

CASE NO. CIV-15-324-C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,

Defendants.

REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S MOTION
TO COMPEL DISCOVERY RESPONSES AND BRIEF IN SUPPORT

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**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

Case No. CIV-15-324-C

SOUTHEASTERN OKLAHOMA STATE
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM
OF OKLAHOMA,

Defendants.

**REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S MOTION
TO COMPEL DISCOVERY RESPONSES AND BRIEF IN SUPPORT**

Defendant Regional University System of Oklahoma (hereinafter "RUSO"), by and through its attorneys of record and pursuant to Fed. R. Civ. P. 37(a)(3)(B), submits its Motion to Compel Discovery Responses. In support hereof, Defendant shows the Court as follows:

BACKGROUND

Rachel Tudor failed to take advantage of the academic and professional opportunities offered to her by the University Defendants in her pursuit of a tenured position at Southeastern Oklahoma State University (hereinafter "SEOSU"). Instead, Tudor ignored the academic and professional advice she received from University leadership, pushed forward with a premature application for tenure, and ultimately failed to attain tenure as a result. Rather than taking responsibility for her cavalier approach to an important and detail-

oriented process, Tudor filed grievances and complaints alleging that she was denied tenure due to the fact that she is male-to-female transgender. Now the Defendants are called upon to defend claims instigated by a disgruntled former employee. Complicating this task, however, is Plaintiff's refusal to respond to valid discovery requests.

COMPLIANCE WITH LCvR 37.1

On September 4, 2015, Defendant RUSO served upon Plaintiff, United States of America, its first set of written discovery requests. Plaintiff's responses were submitted on or about October 21, 2015. Exhibit 1. On January 5, 2016, undersigned counsel sent written correspondence to Plaintiff's counsel detailing numerous deficiencies in the discovery responses. Exhibit 2. Defendant specifically asked Plaintiff to better articulate its numerous claims of privilege, identify what documents were responsive to each request for production, and provide an adequate privilege log. Defendant also requested Plaintiff to supplement certain discovery responses with complete answers. *Id.*

On January 28, 2016, Plaintiff submitted a letter in response, suggesting in part that its discovery responses were sufficient and requesting a telephone conference to discuss any remaining issues. Exhibit 3. On February 2, 2016, the parties conferred by phone and Plaintiff agreed to consider supplementing its discovery requests and privilege log. Exhibit 4. On March 4, 2016, Plaintiff submitted supplemental responses to Defendant's discovery requests. Exhibit 5. *See also* accompanying correspondence at Exhibit 6. However, Plaintiff's discovery responses still fail to comply with the Federal Rules of Civil Procedure governing disclosures and discovery.

ARGUMENT AND AUTHORITY

Rule 37(a) provides that a party may move for an order compelling disclosure or discovery after the party has conferred or made a good faith effort to confer with the non-disclosing party. Fed. R. Civ. P. 37(a). This Rule applies where a party has not disclosed any information, or has disclosed evasive or incomplete answers. *Id.*

“[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). In employment cases, the need for broad discovery is crucial. In fact, the Tenth Circuit has stated that “discovery in [employment] discrimination claims should not be narrowly circumscribed.” *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995) (citation omitted). Broad discovery is necessary in employment cases because “the testimony of other employees about their treatment by the defendant is relevant to the issue of the employers discriminatory intent.” *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990). While the Court may be cognizant of a plaintiff’s concerns that the discovery requests are invasive, embarrassing or of a sensitive nature, discovery plays a significant role in the adversarial system and interference with a defense strategy is not contemplated by the Federal Rules of Civil Procedures. *F.D.I.C. v. Daily*, 973 F.2d 1525, 1530 (10th Cir. 1992).

Interrogatories should be answered directly and without evasion. 8B Wright, Miller & Marcus, Federal Practice and Procedure § 2177. “[T]he longstanding judicial inclination has been that discovery should be allowed unless the court is satisfied that the administration of justice will be impeded...The burden is therefore upon a party objecting to interrogatories ... to show why discovery should not be permitted.” 8B Wright, Miller & Marcus, Federal

Practice and Procedure § 2176. Requests for Production of documents are “designed to permit the broadest sweep of access, inspection, examining, testing, sampling, copying, and photographing of documents, electronically stored information, or objects in the possession or control of another party.” 8B Wright, Miller & Marcus, Federal Practice and Procedure § 2206. “The purpose of Rule 34 is to make relevant and nonprivileged documents and objects in the possession of one party available to the other.” *Id.* at § 2202.

PROPOSITION I. PLAINTIFF’S CLAIMS OF PRIVILEGE MUST FAIL.

In *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984), the Tenth Circuit held as follows:

A party seeking to assert [attorney-client] privilege must make a clear showing that it applies. Failure to do so is not excused because the document is later shown to be one which would have been privileged if a timely showing had been made. Even though it does not seem seriously disputed that the privilege would have attached if the objection had been timely and adequately asserted, that such a showing had not been made when the trial court was called upon to make its ruling defeats the privilege. It is not enough that a document would have been privileged if an adequate and timely showing had been made. The applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document.

See also King v. Glanz, 2013 WL 6627979, at *1 (N.D. Okla. Dec. 16, 2013) (“To qualify for protection under the privilege, the party seeking to invoke the privilege bears the burden of proving” its applicability.)

In this action, Plaintiff has asserted a variety of privileges in response to Defendant’s Interrogatories and Requests for Production. Specifically, Plaintiff claimed Interrogatories 4, 18 and 20 solicited privileged information. Those discovery requests sought the following: (Interrogatory 4) identities of any individuals who told Plaintiff they witnessed discrimination or harassment directed at Intervenor; (Interrogatory 18) the identities of

individuals with whom Plaintiff consulted in forming its opinion that Intervenor should have been awarded tenure; and (Interrogatory 20) the identities of all witnesses Plaintiff intends to call to testify on its behalf in this action. Plaintiff also claimed the responses to Requests for Production (RFP) Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15a, 16, 17, 18, 19, 21, 25, 26, 27, 30 and 31 were privileged. Those requests sought the following: (RFP 1) documents, recordings or transcripts that served as the basis of Plaintiff's contention that Intervenor is male-to-female transgender; (RFP 2) reports or records relating to this case produced by potential witnesses; (RFP 3) copies of all factual and opinion reports, records or statements regarding the events in this lawsuit; (RFP 4) copies of statements made by Defendants' agents or employees regarding Intervenor or the matters at issue in this action; (RFP 5) copies of all records relating to any criminal history, activity and/or background checks regarding Intervenor; (RFP 6) copies of all statements and media posts regarding or created by Intervenor; (RFP 8) documents evidencing complaints made by Intervenor; (RFP 9) documents evidencing admissions by Defendants' agents or employees of discrimination or harassment; (RFP 10) documents identifying persons who told Plaintiff that he or she personally witnessed discrimination or harassment directed at Intervenor; (RFP 11) documents identifying individuals who were permitted to reapply for tenure after denial; (RFP 12) documents demonstrating that Intervenor's qualifications were comparable if not superior to three similarly situated non-transgender individuals who applied for and received tenure; (RFP 13) all documents or records supporting Plaintiff's contention that Intervenor is male-to-female transgender; (RFP 14) documents supporting Plaintiff's denial of Request for Admission No. 1, which asked that Plaintiff admit that it had no evidence to support its

claims that Intervenor's rights were violated by Defendants, its agents or employees; (RFP 15a) copies of all notes, transcripts and recordings of interviews conducted by United States officials in the investigation of Intervenor's claims against Defendants; (RFP 16) a copy of the Plaintiff's entire investigation file regarding EEOC Charge No. 564-2011-00849; (RFP 17) a copy of the United States Department of Justice – Civil Right's Division's investigation file regarding EEOC Charge No. 564-2011-00849; (RFP 18) copies of statements relating to Intervenor's claims given by specified individuals; (RFP 19) copies of all non-privileged documents sent to or from EEOC relating to its investigation of Intervenor's charge of discrimination against Defendants; (RFP 21) copies of all non-privileged documents sent to or from the Department of Education relating to Intervenor's charge of discrimination against Defendants; (RFP 25) copies of all correspondence between Intervenor and Dr. Lisa Coleman; (RFP 26) copies of all correspondence between Defendants and Intervenor regarding Intervenor's application for tenure and promotion during the 2009-2010 academic year; (RFP 27) copies of all correspondence between Defendants and Intervenor regarding Intervenor's application for tenure and promotion during the 2010-2011 academic year; (RFP 30) copies of all documents used by Plaintiff to calculate damages; and (RFP 31) copies of all documents showing attorney fees, court costs, litigation and related fees incurred by Plaintiff in this litigation.

For reasons more fully described below, Plaintiff should be required to respond in full to these discovery requests as it has wholly failed to meet its burden of establishing the applicability of any privilege.

A. Work-Product Doctrine

“At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he[/she] can analyze and prepare his[/her] client’s case.” *United States v. Nobles*, 422 U.S. 225, 238 (1975). However, see *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir.1995) (“Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product.”). The party asserting work-product protection bears the burden of establishing its applicability. *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir.1984). Specifically, a party that withholds otherwise discoverable information claiming work-product protection must: “(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5). However, a requesting party can still obtain discovery of information otherwise protected by the work-product doctrine if it has a substantial need of the material or information for preparation of its case. Fed. R. Civ. P. 26(b)(3).

Plaintiff claimed the work-product doctrine applied to Interrogatories 4, 18 and 20 and Requests for Production 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15a, 16, 17, 18, 25, 26, 27, 30 and 31. However, none of these requests sought divulgence of attorney’s strategies or legal impressions. See *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006) (“[W]ork product protection only applies to attorneys’ or legal representatives’ mental impressions, conclusions, opinions, or legal theories authored in anticipation of

litigation.”) To the contrary, the discovery requests sought production of factual information and Plaintiff has failed to meet its burden demonstrating otherwise.

B. Attorney-Client Privilege

State law controls the application of the attorney-client privilege in this case. *See* Fed. R. Evid. 501. *See also Frontier Ref., Inc. v. Gorman–Rupp Co., Inc.*, 136 F.3d 695, 699 (10th Cir.1998). Under Oklahoma law, attorney-client privilege protects confidential communications between an attorney and a client “who consults [the] attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney.”

OKLA. STAT. tit. 12 § 2502(A) and (B). Moreover,

“[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”

Upjohn Co. v. United States, 449 U.S. 383, 395–96 (1981) (citation omitted).

Communications not made in furtherance of professional services are not privileged. *Self & Associates, Inc. v. Jackson*, 2011 OK CIV APP 126, 269 P.3d 30, 31. As a general rule, attorney billing information reflecting the fees, the general nature of the services performed, and the case on which the services were performed is not privileged. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (matters relating to receipt of fees from a client are not usually privileged); *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129–30 (9th Cir. 1992). However, where such documents include confidential communications, such as litigation strategy or details of research, they may be deemed privileged. *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir.1990).

To establish the “common interest rule”, the claimant must demonstrate (1) that the requested documents were made in the course of a joint-defense or prosecution effort and (2) that they were designed to further that effort. *In re Qwest Commc'ns. Int'l. Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006); *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1142-43 (10th Cir. 1998). However, the “common interest rule is not really a separate privilege. Rather, it is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship.” *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, No. 00CIV.4763(RMB)(JCF), 2002 WL 31296430, at *3 (S.D.N.Y. Oct. 11, 2002) (citation omitted).

Plaintiff stated that the attorney-client privilege applied to Interrogatories 4, 18 and 20. Plaintiff also invoked attorney-client privilege in response to Requests for Production 1, 2, 3, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 25, 26, 27 and 30. However, none of the afore-mentioned requests contemplates disclosure of confidential communications between an attorney and a client. Specifically, attorney-client privilege does not extend to the facts or communications between third-parties and an attorney. *In re Grand Jury Proceedings*, 616 F.3d 1172 (10th Cir. 2010). The party seeking to invoke the attorney-client privilege has the burden of establishing its applicability. *See Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir.1995). To satisfy this burden, it is insufficient merely to contend that documents or information are privileged. That is precisely what Plaintiff has done, and its claim of privilege must accordingly fail.

C. Deliberative Process Privilege

The deliberative process privilege may apply to disclosure of communications or other “material reflecting deliberative or policy-making processes....” *EPA v. Mink*, 410 U.S. 73, 89 (1973). Specifically, “deliberative process privilege protects communications that are part of the decision-making process of a governmental agency.” *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). For the deliberative process to apply, a document or information must be both predecisional and deliberative. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1227 (10th Cir. 2007). “[P]redecisional memoranda prepared in order to assist an agency decision maker in arriving at his decision ... are exempt from disclosure, and post decisional memoranda setting forth the reasons for an agency decision already made ... are not.” *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975). As to the second element, the Court must distinguish between “deliberative” and “factual” material. The deliberative process privilege does not protect discovery of documents and information “consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context.” *EPA v. Mink*, 410 U.S. at 87-88. Specifically, the privilege “does not justify the withholding of purely factual material, nor of documents reflecting an agency’s final policy decisions” *Enviro Tech Int’l, Inc. v. U.S. E.P.A.*, 371 F.3d 370, 374–75 (7th Cir. 2004).

Plaintiff claims deliberative process privilege in its responses to Interrogatories 4, 18 and 20. Plaintiff also invoked deliberative process privilege in response to Requests for Production 1, 3, 8, 9, 10, 11, 12, 14, 15a, 16, 17, 25, 26, 27 and 30. However, these discovery requests sought the identities of witnesses, statements of witnesses, copies of investigatory

files, copies of medical records, evidence of complaints, evidence of Intervenor's qualifications, copies of correspondence, etc. Thus, all of the requested discovery pertained to factual as opposed to deliberative information and records. Furthermore, if any of the information requested may be characterized as pre-decisional, it cannot be said to have been prepared specifically to assist the Plaintiff at arriving at any particular decision, and therefore, it is not deliberative.

However, if the Court is inclined to find that the requested discovery is protected by the deliberative process privilege, Plaintiff should still be required to respond to the discovery requests as the Plaintiff's interest in maintaining the privilege is outweighed by Defendant's need to access the information to pursue its defense. In *Ctr. for Biological Diversity v. Norton*, 336 F. Supp. 2d 1155 (D.N.M. 2004), the district court considered the following factors when weighing the need for disclosure vs. the need preserve privilege:

- (1) relevance of the evidence;
- (2) availability of other evidence;
- (3) Government's role in the litigation; and
- (4) extent to which disclosure would hinder frank and independent discussion regarding contemplative policies and decisions.

Id. at 1161.

Clearly, all of the information requested is relevant to the claims asserted in the above-styled action and the availability of alternative sources of the information are non-existent. Furthermore, because the government is a party to this litigation, if it is allowed to use the deliberative process privilege without limitation, the Defendants' discovery efforts may be unfairly thwarted at every turn. Finally, disclosure of the information requested in discovery would not hamper the way the government makes future decisions regarding pursuing claims such as the instant action, and Plaintiff cannot prove otherwise. This Court

should therefore find the deliberative process privilege inapplicable to the discovery responses at issue.

D. Plaintiff's Privilege Log

If a party withholds a document as privileged, the party must expressly assert the privilege and, in doing so, describe the “nature of the documents, communications, or tangible things not produced or disclosed” Fed. R. Civ. P. 26(b)(5)(A). Production of a sufficiently detailed privilege log satisfies this requirement if it identifies each document for which the defendant asserts a privilege. *United Food v. Chesapeake Energy Corp.*, No. 09–1114, 2012 WL 2370637, at *8 (W.D.Okla. Jun. 22, 2012). *See also In re Application of Michael Wilson & Partners*, No. 06–02575, 2009 WL 1193874, at *6 (D.Colo. Apr. 30, 2009) (“In the typical case, a Rule 26(b)(5) privilege log will individually list withheld documents and provide pertinent information for each document.”). The purpose of the privilege log is to allow the requesting party to assess the validity of the claim to privilege. The party asserting the privilege must establish that the privilege applies to avoid production of the records. *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1276 n. 6 (10th Cir.1998).

Plaintiff's privilege log crudely describes discovery it deems protected, but it fails to match the privileged documents or information to any particular discovery request, as required. Exhibit 7. Furthermore, each “entry” on the log consists of unidentified documents with generic labels, such as “emails, memoranda and invoices.” This clearly runs afoul of the requirement that a privilege log be sufficiently detailed with individual documents listed therein. Because Plaintiff's privilege log is inadequate, so are its claims of

privilege. Plaintiff should therefore be ordered to respond to all discovery requests upon which it claimed privilege.

PROPOSITION II. THE COURT SHOULD COMPEL PLAINTIFF TO RESPOND TO DEFENDANT'S DISCOVERY REQUEST FOR MEDICAL RECORDS AND INFORMATION.

Discovery of medical records is governed by Fed. R. Civ. P. 26(b) and (c) concerning relevancy and protection from annoyance, embarrassment, oppression, or undue burden. The threshold requirement of discoverability under the Federal Rules of Civil Procedure is whether the information sought is "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). To be discoverable, the information "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* The relevance standard, therefore, is commonly recognized as one that is necessarily broad in scope in order "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 (1978) (citation omitted).

In this action, Plaintiff's claim turns on the fact that Intervenor is a male-to-female transgender. Plaintiff specifically alleges that Intervenor was treated in a certain manner due to a physical/medical "transition". Thus, evidence of said "transition" is clearly relevant to the claims and defenses of the parties herein. At Interrogatory No. 10 and Request for Production No. 13, Defendant sought discovery of all facts and records supporting Plaintiff's claim that Intervenor "is a male-to-female transgender" as alleged at Paragraph 2 of Plaintiff's Complaint. In response, Plaintiff objected to disclosing medical and psychological records on the basis that the discovery requests were intended to harass and

humiliate Intervenor. However, the requested discovery is relevant for a number of compelling reasons, including but not limited to the ability to determine whether Intervenor is, in fact, transgender and to establish the timeframe for when Intervenor actually began the male-to-female transition and any correlation to Defendants and their agents/employees' conduct toward Intervenor. In addition, Intervenor has requested a variety of documents regarding Defendant's health insurance benefits, exemptions, negotiations of health insurance policies, and communications regarding policy exclusions. The discovery is also necessary to establish the existence of the damages alleged, including but not limited to Intervenor's humiliation and loss of enjoyment of life.

Neither Plaintiff nor Intervenor can claim that the requested discovery is privileged. Specifically, "[n]either the Supreme Court nor the Tenth Circuit ... has recognized a physician-patient privilege under federal common law." *LeFave v. Symbios, Inc.*, 2000 WL 1644154, at *2 (D. Colo. Apr. 14, 2000). *See also Gilbreath v. Guadalupe Hosp. Found. Inc.*, 5 F.3d 785 (5th Cir. 1993) and *Vondrak v. City of Las Cruces*, 760 F. Supp. 2d 1170, 1178 (D.N.M. 2009). Also, because Plaintiff and Intervenor have placed the medical and psychological condition of Dr. Tudor at issue in both the claims asserted in this action as well as the request for damages, any existing privilege is waived. OKLA. STAT. tit. 12 § 2503. *See also Fisher v. Sw. Bell Tel. Co.*, 361 F. App'x 974, 978 (10th Cir. 2010). In the absence of a valid claim of privilege, issues of relevance control disclosure. *Morris v. City of Colorado Springs*, No. 09-CV-01506-PAB-MEH, 2009 WL 4927618, at *1 (D. Colo. Dec. 18, 2009). Because the discovery is clearly relevant, Plaintiff must be compelled to fully respond to Defendant's requests.

Finally, courts have concluded that an emotional damages claim puts at issue a party's physical or mental medical condition:

[T]his evidence is relevant to the issue of damages and, particularly, the extent to which, if any, [the person alleging discrimination] sustained emotional injuries. The EEOC made this issue material by seeking damages for emotional harm in its Complaint.

E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 2008 WL 2229489, at *4 (D.N.M. Feb. 14, 2008)(Browning, J.). *See also Smith v. Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1417 (10th Cir.1997)(noting that “the testimony of a treating physician or psychologist ... is one suggested method of proving emotional damages”) and *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 2008 WL 2229489, at *4 (evidence of counseling is relevant to prove damages in claim where plaintiff alleged emotional harm.) In this case, Intervenor has made numerous allegations that insults, harassment and humiliation at the hands of Defendants resulted in emotional damages. For the foregoing reasons, Plaintiff should be compelled to disclose any medical or mental health records or related information responsive to Defendant's discovery requests.

