated he would "most like to teach" were (1) "Financial Institutions"; (2) "Insurance Law"; and (3) "Business Associations (including Agency & Part., Corps, Bus. Planning)". Ex. 1 (line 12). In the category of "Other Subjects May Be Interested in Teaching," Plaintiff listed (1) "Securities Regulation"; (2) "Corporate Finance (including Corporate Reorganizations)"; (3) "Constitutional Law"; and (4) "Native American Law." *Id.* (line 13). Finally, in the "Other Subjects Would Be Willing to Teach, If Asked" field, Plaintiff listed "Criminal Law" and "International Business Transactions." *Id.* (line 14). Additionally, Plaintiff did not list any other teaching interests anywhere else on his FAR form – Plaintiff left each of the fields available for "comments" blank. *Id.* (lines 10, 12, 13, 14).

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[3] The Court may examine this document without converting the instant motion to one for summary judgment because it is a document that is "referred to in the [amended] complaint and [is] integral to [Plaintiff]'s [] claim." *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004); *see also* page 9-10, *infra*.

Of those individuals who participated in the AALS process during the fall of 2010, MSU Law ultimately hired instructors to teach: (1) contracts, corporate income taxation, and partnership taxation, Am. Compl. ¶ 69; (2) administrative law and the regulatory state, *id.* ¶ 77; and (3) criminal procedure and sports law. *Id.* ¶ 86. Plaintiff did not list *any* of these courses on his FAR form. *See* Ex. 1. Nor did MSU Law hire an instructor to teach *any* of the subjects in which Plaintiff expressed any interest. *Compare* Am. Compl. ¶¶ 69, 77, 86 *with* Ex. 1.

III. COUNT I[4] OF THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Count I of Plaintiff's Amended Complaint should be dismissed because it fails to state a plausible claim of age discrimination against MSU Law and because Plaintiff will never be able to establish a prima facie case, given that his *mandatory* application form shows that he was not interested in or qualified for the positions MSU Law filled. The entirety of Plaintiff's Amended Complaint is a *post hoc* attempt to embellish his credentials and teaching interests and to create an age discrimination claim where none exists. This, however, is a wholly insufficient basis on which to proceed, and his claim must be rejected. The only information regarding Plaintiff's qualifications that is relevant to Plaintiff's age discrimination claim ***is that which was presented to MSU Law*** at the time it made the decision to decline to offer Plaintiff an interview – not information MSU Law learned for the first time by reading Plaintiff's pleadings in this case. Plaintiff's FAR form, the only mandatory application material provided to MSU Law at the time it made its decisions, demonstrates that he was not qualified. This makes his claim that age discrimination was the only reason he was not offered an interview implausible and further makes it impossible for him ever to establish a prima facie case. Additionally, Plaintiff's claims

[4] The Amended Complaint contains eleven counts. Only Count I applies to defendant MSU Law. The remaining ten counts do not apply to, and as a result do not state a claim against, MSU Law.

for "other compensatory" and exemplary damages must be dismissed because those types of damages are not recoverable under the ADEA.

A. Standard of Review

While an employment discrimination plaintiff need not plead facts "establishing a prima facie case of discrimination" in his complaint, the complaint nonetheless must demonstrate his "entitle[ment] to relief" as required by Rule 8(a)(2). *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 (2002). To satisfy this standard and survive a Rule 12(b)(6) motion to dismiss, the complaint must set forth enough facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Although for purposes of [a Rule 12(b)(6) motion] to dismiss [a court] must take all the factual allegations in the complaint as true, [the court is] not bound to accept as true a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or "accept inferences drawn by plaintiff[] if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

Ashcroft v. Iqbal suggests a two-step process for determining whether a motion to dismiss should be granted. The first step is to "identif[y] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1950. These are to be disregarded. After discarding legal conclusions, the second step is to take any remaining "well-pleaded factual allegations," "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

A plaintiff's "obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions." *Twombly*, 550 U.S. at 555. The plausibility standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Id.* at 556. The "doors of discovery," however, do not "unlock" "for a plaintiff

armed with nothing more than conclusions." *Iqbal*, 129 S. Ct. at 1950. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the ***reasonable inference*** that the defendant is liable for the misconduct alleged." *Id.* at 1949 (emphasis added). This requires more than "a sheer ***possibility*** that a defendant has acted unlawfully"; indeed, "facts that are ***merely consistent*** with a defendant's liability . . . stop[] short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (emphasis added). To be plausible, the facts alleged must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Once legal conclusions and unsupported inferences are properly disregarded, if the remaining, well-pleaded factual allegations "could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558.

In evaluating a motion to dismiss, if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment . . .." Fed. R. Civ. P. 12(d). However, the Court may consider "documents . . . incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss" because such matters are not "outside" the pleadings. *Hinton v. Corr. Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009) (internal citations and quotations omitted); *see also Kaempe,* 367 F.3d at 965 (on a motion to dismiss a court can consider documents that are "referred to in the complaint and are integral to [Plaintiff]'s [] claim"); *Marshall v. Honeywell Tech. Solutions, Inc.*, 536 F. Supp. 2d 59, 65 (D.D.C. 2008) ("where a document is referred to in the complaint and is central to the plaintiff's claim, such a document attached to the motion

papers may be considered without converting the motion to one for summary judgment.") (internal citation and quotation omitted).

B. Plaintiff Has Failed to State a Plausible Claim of Age Discrimination Against MSU Law and Will be Unable to Establish a Prima Facie Case Because He was Not Qualified

The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire . . . or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). The Supreme Court has interpreted the statute to require a plaintiff to "prove by a preponderance of the evidence . . . that age was the 'but-for' cause of the challenged employment action." *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009). In other words, age discrimination must have been "***the reason***" for the adverse employment action; a plaintiff cannot "establish discrimination by showing that age was simply ***a*** motivating factor." *Id.* at 2349 (emphasis added). To prove this, an ADEA plaintiff pursuing a claim for failure to hire must first set forth a prima facie case by demonstrating that he (1) is a member of the protected class (*i.e.*, over 40 years of age); (2) was qualified for the position for which he applied; (3) was not hired; and (4) was disadvantaged in favor of a younger person. *Teneyck v. Omni Shoreham Hotel*, 65 F.3d 1139, 1155 (D.C. Cir. 2004). While an employment discrimination plaintiff need not plead all of the elements of a prima facie case to survive a motion to dismiss, *Swierkiewicz*, 534 U.S. at 508, "the premise that the prima facie case is not a pleading requirement does not preclude courts from exploring the plaintiff's prima facie case" on a motion to dismiss, because such an inquiry allows the court to "inquire whether the [defendant] is entitled to victory" and to "probe whether the plaintiff can *ever* meet his initial burden to establish a prima facie case." *Rochon v. Ashcroft*, 319 F. Supp. 2d 23, 29 (D.D.C. 2004) (emphasis added), *rev'd on other grounds, sub nom. Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006); *see also Hutchinson v.*

Holder, 668 F. Supp. 2d 201, 211 (D.D.C. 2009) ("Courts can . . . explore a plaintiff's prima facie case at the dismissal stage to determine whether the plaintiff can ever meet [his] initial burden to establish a prima facie case.") (internal quotation omitted).