PROPOSITION III. THE COURT SHOULD REQUIRE PLAINTIFF TO RESPOND TO THE FOLLOWING REQUESTS FOR NON-PRIVILEGED, RELEVANT DISCOVERY.

The question of relevance should be broadly construed, and a request for discovery should be deemed relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party. *Millennium Mktg. Grp., Ltd. v. Simonton Bldg. Products, Inc.*, 2009 WL 2407723, at *8 (D. Kan. Aug. 4, 2009). In this action, Plaintiff has objected to the following discovery requests on grounds other than privilege. However,

Plaintiff should be compelled to fully respond as the following requests are relevant to the claims and defenses asserted in this action.

At **Interrogatory No. 2**, Defendant requested the following: *Please identify and describe all complaints, (as per definition nos. 8 and 9, above), made by Intervenor about sexual discrimination or harassment perpetrated by Defendants and/or their agents.* Plaintiff's response was deficient because many of the identified complaints in Plaintiff's original response did not pertain to sexual discrimination or sexual harassment. Plaintiff was asked to narrow its response to include only sexual discrimination and harassment complaints, as requested, and to include a description of each complaint. However, in a teleconference between the attorneys on February 2, 2016, Plaintiff indicated that their original response was final.

At **Interrogatory No. 3**, Defendant requested the following: *Please identify each RUSO or SEOSU agent or employee who has admitted to you that he or she discriminated against, or harassed, Intervenor.* **Answer:** Plaintiff's response was vague and non-responsive as it did not identify specific individuals who admitted to Plaintiff United States of America that he or she had harassed or discriminated against Intervenor. Plaintiff's counsel subsequently indicated, during the Rule 37 teleconference, that Scoufos, McMillan and Minks indicated to Plaintiff that they discriminated against Plaintiff. However, as of the date of this filing, Plaintiff has not yet submitted a supplemental response to Interrogatory No. 3 as required by Fed. R. Civ. P. 26(e).

At **Interrogatory No. 6**, Defendant requested the following: *Please describe with particularity each instance of Dean Scoufos "intentionally" referring to Intervenor as "he" and "him" after Intervenor's transition to a transgender woman, as alleged in Paragraph 26 of Plaintiff's Complaint.*

Plaintiff's original response identified only one instance of Dean Scoufos "intentionally" referring to Plaintiff/Intervenor as "he" and "him". During the Rule 37 conference, Plaintiff's counsel agreed that there were other instances. However, as of the date of this filing, Plaintiff has not yet served a supplemental response to Interrogatory No. 6 as required by Fed. R. Civ. P. 26(e).

At **Interrogatory No. 8**, Defendant requested the following: *Please identify and describe, (as per definition no. 8, above), all factual details supporting your contention that Intervenor's "qualifications for promotion and tenure were comparable, if not superior to, the qualifications of at least three other similarly-situated, non-transgender English professors who were considered for, and received, tenure," as stated in Paragraph 46 of Plaintiff's Complaint.* Plaintiff objected to the request as overbroad and then listed the contents of Rachel Tudor's portfolio. However, Plaintiff wholly failed to include any explanation as to how Dr. Tudor's qualifications matched those of the other professors receiving tenure, as the Interrogatory requested, or how the contents of her portfolio were responsive to the request. Plaintiff submitted a supplemental response to this discovery request on March 4, 2016 identifying other professors who had received tenure. However, the supplement again failed to explain how Dr. Tudor's qualifications were comparable.

At **Interrogatory No. 11**, Defendant requested the following: *Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU violated any of its own policies with regard to Intervenor:* Plaintiff's response and its supplement identify general violations of policy but fail to set forth any factual details to support the allegations of policy violations.

At **Interrogatory No. 12**, Defendant requested the following: *Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU refused to permit Intervenor to re-apply for tenure specifically because of Intervenor’s “gender and gender identity,” as alleged in Paragraph 71 of Plaintiff’s Complaint.* Plaintiff’s response included broad accusations and several hearsay statements but failed to set forth any factual detail to support the allegation that Dr. Tudor was not permitted to reapply for tenure because of her gender and gender identity. Plaintiff makes the conclusory statement that other non-transgender employees were permitted to reapply for tenure, but fails to identify those employees. Plaintiff’s response also states that Defendant refused to allow Dr. Tudor to re-apply for tenure contrary to the FAC’s recommendation. However, Plaintiff fails to provide any factual detail to support the contention that the Defendant’s conduct was motivated by Dr. Tudor’s gender identity.

At **Interrogatory No. 16**, Defendant requested the following: *Please identify and describe in detail the “new policies, practices, and programs” you contend RUSO or SEOSU should “institute and carry out,” according to Paragraphs (b) and (c) of the PRAYER FOR RELIEF in Plaintiff’s Complaint.* Plaintiff’s response states that it needs “more information” before it can state, in detail, what new policies, practices and programs Defendants should institute. However, as of the date of this filing, Plaintiff has not yet served a supplemental response to Interrogatory No. 16 as required by Fed. R. Civ. P. 26(e).

At **Interrogatory No. 17**, Defendant requested the following: *Please identify and describe in detail the training you contend RUSO or SEOSU should implement according to Paragraphs (d) and (e) of the PRAYER FOR RELIEF in Plaintiff’s Complaint.* Plaintiff’s response states that it

needs “more information” before it can state, in detail, what new policies, practices and programs Defendants should institute. However, as of the date of this filing, Plaintiff has not yet served a supplemental response to Interrogatory No. 16 as required by Fed. R. Civ. P. 26(e).

At **Request for Production No. 5**, Defendant requested the following: *Please produce copies of all records relating to any criminal history, criminal activity, and/or background checks conducted by you regarding Intervenor.* Plaintiff responded that Defendants were capable of purchasing the same records. However, if they are in Plaintiff’s possession, custody and control they must be produced or, at the very least, identified.

At **Request for Production No. 7**, Defendants requested the following: *Please produce copies of all documents, receipts, and records evincing the damages, (including but not limited to doctors, hospitals, medical, mental or physical health care providers, etc.) for which you are seeking relief in this lawsuit.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff’s possession, custody and control, they must be produced.

At **Request for Production No. 15**, Defendant requested the following: *Please produce copies of the “new policies, practices, and programs” you contend RUSO or SEOSU should “institute and carry out,” according to Paragraphs (b) and (c) of the PRAYER FOR RELIEF in Plaintiff’s Complaint.* Plaintiff responded that the request was premature. Plaintiff, together with EEOC, have been investigating Tudor’s allegations since 2010. Yet, 6 years later, contends, with no justification, that this request is premature. Defendant is clearly entitled to discover the basis of Plaintiff’s requests for relief.

At **Request for Production No. 23**, Defendant requested the following: *Please produce a copy of any and all award nominations received by Intervenor relating to Intervenor's teaching or research service to any university in the past fifteen (15) years.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 24**, Defendant requested the following: *Please produce a copy of any and all correspondence between Intervenor and Dr. John Mischo.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced and identified as responsive to this request.

At **Request for Production No. 25**, Defendant requested the following: *Please produce a copy of any and all correspondence between Intervenor and Dr. Lisa Coleman.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 28**, Defendant requested the following: *Please produce a copy of any and all documents reflecting Intervenor's earnings since separation from employment with SEOSU and/or RUSO.* Plaintiff responded that the request was overly broad and unduly burdensome. Plaintiff also referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 29**, Defendant requested the following: *Please produce a copy of any and all documents reflecting Intervenor's non-salary benefits from employment with employers since Intervenor's separation from employment with SEOSU and/or RUSO.* Plaintiff responded that the request was overly broad and unduly burdensome. Plaintiff also referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 31**, Defendant requested the following: *Please produce a copy of any and all document(s) showing the amount of attorney fees, court costs, costs of litigation, and other related fees and costs incurred by Plaintiff in this litigation.* Plaintiff responded that the request was not reasonably calculated to lead to admissible evidence as damages do not have to be proven as an element of a claim at trial. However, to the extent that attorney fees are an element of damages sought in this action, they are relevant and must be produced. *See E.E.O.C. v. BNSF Ry. Co.*, No. 12-02634-JWL-KGG, 2014 WL 1571278, at *6 (D. Kan. Apr. 18, 2014).

CONCLUSION

The Court should grant Defendants' Motion to Compel for the above and foregoing reasons.

Respectfully submitted,

/s/ Dixie L. Coffey

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June 2016, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

SOUTHEASTERN OKLAHOMA STATE
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM
OF OKLAHOMA,

Defendants.

Case No. 5:15-CV-00324-C

**UNITED STATES' RESPONSES TO THE REGIONAL UNIVERSITY SYSTEM OF
OKLAHOMA'S FIRST SET OF DISCOVERY REQUESTS**

The United States responds to the Regional University System of Oklahoma's ("RUSO") first set of discovery requests as follows.

INTERROGATORIES

1. Please identify (as per definition no. 5, above), each and all federal employee(s) who investigated the claims made by Intervenor against the Defendants.

RESPONSE:

Kathleen Nusz
Investigator
U.S. Equal Employment Opportunity Commission
215 Dean A. McGee Ave., Suite 524
Oklahoma City, OK 73102
(800) 669-4000

Allan Townsend
Trial Attorney

U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
601 D Street NW
PHB
Washington, DC 20579
(202) 305-3302

2. Please identify and describe all complaints, (as per definition nos. 8 and 9, above), made by Intervenor about sexual discrimination or harassment perpetrated by Defendants and/or their agents.

RESPONSE:

- (a) On or about August 31, 2009, Dr. Tudor met in person with Dean Lucretia Scoufos. During this meeting, in response to a question from Dean Scoufos about who Dr. Tudor would prefer to serve on the Promotion and Tenure Committee (“P&T Committee”) that would review her application for promotion and tenure, Dr. Tudor told Dean Scoufos that she would prefer if Dr. Lisa Coleman did not serve on her P&T Committee. Dr. Tudor told Dean Scoufos that she thought Dr. Coleman had treated her differently ever since Dr. Tudor began to present as a woman at work. ;
- (b) In February 2010, Dr. Tudor submitted a written grievance to the Faculty Appellate Committee (“FAC”) alleging that Dean Scoufos and Vice President Douglas McMillan had failed to accord her with “due process” by refusing to explain the reasons for their decisions to oppose her application for promotion and tenure;
- (c) On August 30, 2010, Dr. Tudor filed a written grievance with President Larry Minks requesting a hearing before the FAC, as well as a discrimination complaint

with Southeastern Oklahoma State University's ("SEOSU") Affirmative Action Officer, Dr. Claire Stubblefield. In her grievance and her complaint, Dr. Tudor alleged that SEOSU had discriminated against her on the basis of her sex and race (Native American) when it denied her 2009-10 application for promotion and tenure;

- (d) On August 31, 2010, Dr. Tudor filed a written discrimination complaint with the U.S. Department of Education's Office for Civil Rights ("DOE") and DOE subsequently forwarded that complaint to the U.S. Equal Employment Opportunity Commission ("EEOC") for investigation;
- (e) On September 16, 2010, Dr. Tudor sent Assistant Vice President Charles Weiner additional written information to supplement her grievance regarding SEOSU's decision to deny her 2009-10 application for promotion and tenure;
- (f) On October 11, 2010, Dr. Tudor filed another written grievance with the FAC and President Minks, challenging SEOSU's decision not to let her re-apply for promotion and tenure during the 2010-11 academic year;
- (g) On October 13, 2010, Dr. Tudor added allegations, in writing, to her complaint to Dr. Stubblefield;
- (h) On October 28, 2010, Dr. Tudor filed an amended written discrimination complaint with Dr. Stubblefield;
- (i) On January 28, 2011, in writing, Dr. Tudor appealed Dr. Stubblefield's findings on her discrimination complaints to President Minks;

- (j) On March 4, 2011, Dr. Tudor sent Dr. Clark a memorandum which asked Dr. Minks to reconsider his decision (as communicated by Ross Walkup) not to allow her to re-apply for promotion and tenure in the 2010-11 academic year;
- (k) On or about July 6, 2011, Dr. Tudor filed a supplemental charge of discrimination with the EEOC; and
- (l) All complaints identified by Dr. Tudor in her response to RUSO's First Set of Discovery Requests, Interrogatory No. 2.

3. Please identify each RUSO or SEOSU agent or employee who has admitted to you that he or she discriminated against, or harassed, Intervenor.

RESPONSE: Lucretia Scoufos, Douglas McMillan, and Larry Minks have all made statements which evidence that they discriminated against Dr. Tudor.

4. Please identify each person who has told you that he or she personally witnessed discrimination or harassment directed at Intervenor.

RESPONSE: The United States objects to this Interrogatory on the basis of attorney-client privilege, the work product doctrine, government deliberative process privilege, and the common interest rule. Subject to and without waiving those objections, the following individuals may have witnessed discrimination or harassment directed at Dr. Tudor: The United States incorporates by reference its Initial Disclosures in this case dated July 31, 2015 as well as Defendants' Initial Disclosures to Plaintiffs and reserves the right to supplement the response provided as Item I.

5. Please identify each person known by you to have been allowed by RUSO to re-apply for tenure (after denial) at the same institution. (For reference see Complaint, ¶ 9).

RESPONSE: The following individuals are known to have been allowed by RUSO to re-apply for tenure, after denial on at least one level, at the same institution:

- Dan Benco; Former or current faculty member at SEOSU; address unknown;
- Claire Stubblefield, Special Assistant to President/Director of Office of Equity, Diversity and Compliance/Associate Professor/Affirmative Action Officer/Title IX Coordinator Equity, Compliance and Diversity at SEOSU; 1405 N. 4th St., Administration 311, Durant, OK 74701; (580) 745-3090;
- Wayne Dixon, Former or current faculty member at SEOSU; address unknown;
- Gerrie Johnson; Former or current faculty member at SEOSU; address unknown;
- John Love; Former or current faculty member at SEOSU; address unknown;
- William Fridley; Professor, Educational Instruction and Leadership; (580) 745-2638; 1405 N. 4th St., Morrison 216, Durant, OK 74701;
- Steve McKim; Associate Professor of Chemistry, Computer, & Physical Science; 1405 N. 4th St., Science Building 209, Durant, OK 74701; (580) 745-2648;
- Rachel Tudor (applied in 2008 and 2009); c/o Jillian Weiss & Ezra Young, Law Office of Jillian T. Weiss, P.C., P.O. Box 642, Tuxedo Park, NY 10987; (949) 291-3185;
- Lisa Schroeder; Associate Professor, Department of Communication & Theatre, SWOSU, 100 E. Campus Dr., Campbell 126-B, Weatherford, OK 73096; (580) 774-3241;
- Anthony Stein; Assistant Professor; Department of Chemistry & Physics; SWOSU; 100 E. Campus Dr., Chemistry/Pharmacy/Physics 101-B Weatherford, OK 73096; (580) 774-3107;
- Curt Woolever; Former or current faculty member at SEOSU or SWOSU; address unknown.

6. Please describe with particularity each instance of Dean Scoufos “intentionally” referring to Intervenor as “he” and “him” after Intervenor’s transition to a transgender woman, as alleged in Paragraph 26 of Plaintiff’s Complaint.

RESPONSE: The practice of intentionally referring to Dr. Tudor after her transition as “he” or “him” is called misgendering. Dr. Tudor recalls Dean Scoufos misgendering her on several discrete occasions between 2009 and 2011.

As alleged in Paragraph 26 of the United States’ Complaint, Dr. Tudor met with Dean Scoufos in late August 2009. This was the first face-to-face meeting Dr. Tudor had with Dean Scoufos. The purpose of the August 2009 meeting was to discuss Dr. Tudor’s 2009-10 cycle application for promotion and tenure. During this meeting, Dean Scoufos referred to Dr. Tudor by her appropriate title (“Dr. Tudor” and/or Professor) and avoided gender pronouns when in direct conversation with Dr. Tudor. During the August 2009 meeting Dr. Tudor and Dean Scoufos discussed Dr. Tudor’s allegation that Lisa Coleman might be biased against Dr. Tudor because of Dr. Tudor’s transition to female in 2007. Thus, Dean Scoufos was aware that Dr. Tudor is a transgender woman.

After the August 2009 meeting, Dr. Tudor met with Dean Scoufos on a handful of other occasions. During these meetings, Dean Scoufos avoided gender pronouns when in direct conversation with Dr. Tudor. However, on occasion during these meetings Dean Scoufos called out to her secretary (who was outside the room) to retrieve documents and/or files pertinent to a discussion point with Dr. Tudor. When Dean Scoufos called out to her secretary, she would switch back and forth between using male (e.g., he, his, and him) and female (e.g., she, her, and hers) pronouns to refer to Dr. Tudor when speaking with the secretary. For example, on one occasion Dean Scoufos called out to her secretary to “please get me *his* file,” referring to Dr.

Tudor with the male pronoun “his.” Dr. Tudor was present for and witnessed this deliberate misgendering by Dean Scoufos.

7. Please identify the “similarly-situated, non-transgender male English professor” described by you in Paragraph 37 of Plaintiff’s Complaint.

RESPONSE: Dr. Mark Spencer, Associate Professor, Department of English, Humanities, and Languages, SEOSU, 1405 N. 4th Street, Morrison Hall, Durant, OK 74701.

8. Please identify and describe, (as per definition no. 8, above), all factual details supporting your contention that Intervenor’s “qualifications for promotion and tenure were comparable, if not superior to, the qualifications of at least three other similarly-situated, non-transgender English professors who were considered for, and received, tenure,” as stated in Paragraph 46 of Plaintiff’s Complaint.

RESPONSE: The United States objects to this Interrogatory because it is overly broad and unduly burdensome. *Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502-03 (D. Kan. 2006) (interrogatories asking for all facts that support a contention are overly broad and unduly burdensome). Subject to and without waiving this objection, the United States responds that its contention is supported by the following facts:

- (a) The Promotion and Tenure Committee (“P&T Committee”) from the English, Humanities and Language (“EHL”) Department recommended Dr. Tudor for tenure and promotion to Associate Professor in 2009;
- (b) Dr. John Mischo, then-Chair of the EHL Department, recommended Dr. Tudor for tenure and promotion to Associate Professor in 2009;

- (c) With the exception of Dr. Tudor, Defendants have never refused to award tenure and promotion to Associate Professor to an English professor at SEOSU who received recommendations from a P&T Committee and the Department Chair.
- (d) A comparison of Dr. Tudor's qualifications with the qualifications of other professors in the EHL Department who received tenure and promotion to Associate Professor indicates that Dr. Tudor was just as qualified, if not more qualified, than professors who received tenure and promotion to Associate Professor;
- (e) The following documents address Dr. Tudor's qualifications:
 - i. Portfolio that Dr. Tudor prepared for submission in 2010;
 - ii. 2006 letter from Randy Prus;
 - iii. February 11, 2007 letter from John Mischo;
 - iv. October 16, 2008 letter from Corie Delashaw;
 - v. February 10, 2009 letter from Randy Prus;
 - vi. March 9, 2009 letter from John Mischo;
 - vii. September 24, 2009 letter from Kim McGehee;
 - viii. May 14, 2010 letter from Daniel Althoff;
 - ix. September 10, 2010 letter from Mark Spencer;
 - x. September 17, 2010 letter from Paula Smith Allen;
 - xi. September 20, 2010 letter from Lisa Coleman;
 - xii. September 27, 2010 letter from Virginia Parrish;
 - xiii. November 17, 2010 letter from Margaret Cotter-Lynch;
 - xiv. August 15, 2011 letter from Mark Spencer;

- xv. August 15, 2011 letter from Margaret Cotter-Lynch;
- xvi. August 19, 2011 letter from Paula Smith Allen;
- xvii. August 24, 2011 letter from John Mischo;
- xviii. September 13, 2011 letter from Mark Spencer;
- xix. September 13, 2011 letter from Margaret Cotter-Lynch;
- xx. Student evaluations and summaries thereof; and
- xxi. Dr. Tudor's receipt of a Faculty Senate Recognition Award for Excellence in Scholarship on April 25, 2011.

9. Please describe in detail each deficiency you contend makes the investigation or conclusions made by Dr. Claire Stubblefield unreliable or unworthy of respect, as suggested by your allegations in Paragraph 61 of Plaintiff's Complaint.

RESPONSE: The United States objects to this Interrogatory because it is overly broad and unduly burdensome. *Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502-03 (D. Kan. 2006) (interrogatories asking for all facts that support a contention are overly broad and unduly burdensome). The United States also objects to this interrogatory in that it mischaracterizes the allegations in the United States' Complaint, which did not assert that Dr. Stubblefield's investigation or conclusions are "unworthy of respect." Subject to and without waiving these objections, the United States responds that Dr. Stubblefield's failure to investigate Dr. Tudor's retaliation allegations demonstrates a severe deficiency in Dr. Stubblefield's investigation. Dr. Stubblefield failed to address the nature of Dr. Scoufos's demand that Dr. Tudor withdraw her application. Dr. Stubblefield selectively quoted Dr. Mischo's description of the meeting in which Dr. Scoufos demanded that Dr. Tudor withdraw her application. Dr. Stubblefield did not explain how Dr. Cotter-Lynch's or Dr. Parrish's portfolios were superior to

Dr. Tudor's other than providing a conclusory statement from Dr. Prus. Dr. Prus later explained that he had not made part of the quoted statement. The report Dr. Stubblefield issued did not contain letters from members of the Tenure and Promotion Committee who supported Dr. Tudor's application even though Dr. Tudor submitted those letters to Dr. Stubblefield. Dr. Stubblefield did not explain why Dr. Tudor was not informed of the FAC's decision on her case in a timely manner, although she admitted the untimeliness. Dr. Stubblefield failed to address Dr. Tudor's allegation that VP McMillan treated her differently than Dr. Spencer because VP McMillan spoke to Dr. Spencer about Dr. Spencer's pending tenure application but refused to speak to Dr. Tudor. Dr. Stubblefield failed to address Dr. Tudor's complaint that SEOSU refused to permit her to apply for promotion and tenure in 2010 and did not address the FAC's December 2010 determination that SEOSU should let Dr. Tudor apply for promotion and tenure.

10. Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that Intervenor "is a male-to-female transgender" as alleged in Paragraph 2 of Plaintiff's Complaint.

RESPONSE: The United States objects to this Interrogatory as it is intended to harass and humiliate in the sense that medical and psychological records, which would be responsive to this request, are not necessary to establish the fact that Dr. Tudor transitioned during her employment with Defendants and began to present as female. The United States also objects to this Interrogatory because it is overly broad and unduly burdensome. *Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502-03 (D. Kan. 2006) (interrogatories asking for all facts that support a contention are overly broad and unduly burdensome). Subject to and without waiving those objections, the United States responds that when hired, Dr. Tudor presented as male, but in June 2007, Dr. Tudor informed administration at SEOSU that she was undergoing a transition

and thereafter would present as female. Prior to the 2007-08 academic year, while working at SEOSU, Dr. Tudor presented herself as male, with an appearance, including clothing, and first name typically associated with the male gender. Beginning in the 2007-08 academic year, Dr. Tudor presented herself as female at SEOSU, including her appearance, clothing and first name.

11. Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU violated any of its own policies with regard to Intervenor.

RESPONSE: The United States objects to this Interrogatory because it is overly broad and unduly burdensome. *Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502-03 (D. Kan. 2006) (interrogatories asking for all facts that support a contention are overly broad and unduly burdensome). Subject to and without waiving this objection, the United States responds that its contention that Defendants violated their own policies with regard to Dr. Tudor is supported by the following facts:

(a) The Defendants violated the following policies:

- i. SEOSU Sexual Harassment policy;
- ii. RUSO Sexual Harassment policy;
- iii. SEOSU Non-Discrimination Equal Opportunity Affirmative Action Policy
(including Title VII component);
- iv. RUSO and SEOSU Retaliation Policy;
- v. SEOSU Policy 3.7.4;
- vi. SEOSU Policy 4.4.1;
- vii. SEOSU Policy 4.4.6;
- viii. SEOSU Policy 4.6.2;
- ix. SEOSU Policy 4.6.3;

- x. SEOSU Policy 4.6.4;
- (b) Dean Scoufos, VP McMillan, and President Minks failed to afford deference in the absence of “compelling reasons” to the EHL Department P&T Committee that reviewed Dr. Tudor’s application for tenure and promotion to Associate Professor, as required by SEOSU Policy 3.7.4;
- (c) Dean Scoufos, VP McMillan, and President Minks failed to afford deference to the Chair of the EHL Department, Dr. John Mischo, as required by SEOSU policy;
- (d) Dean Scoufos and VP McMillan refused to provide an explanation for their decision to deny tenure and promotion to Dr. Tudor in accordance with SEOSU policy and the recommendation of the Faculty Appellate Committee (“FAC”);
- (e) VP McMillan instructed Asst. VP Weiner to wait until after President Minks had rendered his decision regarding Dr. Tudor’s application for promotion and tenure before he informed Dr. Tudor about the FAC’s decision in her favor on her grievances against VP McMillan and Dean Scoufos;
- (f) Because of VP McMillan’s instruction, Asst. VP Weiner did not notify Dr. Tudor of the FAC’s decision within 10 workdays as university policy required;
- (g) Defendants refused to allow Dr. Tudor to apply for tenure and promotion during her seventh year as an Assistant Professor in violation of SEOSU policy and in contravention of prior practice;
- (h) Defendants, on April 6, 2010, required that Dr. Tudor decide whether she would withdraw her application for tenure and promotion, which is not a process set

forth in any SEOSU policy, under threat of termination for cause if she did not withdraw her application;

- (i) Dean Scoufos, VP McMillan, and President Minks applied an unusually high and different standard to the review of Dr. Tudor's portfolio in comparison with their review of the portfolios of other, non-transgender applicants for tenure and promotion;
- (j) Dr. Claire Stubblefield failed to investigate all allegations of discrimination and retaliation that Dr. Tudor asserted in her written complaints to Dr. Stubblefield; and
- (k) Dean Scoufos failed to report Dr. Tudor's concerns that she had been discriminated against, which Dr. Tudor raised in a meeting on August 31, 2009, to SEOSU's Affirmative Action Officer or Human Resources office.

12. Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU refused to permit Intervenor to re-apply for tenure specifically because of Intervenor's "gender and gender identity," as alleged in Paragraph 71 of Plaintiff's Complaint.

RESPONSE: The United States objects to this Interrogatory because it is overly broad and unduly burdensome. *Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502-03 (D. Kan. 2006) (interrogatories asking for all facts that support a contention are overly broad and unduly burdensome). Subject to and without waiving those objections, the United States responds that its contention is supported by the following facts:

- (a) Cathy Conway's statement to Dr. Tudor that VP McMillan wanted to know whether he could terminate Dr. Tudor's employment because her transgender "lifestyle" offended him;
- (b) Jane McMillan's statements to Dr. Tudor about VP McMillan's biases against transgender people;
- (c) Dean Scoufos's and VP McMillan's refusal to meet with Dr. Tudor to explain their reasons for denying her application for promotion and tenure;
- (d) Other non-transgender SEOSU professors were permitted to apply for tenure and promotion again after their applications were denied;
- (e) The FAC concluded that SEOSU should permit Dr. Tudor to apply for promotion and tenure again but SEOSU still refused to let her;
- (f) Defendants' shifting and inconsistent responses to Dr. Tudor's attempt to apply for tenure and promotion during the 2010-11 academic year; and
- (g) Defendants showed discriminatory bias against Dr. Tudor when they refused to let her use the women's restroom and instructed her not to wear certain types of feminine clothing.

The United States also incorporates by reference its response to Interrogatory No. 11, above, as if set forth fully here.

13. Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU refused to permit Intervenor to re-apply for tenure specifically because of Intervenor's "gender and gender identity," as alleged in Paragraph 71 of Plaintiff's Complaint.

RESPONSE: The United States incorporates by reference its response, including objections, to Interrogatory No. 12, above.

14. Please identify, (as per definition no. 5, above), all individual RUSO or SEOSU employees or agents whom you contend held personal or professional animosity toward Intervenor from 2004 - 2011 due to Intervenor's gender or gender identity.

RESPONSE: The United States objects to this interrogatory because it is overly broad and to the extent that it seeks information that is not relevant to the claims asserted in this action or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection the United States responds that, at this time, it contends that Drs. Lucretia Scoufos, Douglas McMillan, and Larry Minks harbored discriminatory bias against Dr. Tudor at various times after they learned that Dr. Tudor was a transgender woman. Furthermore, Drs. Scoufos, McMillan, and Minks may have influenced others to discriminate against Dr. Tudor because of her gender or gender identity. The United States also notes that discovery has just recently begun and we may learn during the course of discovery that others harbored discriminatory bias against Dr. Tudor.

15. Please identify, (as per definition no. 5, above), all individuals whom you contend RUSO or SEOSU subjects to unlawful sex discrimination currently.

RESPONSE: Defendants, by failing to reinstate Dr. Tudor as an Associate Professor, with tenure, and by otherwise refusing to remediate their violations of Title VII, continue to discriminate against her based on her sex.

16. Please identify and describe in detail the "new policies, practices, and programs" you contend RUSO or SEOSU should "institute and carry out," according to Paragraphs (b) and (c) of the PRAYER FOR RELIEF in Plaintiff's Complaint.

RESPONSE: The United States requires more information before it can state, in detail, what new policies, practices, and programs RUSO and SEOSU should institute to remedy their violations of Title VII. The United States will seek this information during the course of discovery.

17. Please identify and describe in detail the training you contend RUSO or SEOSU should implement according to Paragraphs (d) and (e) of the PRAYER FOR RELIEF in Plaintiff's Complaint.

RESPONSE: The United States requires more information before it can state, in detail, what training RUSO and SEOSU should implement to remedy their violations of Title VII. The United States will seek this information during the course of discovery.

18. Please identify, (as per definition no. 5, above), all individuals (including, but not limited to, experts in matters of academic professionalism and tenure), with whom you consulted in forming your opinion that Intervenor should be awarded the position of "Associate Professor with tenure" as alleged in Paragraph (h) of the PRAYER FOR RELIEF in Plaintiff's Complaint.

RESPONSE: The United States objects to this Interrogatory on the basis that it seeks information that is subject to the attorney-client privilege, the work-product doctrine, the government deliberative process privilege, and the common interest rule. Subject to and without waiving those objections, should the United States deem it appropriate to designate a testifying expert on this topic, the United States will comply with Fed. R. Civ. P. 26 and the Court's Scheduling Order dated July 28, 2015.

19. Please identify all persons of whom you are aware that have knowledge of the factual bases of the allegations contained in Plaintiff's Complaint.

RESPONSE: The United States incorporates by reference its Initial Disclosures in this case dated July 31, 2015 as well as Defendants' Initial Disclosures to Plaintiffs and reserves the right to supplement the response provided as Item I.

20. Please identify all witnesses you intend to call to testify on your behalf and describe the substance of his/her proposed testimony.

RESPONSE: The United States objects to this Interrogatory on the basis that it seeks information that is subject to the attorney-client privilege, the work-product doctrine, the government deliberative process privilege, and the common interest rule. The United States incorporates by reference its Initial Disclosures in this case dated July 31, 2015 as well as Defendants' Initial Disclosures to Plaintiffs and reserves the right to supplement the response provided as Item I.

REQUESTS FOR PRODUCTION

The United States has produced documents with this response to Defendant Regional University System of Oklahoma's First Set of Discovery Requests with the following Bates numbers: EEOC000001 – EEOC005333; DOE000001 – DOE000031; DOJ000001 – DOJ000154; PI000001 – PI002008. Documents with the Bates number prefix "EEOC" are from the EEOC's file; documents with the Bates number prefix "DOE" are from the DOE's file; and all other documents are Bates stamped with a "DOJ" prefix. Documents that the United States received from Dr. Tudor will be produced with the Bates number prefix "PI."

1. Please produce all documents, video recordings or audio recordings, transcripts of recordings, and any other information which served as the basis for your contention that Intervenor "is a male-to-female transgender" as alleged in Paragraph 2 of Plaintiff's Complaint.

RESPONSE: Please see the enclosed non-privileged portions of the EEOC's and DOE's files.

2. Please produce copies of all reports or records relating to this case that have been produced to you by potential witnesses (including but not limited to expert witnesses).

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege, attorney-client privilege, the common interest rule, and statutory protections of EEOC conciliation communications. Subject to and without waiving these objections, should the United States deem it appropriate to designate a testifying expert on this topic, the United States will comply with Fed. R. Civ. P. 26 and the Court's Scheduling Order dated July 28, 2015.

3. Please produce copies of all factual and opinion reports, records, or statements, in your possession, custody, or control regarding the events at issue in this lawsuit.

RESPONSE: The United States objects to this request because it seeks documents protected by attorney-client privilege, government deliberative process privilege, attorney work product privilege, and statutory protections of EEOC conciliation communications. The United States also objects because this request is overly broad, unduly burdensome, and seeks irrelevant documents. *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649-50 (10th Cir. 2008) (similar request was found overly broad). The request is so broad that it would include newspaper articles about this case which are not relevant. Furthermore, the term "events at issue in this lawsuit" is ambiguous and renders the request unduly burdensome to answer. Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC's file, non-privileged portions of the DOE's file, and non-privileged documents produced by Dr. Tudor (with Bates prefix "PI").

4. Please produce copies of all statements, (or recordings, notes, or transcriptions thereof), made by Defendants' agents or employees regarding Intervenor or the matters at issue in Plaintiff's Complaint.

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege. Subject to and without waiving this objection, please see the enclosed non-privileged portion of the EEOC's file.

5. Please produce copies of all records relating to any criminal history, criminal activity, and/or background checks conducted by you regarding Intervenor.

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege. Furthermore, Defendants are just as capable as the United States of purchasing criminal history, criminal activity, and/or background checks on Dr. Tudor.

6. Please provide copies of all statements, journals, facebook posts, twitter posts, social media postings, other online-postings, emails, diaries, and other such records of, or created by Intervenor, which are in your possession, custody, or control.

RESPONSE: The United States objects to this request because it seeks documents protected by the common interest rule, attorney-client privilege, attorney work product privilege, and statutory protections of EEOC conciliation communications. This request is also unduly burdensome and overly broad because it seeks documents that are in no way related to this case and/or are just as available on the internet to the Defendants as to the United States. Subject to and without waiving these objections, please see the enclosed emails from Dr. Tudor in the EEOC file as well as emails in the set of documents with Bates prefix "PI."

7. Please produce copies of all documents, receipts, and records evincing the damages, (including but not limited to doctors, hospitals, medical, mental or physical health care providers, etc.) for which you are seeking relief in this lawsuit.

RESPONSE: The United States will be relying upon documents produced by Intervenor (with Bates prefix "PI").

8. Please produce all documents in your possession, custody, or control evidencing complaints made by Intervenor (see Interrogatory No.2, above).

RESPONSE: The United States objects to this request because it seeks documents protected by attorney-client privilege, common interest rule, government deliberative process privilege, attorney work product privilege, and statutory protections of EEOC conciliation communications. Subject to and without waiving these objections, copies of the written complaints identified in response to Interrogatory No. 2 are in the enclosed non-privileged portions of the EEOC and DOE files.

9. Please produce all documents in your possession, custody, or control evidencing admissions by RUSO or SEOSU agents or employees of discrimination or harassment (see Interrogatory No.3, above).

RESPONSE: The United States objects to this request because it seeks documents protected by the government deliberative process privilege, attorney work product privilege, attorney-client privilege, and the common interest rule. Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC and DOE files.

10. Please produce all documents in your possession, custody, or control which support your answer to Interrogatory No.4.

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege, attorney-client privilege, the common interest rule, and government deliberative process privilege. The United States also objects because this request is overly broad and unduly burdensome in that it does not sufficiently specify which documents are requested and, instead, just generally seeks documents that evidence discrimination. Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC file, non-privileged portions of the DOE file, interview recordings from the Department of Justice's ("DOJ") investigation, and documents produced by Defendants during DOJ's investigation.

11. Please produce all documents in your possession, custody, or control which support your answer to Interrogatory No.5.

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege, attorney-client privilege, the common interest rule, and government deliberative process privilege. Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC file.

12. Please produce all documents in your possession, custody, or control which support your answer to Interrogatory No.8.

RESPONSE: As it did with Interrogatory No. 8, the United States objects to this request because it is overly broad and unduly burdensome. *Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502-03 (D. Kan. 2006) (interrogatories asking for all facts that support a contention are overly broad and unduly burdensome). Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC file.

13. Please produce all documents, records or other forms of evidence supporting your contention that Intervenor “is a male-to-female transgender” as alleged in Paragraph 2 of Plaintiffs Complaint.

RESPONSE: The United States objects to this request because it seeks documents protected by attorney-client privilege and the attorney work product privilege. The United States also objects to this request as it is intended to harass and humiliate in the sense that medical and psychological records, which would be responsive to this request, are not necessary to establish the fact that Dr. Tudor transitioned during her employment with Defendants and began to present as female. Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC and DOE files.

14. If your answer to Request for Admission No.1 is anything other than an unqualified admission, then please provide all documents, records, statements, materials and other evidence which support your answer to Request for Admission No.1.

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege, government deliberative process privilege, attorney-client privilege and the common interest rule. The United States also objects because this request is overly broad and unduly burdensome. Subject to and without waiving these objections, please see the enclosed documents and documents with Bates prefix “PI” which constitute all of the discoverable documents currently in the United States’ possession that evidence the Defendants’ discrimination and retaliation against Dr. Tudor.

15. Please produce copies of the “new policies, practices, and programs” you contend RUSO or SEOSU should “institute and carry out,” according to Paragraphs (b) and (c) of the PRAYER FOR RELIEF in Plaintiff’s Complaint.

RESPONSE: The United States objects to this request because it is premature. These new policies, practices, and programs will be developed after trial. Furthermore, please see United States' response to Interrogatory No. 17.

15a. Please produce copies of all notes, transcriptions, and/or audio/visual recordings of all interviews conducted by United States officials in the investigation of Intervenor's claims against RUSO or SEOSU.

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege and the government deliberative process privilege. Subject to and without waiving these objections, please see the enclosed non-privileged portion of the EEOC file and interview recordings.

16. Please produce a copy of the Plaintiff's entire investigation file regarding EEOC Charge No. 564-2011-00849.

RESPONSE: The United States objects to this request because it seeks documents protected by the government deliberative process privilege, attorney-client privilege, attorney work product, common interest rule, and statutory protections of conciliation materials. Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC file.

17. Please produce a copy of the United States Department of Justice - Civil Rights Division investigation file regarding EEOC Charge No. 564-2011-00849.

RESPONSE: The United States objects to this request because it seeks documents protected by attorney-client privilege, attorney work product privilege, and government deliberative process privilege. Subject to and without waiving these objections, please see the enclosed documents.

18. Please produce a copy of any statements (written, oral, video-recorded, audio-recorded, or otherwise transcribed by the speaker or another person) in your possession, custody, or control which relate to Intervenor's claims and were given by any of the following individuals:

- a. Paula Smith Allen
- b. Daniel Althoff
- c. Teresa Anderson
- d. Janet Barker
- e. Byron Clark
- f. Lisa Coleman
- g. Cathy Conway
- h. Margaret Cotter-Lynch
- i. Corie Delashaw
- j. Charla Hall
- k. Beth Kerr
- l. James Knapp
- m. Jana Legako
- n. Kim McGehee
- o. Douglas McMillan
- p. Jane McMillan
- q. Larry Minks
- r. John Mischo
- s. Brad Morelli
- t. Virginia Parrish

- u. Larry Prather
- v. Randy Prus
- w. Lucretia Scoufus
- x. Jesse Snowden
- y. Mark Spencer
- z. Claire (Gilmore) Studdblefield
- aa. Rachel Tudor
- bb. Ross Walkup
- cc. Charles Weiner
- dd. Members of SEOSU faculty not already listed in (a)-(cc)
- ee. Members of SEOSU's Native American Symposium Committee
- ff. Members of SEOSU's Faculty Appellate Committee
- gg. Members of SEOSU's Personnel Policy Committee

RESPONSE: The United States objects to this request because it seeks documents protected by the attorney work product privilege, attorney-client privilege, and common interest rule. Subject to and without waiving these objections, please see the enclosed non-privileged portions of the EEOC file and interview recordings.