In this case, Plaintiff's claim that age discrimination was "the reason" he was not offered an interview, is at best "speculative"; ***it is not plausible***. When the legal conclusions and unsupported inferences in the Amended Complaint are properly disregarded, the remaining factual allegations, and the facts incorporated by reference in the Amended Complaint, reveal that Plaintiff (1) has not stated a plausible claim and (2) will never be able to establish a prima facie case of age discrimination because Plaintiff was not qualified for the positions for which MSU Law hired. Accordingly, because the case is at "the point of minimum expenditure of time and money by the parties and the court," *Twombly*, 550 U.S.at 558, it should be dismissed now.[5]

1. Plaintiff's Amended Complaint fails to state a plausible claim for age discrimination

Following the guidance of *Iqbal*, the Court should first identify and disregard legal conclusions that are not entitled to the assumption of truth. The importance of this step is not to be underestimated. Indeed, it can be dispositive of the entire case, as the Supreme Court in *Iqbal* noted about its decision in *Twombly*. *See Iqbal*, 129 S. Ct. at 1950. The *Twombly* Court "first noted that the plaintiff's assertion of an unlawful agreement[6] was a 'legal conclusion' and, as such, was not entitled to the assumption of truth." *Id.* (quoting *Twombly* 550 U.S. at 555). "Had

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[5] The claim against MSU Law also should be dismissed now with prejudice, because this is Plaintiff's second effort at pleading his case with knowledge of MSU Law's arguments as to why Plaintiff has failed to state a cause of action. *See Caldwell v. Argosy Univ.*, 2011 U.S. Dist. LEXIS 74617, *7 (D.D.C. July 12, 2011) (when a plaintiff files an amended complaint that merely "recycles" the original, deficient complaint, it may be dismissed with prejudice).

[6] Regarding an unlawful agreement, the "plaintiffs in *Twombly* flatly pleaded that the defendants 'ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another.'" *Iqbal*, 129 S. Ct. at 1950 (quoting *Twombly*, 550 U.S. at 551).

the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce." *Id.* In other words, had the Court afforded the assumption of truth to the plaintiffs' conclusory allegations of the existence of a conspiracy, the plaintiffs would have survived the motion to dismiss. Because such conclusions are not entitled to that assumption, however, the Court dismissed the complaint for failure to state a claim.

"In the specific context of age discrimination claims, *a mere allegation that an adverse employment action was motivated by age, without more, is the type of broad, conclusory allegation that the Supreme Court has found insufficient*." *Pezzoli v. Allegheny Ludlum Corp.*, 2010 U.S. Dist. LEXIS 72734 at *2 (W.D. Pa. July 20, 2010) (internal citation omitted) (emphasis added) (granting motion to dismiss plaintiff's ADEA claim). In that case, the court found that the plaintiff's age discrimination allegations (that "his 'age actually motivated and was a key factor in the Defendant's decision not to hire him,' and that Defendant's failing to hire [him] 'on account of his age is in violation of the Age Discrimination in Employment Act'") were "conclusory and speculative." *Id.*

Plaintiff's Amended Complaint contains similar conclusory allegations, and the same result should follow here. Plaintiff's allegation that MSU Law "refused to interview or hire Plaintiff" "***because of his age***" by giving less weight to its "core criteria" when considering Plaintiff's application than when considering the applications of younger applicants, *see* Am. Compl. ¶ 258 (emphasis added), is a bald and speculative legal conclusion that must be disregarded. This Court, in dismissing discrimination claims, has rejected as inadequate similar conclusory allegations – that certain actions were taken "because of" a discriminatory reason. *See, e.g., Ihebereme v. Capital One, N.A.*, 730 F. Supp. 2d 40, 54 (D.D.C. 2010) (noting that "[s]imply including the conclusory clause 'by virtue of his race and ethnicity' after recounting

defendant's behavior, without any factual allegations that address the relevance of race and ethnicity, does not state a claim for discrimination"); *Middlebrooks v. Godwin Corp.*, 722 F. Supp. 2d 82, 88 (D.D.C. 2010) (noting that "plaintiff's conclusory statements that she was 'terminated . . . based on [her] race' and 'color'" are "two allegations [that] amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" that therefore "are 'not entitled to the assumption of truth.'" (quoting *Iqbal* 129 S. Ct. at 1950-51)). Similarly, another recent decision in this District held that blanket conclusions that negative actions were taken for discriminatory reasons were not entitled to the assumption of truth. *See Mekuria v. Bank of Am.*, 2011 U.S. Dist. LEXIS 108649 at *10-11 (D.D.C. Sept. 23, 2011) (finding that the plaintiff's allegations, that ended with the clauses '"because of [plaintiff's] national origin, race and color'" and '"because of his race and nationality,'" were "nothing more than legal conclusions").

In addition to its speculative legal conclusions, Plaintiff's Amended Complaint contains unsupported, self-serving inferences that likewise are not entitled to the presumption of truth. *Kowal*, 16 F.3d at 1276 ("the court need not accept inferences drawn by plaintiff[] if such inferences are unsupported by the facts set out in the complaint."). Examples of such inferences in the Amended Complaint include: (1) that the qualifications of MSU Law's "second hire" were "significantly inferior" to Plaintiff's because Plaintiff's clerkships were "more prestigious" than the clerkship of the "second hire," *see* Am. Compl. ¶¶ 79, 80; (2) that the courses for which MSU Law hired are ones for which it "is particularly crucial" that the professors "have relevant practical work experience," because in Plaintiff's opinion those areas of law "are more skills-based and less theoretical than other areas of the law," *see id.* ¶¶ 73, 82; and (3) that had MSU Law "considered Plaintiff's application based on his qualifications alone and not based on his

age," it would have "granted him an interview at the AALS Faculty Recruitment Conference" and would have "***hired him for any of the teaching positions it filled for the 2011-2012 academic year***." *Id.* ¶¶ 93, 94 (emphasis added). No factual allegations in the Complaint support these inferences[7], and therefore they are not entitled to the presumption of truth.

Once Plaintiff's legal conclusions and unsupported inferences are properly disregarded, the remaining factual allegations, even if true, reveal that the Amended Complaint fails to state a plausible claim for age discrimination against MSU Law. Assuming that Plaintiff was born in 1950, Am. Compl. ¶ 1, that he submitted his application information to MSU Law, *id.* ¶ 28, that MSU Law chose not to interview him, *id.* ¶ 68, and that MSU Law chose to interview and subsequently hired three other candidates through the AALS process, who "on information and belief" were younger than Plaintiff, *id.* ¶¶ 64, 65, this does not create the ***reasonable inference*** that MSU Law decided not to interview or hire Plaintiff (and instead chose to interview and hire the successful candidates) ***because of*** his age.