19. Please produce a copy of all non-privileged documents sent to or from the EEOC relating to its investigation of Intervenor's charge of discrimination against SEOSU or RUSO.

RESPONSE: Please see the enclosed non-privileged portion of the EEOC file.

20. Please produce a privilege log of all privileged documents sent to or from the EEOC relating to its investigation of Intervenor's charge of discrimination against SEOSU or RUSO.

RESPONSE: Please see the enclosed privilege log.

21. Please produce a copy of all non-privileged documents sent to or from the Department of Education relating to Intervenor's charge of discrimination against SEOSU or RUSO.

RESPONSE: Please see the enclosed non-privilege portion of the DOE file.

22. Please produce a privilege log of all privileged documents sent to or from the Department of Education relating to Intervenor's charge of discrimination against SEOSU or RUSO.

RESPONSE: Please see the enclosed privilege log.

23. Please produce a copy of any and all award nominations received by Intervenor relating to Intervenor's teaching or research service to any university in the past fifteen (15) years.

RESPONSE: Please see the enclosed documents and documents with Bates prefix "PI."

24. Please produce a copy of any and all correspondence between Intervenor and Dr. John Mischo.

RESPONSE: Please see the enclosed emails between Dr. Tudor and Dr. Mischo.

25. Please produce a copy of any and all correspondence between Intervenor and Dr. Lisa Coleman.

RESPONSE: Please see the enclosed non-privileged portion of the EEOC file and documents with Bates prefix "PI."

26. Please produce a copy of any and all correspondence between the Defendants and Intervenor regarding Intervenor's application for tenure and promotion during the 2009-2010 academic year.

RESPONSE: Please see the enclosed non-privileged portion of the EEOC file.

27. Please produce a copy of any and all correspondence between the Defendants and Intervenor regarding Intervenor's application for tenure and promotion during the 2010-2011 academic year.

RESPONSE: Please see the enclosed non-privileged portion of the EEOC file.

28. Please produce a copy of any and all documents reflecting Intervenor's earnings since separation from employment with SEOSU and/or RUSO.

RESPONSE: The United States objects to this request because it is overly broad and unduly burdensome in that it seeks every pay stub, payroll record, personnel record, and similar documents with information about Dr. Tudor's earnings since her termination from employment with Defendants. Subject to and without waiving this objection, the United States responds as follows: Please see documents with Bates prefix "PI."

29. Please produce a copy of any and all documents reflecting Intervenor's non-salary benefits from employment with employers since Intervenor's separation from employment with SEOSU and/or RUSO.

RESPONSE: The United States objects to this request because it is overly broad and unduly burdensome in that it seeks every pay stub, payroll record, personnel record, and similar documents with information about Dr. Tudor's non-salary benefits since her termination from employment with Defendants. Subject to and without waiving this objection, the United States responds as follows: Please see documents with Bates prefix "PI."

30. Please produce a copy of any and all documents used by Plaintiff to calculate damages allegedly incurred by Intervenor since separation from employment with SEOSU and/or RUSO.

RESPONSE: The United States objects to this request because it seeks documents protected by attorney-client privilege, government deliberative process privilege, common interest rule, and the attorney work product privilege. Subject to and without waiving these objections, the United States responds as follows: Please see documents with Bates prefix "PI."

31. Please produce a copy of any and all document(s) showing the amount of attorney fees, court costs, costs of litigation, and other related fees and costs incurred by Plaintiff in this litigation.

RESPONSE: The United States objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence as Title VII does not require costs and fees to be proved as an element of damages at trial. *Stevens v. DeWitt Cnty.*, Ill., No. 11-CV-3162, 2013 WL 819372, at *2 (C.D. Ill. Mar. 6, 2013) (holding that costs and attorney fees only become relevant if and when plaintiff becomes a prevailing party). If the United States becomes a “prevailing party” on specific claims and requests reimbursement for costs, some of the requested information will become relevant and the United States will produce it in the manner and at the time required by Title VII, the Federal Rules of Civil Procedure, and the Local Rules. *See* Fed. R. Civ. P. 54(d); Local Rule 54.1. The United States further objects to this request because billing records will reveal information protected by the attorney-work product privilege.

REQUESTS FOR ADMISSION

1. Admit that you have no evidence to support your claims that Intervenor’s rights were violated by RUSO or SEOSU, their agents, or their employees.

RESPONSE: Denied.

2. Admit that the decision to promote or grant tenure to any professor depends upon an institution’s academic freedom.

RESPONSE: The United States objects to this request because it asks the United States to admit a legal conclusion regarding the legal concept of “academic freedom.” *Utley v. Wray*, 05-CV-1356, 2007 WL 2703094, *3 (D. Kan. Sep. 14, 2007) (requests to admit legal conclusions are improper). Furthermore, the United States cannot truthfully admit or deny this statement.

The terms “academic freedom” and “institution” are ambiguous and render the request impossible for the United States to admit or deny. This statement also pertains to all institutions and the United States does not know what criteria institutions other than SEOSU and RUSO use to determine whether to grant promotion or tenure to a professor.

3. Admit that the process of granting promotion or tenure to any professor is a subjective one.

RESPONSE: The United States cannot truthfully admit or deny this statement. This statement pertains to all academic institutions and the United States does not know what criteria academic institutions other than SEOSU and RUSO use to determine whether to grant promotion or tenure to a professor. To the extent this request pertains to SEOSU and RUSO, there is a mix of objective and subjective criteria that professors must satisfy in order to receive a promotion or tenure. And, of course, any process of granting promotion or tenure must comply with applicable laws, including Title VII.

4. Admit that the EEOC did not find sufficient grounds for Plaintiff to pursue a claim of “hostile work environment” against RUSO or any of its constituent universities regarding Intervenor.

RESPONSE: Denied.

VERIFICATION

I, Meredith Burrell, declare the following under penalty of perjury pursuant to 28 U.S.C. § 1746. I am an employee of the United States Department of Justice and one of the attorneys assigned to this suit. I have reviewed the foregoing interrogatory responses and they are true and correct to the best of my knowledge and belief based on information that has been supplied to the United States.

Executed on October 21, 2015.


Meredith Burrell

As to objections:

Respectfully Submitted,

Date: October 21, 2015

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division
DELORA L. KENNEBREW
Chief
Employment Litigation Section

By:

/s/ Meredith L. Burrell
MEREDITH L. BURRELL (MD no number issued)
Deputy Chief

Employment Litigation Section

/s/ Allan K. Townsend

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Attorneys for Plaintiff United States

CERTIFICATE OF SERVICE

This is to certify that on the date below, a true and correct copy of the above and foregoing discovery responses were electronically transmitted, and sent via overnight Federal Express to the following:

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Date: October 21, 2015

/s/ Allan K. Townsend



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

January 5, 2016

Via Email: allan.townsend@usdoj.gov

Via Email: shayna.bloom@usdoj.gov

Allan Townsend

Shayna Bloom

TRIAL ATTORNEYS

U.S. DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

EMPLOYMENT LITIGATION SECTION—PHB

950 Pennsylvania Avenue, NW

Washington, D.C. 20530

Re: *United States of America v. Southeastern Oklahoma State University and the
Regional University System of Oklahoma*
Case No: 15-CV-324-C (Okla. Western District)

Dear Counsel:

Our review of your discovery responses indicates a large number of insufficient responses, as specifically set forth below. In addition, some initial issues must be addressed, which apply to a significant number of your responses.

INITIAL ISSUES:

1. How is any part of the EEOC file or the DOE file privileged?
2. For each request, you must specify each document withheld as privileged from:
 - a) EEOC file;
 - b) Department of Education File;
 - c) DOJ file; and
 - d) Any other files.
3. FOIA document request – have you produced the documents that you withheld in response to our FOIA request? As you recall, you indicated they would be produced through the discovery process.

Allan Townsend
Shayna Bloom
TRIAL ATTORNEYS
U.S. DEPARTMENT OF JUSTICE
January 5, 2016
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4. You have not identified the specific response to which documents are responsive.
5. Your privilege log is deficient. You must adequately identify each document, i.e. describe it so that we can assess your claim of privilege.
6. Describe Allan Townsend's role in the interviews and investigation. Your privilege log specifically identifies him as participating, and to some extent, controlling and/or directing the EEOC interviews.
7. You must be prepared to provide a legal basis for your repeated claims of privilege regarding investigation documents.

INTERROGATORY RESPONSES

Response to Interrogatory #2: Many of the identified complaints have nothing to do with sexual discrimination or sexual harassment. Please narrow your response to include only those types of complaints, and include a description of each complaint (date and recipient is not sufficient).

Response to Interrogatory #3: This asks for persons that admitted TO YOU that he/she discriminated against or harassed Ms. Tudor. Your response is vague and nonresponsive.

Response to Interrogatory #4: Is vague and nonresponsive. Again, it asks for persons that TOLD YOU he/she witnessed the discrimination/harassment. There is no privilege to which Plaintiff is entitled regarding information gleaned during the EEOC investigation, or subsequent interviews of Defendants' employees. In addition, please provide detailed, specific information regarding information you have withheld as privileged.

Response to Interrogatory #5: This nonresponsive. It does not contain the qualifier that USA added, "ON AT LEAST ONE LEVEL AT THE SAME INSTITUTION". USA is well aware that when a committee votes not to recommend a professor for tenure, this does not constitute a denial. Further, any withdrawal of an application for tenure, regardless of whether it was done at the recommendation of Defendant, does not constitute tenure denial.

Response to Interrogatory #6: This asks for each instance of intentional reference to Dr. Tudor as he or him. Your response identifies only one instance. If that is the only instance of which you are aware, then you need to state the same. Otherwise, you need to provide specific information regarding other references.

Allan Townsend
Shayna Bloom
TRIAL ATTORNEYS
U.S. DEPARTMENT OF JUSTICE
January 5, 2016
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Response to Interrogatory #8: This asks for all details supporting your claim that Tudor's qualifications were comparable or superior to at least 3 other professors that received tenure. How is this overbroad? Second, you have not provided any of the requested information, but instead listed contents of Tudor's portfolio. USA made the claim – if you have no evidence to support it, you must state that.

Response to Interrogatory #10: Have you provided all of the facts that support your contention that Intervenor is a male-to female transgender?

Response to Interrogatory #11: These are not facts – you have merely repeated your allegations that policies were violated; identify all facts that support contentions that these policies were violated.

Response to Interrogatory #12: This request seeks the factual support for your contention that Dr. Tudor was not permitted to reapply for tenure due to her gender and gender identify. Identify how this is overbroad and unduly burdensome; you have listed several hearsay statements, as well as broad accusations. For instance, (d) references other non-tansgender SEOSU professors. You must identify these professors. In addition, any statements you have that support this contention are discoverable.

Response to Interrogatory #14: What is the basis for your objection that this is overbroad? What information have you withheld? It appears there are only 3 people with RUSO or SEOSU (Scoufos, McMillan and Minks) that you are contending, at this point, held personal/professional animosity toward Tudor due to gender/gender identity. Are there others you have not identified?

Responses to Interrogatories #16 and 17: What additional information is needed? If you cannot identify new policies, practices and programs that are needed, you must so state.

Response to Interrogatory #18: Are any documents withheld pursuant to your asserted privilege?

Response to Interrogatory #20: How is the identity of witnesses, and the substance of their testimony privileged?

REQUESTS FOR PRODUCTION OF DOCUMENTS

As previously stated, you have not identified the specific response to which documents are responsive. You must provide this information before we can determine deficiencies in your document production.

Allan Townsend
Shayna Bloom
TRIAL ATTORNEYS
U.S. DEPARTMENT OF JUSTICE
January 5, 2016
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Request #1: Which documents support this contention?

Request #2, 3, 4: Which documents are withheld due to privilege? Basis for privilege claim as to reports and statements?

Request #5: This is not a valid objection; must also identify what is being withheld.

Request #6: These are not privileged materials; must identify what is responsive that is being withheld.

Request #7: Must produce all responsive documents; if have none, must state this

Request #8, 9, 10, 11: No basis for privilege. Must identify what you have withheld.

Request #12: This request seeks documents to support your contention that Tudor's qualifications were comparable to at least 3 other English professors. How is this overly broad or unduly burdensome? You have not identified any responsive documents.

Request #13: There is no basis for privilege assertion. In addition, Tudor's medical and psychological records are discoverable.

Request #14: No basis for privilege claim as to documents that support your contention that Tudor's rights were violated.

Request #15: How can this request be premature? If you have no responsive documents, you must state this.

Request #15a: No basis for privilege assertion; must identify what is being withheld as privileged, and must identify responsive documents.

Request #16, 17, 18, 19: No basis for privilege claim as to USA's investigation file or statements; must identify responsive documents.

Request #20: Privilege log is insufficient; must sufficiently identify each document withheld.

Request #23, 24, 25, 26, 27: Must identify which documents are responsive to which requests.

Request #28: Identify the responsive documents.

Allan Townsend
Shayna Bloom
TRIAL ATTORNEYS
U.S. DEPARTMENT OF JUSTICE
January 5, 2016
Page | 5

Request #29: How is this overbroad or unduly burdensome? Identify the responsive documents; any documents withheld?

Request #30: Documents utilized to calculate damages are not privileged.

Request #31: This is discoverable information, and there is no legal basis for a claim of privilege.

Sincerely,

Dixie Coffey
Assistant Attorney General

DLC/hs

cc: Brittany Novotny
Jillian Weiss
Ezra Young

Via Email: bnovotny@nationlit.com
Via Email: jweiss@jtweisslaw.com
Via Email: eyoung@jtweissla



U.S. Department of Justice
Civil Rights Division

DLK:MLB:AT/SB
DJ 170-76-405

Employment Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530
www.usdoj.gov/crt/emp

Via E-Mail and U.S. Mail

January 28, 2016

Dixie Coffey
Jeb Joseph
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105

Re: *United States & Tudor v. Southeastern Okla. State Univ. & Reg. Univ. Sys. of Okla.*,
5:15-CV-00324-C (W.D. Okla.)

Dixie and Jeb,

We are writing with respect to Dixie's letter dated January 5, 2016, in which she asked questions and raised concerns about the United States' Responses to the Regional University System of Oklahoma's First Set of Discovery Requests ("United States' discovery responses"). Dixie's letter contained a section titled "Initial Issues" and then went on to raise questions and concerns specifically directed at certain of the United States' discovery responses. In this letter, we will address the questions and concerns raised in the "Initial Issues" section of the January 5 letter. For the other questions and concerns raised in the January 5 letter, we propose that we schedule a teleconference to discuss those questions and concerns.

Below we have copied the questions and concerns raised in the "Initial Issues" section of the January 5 letter and provided our response below them.

1. How is any part of the EEOC file or the DOE file privileged?

RESPONSE: In our discovery responses and privilege log, we identified the privileges that we maintain protect some portions of the EEOC and DOE files.

2. For each request, you must specify each document withheld as privileged from:

- a) EEOC file;
- b) Department of Education File;
- c) DOJ file; and
- d) Any other files.

RESPONSE: The United States' discovery responses included a privilege log which identified the documents that we withheld because of privilege and cited the privileges that applied to the documents. This privilege log complied with Federal Rule of Civil Procedure 26(b)(5)(A) which requires a party asserting privilege to "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the

claim.” The privilege log also complied with the agreement that the parties reached over what categories of documents do not need to be included in privilege logs. *See* Email from A. Townsend (July 16, 2015). We maintain that our privilege log enables you to assess the various claims of privilege that we have asserted. Indeed, in Dixie’s January 5 letter she indicated that she had already assessed many of our claims of privilege and found them to be without merit. If you believe that you need further information to assess our claims of privilege, please set forth what information you claim to need and why you claim to need it.

3. FOIA document request – have you produced the documents that you withheld in response to our FOIA request? As you recall, you indicated they would be produced through the discovery process.

RESPONSE: Your FOIA request, dated April 23, 2015, asked for the “entire investigation file regarding” the charge of discrimination that Dr. Tudor filed with the EEOC. Requests 16 and 17 in the Regional University System of Oklahoma’s (“RUSO”) First Set of Discovery Requests posed the same request that you made through FOIA. In response to Requests 16 and 17, the United States produced all responsive documents that are discoverable.

4. You have not identified the specific response to which documents are responsive.

RESPONSE: In response to each document request that RUSO posed, we indicated which categories of documents contained documents responsive to the request. We also provided you with a letter dated November 9, 2015, which described the contents of each data file that we produced in response to RUSO’s First Set of Discovery Requests. Furthermore, the Bates numbering system that we used allows you to differentiate between documents from the EEOC, DOE, DOJ, and Dr. Tudor. We maintain that these efforts satisfied our discovery obligations but, to resolve this dispute, we are willing to provide you with further information on which documents are responsive to each specific request.

5. Your privilege log is deficient. You must adequately identify each document, i.e. describe it so that we can assess your claim of privilege.

RESPONSE: Please see response to question 2 above.

6. Describe Allan Townsend’s role in the interviews and investigation. Your privilege log specifically identifies him as participating, and to some extent, controlling and/or directing the EEOC interviews.

RESPONSE: This request is a new interrogatory which we object to on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence and also seeks information covered by the government deliberative process privilege and attorney-client privilege. Subject to and without waiving these objections, we want to point out that the premise of your request is false. Our privilege log does not specifically identify Allan and does not indicate that Allan controlled or directed EEOC interviews.

7. You must be prepared to provide a legal basis for your repeated claims of privilege regarding investigation documents.

RESPONSE: The United States has complied with its obligations for asserting privilege. For each document or category of documents that the United States withheld as privileged, we identified the privileges that protect the documents. The privileges that we have asserted are attorney-client privilege, attorney work product privilege, government deliberative process privilege, the common interest rule, and statutory protection of EEOC conciliation communications. Our letter to you dated August 18, 2015, provided you with case law to support our assertion of the government deliberative process privilege and the common interest rule. It appears as though you believe some of the privileges that we have asserted do not protect the documents that we withheld. We are willing to discuss your concerns further during the conference call that we have proposed.

Please let us know if you would like to schedule a conference call to discuss the issues above and other issues identified in your January 5, 2016, letter.

Thank you for your attention to this matter.

Sincerely,

Delora L. Kennebrew
Chief
Employment Litigation Section

By:



Allan K. Townsend
Shayna Bloom
Trial Attorneys
Employment Litigation Section

CC: Jillian Weiss
Ezra Young
Brittany Novotny



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 8, 2016

Via Email: allan.townsend@usdoj.gov

Via Email: shayna.bloom@usdoj.gov

Allan Townsend

Shayna Bloom

TRIAL ATTORNEYS

U.S. DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

EMPLOYMENT LITIGATION SECTION—PHB

950 Pennsylvania Avenue, NW

Washington, D.C. 20530

Re: *United States of America v. Southeastern Oklahoma State University and the
Regional University System of Oklahoma*
Case No: 15-CV-324-C (Okla. Western District)

Dear Counsel:

This letter is to follow up on our February 2, 2016 discussion regarding Plaintiff's insufficient discovery responses.

1. You agreed to revise your privilege log to reflect the information required pursuant to Fed. R. Civ. P. 26. This includes specific identification of each withheld document. In most instances, it will include the date, the author and recipient, and sufficient description of the subject matter to determine whether it is a privileged document. For each request, you must specify each document withheld as privileged from the EEOC file, Department of Education File, DOJ file, and any other files.

2. FOIA document request – You will specifically identify which documents have been withheld that are responsive to our FOIA request.

3. You will identify the documents that are responsive to each request.

Allan Townsend
Shayna Bloom
TRIAL ATTORNEYS
U.S. DEPARTMENT OF JUSTICE
February 8, 2016
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INTERROGATORY RESPONSES

Response to Interrogatory #3: This asks for persons that admitted TO YOU that he/she discriminated against or harassed Ms. Tudor. Your response is vague and nonresponsive. You agreed to supplement your response.

Response to Interrogatory #4: As we discussed, the identity of persons that allegedly told you he/she witnessed the discrimination/harassment is not privileged. You indicated you would provide us a list of people responsive to this request.

Response to Interrogatory #5: As we discussed, withdrawal of an application for tenure, regardless of whether it was done at the recommendation of Defendant, does not constitute tenure denial. You agreed to supplement your response to reflect only those persons that were denied tenure.

Response to Interrogatory #6: This asks for each instance of intentional reference to Dr. Tudor as he or him. Your response identifies only one instance. If that is the only instance of which you are aware, then you need to state the same. Otherwise, you need to provide specific information regarding other references.

Response to Interrogatory #8: This asks for all details supporting your claim that Tudor's qualifications were comparable or superior to at least 3 other professors that received tenure. You indicated you had additional information. We disagree with your objection of overbroad. Please identify what you have withheld pursuant to your objections, and identify the requested details regarding comparisons to other professors that received tenure.

Response to Interrogatory #10: Although we do not agree that the original request is overbroad, we will limit it to the significant facts upon which you rely to establish that Dr. Tudor transitioned during her employment, and thus, is a male-to-female transgender.

Response to Interrogatory #11: We pointed out that you have not listed specific facts, but merely repeated your allegations that policies were violated. You agreed to consider our request, of listing the significant facts that support your contentions that these policies were violated.

Response to Interrogatory #12: Despite our attempts to reach an agreed limitation, you repeatedly refused, stating instead that we should send you a proposed limitation in writing, and you would consider it.

We are seeking direct evidence, not circumstantial evidence or hearsay, that supports your contention that Dr. Tudor was not permitted to reapply for tenure due to her gender and

Allan Townsend
Shayna Bloom
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U.S. DEPARTMENT OF JUSTICE
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gender identity. It is neither overbroad nor unduly burdensome; please identify all evidence you have withheld pursuant to your objection.

In your response, you have listed actions which you contend were discriminatory, but no facts to support your contentions. In addition, any statements you have that support this contention are discoverable.

Response to Interrogatory #14: What is the basis for your objection that this is overbroad? What information have you withheld? You have identified only 3 people with RUSO or SEOSU (Scoufos, McMillan and Minks) that you are contending, at this point, held personal/professional animosity toward Tudor due to gender/gender identity. You agreed to consider providing additional names, if known.

Response to Interrogatory #18: You agreed to reconsider your response, as well as indicate if anything has been withheld subject to privilege.

Response to Interrogatory #20: You agreed to review your initial disclosures and identify any additional witnesses not listed.

REQUESTS FOR PRODUCTION OF DOCUMENTS

As previously stated, you have not identified the specific response to which documents are responsive. You agreed to identify the documents responsive to each request before we can determine deficiencies in your document production.

Sincerely,

Dixie Coffey
Assistant Attorney General

DLC/hs

cc: Brittany Novotny
Jillian Weiss
Ezra Young

Via Email: bnovotny@nationlit.com
Via Email: jweiss@jtweisslaw.com
Via Email: eyoung@jtweisslaw.com

From: Lori Cornell
To: allan.townsend@usdoj.gov; shayna.bloom@usdoj.gov
Cc: bnovotny@nationalit.com; jillian.t.weiss@gmail.com; jweiss@itweisslaw.com; eyoung@itweisslaw.com; [Dixie Coffey](mailto:Dixie.Coffey); [Jeb Joseph \(Jeb.Joseph@oag.ok.gov\)](mailto:Jeb.Joseph@oag.ok.gov)
Subject: USA v SOSU and RUSO - CIV-15-324
Date: Monday, February 08, 2016 3:51:00 PM
Attachments: [2016-02-08 - DLC ltr to DOJ re 2-2 discussion of insufficient disc rsps.pdf](#)
[image002.png](#)

Counsel:

Please see attached correspondence from Ms. Coffey regarding follow up to your February 2, 2016 discussion on Plaintiff's insufficient discovery responses. Should you have any questions, please do not hesitate to contact us.

Thanks,

Lori Cornell
Office of the Attorney General
Paralegal
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
Telephone: 405.521.3921
Direct: 405.522.2906
Facsimile: 405.521.4518



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

SOUTHEASTERN OKLAHOMA STATE
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM
OF OKLAHOMA,

Defendants.

Case No. 5:15-CV-00324-C

UNITED STATES' SUPPLEMENTAL RESPONSES TO
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S
INTERROGATORIES NOS. 4, 5, 8, 11 AND 14

The United States supplements its response to the Regional University System of Oklahoma's ("RUSO") first set of interrogatories as follows.

INTERROGATORIES

4. Please identify each person who has told you that he or she personally witnessed discrimination or harassment directed at Intervenor.

RESPONSE: The United States incorporates by reference its previous response to this Interrogatory. Subject to and without waiving any previously asserted objections, the following people have told the U.S. Department of Justice that they believe Defendants discriminated against or harassed Intervenor:

- Dr. Margaret Cotter-Lynch

- Dr. Virginia Parrish
- Dr. Rachel Tudor

There may be more witnesses who witnessed discrimination or harassment directed toward Intervenor. The United States has only identified people who have told the U.S. Department of Justice that they believe the Defendants discriminated against or harassed Dr. Tudor. As with all of its interrogatory responses, the United States reserves the right to supplement this response as more information becomes available in discovery.

5. Please identify each person known by you to have been allowed by RUSO to re-apply for tenure (after denial) at the same institution. (For reference see Complaint, 119).

RESPONSE: The United States incorporates by reference its previous response to this Interrogatory. Subject to and without waiving any previously asserted objections, the United States responds that the following individuals were denied tenure or promotion by a President of a university and allowed to reapply later at the same institution:

- Lisa Schroeder; Associate Professor, Department of Communication & Theatre, SWOSU, 100 E. Campus Dr., Campbell 126-B, Weatherford, OK 73096, (580) 774-3241;
- Anthony Stein; Assistant Professor; Department of Chemistry & Physics; SWOSU; 100 E. Campus Dr., Chemistry/Pharmacy/Physics 101-B, Weatherford, OK 73096, (580) 774-3107; and
- Curt Woolever; Former or current faculty member at SEOSU or SWOSU, address unknown.

The United States reserves the right to supplement this response as it obtains new information.

8. Please identify and describe, (as per definition no. 8, above), all factual details supporting your contention that Intervenor's "qualifications for promotion and tenure were comparable, if not superior to, the qualifications of at least three other similarly-situated, non-transgender English professors who were considered for, and received, tenure," as stated in Paragraph 46 of Plaintiff's Complaint.

RESPONSE: Subject to and without waiving previous objections, the United States incorporates its previous response to this Interrogatory and revises paragraph (d) of its previous response as follows: At the time of the filing of the Complaint, the United States primarily based the allegation quoted in the Interrogatory on a comparison of Dr. Tudor's qualifications with the qualifications of other professors in the EHL Department who received tenure and promotion to Associate Professor including, but not limited to, Dr. Cotter-Lynch, Dr. Parrish, and Dr. Barker.

11. Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU violated any of its own policies with regard to Intervenor.

RESPONSE: The United States incorporates by reference its objections to this Interrogatory. Defendants have limited their interrogatory to "significant facts" without further explanation, but as the United States interprets the term "significant facts," the response contained all significant responsive facts with the exception of the following: Defendants violated SEOSU Policy 4.6.5 when they determined that Dr. Tudor was not qualified for tenure.

14. Please identify, (as per definition no. 5, above), all individual RUSO or SEOSU employees or agents whom you contend held personal or professional animosity toward Intervenor from 2004 - 2011 due to Intervenor's gender or gender identity.

RESPONSE: Subject to and without waiving previous objections, the United States incorporates its previous response to this Interrogatory and responds as follows: Drs. Scoufos, McMillan, and Minks are the people involved in the discriminatory decisions alleged in the United States' complaint who the United States contends harbored animus toward Dr. Tudor because of her gender or gender identity.

VERIFICATION

I, Meredith Burrell, declare the following under penalty of perjury pursuant to 28 U.S.C. § 1746. I am an employee of the United States Department of Justice and one of the attorneys assigned to this suit. I have reviewed the foregoing interrogatory responses and they are true and correct to the best of my knowledge and belief based on information that has been supplied to the United States.

Executed on 3/4/16

Meredith Burrell

Meredith Burrell

As to objections:

Respectfully Submitted,

Date: March 4, 2016

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division
DELORA L. KENNEBREW
Chief
Employment Litigation Section

By:

/s/ Meredith L. Burrell
MEREDITH L. BURRELL (MD no number issued)
Deputy Chief

Employment Litigation Section
/s/ Allan K. Townsend
ALLAN K. TOWNSEND (ME Bar No. 9347)
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Allan.Townsend@usdoj.gov
Shayna.Bloom@usdoj.gov

Attorneys for Plaintiff United States

CERTIFICATE OF SERVICE

This is to certify that on the date below, a true and correct copy of the above and foregoing discovery responses were electronically transmitted, and sent via overnight Federal

Express to the following:

Brittany Novotny
National Litigation Law group, PLLC
42 Shepherd Center
2401 NW 23rd St.
Oklahoma City, OK 73107

Jillian Weiss
Law Office of Jillian T. Weiss, P.C.
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Ezra Young
Law Office of Jillian T. Weiss, P.C.
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Kindanne Jones
Dixie Coffey
Jeb E. Joseph
Litigation Division
Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Date: March 4, 2016

/s/ Allan K. Townsend



U.S. Department of Justice

Civil Rights Division

DLK:MLB:AT/SB:tj
DJ 170-59N-31

Employment Litigation Section - PHB
950 Pennsylvania Avenue, NW
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MAR 0 4 2016

Via E-Mail and FedEx

Dixie Coffey
Jeb Joseph
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105

Re: *United States & Tudor v. Southeastern Okla. State Univ. & Reg. Univ. Sys. of Okla.*,
5:15-CV-00324-C (W.D. Okla.)

Counsel:

This letter is to follow up on our ongoing discussions regarding the United States' responses to Defendants' interrogatories. We are enclosing supplemental interrogatory responses.

With respect to Interrogatory No. 10, Defendants have limited their interrogatory to "significant facts" without further explanation, but as the United States interprets the term "significant facts," the response contained all significant responsive facts.

In response to Interrogatory No. 12, the United States notes that the Defendants have limited this interrogatory so that it only requests direct evidence, not circumstantial evidence or hearsay, that supports the United States' contention that Dr. Tudor was not permitted to reapply for tenure due to her gender and gender identity. Subject to the limitation the Defendants have made to this Interrogatory, the United States' previous response provided the facts on which it primarily relies in support of this contention.

For Interrogatory No. 18, revealing who the United States has chosen to consult with on this issue would reveal privileged information and information protected by the work product rule. If you believe that is incorrect, we ask that you please send us authority to support that argument.

In response to Interrogatory No. 20, the United States knows of no other witnesses, at this time, who it intends to add to the initial disclosure but will supplement the initial disclosure if that changes.

We believe these should address the issues we have talked through during our telephone conversations, but to the extent there is any further supplementation Defendants believe is appropriate, we ask that you please let us know. Thank you.

Exhibit 6

Sincerely,

Delora L. Kennebrew
Chief
Employment Litigation Section

By:

/s/ Allan K. Townsend
/s/ Shayna Bloom
Trial Attorneys
Employment Litigation Section

Enclosure

cc: Jillian Weiss
Ezra Young
Brittany Novotny

United States et al. v. Southeastern Oklahoma State University et al.,
Case No. 5:15-CV-00324-C (W.D. Okla.)

**Privilege Log for United States' Response to Regional University System of Oklahoma's
First Set of Discovery Requests**

Bates Numbers	Document Type	Date	Document Description	Privilege
N/A	Emails	1/24/2014 – present	Emails between Department of Justice (DOJ) counsel and Dr. Tudor and/or Dr. Tudor's counsel	Common Interest Rule; Attorney Client Privilege
N/A	Declaration	7/21/2015	Declaration prepared by DOJ for witness's signature	Attorney Work Product
N/A	Emails, memoranda, and invoices	3/25/2015 – present	Communications with potential experts and litigation consultants	Attorney Work Product
N/A	Background report for Dr. Tudor	3/7/2013	Report generated in connection with deliberative process over what claims, if any, to litigate if EEOC referred charge	Attorney Work Product; Government Deliberative Process
N/A	Notes	2/8/2012 and 2/9/2012	DOJ counsel's notes from witness interviews during EEOC investigation	Attorney Work Product; Government Deliberative Process
N/A	Transcripts	4/20/2015	Transcripts of digital recordings from witness interviews that have been produced	Attorney Work Product
N/A	Notes	4/22/2014	DOJ counsel's outlines for witness interviews	Attorney Work Product; Government Deliberative Process
N/A	Notes	7/21/2015 and 7/22/2015	DOJ counsel's notes from witness interviews and	Attorney Work Product; Common Interest

			related outlines	Rule
N/A	Emails	6/16/2011 – 9/5/2012	Emails between DOJ counsel and EEOC reflecting deliberations regarding investigation and finding on Dr. Tudor's charge of discrimination	Government Deliberative Process; Attorney Client Privilege
N/A	Emails	9/13/2012 – 5/29/2013	Emails between DOJ counsel and EEOC regarding EEOC's conciliation process	Government Deliberative Process; Attorney Client Privilege
N/A	Emails	5/29/2013 – present	Emails between DOJ attorneys/staff and EEOC regarding referral of Dr. Tudor's charge to DOJ for litigation and the litigation of the charge	Government Deliberative Process; Attorney Work Product
N/A	Emails	8/22/2013 – 8/26/2013	Emails between DOJ counsel and DOE regarding DOE's file on Dr. Tudor's complaint of discrimination	Government Deliberative Process; Attorney Work Product

EEOC FILE

Bates Numbers	Document Type	Date	Document Description	Privilege
EEOC4569 – 4571	Case Log	4/13/2011 – 5/2/2013	Log entries recording deliberations between EEOC staff/attorneys and DOJ and EEOC staff/attorneys have been redacted	Government Deliberative Process
EEOC4572 – 4573	Closure/Cause Charge Data Sheet	5/29/2013	Form with coding for EEOC's internal data tracking	Government Deliberative Process
EEOC4578 – 4585	Memorandum	8/15/2012	Memorandum from EEOC investigator	Government Deliberative

			to supervisory EEOC staff regarding investigative findings	Process
EEOC4588	File Table of Contents	N/A	Form used by EEOC for its internal recordkeeping	Government Deliberative Process
EEOC4589	Categorization Sheet	N/A	Form documenting internal deliberations regarding the charge	Government Deliberative Process
EEOC4590 – 4591	Charge Detail Inquiry	N/A	EEOC database report showing internal charge data tracking	Government Deliberative Process
EEOC4597 – 4598 and EEOC4600 – 4601	Database screenshot	N/A	Screenshot of EEOC database showing internal charge data tracking	Government Deliberative Process
EEOC4599	Memorandum	N/A	EEOC's draft statement of particulars for charge of discrimination	Government Deliberative Process
EEOC4607 – 4609	Emails	9/17/2012 - 9/26/2012	Emails between EEOC and Dr. Tudor regarding conciliation efforts	Statutory Protection of Conciliation Communications
EEOC4616	Redacted email	12/29/2011	EEOC investigator's notations reflecting investigator's thoughts have been redacted	Government Deliberative Process
EEOC4671	Redacted document	N/A	EEOC investigator's notations reflecting investigator's thoughts have been redacted	Government Deliberative Process
EEOC4673	Redacted document	N/A	EEOC investigator's notations reflecting investigator's thoughts have been redacted	Government Deliberative Process
EEOC4705 – 4728	Letters	11/1/2012 - 5/29/2013	Correspondence between EEOC and RUSO regarding conciliation efforts	Statutory Protection of Conciliation Communications
EEOC4801	Redacted	N/A	EEOC investigator's	Government

	document		notations reflecting investigator's thoughts have been redacted	Deliberative Process
EEOC4859 - 4866	Notes	N/A	EEOC investigator's notes related to internal deliberation with EEOC attorney regarding interview questions	Attorney-Client Privilege; Government Deliberative Process
EEOC4904-4905	Letter	10/12/2010	Correspondence between EEOC and DOE attorneys regarding referral of Dr. Tudor's charge of discrimination	Government Deliberative Process
EEOC4910 - 4936	Emails	9/17/2012 - 5/28/2013	Correspondence between EEOC and Dr. Tudor regarding conciliation efforts	Statutory Protection of Conciliation Communications
EEOC4971	Memorandum	N/A	Draft statement of particulars for charge of discrimination	Government Deliberative Process
EEOC5283 - 5324	Emails and notes	12/29/2011 and 1/4/2012	Communications between DOJ attorneys and EEOC related to investigation of charge and EEOC investigator's notes about those emails	Attorney-Client Privilege; Government Deliberative Process
EEOC5325	Email	9/1/2011	Email from EEOC attorney to EEOC attorneys, EEOC supervisory staff, and DOJ attorneys reflecting deliberations concerning proposed content of correspondence	Attorney-Client Privilege; Government Deliberative Process
EEOC5326 - 5328	Email		Email from DOJ to EEOC inquiring about charge	Government Deliberative Process
EEOC5329 - 5331	Emails	6/12/2013 - 7/29/2013	Emails between EEOC and attorneys	Attorney-Client Privilege;

			with DOJ regarding referral of charge	Government Deliberative Process
EEOC5333	Email	7/29/2013	Email between EEOC and DOJ staff regarding referral of charge	Government Deliberative Process

DOE FILE

Bates Numbers	Document Type	Date	Document Description	Privilege
DOE1	Letter	8/26/2013	Letter from DOE to DOJ regarding DOJ's investigation of charge	Government Deliberative Process
DOE2	Letter	10/12/2010	Letter from DOE to EEOC regarding referral of charge from DOE to EEOC	Government Deliberative Process
DOE7-9	Emails	9/20/2010 – 10/12/2010	Emails within DOE regarding decision to refer charge to EEOC	Government Deliberative Process
DOE30-31	Database reports	N/A	DOE database report showing internal data tracking used to facilitate investigation and determinations related to charge	Government Deliberative Process

2008 WL 2229489

Only the Westlaw citation is currently available.
United States District Court,
D. New Mexico.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,

v.

BCI COCA-COLA BOTTLING COMPANY
OF LOS ANGELES, d/b/a Phoenix Coca-
Cola Bottling Company and Coca-Cola
Bottling Company of Albuquerque, Defendant.

No. CIV 02-1644 JB/RHS.

|
Feb. 14, 2008.

Attorneys and Law Firms

Mary Jo O'Neill, Regional Attorney, Sally C. Shanley, Supervisory Trial Attorney, Equal Employment Opportunity Commission, Phoenix, AZ and Loretta Medina, Senior Trial Attorney, Veronica A. Molina, Trial Attorney, Equal Employment Opportunity Commission, Albuquerque, NM, for the Plaintiff.

E. Todd Presnell, Kara E. Shea, Miller & Martin LLP, Nashville, TN and Christopher M. Moody, Moody & Warner, P.C., Albuquerque, NM, for the Defendant.

MEMORANDUM OPINION AND ORDER

JAMES O. BROWNING, District Judge.

*1 **THIS MATTER** comes before the Court on the Plaintiff's Motion in Limine to Exclude All Evidence Concerning Claimant Not Seeking Professional Counseling, filed December 28, 2007 (Doc. 124). The Court held a hearing on February 14, 2008. The primary issues are: (i) whether evidence that the charging party, Stephen B. Peters, did not seek professional medical or psychological treatment or counseling is relevant to the damages issues raised by Plaintiff Equal Employment Opportunity Commission's claim for emotional distress; and (ii) whether, if the evidence is relevant, the Court should nonetheless exclude the evidence because it will distract the jury from the EEOC's damages claim and will intimidate Peters by putting him on trial. Because the

Court believes that the evidence of Peters' failure to seek profession help is relevant to his request for relief under a claim for emotional distress, because the Court does not believe admitting the evidence is inconsistent with the United States Court of Appeals for the Tenth Circuit's decision in *Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408 (10th Cir.1997), and because the Court concludes that the danger of the evidence's unfair prejudice, if any, does not substantially outweigh its probative value, the Court will deny the motion.