The Supreme Court has held that a complaint cannot survive a motion to dismiss where its allegations show that defendants' actions may be ***consistent with*** illegal conduct, but are ***more likely*** the result of legal activity. *Twombly*, 550 U.S. 544. In *Twombly*, the Supreme Court dismissed the plaintiffs' complaint alleging an antitrust conspiracy where the plaintiffs had alleged facts establishing parallel actions and additionally pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another." *Id.* at 551. The complaint also alleged that the

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[7] Indeed, as to the third assertion, Plaintiff's FAR form, incorporated by reference in the Amended Complaint, demonstrates just the opposite. While Plaintiff claims that if MSU Law properly had considered his qualifications it would have "hired him for any of the teaching positions it filled," Am. Compl. ¶ 94, the teaching positions MSU Law filled were for contracts, corporate income taxation, partnership taxation, administrative law, the regulatory state, criminal procedure, and sports law, *id.* ¶¶ 69, 77, 86, none of which Plaintiff listed among his teaching interests on his FAR form—a document that plaintiff himself describes as the "mandatory" vehicle for submitting one's "education, background, ***and teaching interests***" . *See* Ex. 1; Am. Compl. ¶ 21 (emphasis added) .

defendants' parallel conduct was indicative of the unlawful agreement. *Id.* The Court found this pleading insufficient, "[a]cknowledging that parallel conduct was consistent with an unlawful agreement," but "nonetheless conclud[ing] that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed ***was more likely explained by[] lawful . . . behavior***." *Iqbal*, 129 S. Ct. at 1950 (emphasis added).

Courts in this jurisdiction have followed *Twombly*'s guidance and dismissed complaints that fail to support a reasonable inference of wrongdoing. *See, e.g.*, *McKeithan v. Boarmann*, 2011 U.S. Dist. LEXIS 91515 at *17 (D.D.C. Aug. 17, 2011) (finding that the plaintiff "failed to present a plausible claim that he was subjected to a hostile work environment based on age" when he "offer[ed] nothing to support a claim that any of [the alleged wrongdoer's] conduct was linked to his age" and "***[t]he Court [was] left to infer that each act was discriminatory or retaliatory simply based on the fact that he is over sixty***.") (emphasis added); *Ihebereme*, 730 F. Supp. 2d at 54 (dismissing complaint in which plaintiff alleged only "his membership in a protected class by stating his race and ethnicity," because such allegations "do not meet the requirement of a 'detailed factual allegation' under *Twombly*, to adequately allege that race or ethnicity motivated another's actions."); *Middlebrooks*, 722 F. Supp. 2d at 88 (dismissing complaint when, after disregarding conclusions not entitled to the assumption of truth, "[t]here [wa]s nothing in the complaint that 'permit[ted] the Court to infer ***more than the mere possibility of misconduct*** on the part of [the alleged wrongdoers], meaning that plaintiff ha[d] failed to show that she is entitled to relief.") (quoting *Iqbal*, 129 S. Ct. at 1950) (emphasis added).

Similarly here, the Amended Complaint does not contain well pleaded factual allegations that allow the Court to infer more than the ***mere possibility*** that MSU Law's decisions not to interview Plaintiff and to hire other candidates was due to age discrimination, when such a

decision is "just as much in line with a wide swath of rational" and legal hiring decisions, such as hiring those most qualified for and interested in positions it sought to fill. *See Twombly*, 550 U.S. at 554. Such circumstances do not create a ***reasonable inference*** of age discrimination, especially given that Plaintiff's FAR form reveals that he was not qualified for – indeed, had no interest in teaching or willingness to teach – the subjects for which MSU Law hired, as discussed below.

To survive a motion to dismiss, Plaintiff must allege more than that he was not hired and is over 40, yet that is all Plaintiff has plausibly pled. *See Mekuria*, 2011 U.S. Dist. LEXIS 108649 at *12-13 ("At the end of the day, Plaintiff's case boils down to an argument that because he was mistreated and because he is black, there must be some connection between the two. Such supposition is not enough."). Count I of the Amended Complaint, therefore, must be dismissed because it lacks sufficient well pleaded factual allegations to suggest a reasonable inference of age discrimination, and has failed to move Plaintiff's claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. This deficiency is fatal to Plaintiff's claim against MSU Law.

2. Plaintiff will not be able to establish a prima facie case of age discrimination because his "qualifications" he presented to MSU Law show that he was not qualified for MSU Law's teaching positions

Courts can "explore a plaintiff's prima facie case at the dismissal stage to determine whether the plaintiff can *ever* meet [his] initial burden to establish a prima facie case." *Hutchinson*, 668 F. Supp. 2d 211 (internal quotation omitted) (emphasis added). An essential element of a prima facie case of age discrimination is that the plaintiff was qualified for the position for which he applied. *Teneyck*, 65 F.3d at 1155. The "qualifications" that are relevant to this analysis are those that were presented to the employer when the hiring decision was made. *See, e.g., Edwards v. Joe Cullipher Chrysler-Plymouth, Inc.*, 57 FEP 1685 (E.D.N.C. 1990), *aff'd*

without op., 932 F.2d 963 (4th Cir. 1991). In that case, the plaintiff sued after he was not promoted to a position that required managerial experience. The plaintiff claimed he did not receive the promotion because of his race, in violation of Title VII. *Id.* The employer stated the reason the plaintiff was not promoted was because he "had no managerial and supervisory experience," to which the plaintiff responded by claiming that he had gained managerial experience during his time in the Army. *Id.* The court, in granting summary judgment for the employer, noted that the employer "had no knowledge of the plaintiff's alleged military management experience," that "[n]o managerial experience [wa]s listed in either of the applications on file with defendants," and even "[a]ssuming the plaintiff's characterization of his experiences [wa]s correct, ***it is irrelevant because he did not provide this information to the defendants when the hiring decisions were made***." *Id.* (emphasis added). *See also Hoff v. County of Erie, S.E. Corp.*, 1981 U.S. Dist. LEXIS 13968 (W.D.N.Y. June 19, 1981) *aff'd without op.*, 697 F.2d 291 (2d Cir. 1982) (finding that plaintiff failed to establish the "qualified" prong of a prima facie case of sex discrimination even though she was in fact qualified, because "she did not show to the employer at the time she applied that she was qualified").