PROCEDURAL BACKGROUND

The EEOC brought this case pursuant to Title VII of the Civil Rights Act of 1964. *See* Complaint, filed December 30, 2002 (Doc. 1)(“Complaint”). The EEOC has alleged that Defendant BCI Coca-Cola Bottling Company of Los Angeles engaged in unlawful discrimination when it terminated Peters' employment. *See id.* ¶¶ 6-10, at 2-3. In its Complaint, the EEOC requests certain relief from the Court, including that the Court “[o]rder Defendant to make whole Stephen B. Peters by providing compensation for past and future nonpecuniary losses ... including, but not limited to, emotional pain, suffering, inconvenience, mental anguish, humiliation, loss of enjoyment of life, and other non-pecuniary losses, in amounts to be determined at trial.” Complaint ¶ E, at 4. Similarly, in its initial disclosures, the EEOC indicated that it would be seeking monetary relief “for Stephen Peters' emotional pain, suffering, inconvenience, mental anguish, humiliation, loss of enjoyment of life and other non-pecuniary compensatory damages.” Defendant's Response in Opposition to Plaintiffs Motion in Limine to Exclude Evidence Concerning Claimant Not Seeking Professional Counseling, filed January 11, 2008 (Doc. 132)(“Response”), Exhibit 1, Plaintiff Equal Opportunity Commission's Initial Disclosures at 3 (dated June 19, 2003) (“EEOC's Initial Disclosures”).

BCI Coca-Cola sought discovery concerning these elements of damages. *See* Response at 2. It was revealed that Peters has not sought or received professional counseling or treatment for any emotional harm that he allegedly has sustained as a result of BCI Coca-Cola's allegedly unlawful employment practices. *See id.* In his deposition, BCI Coca-Cola's counsel asked Peters about his failure to seek professional counseling for the emotional harm he suffered as a result of the unlawful

discrimination to which BCI Coca-Cola subjected him. *See* Plaintiff's Motion in Limine to Exclude all Evidence Concerning Claimant's Familial Circumstances, Exhibit A, Deposition of Stephen B. Peters at 34:21-23 (taken December 2, 2003). Consequently, the EEOC anticipates that BCI Coca-Cola may attempt to introduce evidence, or elicit testimony, concerning Peters' failure to seek professional counseling. *See* Plaintiff's Memorandum in Support of Motion in Limine to Exclude All Evidence Concerning Claimant Not Seeking Professional Counseling at 2, filed December 28, 2007 (Doc. 124) ("EEOC's Memo.").

*2 Pursuant to D.N.M. LR-Civ. 7.2, the EEOC's counsel conferred with BCI Coca-Cola's local counsel, Christopher Moody, about this matter, but Mr. Moody, at the time the EEOC filed its motion, was unable to object or concur on the EEOC's motion. *See* Plaintiff's Motion in Limine to Exclude all Evidence Concerning Claimant Not Seeking Professional Counseling at 1, filed December 28, 2007 (Doc. 124) ("Motion"). The EEOC therefore moves the Court for an order excluding all evidence concerning claimant not seeking professional counseling as evidence at a trial, a hearing, or on a motion. *See id.* The EEOC seeks a pretrial ruling to exclude any evidence concerning Peters' failure to seek professional counseling with regard to BCI Coca-Cola's allegedly unlawful termination of his employment. *See id.*; EEOC's Memo. at 1. The EEOC offers two grounds for its motion: (i) such evidence is irrelevant; and (ii) the danger of unfair prejudice substantially outweighs the evidence's probative value. *See* EEOC's Memo. at 1 (citing [rules 401, 402, 403, and 802 of the Federal Rules of Evidence](#)).

Pursuant to D.N.M. LR-Civ. 7.3, BCI Coca-Cola filed its Response. *See* Doc. 132. BCI Coca-Cola opposes the EEOC's motion to exclude evidence that Peters did not seek professional counseling, arguing that it should be able to present to the jury such evidence to challenge Peter's claim for emotional harm damages. *See id.* at 1-2. On January 28, 2008, the EEOC submitted its reply. *See* Plaintiff's Reply to Defendant's Response to Plaintiff's Motion in Limine to Exclude All Evidence Concerning Claimant Not Seeking Professional Counseling, filed January 28, 2006 (Doc. 143) ("Reply"). On January 29, 2008, the EEOC filed, pursuant to D .N.M. LR-Civ. 7.3(b), a Notice of Completion of Briefing, stating that the briefing on this motion was complete and indicated what

documents the parties had filed with the Court. *See* Doc. 145.

LAW REGARDING RACIAL DISCRIMINATION

A prima facie case of racial discrimination requires a showing that: (i) the plaintiff belongs to some protected class; (ii) the plaintiff was qualified for the position or benefit at issue; (iii) the plaintiff suffered an adverse employment action; and (iv) the plaintiff was treated less favorably than others. *See EEOC v. BCI Coca-Cola Bottling of Los Angeles, db/a Phoenix Coca-Cola Bottling Company Coca-Cola Bottling Company of Albuquerque*, 450 F.3d 476, 483-84 (10th Cir.2006). "Title VII of the Civil Rights Act of 1964 prohibits an employer from 'fail[ing] or refus[ing] to hire or ... discharg [ing] any individual, or otherwise ... discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Negrete v. Maloof Distributing L.L.C.*, No. CIV 06-0338 JB/LFG, 2006 WL 4061178 at * 2 (D.N.M. Oct. 17, 2006)(Browning, J.)(quoting 42 U.S.C. § 2000e-2(a)(I)) (alterations in original). "A plaintiff raising a cause of action under Title VII may demonstrate intentional discrimination through either direct or indirect evidence." *Mirzai v. State of New Mexico General Servs. Dep't.*, 506 F.Supp.2d 767, 775 (D.N.M.2007)(Browning, J.). "[T]he critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred 'under circumstances which give rise to an inference of unlawful discrimination.'" *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1227 (10th Cir.2000)(internal quotations omitted).

LAW REGARDING RELEVANT EVIDENCE

*3 The Federal Rules of Evidence defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [Fed.R.Evid. 401](#). Under [rules 402](#) relevant evidence is admissible. *See Fed.R.Evid. 402*. The Court may exclude relevant evidence only if its "probative value is substantially outweighed by the danger of unfair prejudice, confusions of the issues, or misleading the

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jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” [Fed.R.Evid. 403](#).

LAW REGARDING PROFFER OF EVIDENCE ON EMOTIONAL HARM

A victim of discrimination who claims emotional harm need not present evidence that he received professional counseling. *See Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1417 (10th Cir.1997). The Tenth Circuit explained that “the testimony of a treating physician or psychologist ... is one suggested method of proving emotional damages but is not the sole dispositive requirement.” *Id.* The harm suffered by that plaintiff included “nausea, migraines, humiliation, degradation, loss of self-respect, sleeplessness, consumption of sleeping pills, frequent crying, loss of a loan officer career, and stress in Plaintiff’s relationship with her daughter.” *Id.* at 1416. The Tenth Circuit stated that, “[c]onsidering the cumulative evidence of Plaintiff’s emotional harm, the absence of testimony by a treating physician does not necessarily mean her claim is devoid of substantial evidence.” *Id.* at 1417.

In *Owens v. Sprint/United Management Co.*, 221 F.R.D. 657 (D.Kan.2004), the United States District Court for the District of Kansas noted that the plaintiff’s medical and psychological records are generally relevant to causation and claims for emotional pain, suffering, and mental anguish. *See id.* at 659-60. The Court found that “information on Plaintiff’s medical and health care providers and records relating to her medical care, treatment and counseling are relevant to the claims she seeks for her ‘garden variety’ emotional damages under Title VII.” 221 F.R.D. at 660.

In *Rettinger v. IBP, Inc.*, No. 96-4015-SAC, 1999 WL 318153 (D .Kan. January 6, 1999), another case that BCI Coca-Cola cites, the defendant sought to introduce evidence supporting their theory of causation. The issue in *Rettinger v. IBP, Inc.* was whether it was appropriate for the court to allow the defendants to introduce evidence of alternate or multiple causes of such distress. *See id.* at *2. The district court stated: “[I]t would be inequitable to allow the plaintiff to introduce selected evidence on [the issue of emotional distress] but to disallow the

defendants to present evidence supporting their theories of causation.” *Id.*

ANALYSIS

Even though the EEOC seeks damages attributable to Peters’ alleged emotional harm, it has filed a motion in limine requesting that the Court preclude BCI Coca-Cola from eliciting testimony demonstrating that he has never sought professional treatment for this alleged harm. The EEOC contends that these counseling matters have no legitimate bearing on the issues involved in this case other than to detract the jury from the claimant’s damages and to attempt to intimidate Peters with matters that are wholly unrelated to his claim of race discrimination.

I. THE COUNSELING EVIDENCE IS RELEVANT TO THE DAMAGES ISSUES IN THE CASE.

*4 The parties are in agreement that a victim of discrimination who alleges emotional harm need not present evidence that he or she received professional counseling. *See* EEOC’s Memo. at 2; Response at 3; Reply at 1. There is also no dispute that evidence concerning these matters is not relevant to the issue whether Peters was the victim of unlawful race discrimination. *See* EEOC’s Memo. at 2; Response at 2. Such evidence is irrelevant to the issue whether Peters was discharged from employment because of his race. *See id.* The EEOC contends, therefore, that the only purpose for introducing such evidence is to put the victim on trial and inflame the jury, thereby prejudicing the EEOC. *See* EEOC’s Memo. at 2.

The EEOC’s argument does not take into account, however, that this evidence is relevant to the issue of damages and, particularly, the extent to which, if any, Peters sustained emotional injuries. The EEOC made this issue material by seeking damages for emotional harm in its Complaint. It is reasonable that a jury could determine that Peters’ failure to seek professional counseling or treatment has a “tendency to make” the EEOC’s claim that he has sustained emotional injuries “less probable.” [Fed.R.Evid. 401](#).

A jury may be more inclined to find that a claimant has sustained legitimate emotional injuries if that person has sought professional counseling. On the other hand,

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a jury may be less inclined to award significant damages for emotional injuries to a claimant who did not seek professional counseling than to a claimant who sought such treatment. The evidence is relevant, and the jury should give it such weight as it deems appropriate.

The EEOC relies heavily on *Smith v. Northwest Financial Acceptance, Inc.*, for the proposition that a Title VII claimant alleging emotional harm need not present evidence that he or she received professional treatment. See 129 F.3d at 1417. BCI Coca-Cola has not argued, however, that the EEOC cannot obtain damages attributable to Peters' alleged emotional injuries on the sole basis that he has not received professional counseling. See Response at 3.

The Court does not believe that *Smith v. Northwest Financial Acceptance, Inc.*, can fairly be construed as supporting the notion that a defendant in this situation may not, as a matter of law, show that a claimant did not obtain professional treatment. The EEOC does not dispute that such a defendant has the right to challenge a claimant's contention that he or she has been emotionally injured and the extent of the injuries claimed. There is nothing in *Smith v. Northwest Financial Acceptance, Inc.*, that says this category of evidence is inadmissible.

While the EEOC maintains that the Court's position does not comport with the holding in *Smith v. Northwest Financial Acceptance, Inc.*, the Court has carefully read the Tenth Circuit's opinion, and does not see any inconsistency between its holding here and the Tenth Circuit's holding in *Smith v. Northwest Financial Acceptance, Inc.* The EEOC maintains that, under the Court's view, victims of discrimination would be required to disprove a negative to prove their claims, which is an impossible task that discrimination victims would never be able to attain. See Reply at 1. But the burden of proof is already on the plaintiff; he or she already must deal with unfavorable evidence, and the Court's ruling does not change those dynamics.

*5 Moreover, the assumption in *Smith v. Northwest Financial Acceptance, Inc.*, is that such evidence is admissible and probative, and that a plaintiff seeking damages for emotional injuries can present evidence of professional help to support his request for damages. See 129 F.3d at 1417 (explaining that “[s]uch testimony is one suggested method of proving emotional damages but is

not the sole dispositive requirement.”). The Tenth Circuit in *Smith v. Northwest Financial Acceptance, Inc.*, indicated that evidence of professional treatment is probative to whether a claimant has sustained emotional injuries and the extent of any such injuries, but is not required. See *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d at 1417 (citing *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1265-66 (10th Cir.1995)); *Wulf v. City of Wichita*, 883 F.2d 842, 874-75 (10th Cir.1989)(finding that an award for emotional distress was excessive, but not precluding the award which was not based on medical or psychological testimony). There is no sound reason to conclude that professional treatment is relevant to a plaintiff's case, but, as a matter of law, irrelevant to the defendant's defense.

II. THE COURT WILL NOT EXCLUDE THE EVIDENCE UNDER RULE 403.

The EEOC has not met its burden under rule 403 of demonstrating that the probative value of this evidence is “substantially outweighed by the danger of unfair prejudice” or other considerations. Fed.R.Evid. 403. The only suggestion that the EEOC made in its motion is that BCI Coca-Cola intends to introduce such evidence to detract the jury from the claimant's damages and to attempt to intimidate Peters. See EEOC's Memo. at 2. The EEOC does not explain, however, how the introduction of such evidence would intimidate Peters. The Court also does not believe that the introduction of this evidence will intimidate Peters.

The Court is not convinced that such evidence will detract the jury from the EEOC's claim for damages. Rather, the Court believes that the evidence may prove helpful to the jury. Specifically, it may assist the jury in determining whether Peters has sustained any emotional injuries, as the EEOC alleges, and, if so, the extent of any such injuries. Having asserted a claim for damages attributable to emotional damages, the EEOC is not in a good position to seek to deprive BCI Coca-Cola of the opportunity to defend itself against such a claim.

For example, a plaintiff in a car-collision case almost always seeks damages for personal injuries. It would be unusual, but nonetheless noteworthy and relevant, if the plaintiff never sought medical assistance. The EEOC's theory would preclude the defendant from bringing this failure to seek medical assistance to the jury's attention. The EEOC's theory appears to be a novel limitation on

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a defendant's ability to rebut evidence of the plaintiffs damages, because the EEOC has not cited any authority from any court in any jurisdiction that expressly supports its position.

*6 If the EEOC wishes to preclude BCI Coca-Cola from presenting this evidence at trial, it should consider abandoning its claim for damages attributable to Peter's alleged emotional injuries. The EEOC's request for damages for emotional injuries may be weak. As long as the EEOC persists in its claim, however, BCI Coca-Cola is entitled to bring to the jury's attention that Peters has not sought nor received professional counseling or treatment for any such alleged injuries.

It would be unfair to BCI Coca-Cola, under the present circumstances and posture of the case, for the Court to prohibit BCI Coca-Cola from presenting its evidence. Cf. *Owens v. Sprint/United Mgmt Co.*, 221 F.R.D. at 660 (finding that "information on Plaintiff's medical and health care providers and records relating to her medical care, treatment and counseling are relevant to the claims she seeks for her 'garden variety' emotional damages under Title VII"); *Rettinger v. IBP, Inc.*, 1999 WL 318153 at *2 ("[I]t would be inequitable to allow the plaintiff to introduce selected evidence on [the issue of emotional distress] but to disallow the defendants to present evidence

supporting their theories of causation."). The EEOC responds that BCI Coca-Cola and the Court's reliance on *Owens v. Sprint/Mgmt Co.* is misplaced. See Reply at 2. The EEOC notes that Peters' case is different from Owens', because there are no such medical and healthcare provider records. See *id.* While there is a factual distinction, the EEOC does not explain why records are relevant when a plaintiff is offering them, but are irrelevant when a defendant is offering evidence that those records do not exist. Similarly, the evidence at issue in *Rettinger v. IBP, Inc.*, is not the same evidence that the EEOC is seeking to exclude in this case, but the case remains instructive regarding what is relevant evidence.

The Court will therefore not preclude BCI Coca-Cola from introducing any documents or testimony relating to this topic. The Court will deny the EEOC's motion in limine.

IT IS ORDERED that the Plaintiffs Motion in Limine to Exclude All Evidence Concerning Claimant Not Seeking Professional Counseling is denied.

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United States District Court,
D. Kansas.

EQUAL EMPLOYMENT OPPORTUNITY

COMMISSION, Plaintiff,

Kent Duty, Plaintiff–Intervenor,

v.

BNSF RAILWAY COMPANY, Defendant.

No. 12–02634–JWL–KGG.

Signed April 18, 2014.

Attorneys and Law Firms

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**ORDER ON DEFENDANT'S
MOTIONS TO COMPEL**

[KENNETH G. GALE](#), United States Magistrate Judge.

*1 Now before the Court is Defendant's "Motion to Compel Responses to Defendant's First Interrogatories and First Requests for Production of Documents" from Plaintiff EEOC (Doc. 120). For the reasons set forth below, the Court **GRANTS in part** and **DENIES in part** this motion.¹ Also before the Court is Defendant's "Motion to Compel Deposition Testimony" from Samuel James, an investigator employed by the EEOC (Doc. 122). For the reasons set forth below, the Court **DENIES** this motion in its entirety.

BACKGROUND

This is an employment discrimination case brought under the Americans with Disabilities Act. Plaintiff–Intervenor Kent Duty ("Mr.Duty") applied for a position with

Defendant railroad as a locomotive electrician. Mr. Duty was hired subject to a medical examination. He was then denied the position after a medical examination by Defendant opined that he is unable to perform essential functions of the job because of a physical impairment in one of his hands.

Defendant has filed two motions to compel requesting the Court to order Plaintiff to provide supplemental discovery responses (Doc. 120) and to order EEOC investigator Samuel James to respond to certain deposition inquiries that he was instructed by counsel not to answer (Doc. 122). Plaintiff has objected that providing the information at issue would implicate the deliberative process privilege, would improperly disclose materials regarding the EEOC's statutorily-required conciliation efforts, would require disclosure of information protected by the work-product doctrine, would improperly implicate communications and information protected by the common interest privilege, and would require disclosure of information protected by the attorney-client privilege. (*See generally* Doc. 135.)

Rather than discuss each discovery request or deposition inquiry individually, Defendant approached its motions to compel by addressing the various categories of objections raised by Plaintiff EEOC. The Court will, therefore, tailor its analysis accordingly.

DISCUSSION

[Fed.R.Civ.P. 26\(b\)](#) states that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." As such, the requested information must be both nonprivileged and relevant to be discoverable.²

" 'Discovery relevance is minimal relevance,' which means it is possible and reasonably calculated that the request will lead to the discovery of admissible evidence." *Teichgraeber v. Memorial Union Corp. of Emporia State University*, 932 F.Supp. 1263, 1265 (D.Kan.1996) (internal citation omitted). "Relevance is broadly construed at the discovery stage of the litigation and a request for discovery should be considered relevant if there is any possibility

the information sought may be relevant to the subject matter of the action.” *Smith v. MCI Telecommunications Corp.*, 137 F.R.D. 25, 27 (D.Kan.1991). Stated another way, “discovery should ordinarily be allowed unless it is clear that the information sought can have no possible bearing on the subject matter of the action.” *Snowden By and Through Victor v. Connaught Lab.*, 137 F.R.D. 325, 341 (D.Kan.1991), appeal denied, 1991 WL 60514 (D.Kan. Mar. 29, 1991).

*2 The scope of discovery is broad, but not unlimited. If the proponent has failed to specify how the information is relevant, the Court will not require the respondent to produce the evidence. *Gheesling v. Chater*, 162 F.R.D. 649 (D.Kan.1995).

A. The Deliberative Process Privilege.

1. Discovery requests.

Plaintiff EEOC raises the deliberative process privilege in response to Defendant's Requests for Production Nos. 1–24, 31, and 32.³ (See generally Doc. 121–1.) The “ ‘deliberative process’ privilege ... protects advice, recommendations, opinions and other material that is part of the deliberative decisionmaking processes of a government agency.” *Hass v. U.S. Air Force*, 848 F.Supp. 926, 930 (D.Kan.1994) (citing *Covington & Burling v. Food and Nutrition Service*, 744 F.Supp. 314, 318 (D.D.C. 1990)). In order for the privilege to apply, the documents at issue must be predecisional; in other words, “they must have been prepared before the agency's decision to which they relate.” *Id.* (internal citation omitted). “Next, the documents must be sufficiently deliberative; that is, they must contain recommendations or express opinions on legal or policy matters.” *Id.* (citing *Nadler v. Department of Justice*, 955 F.2d 1479, 1491 (11th Cir.1992)). “Purely factual matters are not exempt, unless they are sufficiently intertwined with deliberative matters.” *Id.* (citing *Covington & Burling*, 744 F.Supp. at 319).