Like Plaintiff's original complaint, his Amended Complaint is devoid of allegations about what qualifications he provided to MSU Law when he "applied." MSU Law pointed this out in its motion to dismiss Plaintiff's original complaint. DE 7 at 14-18. Though given a second bite at the pleading apple, Plaintiff does not remedy this problem, which underscores that Plaintiff will never be able to establish a prima facie case of age discrimination. Plaintiff now makes vague references to a resume, *see* Am. Compl. ¶¶ 37, 63, but these fleeting references do not allege that his resume would have addressed the mandatory information sought by the FAR form, *i.e.* the courses that Plaintiff was interested in and/or willing to teach. Ex. 1 (lines 12, 13,

14). The Amended Complaint's silence on this issue speaks volumes about the weakness of Plaintiff's claim.

Despite Plaintiff's failure to plead what information he provided to MSU Law, three things are clear about the materials MSU Law had when it made it employment decision. First, Plaintiff was required to, and did, submit a FAR form. Am. Compl. ¶¶ 21, 37. Second, the FAR form requires each candidate to list his or her teaching interests. Ex. 1 (lines 12, 13, 14). Third, Plaintiff's FAR form[8] shows that Plaintiff's expressed interests and MSU Law's needs had absolutely no overlap.

MSU Law sought professors '"especially for first year courses and tax.'" Am. Compl. ¶ 66 (quoting MSU Law's AALS Placement Bulletin). Plaintiff's FAR form demonstrates that he is not qualified to teach tax law or many traditional first year courses because ***he expressed no interest in teaching or ability to teach those courses***. The FAR form expressly asks candidates to list which subjects they would "most like to teach" ex. 1. (line 12); "other subjects [they] may be interested in teaching" *id.* (line 13); and "other subjects [they] would be willing to teach, if asked." *Id.* (line 14). Plaintiff did not list tax in any of those fields. *See* Ex. 1 (lines 12, 13, 14). That Plaintiff repeatedly touts his tax experience in the Amended Complaint, ¶¶ 47, 50, 53, 54, 69, 72, 76, 113, 116, 118, 167, 175, 176, 184, 199, 202, 206, 231, 259, while the word "tax" did not appear once on his mandatory application material (the FAR form), demonstrates the completely manufactured nature of Plaintiff's claim. Additionally, Plaintiff did not indicate any desire or willingness to teach the typical first year courses of property, contracts, torts, or civil

[8] The Court may consider Plaintiff's FAR form without converting the instant motion into one for summary judgment because Plaintiff refers to it in his Amended Complaint (Am. Compl. ¶¶ 37, 63) and it is central to his claims. *See Marshall*, 536 F. Supp. 2d at 65 ("where a document is referred to in the complaint and is central to the plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.").

procedure on his FAR form. *See id.* (lines 12, 13, 14)[9]. Instead, Plaintiff expressed a strong desire to teach upper level corporate classes, by listing financial institutions, insurance law, and business associations as subjects he would "most like to teach." *See id.* (line 12). In total, Plaintiff listed nine courses he would be interested in or willing to teach. *See id.* (line 12, 13, 14). MSU Law did not hire a candidate to teach *any* of those nine subjects. *See* Am. Compl. ¶¶ 69, 77, 86. MSU Law hired instructors to teach seven courses. *See id.* Plaintiff expressed no interest in teaching *any* of those seven subjects. *See* Ex. 1 (lines 12, 13, 14). The FAR form on its face demonstrates that the hiring needs of MSU Law did not match the subjects which Plaintiff, himself, indicated he was willing or able to teach. This alone should be determinative of the issue of qualification.

Thus, Plaintiff will *never* be able to establish a prima facie case of age discrimination because his submission to MSU Law did not demonstrate that he was qualified for the positions for which MSU Law hired. An applicant cannot be qualified for a job he has no interest in performing. Even if Plaintiff had provided MSU Law with a resume, he has not alleged if said resume outlined his specific teaching interests. Even if he had made such allegations, however, Plaintiff can never plead around the facts that the mandatory FAR form required Plaintiff to list his teaching interests, and the interests *he chose to express* did not correlate with the hiring needs of MSU Law.

The vast majority of the Amended Complaint must be disregarded as legal conclusions, unsupported inferences, or allegations about Plaintiff's qualifications that are irrelevant because Plaintiff has not alleged that they were presented to MSU Law at the time it made its employment decisions. Through his FAR form Plaintiff was given the opportunity to

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[9] Nor did Plaintiff take the opportunity to elaborate on his interests or qualifications in any of the "comments" fields on his FAR form, ***all of which he left blank***. *See id.* (lines 10, 12, 13, 14).

demonstrate that he was interested in and qualified to teach courses at MSU Law. When presented with this opportunity, ***Plaintiff expressed no interest in teaching the subjects for which MSU Law sought professors***. No amount of discovery will change this fact. Thus, Plaintiff's Amended Complaint fails to state a plausible claim of age discrimination. Given Plaintiff's total lack of interest in the jobs that MSU Law filled, it is not plausible, given the few relevant factual allegations in the Amended Complaint and Plaintiff's FAR form, that MSU Law's decision not to offer Plaintiff an interview was due to age discrimination. MSU Law's actions are not only compatible with, but indeed much more likely explained by, a completely lawful decision to hire the candidates both interested in and qualified for the available positions. As such, Plaintiff's Amended Complaint "stops short of the line between possibility and plausibility of entitlement to relief," *Twombly*, 550 U.S. at 557, and should be dismissed, especially considering that his lack of qualifications means that he will never be able to establish a prima facie case. *See Rochon*, 319 F. Supp. 2d at 29 (granting motion to dismiss after evaluating plaintiff's claims in light of the prima facie framework and determining that plaintiff would never be able to establish a prima facie case of retaliatory discrimination).

C. Plaintiff's Claims for "Other Compensatory" and Exemplary Damages Must Be Dismissed as Improper Forms of Relief Under the ADEA

In its motion to dismiss the original complaint MSU Law showed that "[t]he overwhelming weight of legal authority indicates that compensatory and punitive damages are not available under the ADEA," *Prouty v. Nat'l Railroad Passenger Corp.*, 572 F. Supp. 200, 208 (D.D.C. 1983), and that the Supreme Court has stated that "the Courts of appeals have unanimously held . . . that the ADEA does not permit . . . recovery of compensatory damages for pain and suffering or emotional distress." *Comm'r v. Schleier*, 515 U.S. 323, 326 (1995), *superseded by statute on other grounds as stated in Hennessey v. Comm'r*, T.C. Memo 2009-132

(Tax Ct. June 9, 2009). DE 7 at 18. Apparently heeding this authority and recognizing his error in requesting this type of relief, Plaintiff removed his requests for emotional distress and punitive damages when he filed his Amended Complaint. Yet, Plaintiff continues his improper request for inappropriate remedies. He now requests "other compensatory" instead of "emotional distress" damages, and "exemplary" instead of "punitive" damages. *See* Am. Compl., Prayer for Relief, D and E. Such semantic changes, however, do not transform his demands into appropriate categories of relief under the ADEA.