Of course, as a threshold matter, the information must also be shown to be relevant. Plaintiff EEOC argues that the information sought “has no relevance to this action because this is a *de novo* proceeding on the merits of EEOC's allegations of discrimination not an adjudication of the propriety of the agency's investigation or determination.” (Doc. 135, at 6.) Defendant argues, however, that Plaintiff misunderstands its position.

The issue is that by the very act of suing BNSF and prosecuting a case the agency made itself a party opponent subject to impeachment. The very act of suing and prosecuting a case against BNSF is a representation to any jury that hears this case that EEOC's position on the merits is correct....BNSF is entitled to challenge the agency's claimed or perceived impartiality, expertise, and exercise of care to avoid an impermissible negative impression arising simply by virtue of the agency's role and the fact that it has sued BNSF.

(Doc. 142, at 5–6.)

A similar argument was made in the case of *EEOC v. JBS USA, LLC*, by a Defendant moving to compel production of internal EEOC emails relating to the investigation of the Defendant as well as notes from the EEOC investigator. No. 10–2103–PAB–KLM, 2013 WL 5812478 (D.Colo. Oct. 29, 2013). In denying that motion to compel, the Magistrate Judge held that

Defendant's explanation that the documents go to the ‘credibility’ of the EEOC's allegations sounds uncomfortably like a back-door attempt to evaluate the adequacy of the EEOC investigation, a subject which is simply off limits. See, e.g., *EEOC v. KECO Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir.1984); *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832–33 (7th Cir.2005) (holding “[n]o case actually holds that the scope of the EEOC's investigation is a justiciable issue in a suit by the EEOC”). In addition, Defendant offers no specific reason why the investigator's post-filing notes relating to the Charging Parties' attorneys could be relevant, and the Court perceives none.

*3 Second, to the extent that Defendant argues that the requested documents contain information about ‘facts and witnesses ... and the process [the EEOC] used to investigate,’ the Court is unconvinced. The EEOC's investigatory process is not relevant, for the reason cited above. Moreover, if these types of internal emails were routinely discoverable simply because they refer to facts and witnesses, the deliberative process privilege

would be eviscerated. *EEOC v. Albertson's LLC*, No. 06-cv-01273-CMA-BNB, 2008 WL 4877046 at * 5 (D.Colo. Nov. 12, 2008) (holding that argument that litigant was entitled to discover what information EEOC obtained during its investigation prior to filing of lawsuit as opposed to what purported evidence it put forth after the filing of the lawsuit 'would eviscerate the deliberative process privilege.') (emphasis in original). 'A defendant always wants the benefit of the EEOC's analysis ..., but that alone is insufficient to overcome the important interests of the privilege, properly asserted.' *Id.*

The deliberative process privilege 'shields documents reflecting advisory opinions, recommendations and deliberations compromising part of a process by which governmental decisions and policies are formulated.' *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1226 (10th Cir.2007). The purpose of the privilege is to 'enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.' *Id.*

The deliberative process privilege has been properly asserted here. In the context of an EEOC investigation, the deliberative process privilege may be invoked to protect from disclosure predecisional documents and other information which 'reveal the give and take of the consultative process' concerning the EEOC's investigation and its decisions regarding whether and how to pursue an enforcement action. *EEOC v. Continental Airlines, Inc.*, 395 F.Supp.2d 738, 741 (N.D.Ill.2005).

2013 WL 5812478, at *1-2.

The Requests for Production at issue specifically relate to the EEOC charging and investigatory process (Requests Nos. 1-11, 15, 16), communications with Plaintiff Duty prior to the issuance of his EEOC charge (Request No. 23, 24), communications with BNSF employees (Requests Nos. 14, 17, 31, 32), Defendant's defenses, statements, or contentions (Request No. 5-7), Plaintiff's request for damages (Request No. 12, 13), and communications with individuals who the Court surmises to be experts/consultants (Request Nos. 18, 19, 20, 21, 22). (*See generally* Doc. 121-1, at 3-17.) Given the stated subject matter of the document requests at issue, the Court finds the above reasoning from *EEOC v. JBS USA*, *supra*, applying the deliberative process privilege to be sound.

Given the subject matter of these requests, the Court finds that Defendant's stated desire to impeach the EEOC at trial is merely an inventive attempt to attack the adequacy of the EEOC's investigation. The Court sees no basis in the law to allow Defendant to do this. As such, Plaintiff's assertion of the deliberative process privilege in regard to the discovery requests at issue is **SUSTAINED** and this portion of Defendant's Motion to Compel (Doc. 120) is **DENIED**.

*4 The Court notes that Request No. 20, and portions of Requests Nos. 21 and 22 are not deliberative in nature. Request No. 20 seeks information regarding "amounts paid by you" to medical, technical, or specialized consultants. (Doc. 121-1, at 12.) The Court finds that such documents, which only request information on amounts paid, cannot implicate the deliberative process of the EEOC. The same is true of the portions of Requests Nos. 21 and 22 referencing "any amounts paid to" Terry L. Cordray and Scott Woods, Dsc, PT. Even so, this information is only relevant as it relates to Plaintiff EEOC's deliberative process—and that process is protected from discovery. As such, the documents are irrelevant and will not be produced.

2. Deposition questions.

Plaintiff's counsel also instructed deponent Samuel James, an EEOC investigator, not to respond to various deposition inquiries on the basis of the deliberative process privilege. This is the subject of Defendant's other motion to compel. (Doc. 122.)

The deposition questions implicated relate to why the charge was moved from the KHRC to the EEOC (Doc. 123-1, at 3), why certain interviews never occurred (*id.*, at 4-7), the contents and meaning of redacted sentences included in interview notes the EEOC produced in redacted form (*id.*, at 8-9), conclusions regarding the function in Plaintiff Duty's fingers and sufficiency of work performed/tools used (*id.*, at 10-15), and conclusions regarding the EEOC's investigation and recommendations for the disposition of the charge (*id.*, at 16-19). The Court finds these deposition inquiries to be further attempts to glean information to attack the adequacy of the EEOC's investigation. The Court sees no basis in the law to allow Defendant to do this. As such, Plaintiff's assertion of the deliberative process privilege in regard to these deposition inquiries is **SUSTAINED** and this portion of Defendant's

Motion to Compel Deposition Testimony (Doc. 122) is **DENIED**.

B. Conciliation Materials.

Plaintiff has raised the objection that Requests for Production Nos. 13, 15, 23–33, and Interrogatories Nos. 4, 10, and 11, in part, “call[s] for production of documents protected by ... federal law precluding disclosure of conciliation materials (ADA incorporating Title VII 42 U.S.C. § 2000e–5(b))....” (See generally Doc. 121–1, at 9–10, 13–17; Doc. 121–2, at 7, 11.) This portion of Title VII, which Congress made applicable to the Americans With Disabilities Act, states:

If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

*5 42 U.S.C. § 2000e–5(b).

Citing the case of *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 101 S.Ct. 817, Defendant argues that as a party to an agency proceeding, it “is not a member of the ‘public’ for purposes of the prohibition” on disclosure of this information. (Doc. 121, at 12.) Plaintiff argues that Defendant is interpreting *Associated Dry Goods* too broadly and that, without Plaintiff Duty’s consent, it cannot produce this information. (Doc. 135, at 16–17.)

The Court does not agree with Plaintiff. The language of *Associated Dry Goods* specifically addresses the portion of the statute forbidding public disclosure of any matters

arising in informal conciliation “without the written consent of the persons concerned.” 449 U.S. 590, 598, at n. 13, 101 S.Ct. 817, 822, at n. 13 (citing § 2000e–5(b)). In that context, the Supreme Court held that “[t]his phrase suggests that the parties, the ‘persons’ whose consent would most obviously be necessary, are not members of the ‘public’ to whom disclosure is forbidden.” *Id.*, at n. 13.

Plaintiff also argues that the information is irrelevant because documents it “previously disclosed in this matter are more than sufficient to establish that the Commission met its requirements for good faith conciliation under Tenth Circuit law.” (Doc. 135, at 17.) This argument flies in the face of the very purpose of discovery. It is not for the producing party to pick and choose the information on a relevant subject matter it wishes to disclose and then *sua sponte* determine that it has produced “sufficient” information on the issue.

Defendant has raised the issue that the EEOC did not meet its conciliation requirements. The Court notes that the lack of good faith efforts to conciliate is not an outright defense to liability, but rather a condition precedent to prosecuting the action. See *EEOC v. Prudential Fed. Sav. & Loan Assoc.*, 763 F.2d 1166, 1169 (10th Cir.1985) (noting the Court’s failure to dismiss cases in which the EEOC failed to fulfill its duty to conciliate); *EEOC v. BNSF*, No 07–734–D, 2008 WL 4845308, at *2, n. 6 (W.D. Okla. June 23, 2008) (holding that the remedy for a failure by the EEOC to conciliate is “a stay of the case until conciliation efforts are completed, not dismissal of the case.”). Further, the Tenth Circuit has been clear that district courts are not to “examine the details of the offers and counter-offers between the parties, nor impose its notions of what the agreement should provide” in deciding whether the EEOC has fulfilled its conciliation requirements. *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir.1978). Even so, the issue of conciliation remains relevant to this lawsuit. See *id.* (holding that the EEOC may bring an action in federal court “[o]nly if conciliation proves to be impossible” after statutorily-mandated good faith efforts to conciliate); *EEOC v. BNSF*, 2008 WL 4845308, at *2, n. 6 (holding that it is appropriate to stay a case to remedy the EEOC’s failure to conciliate).

*6 The Court, therefore, must determine whether the individual requests at issue are relevant to the issue of conciliation generally without seeking to improperly dissect the details of the conciliation, as such overly

specific information becomes irrelevant. Plaintiff raised the conciliation materials objection that Requests for Production Nos. 13, 15, 23–33, and Interrogatories Nos. 4, 10, and 11. Each discovery request will be discussed in turn.

1. Request No. 13.

This request seeks documents regarding the type and amount of damages and relief Plaintiff seeks “including but not limited to unpaid wages and overtime compensation on behalf of Duty, liquidated damages, punitive damages, attorney’s fees, costs, expenses, prejudgment and postjudgment interest, expert witness fees, and any other damages to which you claim you are entitled.” (Doc. 121–1, at 9.) The Court fails to see how information responsive to this request could be considered protected conciliation materials. Even to the extent this information was discussed or analyzed during the conciliation process, information regarding the type and calculation of Plaintiff’s damages is not *per se* protected conciliation material. Plaintiff’s objection is **overruled** and Defendant’s motion is **GRANTED** in regard to Request No. 13.

2. Request No. 15.

Request No. 15 seeks “[t]he entire, unredacted contents of your investigative file(s) related to EEOC Charge No. 28D–2009–00420.” (Doc. 121–1, at 10.) While information contained in the investigative file might be privileged on other grounds,⁴ the Court **overrules** Plaintiff’s objection to producing any documents that where withheld from disclosure solely on the basis that they constitute conciliation materials, with the exception of specific offers and counter-offers, discussed in subsection 3, *infra*. Defendant’s motion is **GRANTED** in regard to Request No. 15.

3. Requests Nos. 23–29.

Request No. 23 seeks documents “containing, reflecting, or referencing communications from you to Duty prior to the issuance in EEOC Charge No. 28D–2009–00420 of the Determination dated August 24, 2011” while Request No. 24 seeks such communications from Plaintiff Duty to the EEOC. (Doc. 121–1, at 13.) Request No. 25 seeks documents regarding “communications from you to Duty after the issuance in EEOC Charge No. 28D–2009–00420 of the Determination dated August 24,

2011, but prior to your conclusion that conciliation with respect to that charge had failed,” while Request No. 26 seeks such communications from Plaintiff Duty to the EEOC. (Doc. 121–1, at 14.) Request No. 27 asks for documents regarding “communications from you to Duty in connection with the Conciliation Agreement you proposed on or about August 24, 2011 in connection with EEOC Charge No. 28D–2009–004200,” while Request No. 28 seeks such communications from Plaintiff Duty to the EEOC. (*Id.*, at 14–15.) Request No. 29 seeks “[a]ll documents that you contend demonstrate satisfaction of your conciliation obligation with respect to EEOC Charge No. 28D–2009–00420.” (*Id.*, at 15.)

*7 The Court finds that such information may shed light on the issue of whether the EEOC’s conciliation efforts were in good faith, which is a condition precedent to the EEOC bringing a lawsuit in its name. Because Defendant is not a member of the “public” to whom disclosure of these materials is prohibited, *see Associated Dry Goods, supra*, and because good faith conciliation efforts are a condition precedent to suit, the Court finds that the documents at issue are generally discoverable.

The Court previously stated, however, that it would be improper for it to “examine the details of the offers and counter-offers between the parties, nor impose its notions of what the agreement should provide” in deciding whether the EEOC has fulfilled its conciliation requirements. *Zia*, 582 F.2d at 533. Therefore, communications relating to conciliation offers and counter offers are irrelevant to any analysis the Court will make in this case. Plaintiff’s objection is **sustained in part** and **overruled in part** while Defendant’s motion is **GRANTED in part** and **DENIED in part** in regard to Requests Nos. 23–29. Documents or communications regarding conciliation offers and counter-offers are not to be produced. All other conciliation materials withheld by Plaintiff in response to these document requests, however, shall be produced.

4. Request No. 30.

This request seeks “[a]ll documents you relied on in arriving at the payments requested in the Conciliation Agreement (section III, paragraphs B & C, “Charging Party Relief”) you proposed on or about August 24, 2011 in connection with EEOC Charge No. 28D–2009–00420.” (Doc. 121–1, at 16.) As stated above, the Tenth Circuit has been clear that district courts are not to

“examine the details of the offers and counter-offers between the parties, nor impose its notions of what the agreement should provide” in deciding whether the EEOC has fulfilled its conciliation requirements. *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir.1978). As such, the Court finds the information sought by Request No. 30 to be irrelevant. Plaintiff’s objection is **sustained** and Defendant’s motion is **DENIED** in regard to Request No. 30.

5. Requests Nos. 31–33.

Request No. 31 seeks “[a]ll documents containing, reflecting, or referencing communications to you from any past or present employee of BNSF or on his/her behalf, referring or relating to the subject matter of this lawsuit” while Request No. 32 asks for such communications from the EEOC to such individuals. Request No. 33 seeks “[a]ll documents, including Statements or reports, given to you and/or anyone acting on your behalf by any persons interviewed by you and/or anyone acting on your behalf, with respect to the subject matter of this lawsuit.” (Doc. 121–1, at 16–17.) The Court fails to see how information responsive to this request could be considered conciliation materials. Plaintiff has not provided sufficient argument on the issue as it relates to these specific requests. Even to the extent such communications relate to or specifically reference conciliation efforts, the Court also sees no basis to find that such communications would be protected given that Defendant is not considered a member of the “public” to whom production of such materials is prohibited. *See Associated Dry Goods, supra*. Plaintiff’s objection is **overruled** and Defendant’s motion is **GRANTED** in regard to Requests Nos. 31 and 32.

6. Interrogatory No. 4.

*8 Interrogatory states, “[w]ith respect to every oral communication you have had with Duty (a) describe the substance of the communication; (b) provide the date of the communication; (c) state the mode of the communication (i.e., in person or by other means); and (d) identify any other persons present during such communications.” (Doc. 121–2, at 7.) The Court finds that it was improper for the Plaintiff to withhold conciliation materials responsive to Interrogatory No. 4 *other than* communications relating to conciliation offers and counter offers. *See Zia*, 582 F.2d at 533 (holding that it would be improper for it to “examine the details of the offers and counter-offers between the parties,

nor impose its notions of what the agreement should provide” in deciding whether the EEOC has fulfilled its conciliation requirements). As such, Plaintiff’s objection is **sustained in part** and **overruled in part** while Defendant’s motion is **GRANTED in part** and **DENIED in part** in regard to Interrogatory No. 4. Plaintiff shall provide a supplemental response to Interrogatory No. 4, detailing all such communications, including those relating to the conciliation process. Plaintiff shall not, however, divulge the specific conciliation offers and counter-offers discussed with Plaintiff Duty.

7. Interrogatory No. 10.

This interrogatory asks Plaintiff EEOC for “the basis on which you arrived at the payments requested in the Conciliation Agreement (section III, paragraphs B & C, “Charging Party Relief”) you proposed on or about August 24, 2011 in connection with EEOC Charge No. 28D–2009–00420, and describe all documents referenced in arriving at those amounts.” (Doc. 121–2, at 11.) As stated numerous times herein, the Tenth Circuit has been clear that district courts are not to “examine the details of the offers and counter-offers between the parties, nor impose its notions of what the agreement should provide” in deciding whether the EEOC has fulfilled its conciliation requirements. *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir.1978). The information sought by Interrogatory No. 10 is clearly improper and irrelevant to the District Court’s analysis of Plaintiffs’ claims and Defendant’s defenses. Plaintiff’s objection is **sustained** and Defendant’s motion is **DENIED** in regard to Interrogatory No. 10.

8. Interrogatory No. 11.

This interrogatory asks Plaintiff EEOC to “[i]dentify all persons involved in making decisions on behalf of you with respect to the conciliation process for EEOC Charge No. 28D–2009–00420, including decisions as to what relief to request, how to respond to any proposals from Defendant, and whether to declare conciliation to have been unsuccessful.” As previously noted herein, aspects of the conciliation process relating to offers and counter-offers are irrelevant. *See* subsections and 3, 4, 6, and 7, *supra*. Even so, the Court finds that the identities of individuals involved in the conciliation process on behalf of the EEOC—including those involved in formulating and responding to offers and counter-offers—is relevant. The identity of these individuals may lead to admissible evidence regarding the issue of whether the EEOC

engaged in the mandated good faith conciliation efforts. Plaintiff's objection is **overruled** and Defendant's motion is **GRANTED** in regard to Interrogatory No. 11.

9. Deposition questions.

*9 Plaintiff's counsel also instructed deponent Samuel James not to respond to various deposition inquiries on the basis that the information requested constituted or implicated conciliation materials. These deposition objections are addressed in Defendant's Motion to Compel Deposition Testimony. (Doc. 122.)

The subjects of the deposition questions implicated involve whether the deponent investigator made the decision regarding the amounts to be requested in the proposed conciliation agreement (Doc. 123-1, at 20), and whether the EEOC would be willing as part of the conciliation process to consider legal challenges to its investigatory findings (*id.*, at 21, 22). Regardless of whether or not this information implicates protected conciliation materials, the Court fails to see any relevance whatsoever as to Plaintiffs' claims or Defendant's defenses.

It is well-established that the EEOC is required to act in good faith, and must make "a sincere and reasonable effort to negotiate by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements." *EEOC v. Prudential*, 763 F.2d at 1169. Even so, the Tenth Circuit has been clear that district courts are not to "examine the details of the offers and counter-offers between the parties, nor impose its notions of what the agreement should provide" in deciding whether the EEOC has fulfilled its conciliation requirements. *EEOC v. Zia*, 582 F.2d at 533. Because this information is irrelevant on its face, the Court **DENIES** Defendant's Motion to Compel Deposition Testimony (Doc. 122) in this regard.

C. Work Product Materials.

Plaintiff has raised the protection of the work product doctrine in response to Defendant's Interrogatories Nos. 1, 4, 6, 7, 9, 10, and 12, and Requests for Production Nos. 1-32 and 34-36. (*See generally* Doc. 121-1, 121-2.) The general limitation on the discovery of work product is described in *Fed. R. Civ. Proc. 26(b)(3)*, which provides that, with limited exceptions, "documents and tangible things" prepared by a party or its agents "in anticipation of litigation or for trial" are not discoverable. "To

establish the applicability of the work product privilege, [the withholding party] must show the following elements: '(1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party.' " *U.S. Fire Ins. Co. v. Bunge North America, Inc.*, No. 05-2192-JWL-DJW, 2008 WL 2548129, at *5 (D. Kan. June 23, 2008) (quoting *Johnson v. Gmeinder*, 191 F.R.D. 638, 643 (D.Kan.2000) (citations omitted)).