Section 626(b) of the ADEA specifies the remedies available to plaintiffs alleging ADEA violations. These include equitable relief, including compelled employment, and liquidated damages in cases of willful violations. 29 U.S.C. § 626(b). The statute does not provide for compensatory or exemplary damages. *See id.* '"Thus, the text of the ADEA explicitly provides for . . . liquidated damages but not compensatory and punitive[10] damages.'" *Lindsey v. Dist. of Columbia*, 2011 U.S. Dist. LEXIS 103492 at * 30 (D.D.C. Sept. 14, 2011) (noting that compensatory and punitive damages are unavailable under the ADEA, and granting summary judgment to defendant on demand for compensatory damages after plaintiff voluntarily withdrew demand for punitive damages) (quoting *Vanegas v. P&R Enterprises, Inc.*, 2002 U.S. Dist. LEXIS 21781 (D.D.C. Oct. 9, 2002)).

Additionally, courts have explicitly held that compensatory and exemplary damages are not available remedies under the ADEA. *See Carter v. Marshall*, 457 F. Supp. 38, 42 (D.D.C. 1978) (holding that "**exemplary**, punitive, **and compensatory** damages are not recoverable under the ADEA" and dismissing plaintiff's claims for such damages) (emphasis added) (cited in MSU Law's motion to dismiss original complaint, DE 7 at 19); *see also Looney v. Commercial*

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[10] "The terms 'punitive damages' and 'exemplary damages' generally have the same meaning." 22 Am. Jur. 2d *Damages* § 539 (2003) (citing cases).

Union Assurance Cos., 428 F. Supp. 533, 536 (E.D. Mich. 1977) (concluding that exemplary and compensatory damages are not available under the ADEA, noting that "the availability of exemplary or punitive damages has been foreclosed by 29 U.S.C. § 626(b)," which provides for liquidated damages, and granting defendant's motion to strike plaintiff's prayer for compensatory and exemplary damages). Whether Plaintiff elects to use the words "other compensatory" or "emotional distress," and "exemplary" or "punitive," therefore, the ADEA does not recognize a right to those remedies.

Plaintiff should have been aware of this before filing his original complaint. He definitely was aware before filing the Amended Complaint, after having been informed by MSU Law's motion to dismiss the original complaint. Plaintiff's continued requests for improper remedies are inappropriate. Given that Plaintiff holds himself out as an experienced practitioner who once served as a state attorney general, these continued requests also suggest bad faith. They must be dismissed.

IV. IN THE ALTERNATIVE, THE CLAIM AGAINST MSU LAW SHOULD BE SEVERED AND TRANSFERRED

In the event the Court determines that Plaintiff's claim against MSU Law should not be dismissed, the claim against MSU Law should be severed and transferred to the Western District of Michigan. MSU Law's decision not to offer Plaintiff an interview was made in Michigan, by members of the MSU Law hiring committee, completely independent from the decisions made by the other law schools. As such, Plaintiff's claim against MSU Law arose from a different occurrence than his claims against the other law school and individual defendants, it involves particularized issues of law and fact, and therefore it has been misjoined. The claim against MSU Law should therefore be severed. Not only could the action against MSU Law have been

brought in the Western District of Michigan, the balance of convenience of the parties and witnesses and the interest of justice favor transfer to that forum.

A. Plaintiff's Claim Against MSU Law is Misjoined and Should be Severed

"'The Court may . . . sever any claim against a party' that is misjoined." *Abuhouran v. Nicklin*, 764 F. Supp. 2d 130, 132 (D.D.C. 2011) (quoting Fed. R. Civ. P. 21). A party is misjoined when the permissive joinder requirements of Federal Rule of Civil Procedure 20(a) are not met. *Montgomery v. STG Int'l, Inc.*, 532 F. Supp. 2d 29, 35 (D.D.C. 2008). "In order to permissively join defendants under Fed. R. Civ. P. 20(a), a complaint must satisfy both prongs of a two part test." *United States ex rel. Grynberg v. Alaska Pipeline Co.*, 1997 U.S. Dist. LEXIS 5221 *3 (D.D.C. Mar. 27, 1997). "First, the complaint must either assert joint and several liability or must allege that the case against each party arises out of 'the same transaction, occurrence, or series of transactions.'" *Id.* at *3-4 (quoting Fed. R. Civ. P. 20(a)). "Second, there must be questions of law or fact that are common to each party." *Id.* at *4.

Where, as here, the plaintiff has not alleged joint and several liability, he must "show that the cases against the joined defendants arise from the same transaction or series of transactions." *Id.* To satisfy this burden, "the claims must be logically related." *Disparte v. Corporate Exec. Bd.*, 223 F.R.D. 7, 10 (D.D.C. 2004). It is not sufficient, however, to allege merely that the defendants each committed the same violation, without alleging some sort of connection between the defendants. "***Plaintiff cannot join defendants who simply engaged in similar types of behavior, but who are otherwise unrelated; some allegation of concerted action between defendants is required***." *Grynberg*, 1997 U.S. Dist. LEXIS 5221 at*4 (emphasis added); *see also Davidson v. Dist. of Columbia*, 736 F. Supp. 2d 115, 121 (D.D.C. 2010) (claims did not arise out of "same transaction or occurrence" – were not "logically related" – because "[b]eyond

the fact that the claims all arise under the [Act], the plaintiffs have offered nothing to suggest that the claims are logically related in any way."); *Wilson v. ABN AMRO Mort. Group*, 2005 U.S. Dist. LEXIS 38271, *12 (D.D.C. Dec. 21, 2005) ("Under Rule 20 . . . it is not enough that defendants share some general connection to the plaintiff, such as having allegedly caused the plaintiff similar harm or having interacted with plaintiff around the same period of time; there must a right to relief asserted against them jointly, severally, or in the alternative.") (internal quotation omitted).

Regarding the second prong, alleging claims against defendants based on the same general theory of law "is not a sufficient ground to find that their claims raise common legal or factual questions." *Wynn v. NBC, Inc.*, 234 F. Supp. 2d 1067, 1081 (C.D. Cal. 2002). In making the "common question of law or fact" determination in employment discrimination cases, "courts often consider the circumstances surrounding the plaintiffs' claims, including the people involved, the location, the time frame, and the defendant's pattern of behavior." *Montgomery v. STG Int'l, Inc.*, 532 F. Supp. 2d 29, 35 (D.D.C. 2008).

Finally, '"the court should consider whether an order under Rule 21 would prejudice any party, or would result in undue delay.'" *M.K. v. Tenet*, 216 F.R.D. 133, 138 (D.D.C. 2002) (quoting *Mosley v. Gen Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)); *see also Brereton v. Commc'ns Satellite Corp.*, 116 F.R.D. 162, 163 (D.D.C. 1987) (stating that Rule 21 must be read in conjunction with Rule 42(b), which allows the court to sever claims in order to avoid prejudice to any party). "The court may also consider whether severance will result in less jury confusion." *M.K.*, 216 F.R.D. at 138.

Plaintiff's claims fail to establish either prong of Rule 20(a)'s test: they do not arise from the same transaction or occurrence, nor do they raise a common question of fact or law, both of

which are required for permissive joinder. Plaintiff has not alleged that the defendant law schools are joint and severally liable. Nor has he alleged that they conspired to discriminate against him. Nor has he even alleged that the law schools were operating according to an industry-wide pattern and practice, or that there was any type of concerted action between defendants. Plaintiff has merely made independent allegations against the various law schools based on the same general legal theory. Many courts have found such allegations insufficient to meet the "same transaction or occurrence" prong of Rule 20(a). *See, e.g.*, *Nassau County Assoc. of Ins. Agents, Inc. v. Aetna Life & Casualty Co.*, 497 F.2d 1151 (2d Cir. 1974) (finding misjoinder based on the first prong of Rule 20(a) where there was "[n]o allegation of conspiracy or other concert of action" and no allegation of any "connection at all between the practices engaged in" by each of the defendants); *Wynn*, 234 F. Supp. 2d 1067 (finding that joinder of multiple employers in ADEA case was improper under first prong of Rule 20(a), even though plaintiffs had alleged an industry-wide pattern and practice of age discrimination, where the defendants were "separate entities, each with distinct hiring and firing practices," and there were "no allegations of an actual concert of action among all of the Defendants to unite in a discriminatory hiring scheme."); *Androphy v. Smith & Nephew, Inc.*, 31 F. Supp. 2d 620 (N.D. Ill. 1998) (granting motion to sever based on "same transaction or occurrence" prong in patent infringement case in which plaintiff alleged both defendants infringed the same patents, because the two defendants were "separate companies that independently design, manufacture and sell different products in competition with each other"); *Tele-Media Co. of Western Conn. v. Antidormi*, 179 F.R.D. 75 (D. Conn. 1998) (finding misjoinder of defendants and noting that "[i]n the absence of any claim that the defendants conspired or acted jointly, the same transaction requirement of Rule 20, even when read as broadly as possible, is plainly not satisfied."); *Movie*

Systems, Inc. v. Abel, 99 F.R.D. 129 (D. Minn. 1983) (finding misjoinder of defendants "in contravention of the 'same transaction' requirement of Rule 20(a)" where plaintiff-television distributor joined approximately 100 defendants, alleging that they all pirated plaintiff's microwave signals. This requirement was not satisfied because there was "no claim that the alleged [violation] was done other than independently" by each of the defendants, whereas "[a]n allegation of joint action is required."); *Kenvin v. Newburger, Loeb & Co.*, 37 F.R.D. 473 (S.D.N.Y. 1965) (granting motion to sever based on misjoinder of defendants for failure to meet first prong of Rule 20(a) where the plaintiff "alleged against each of the four defendants distinct and unrelated acts which happen to involve violations of the same statutory duty.").

The only connection between the defendants that Plaintiff could proffer is their participation in AALS' recruiting conference, but this is insufficient to establish the "same transaction or occurrence" prong. *See Wynn*, 234 F. Supp. 2d at 1078 (allegation that defendants "are members of a common industry is not sufficient to satisfy the requirement that the right to relief against all Defendants arises out of the same transaction or occurrence."); *Grynberg*, 1997 U.S. Dist. LEXIS 5221 at*6 ("Defendants' status . . . as members of a single trade association is not sufficient to establish the level of concert required by Rule 20(a)."). All Plaintiff has pled is that the law school defendants (except for the University of Missouri) each made a decision not to offer him an interview during the same hiring cycle. While it may be true that the Amended Complaint "assert[s] a right to relief against all defendants arising from *similar* transactions," the rule "requires that such arise from the *same* transactions." *Movie Systems, Inc.*, 99 F.R.D. at 130 (original emphasis). The defendants have therefore been misjoined, because Plaintiff has neither alleged joint and several liability nor any connection whatsoever between the defendants.

Further, Plaintiff cannot establish that his claims against the defendants involve common questions of law or fact. Though he alleges an age discrimination claim against each defendant, he has not alleged a common policy amongst the law schools or that their actions were in any way coordinated or related as to him. Therefore, whether each school discriminated against him will be an individualized determination based on the particular facts of each law school's hiring process. The claim against each school is based on hiring decisions that involve different personnel, different locations, different positions, and different time frames. Alleging a claim based on the same general theory of law is insufficient to satisfy the "common question of law or fact" prong. *See Wynn*, 234 F. Supp. 2d at 1081 (no common question of law or fact among defendants despite alleged claim against defendants "based on the same general theory of law" because no evidence of industry-wide policy); *Grayson v. K Mart Corp.*, 849 F. Supp. 785, 789 (N.D. Ga. 1994) (no common question of law or fact between plaintiffs' claims even though all plaintiffs "alleged against defendant claims based upon the same general theories of law" because each decision was a discrete act by the defendant).

Even if the Court were to find that both requirements for permissive joinder were met, severance should still be granted to prevent the unfair prejudice to MSU Law that could result if all of Plaintiff's claims were litigated in one suit. As currently configured, there is a substantial risk in this case that one law school could be tainted by the alleged misconduct of another, unfairly resulting in guilt by association. *See, Wynn*, 234 F. Supp. 2d at 1089. The risk of unfair prejudice is especially great when "a decision by one company might taint the jury's view of another decision made by a different company." *Id.* Here MSU Law could potentially be prejudiced by evidence regarding the individual hiring practices of other law schools, about which it has absolutely no input, association, or responsibility.

Severance is appropriate if: (1) Plaintiff's claims against the defendants do not arise from the same transaction or occurrence; ***or*** (2) Plaintiff's claims against the defendants do not involve a common question of law or fact; ***or*** (3) unfair prejudice could result from the parties being joined. Here, all three weigh heavily in favor of severance. Plaintiff has made no allegations about the law schools conspiring to discriminate against him or acting pursuant to an industry-wide pattern or practice. All he has alleged is that they each independently declined to offer him an interview and/or a teaching position. The only common thread is the legal claim that Plaintiff asserts, which is insufficient under both prongs of the permissive joinder rule. As such, it would be unfairly prejudicial to try the claims together and risk confusing a jury about which individual acts and decisions are attributable to each individual defendant.

B. The Claim Against MSU Law Should be Transferred to the Western District of Michigan

Once the claim against MSU Law has been severed, the resulting case should be transferred to the Western District of Michigan. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). In a suit brought under federal question jurisdiction, venue is proper in any district in which "any defendant resides" or "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b).

Once this threshold inquiry is met, courts have broad discretion "to adjudicate motions to transfer according to individualized, case-by-case consideration of convenience and fairness." *Ysleta del Sur Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 39 (D.D.C. 2010) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). In exercising that discretion courts weigh several private and public factors. The private factors include: (1) plaintiff's

privilege of choosing the forum; (2) defendant's preferred forum; (3) location where the claim arose; (4) convenience of the parties; (5) convenience of witnesses, to the extent that witnesses may be unavailable for trial in one of the fora; and (6) ease of access to sources of proof. *Ysleta del Sur Pueblo*, 731 F. Supp. 2d at 39 (citing *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, 3 (D.D.C. 2006)). The public factors include: (1) the transferee's familiarity with the governing law; (2) the relative congestion of the courts of the transferor and potential transferee districts; and (3) the local interest in deciding local controversies at home. *Id.* (citing *Onyeneho*, 466 F. Supp. 2d at 3).

1. Venue is Proper in the Western District of Michigan

There are two bases upon which to conclude that venue is proper in the Western District of Michigan. The action against MSU Law "might have been brought" in the Western District of Michigan, both because that is where "Defendant resides[11]" and because the "events or omissions" giving rise to the instant claim occurred in Michigan. *See* 28 U.S.C. § 1391(b). The decision about which candidates to interview at the Faculty Recruitment Conference ("FRC") was made in Michigan by the MSU Law Faculty Appointments Committee ("Committee"), a committee that, in 2010, was comprised of seven individuals who were members of the MSU Law faculty and administration. Declaration of Kathleen Payne (November 18, 2011), attached hereto as Ex. 2, at ¶¶ 4, 9. The Committee received from the AALS four distributions of Faculty

[11] A corporate defendant is considered a resident in a judicial district in which it is subject to personal jurisdiction. 28 U.S.C. § 1391(c). "A federal district court can exercise personal jurisdiction over a defendant [who] . . . would be subject to the jurisdiction of a court of general jurisdiction in that state." *Intrepid Potash-New Mexico, LLC v. United States DOI*, 669 F. Supp. 2d 88, 93 (D.D.C. 2009) (citing Fed. R. Civ. P. 4(k)(1)(A)). A corporation that carries on a continuous and systematic part of its general business within the state of Michigan is subject to general personal jurisdiction in Michigan. Mich. Comp. Laws § 600.711(3). Because MSU Law is located, and conducts its business, in East Lansing, Michigan (located in the Western District of Michigan), the Western District of Michigan has personal jurisdiction over MSU Law, thus making MSU Law a "resident" of the Western District of Michigan. *See also Montgomery v. STG Int'l, Inc.*, 532 F. Supp. 2d 29, 32 (D.D.C. 2008) (finding that action against corporation "could have been brought in transferee district" because the defendant was headquartered in that district and many of the alleged events complained of occurred in or involved employees in the transferee district).

Appointments Register ("FAR") forms[12], and was charged with reviewing the distributions. Ex. 2 at ¶¶ 8, 9. The decision about which candidates to whom MSU Law faculty positions should be offered was also made in Michigan by the Committee members. *Id.* at ¶ 11.

2. Considerations of Convenience and the Interests of Justice Favor Transfer

Private and public interest considerations weigh heavily in favor of transfer to the Western District of Michigan. Given the District of Columbia's lack of relation to the claim, Plaintiff's choice of forum should be given little deference, especially considering that the events giving rise to the claim occurred in Michigan, the vast majority of potential witnesses are located in Michigan, and MSU Law is located in Michigan (while neither party resides in the District of Columbia). Further, Western District of Michigan courts are equally qualified to hear the case, are less congested, and serve a public that is more interested in the events at issue than do the District of Columbia courts.

a. Private interest considerations weigh in favor of transfer

Plaintiff's choice of forum should be given little deference in this case because Plaintiff is not a resident of the District of Columbia, and most of the events relevant to the lawsuit against MSU Law occurred outside of the District of Columbia (and in the Western District of Michigan). "While a plaintiff's choice of forum is typically accorded substantial deference, such deference is weakened when a plaintiff chooses a forum other than his home forum, or when most of the relevant events occurred elsewhere." *Chauhan v. Napolitano*, 746 F. Supp. 2d 99, 103 (D.D.C. 2010). Further, "[t]he fact that plaintiff['s] counsel is in the District of Columbia is of little significance." *Kazenercom Too v. Turan Petroleum, Inc.*, 590 F. Supp. 2d 153, 163 (D.D.C. 2008) (citing *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 52 n.7 (D.D.C. 2000)); *see*

[12] Ex. 1 is a true and accurate copy of Plaintiff's FAR form as it was received from the AALS during the 2010-2011 faculty hiring process. Ex. 2 at ¶ 18.

also McClamrock v. Eli Lilly & Co., 267 F. Supp. 2d 33, 40-41 (D.D.C. 2003) ("The location of counsel carries little, if any weight, in an analysis under § 1404(a)") (citing *Armco Steel Co. v. CSX Corp.*, 790 F. Supp. 311, 324 (D.D.C. 1991)).

Conversely, MSU Law's choice of forum, the Western District of Michigan, has many ties to this litigation. It is the location where the claim arose, the location of most of the witnesses, and the location of most of the evidence. *See Schmidt v. Am. Inst. of Physics*, 322 F. Supp. 2d 28, 34 (D.D.C. 2004) ("[T]he fact that relevant documents, witnesses and [defendant]'s corporate offices are in [the transferee district] supports [the defendant]'s choice of forum."). Plaintiff's lawsuit against MSU Law arises out of MSU Law's decision not to offer him an interview. *See* Am. Compl. ¶ 1. All Committee meetings related to faculty hiring took place on the MSU Law campus in East Lansing, Michigan, including those in which the Committee decided to whom MSU Law would offer interview slots and to whom it should offer MSU Law faculty positions. Ex. 2 at ¶¶ 6, 9, 11.

Plaintiff was not offered an interview. *Id.* at ¶ 10. As the makers of the relevant decision, the Committee members are likely to be witnesses in this case. *See id.* at ¶¶ 7-11. As such, their convenience should be taken into consideration. "The most critical factor to examine under 28 U.S.C. § 1404(a) is the convenience of the witnesses, as well as the availability of compulsory process to compel the attendance of potential witnesses." *Vencor Nursing Ctrs., L.P. v. Shalala*, 63 F. Supp. 2d 1, 6 (D.D.C. 1999). The witnesses' convenience is properly considered, even if they could be made available to attend trial based on their relationship as employees of MSU Law. The transferee district "may be more convenient for witnesses even if the witnesses would not be unavailable to testify in the transferor district." *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 771 F. Supp. 2d 42, 49 (D.D.C. 2011). All of

these witnesses permanently reside in Michigan. Ex. 2 at ¶ 5. Committee members collectively are teaching fourteen courses during the 2011-2012 academic year. *Id.* at ¶ 12. It would be very inconvenient for these witnesses to have to travel more than 1,000 miles to the District of Columbia to testify, particularly because travel would likely result in class cancellations and rescheduling, which is very disruptive to the law students. *Id.* at ¶ 13. Cancelling classes negatively impacts the educational experience and the ability to adhere to the posted schedule for courses. *Id.* at ¶ 15. MSU Law does not employ a substitute faculty system, so all missed classes must be rescheduled during the semester by the faculty member assigned to teach the class. *Id.* at ¶ 14. Faculty members who cancel and reschedule classes historically receive lower marks on their student evaluations that the students attribute to the cancelling and rescheduling of classes. *Id.* at ¶ 16. Because the Committee includes the top two administrators at MSU Law, the Dean and Associate Dean for Academic Affairs, requiring Committee members to travel to the District of Columbia to testify would also constitute a disruption of MSU Law affairs. *Id.* at ¶ 17. Similarly, the sources of proof in this matter, documents related to the 2010-2011 faculty hiring process, are located at MSU Law in East Lansing, Michigan. *Id.* at ¶ 19.

The convenience of the parties factor also weighs in favor of transfer. A court may consider whether litigating in a particular forum would cause a party to suffer a hardship, such as from significant expense. *See Kotan v. Pizza Outlet, Inc.*, 400 F. Supp. 2d 44, 50 (D.D.C. 2005). Clearly MSU Law would incur significantly greater expenses if the action continues in the District of Columbia as opposed to being transferred to the Western District of Michigan. It likely would be required to expend significant funds in airfare and lodging for trial witnesses who live in Michigan but could be compelled to testify in the District of Columbia. Additionally, Plaintiff resides in Kansas City, Missouri. Am. Compl. ¶ 6. Plaintiff has selected

the District of Columbia as his forum, indicating that he does not consider litigating away from his home forum to be an undue burden. Transferring the case to the Western District of Michigan would actually move the litigation *closer* to Plaintiff (700 versus more than 1,000 miles to the District of Columbia), making the transfer more convenient for both parties. *See Westrick*, 771 F. Supp. 2d at 48 (convenience of the parties factor weighs in favor of transfer when transfer would not "merely shift inconvenience" to the plaintiff, but when it would "lead to an overall increase in convenience for the parties.").

That the center of gravity of Plaintiff's dispute with MSU Law is Michigan, rather than the District of Columbia, is reinforced by the Amended Complaint, which purports to join MSU Law Dean Howarth as a defendant, alleging that she had "final authority" as to the decision not to hire Plaintiff. Am. Compl. ¶ 263. Even if that allegation were accurate, and it is not, Plaintiff's own allegations show that Dean Howarth resides in Michigan, not D.C. *Id.* (caption).[13]

b. Public interest considerations weigh in favor of transfer

The public interest factors also strongly favor transfer to the Western District of Michigan. Courts in the Western District of Michigan are equally capable of adjudicating federal statutory claims, are less congested, and serve a public far more concerned with the hiring practices of a local Michigan law school, than the District of Columbia courts.

The first public interest factor is familiarity with the governing law. In the instant case, the governing law is the federal Age Discrimination in Employment Act. Therefore, the federal

[13] As of the filing of his motion, Dean Howarth had not been served with process or the Amended Complaint and therefore is not properly before the Court. At the appropriate time (if it comes), Dean Howarth intends to move to dismiss as to her and to sever and transfer the claim as to her (Count II of the Amended Complaint) to the Western District of Michigan. Nonetheless, if the Court agrees with MSU Law's motion to transfer and, if by the time the Court rules, Dean Howarth has not yet responded to the Amended Complaint, the Court should sever and transfer both Counts I and II of the Amended Complaint to the Western District of Michigan to permit that court to address all further motions as to Dean Howarth.

court for the Western District of Michigan is presumed to be as competent as the instant Court in deciding the claim. *See Miller v. Insulation Contractors, Inc.*, 608 F. Supp. 2d 97, 103 (D.D.C. 2009) ("all federal courts are presumed to be equally familiar with the law governing federal statutory claims.").

The second public interest factor, relative court congestion, weighs heavily in favor of transfer to the Western District of Michigan. It is appropriate "for the court to consider the relative docket congestion and potential speed of resolution by the transferor and transferee courts." *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 57 (D.D.C. 2000) (citing *SEC v. Savoy Indus.*, 190 U.S. App. D.C. 252, 587 F.2d 1149, 1156 (D.C. Cir. 1978)). Courts have evaluated relative docket congestion by comparing the median times from filing to disposition and from filing to trial in the courts at issue. *See, e.g., Parkridge 6, LLC v. United States DOT*, 772 F. Supp. 2d 5, 9 (D.D.C. 2009). According to the March 2011 Federal Court Management Statistics published by the Administrative Office of the United States Courts, the District of Columbia has a slightly longer median filing-to-disposition period than the Western District of Michigan (6.5 to 6.3 months, respectively), but an appreciably longer filing-to-trial period (40.1 months as to 29.6 months). *See Federal Court Management Statistics, District Courts 2011*, available at http://www.uscourts.gov/cgi-bin/cmsd2011Mar.pl (select respective districts from drop down list). Additionally, the District of Columbia has more than *eight times* as many civil cases over three (3) years old than does the Western District of Michigan (454 to 53, respectively). *Id.* Even accounting for the fact that the District of Columbia has a greater number of overall cases, the District of Columbia has a far greater *percentage* of civil cases that are older than 3 years (16.8%, compared to 3.6% for the Western District of Michigan). *Id.* The Court can take judicial notice of these statistics. *Signode v. Sigma Techs. Int'l, LLC*, No. 09 C

7860, 2010 U.S. Dist. LEXIS 27828 at *18 n.1 (N.D. Ill. Mar. 24, 2010). Further, "[s]ince this case is in its earliest stages, there would be no delay associated with the [Michigan] district court's having to familiarize itself with this case." *Trout Unlimited v. United States Dep't of Agric.*, 944 F. Supp. 13, 19, (D.D.C. 1996).

Finally, "[t]here is a local interest in having localized controversies decided at home." *Ysleta del Sur Pueblo*, 731 F. Supp. 2d at 41 (D.D.C. 2010) (quoting *Gulf Oil Corp. v. Gilbert*, 301 U.S. 501, 509 (1947), *superseded by statute on other grounds*, 28 U.S. C. § 1404(a), *as recognized in Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994)). "[T]he fact that plaintiff's cause of action arises under federal law does not mean that the subject of his lawsuit does not present an issue of local controversy." *Bergmann v. U.S. Dep't of Transp.*, 710 F. Supp. 2d 65, 75 (D.D.C. 2010). MSU Law's hiring practices are of greater interest in the Western District of Michigan than in the District of Columbia, "as the parties and material events that make up the claims' factual predicate are more connected to" that district. *See Milanes v. Holder*, 264 F.R.D. 1, 6 (D.D.C. 2009) (internal quotation omitted). As such, the private and the public interest factors weigh in favor of transfer to the Western District of Michigan.

V. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that its motion be granted, and the claim against MSU Law be dismissed, or, in the alternative, that the case against MSU Law be severed from the other claims and be transferred to the Western District of Michigan, Southern Division.

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Respectfully submitted,

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