The asserting party has the burden of establishing work product protection. To carry that burden, the proponent must make a 'clear showing' that the asserted objection applies. A 'blanket claim' as to the applicability of the work product doctrine does not satisfy the burden of proof. It is well settled that the party seeking to invoke work product immunity has the burden to establish all elements of the immunity and that this burden can be met only by an evidentiary showing based on competent evidence.

*10 *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, No. 10-2008-CM-DJW, 10-2068-CM-DJW, 2011 WL 1102868, at *8 (D.Kan. March 23, 2011) (citing *U.S. Fire Ins. Co. v. Bunge N.Am., Inc.*, 247 F.R.D. 656, 657 (D.Kan.2007)).

Defendant argues that it

is not seeking access to EEOC's attorneys' notes even if they predate the time when BNSF contends that EEOC could possibly have been anticipating litigation. Second, BNSF is not seeking any materials claimed as work product that were created after the date that EEOC announced that the pre-lawsuit conciliation process had failed, which was on December 20, 2011. But BNSF does ask the Court to overrule all work-product objections EEOC has asserted for

materials or communications prior to that date, other than EEOC's attorneys' own notes. Those are the categories of information that make up the bulk of the dispute over the work-product privilege, although BNSF discusses a few other items below.

(Doc. 121, at 13–14.) Defendant continues that any such documents should be considered “[m]aterials assembled in the ordinary course of business or for other non-litigation purposes,” which are not protected by the doctrine. (*Id.*, at 14 (citing *Ledgin v. Blue Cross & Blue Shield of Kansas City*, 166 F.R.D. 496, 498 (D.Kan.1996)). According to Defendant, Plaintiff EEOC “could not have been anticipating litigation such that a work-product privilege could apply until, at the earliest, sometime after the date it announced that conciliation had failed.” (Doc. 121, at 14.)

Plaintiff responds that its

enforcement unit is a neutral fact-finder before conciliation fails, but the EEOC legal unit operates in different manner. EEOC attorneys identify a small number of charges as potential litigation vehicles for the Agency by ‘flagging’ them as ‘A’ cases when they are filed with the Commission (either directly with the EEOC or dual-filed with a state and local agency, as was the case here). An EEOC attorney flagged Mr. Duty's charge in this manner. Once an EEOC attorney flags a charge, the attorney is assigned to the charge. From that point forward, the EEOC attorney assigned to the charge is providing input to the EEOC Investigator and evaluating the charge for the purpose of determining whether it will be suitable for a Commission enforcement action. The vast majority of charges filed with the EEOC are not flagged by an EEOC attorney and have no attorney assigned to them. But on those cases that are attorney-flagged, all the attorney work product that is produced is prepared in anticipation of litigation. To hold otherwise would limit the work product protection to work that is prepared for ‘proceedings in a court of record,’ which is not consistent with the law. Thus, the EEOC attorney work product withheld in this case is, in fact, entitled to work product protection.

(Doc. 135, at 23.)

Defendant replies, however, that it “is not asking for EEOC's counsel's notes or ... internal EEOC communications with their lawyer.” (Doc. 142, at 20.) Instead, “the communications at issue here are EEOC's communications with [Plaintiff] Duty and his lawyer, Duty and his lawyer's communications with EEOC, and communications with third-party, Terry Cordray.” (*Id.*) Plaintiff did not specifically address such documents or communications in its response to Defendant's motion. As such, any such arguments or objections should be considered to have been waived.

*11 The Court will, however, assume Plaintiff is arguing its communications with Duty and his counsel fall under the work product doctrine that Plaintiff contends came into existence “once an EEOC attorney flags the charge....” (Doc. 135, at 23.) Plaintiff does not, however, indicate when such a “flagging” by an EEOC attorney allegedly occurred in the present case. Thus, the only date available on which the Court may draw this figurative line in the sand is December 20, 2011, the date that the EEOC announced that the pre-lawsuit conciliation process had failed.

Defendant's motion is **GRANTED** in this regard. Plaintiff is directed to produce any responsive information regarding communications between Plaintiff EEOC and Plaintiff Duty (and their counsel) that were created before December 20, 2011, and were withheld on the basis of the work product doctrine.

D. Common Interest Doctrine.

Plaintiff has raised the common interest doctrine as a reason not to respond to Request for Production Nos. 1–14, and 17–33, (Doc. 121–1), and Interrogatories No. 4 (Doc. 121–2, at 7). The doctrine was explained by Magistrate David Waxse in the case of *United States Fire Ins. Co. v. Bunge North America*:

Generally, when a communication between a client and an attorney occurs in the presence of third parties, the attorney-client privilege is waived. The common interest doctrine, however, affords two parties with a common legal interest a safe harbor in which they can openly share privileged information without risking the wider dissemination of that information. The common interest doctrine can only exist where there is an applicable underlying privilege.

The common interest doctrine is not a separate privilege, but an exception to waiver of the attorney-client privilege. The common interest doctrine thus acts as an exception to the general waiver rule by facilitating cooperative efforts among parties who share common interests. For the common interest doctrine to attach, ‘most courts ... insist that the two parties have in common an interest in securing legal advice related to the same matter—and that the communications be made to advance their shared interest in securing legal advice on that common matter.’ ‘The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.’

No. 05–2192–JWL–DJW, 2006 WL 3715927, at *2 (D.Kan. Dec. 12, 2006) (citations omitted).

Defendant argues that the

EEOC cannot rely on the common-interest privilege as to communications prior to conciliation failure because prior to that time EEOC and Duty did not share a common interest sufficient to rely on the common-interest privilege the parties must ‘have an identical legal interest,’ not merely a similar one. But until EEOC had an interest in prosecuting the action—which as a matter of law could only have been after conciliation efforts failed—Duty and EEOC did not have ‘identical legal interest[s]. As such, the common-interest exception to waiver cannot apply to any of the pre-conciliation materials.

*12 (Doc. 121, at 16–17.) Defendant contends that this is also true of any preconciliation failure communications between the EEOC, Plaintiff Duty, and Terry Cordray, a former employee of Defendant who provides vocational rehabilitation services who was retained and paid by the EEOC to compile a report on Plaintiff during the EEOC’s investigation process. (*Id.*)

In response, Plaintiff cites numerous cases in which private individuals were considered to share a “common interest” with a governmental agency. (*See* Doc. 135, at 24–25.) Unfortunately for Plaintiff, however, none of these cases involved the factual situation occurring in the present matter in which the governmental agency involved has the initial, statutorily-mandated role of conciliator between the individual Plaintiff and his former employer

Defendant—a role which subsequently changes if and when the conciliation process is unsuccessful.

The Court agrees with Plaintiff that a common interest exists between the EEOC and Duty—but the Court agrees with Defendant that the common interest between the EEOC and Duty did not exist until the conciliation efforts of the EEOC were unsuccessful and the agency decided to bring suit in its name, giving the EEOC and Duty an identical legal interest.

Defendant’s motion is **GRANTED** in this regard. Plaintiff is directed to produce any responsive information regarding communications between Plaintiff EEOC and Plaintiff Duty (and their counsel), including such communications involving Terry Cordray, that were created before December 20, 2011, and were withheld on the basis of the common interest doctrine.

E. Attorney–Client Privilege.

1. Discovery requests.

Defendant challenges Plaintiff’s assertion of the attorney-client privilege in response to Interrogatories Nos. 4 and 10 (Doc. 121–2, at 7, 11) and Requests for Production Nos. 14, 17–28, and 31–32⁵ (Doc. 121–1, at 9–17) for any communications between the EEOC, Duty, and/or Duty’s attorney that occurred before the EEOC’s statutorily-mandated conciliation was deemed unsuccessful. Defendant specifically states that it “does not seek any communications between EEOC’s attorneys and EEOC employees.” (Doc. 121, at 19.) Plaintiff’s response discusses only those communications within the EEOC, and states that “[a]ll of the information the EEOC has withheld under the attorney/client privilege are communications between counsel and personnel in the EEOC Enforcement Unit and Office of General Counsel concerning legal advice about Mr. Duty’s charge.” (Doc. 135, at 21.) For the reasons set forth above in regard to the work product doctrine and the common interest doctrine, Defendant’s motion is **GRANTED** to the extent such communications occurred between the EEOC, Duty, and/or Duty’s attorney before the EEOC’s statutorily-mandated conciliation was deemed unsuccessful and have been withheld on the basis of the attorney-client privilege.

2. Deposition questions.

*13 Plaintiff's counsel also instructed deponent Samuel James not to respond to various deposition inquiries on the basis that the information requested was protected by the attorney-client privilege. These deposition objections are addressed in Defendant's Motion to Compel Deposition Testimony. (Doc. 122.)

The deposition questions implicated involve the EEOC investigator's conclusions regarding the sufficiency of the work performed/tools used (Doc. 123–1, at 13), why it took approximately nine months to reach a conclusion regarding the alleged insufficiency (*id.*, at 14), why the EEOC determinations did not include a reference to the phrase “reasonable cause” (*id.*, at 16), and whether the EEOC was willing to consider legal challenges to its determination of cause as part of a conciliation agreement (*id.*, at 21). Plaintiff makes little effort to explain how or why the attorney-client privilege would prohibit deposition responses to these questions. (*See generally* Doc. 135, at 20–22 .) Even so, the Court fails to see how this information is in any way relevant to Plaintiffs' claims or Defendant's defenses. Further, these

questions appear to be nothing more than an additional back door attempt to attack the adequacy of the EEOC's investigation. Because this information is irrelevant on its face, the Court **DENIES** Defendant's Motion to Compel Deposition (Doc. 122) Testimony in this regard.

IT IS THEREFORE ORDERED that Defendant's Motion to Compel Responses to Defendant's First Interrogatories and First Requests for Production of Documents (Doc. 120) is **GRANTED in part** and **DENIED in part** as more fully set forth herein.

IT IS FURTHER ORDERED that Defendant's Motion to Compel Deposition Testimony (Doc. 122) is **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 1571278, 29 A.D. Cases 1604

Footnotes

- 1 Plaintiff has raised multiple objections and privileges to most of the discovery requests at issue. More than one of the objections and privileges may apply to a particular discovery request or document that has been withheld from production. To the extent an objection or assertion of privileges is overruled herein in regard to a specific discovery request, any responsive information shall be produced only to the extent it does not fall under the protection of another privilege raised by Plaintiff that the Court has sustained. While this may complicate the process of determining which documents are to be produced, this analytical approach was necessary for the Court to employ based on the manner in which these objections were grouped together in the underlying briefs.
- 2 Most of Plaintiff's objections relate to issues of privilege, although relevance is also implicated in the Court's decision.
- 3 The Court notes that Plaintiff has, without waiving this objection, produced nonprivileged documents in response to all but one of these requests—R.F.P. No. 22, seeking documents relating to communications with Scott Woods, DSc, PT. (Doc. 121–1, at 12–13.)
- 4 The Court reiterates that more than one of the objections and privileges may apply to a particular discovery request or responsive document that has been withheld from production. To the extent an objection or assertion of privileges is overruled herein in regard to a specific discovery request, any responsive information shall be produced only to the extent it does not fall under the protection of another privilege raised by Plaintiff that the Court has sustained.
- 5 The Court notes that Defendant is not challenging Plaintiff's assertion of the attorney-client privilege in regard to Requests for Production Nos. 1–13, 15, 16, 29, and 30.

2009 WL 1193874

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2009 WL 1193874

Only the Westlaw citation is currently available.
United States District Court,
D. Colorado.

In re APPLICATION OF [MICHAEL WILSON
& PARTNERS, Limited](#), for Judicial
Assistance Pursuant to 28 U.S.C. § 1782.

Civil Action No. 06-cv-02575-MSK-KMT.

|
April 30, 2009.

Attorneys and Law Firms

[Anne Katherine Toomey](#), Baach Robinson & Lewis, PLLC, Washington, DC, [James F. Scherer](#), Miller & Law, P.C., Littleton, CO, [Thomas R. Bromberg](#), Solomon Pearl Blum Heymann & Stich, LLP, Denver, CO, For Application of Michael Wilson & Partners, Limited.

ORDER

[KATHLEEN M. TAFOYA](#), United States Magistrate Judge.

*1 This matter is before the court on Michael Wilson & Partners Limited's ("MWP") Motion to Compel Further Discovery Responses" ("Mot.") [Doc. No. 100, filed November 24, 2008]. "Respondents' Opposition to Motion to Compel Further Discovery Responses" ("Rsp.") [Doc. No. 102] was filed on December 15, 2008 and MWP's Reply was filed on December 30, 2008 ("Reply") [Doc. No. 104]. Related to these proceedings and also considered by the court is the "Notice of Judgment" [Doc. No. 106] filed by the Respondents on February 2, 2009. The court has concluded that oral argument would not be beneficial and therefore the matter is ripe for review and ruling.

BACKGROUND

The following synopsis of underlying facts is taken from the Order of Magistrate Judge Michael Hegarty dated July 27, 2007. [Doc. No. 37.]

Petitioner Michael Wilson & Partners, Limited ("MWP") is an international law firm that is seeking discovery from former clients who have ended their business relationship with Petitioner in favor of one with a law firm comprised of Petitioner's former partner Mr. Emmott, and former associates, Messrs. Nicholls and Slater. Petitioner has instituted a lawsuit against Mr. Emmott in England seeking evidence related to Petitioner's claims against Emmott in private arbitration proceedings. Petitioner has also filed suit against Messrs. Nicholls and Slater in Australia alleging accessory liability for dishonest assistance, conspiracy to defraud, and breaches of fiduciary and contractual duties, including breaches of restrictive covenants and duties of confidentiality.

Petitioner filed its Application for discovery pursuant to Section 1782 to obtain documents and deposition testimony from two former clients, Sokol and Frontier Mining, as well as the principal owners of these companies, Mr. Sinclair and Mr. Savage, respectively. The two companies are both Delaware corporations with principal places of business in Centennial, Colorado. Petitioner argues that Emmott diverted business from these clients away from MWP and to the firms and companies with which he is now associated. Petitioner contends that many of its clients compensate the firm for its legal work by giving the firm a stake in the underlying venture. Petitioner asserts that Emmott has received an interest in one project, the Max Petroleum project, and likely others, as a result of work he completed while still associated with MWP. Thus, Petitioner seeks documentation related to ten different ventures around the world in which Petitioner believes that an interest or compensation for the project has been diverted from MWP and to a company owned or controlled by Emmott, Nicholls, and Slater.

District Judge Marcia S. Krieger granted Petitioner's Application under Section 1782, and MWP served subpoenas on Respondents in January and February 2007. Respondents objected to the subpoenas on various grounds, and after some months of conferring, Petitioner filed the instant Motion to Compel.

*2 *Id.* at 1-2.

On October 31, 2007, Magistrate Judge Hegarty issued an Order clarifying the extent of allowable discovery,

addressing matters subject to protective order, and addressed issues of cost sharing for the discovery to be produced. [Doc. No. 54.] That Order was appealed by both MWP and Respondents; however the Order was affirmed by the District Court on May 15, 2008. On March 5, 2009, the District Court declined to reconsider its Order but re-opened the case in order to provide a mechanism for review of the instant Motion and of the Notice of Judgment.

MWP seeks further discovery in this matter which it claims was either not provided by Respondents as required, or which was not complete. Respondents oppose producing any further documents, claiming they have fully complied with the subpoenas and have produced over 350,000 pages of discovery at a cost of “in excess of \$2.5 million.” (Rsp. at 6.) Respondents request that the court require MWP to post a bond in the sum of \$1 million dollars to guarantee the payment of their share of the costs of discovery production as previously ordered by the Magistrate Judge and upheld by the District Court.

Respondents claim they entered into an agreement with MWP which would have obviated the need for ruling on MWP's Motion. Respondents claim MWP has breached the agreement. MWP agrees that a proposal to resolve the issues contained in the instant motion was made but asserts that agreement was never reached. The parties disagree about the terms of any agreement and, further, whether either party performed fully under the agreement. This court finds there was no meeting of the minds with respect to resolution of the discovery issues in this case and therefore the court will decide the merits of the pending discovery dispute.

MWP's requests can be broken down into five essential categories. MWP asserts: 1) the deposition testimony of respondents' Rule 30(b)(6) witness was inadequate and the deponent was not properly prepared and educated prior to the deposition; 2) the search for documents relevant to its discovery requests was inadequate and that a more thorough search should be made of respondents' files and records; 3) Respondents improperly withheld documents on the basis of privilege; 4) the respondents' privilege log is inadequate; and 5) the production which was made was a “jumble” of documents which so impeded their ability to sort and review the documents that they should be compensated.

STANDARDS

The documents and testimony to be produced in this matter are subject to the provisions of [Title 28 U.S.C. § 1782](#), “Assistance to foreign and international tribunals and to litigants before such tribunals.” [Section 1782](#) provides, “To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.” *Id.*

[Fed.R.Civ.P. 45](#) governs documents and deposition productions from non-parties by subpoena. The scope of permissible discovery pursuant to [Rule 45](#) is set forth in [Fed.R.Civ.P. 26\(b\)\(1\)](#), which provides, in part, that, “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents....” Further, “for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” *Id.*; *see also* [Fed.R.Civ.P. 45\(d\)\(1\)](#), Advisory Committee Note (“[t]he changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and other discovery rules.”) Congress' clear intention was to more actively involve the court in limiting discovery to “the actual claims and defenses involved in the action.” [Fed.R.Civ.P. 26](#), Advisory Committee Note.

*3 When non-parties are responding to discovery requests, courts consider the burden on the non-parties and apply, among others, the following factors in ruling on a Motion to Compel: relevance, the requesting party's need for the documents, the breadth of the document request, and the time period covered by the request. [Echostar Communications Corp. v. News Corp. Ltd.](#), 180 F.R.D. 391, 396 (D.Colo.1998). *See* [Cytodyne Tech., Inc. v. Biogenic Tech., Inc.](#), 216 F.R.D. 533, 535 (M.D.Fla.2003), citing [Farnsworth v. Proctor & Gamble Co.](#), 758 F.2d 1545 (11th Cir.1985); [erinMedia, LLC v. Nielsen Media Research, Inc.](#), 2007 WL 1970860, 1–2 (M.D.Fla. .2007). The court has considerable discretion in the regulation of the discovery which is exchanged in a lawsuit, and the rules provide that the court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense....” [Fed.R.Civ.P. 26\(c\)](#). Discovery from third-parties must, under most circumstances, be closely regulated. [Echostar](#) at 396.

ANALYSIS

I. Discovery

A. Further Deposition of Rule 30(b)(6) Witness for Respondents

The parties do not disagree that by Order of the English Arbitral Tribunal, the deposition to be taken of the non-party respondents' Rule 30(b)(6) designated representative was to be a “purely custodial deposition ... strictly limited to issues relating to the Companies' possession of, custody of, or power over alleged documents.” (Rsp. at 8.) The designated deponent was Brian C. Savage.

The procedure for taking an oral deposition of an organizational entity is governed by Fed.R.Civ.P. 30(b)(6) which provides:

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization.

Id.

Rule 30(b)(6) implicitly requires the designated entity representative to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 1054279, *3 (D.Kan.2007). This interpretation is necessary in order to make the deposition meaningful. “Inadequate preparation of a Rule

30(b)(6) designee can be sanctioned based on the lack of good faith, prejudice to the opposing side, and disruption of the proceedings.” *Starlight Int'l. v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan.1999); *Payless Shoesource Worldwide, Inc. v. Target Corp.*, 2007 WL 1959194, *1 (D.Kan.2007).

*4 While acknowledging that preparing for a Rule 30(b)(6) deposition can be burdensome, the scope of the inquiry here was substantially limited. However, it appears Mr. Savage engaged in little to no preparation for the deposition, even on the circumscribed topics to be covered. (Reply at 12, citing Savage Dep.) He was uninformed about such routine custodial information as employee document preservation and storage practices as well as the limitations of his own electronic systems concerning document retention and retrieval. *Id.* A deponent does not fulfill its obligations at the Rule 30(b)(6) deposition by stating it has no knowledge or position with respect to a set of facts or area of inquiry within its knowledge or reasonably available. *Heartland, id.* The deponent was also not knowledgeable as to the framework of the search for documents which were produced as part of the discovery obligations under the subpoenas. This information is part of a document custodian's reasonable sphere of knowledge. See *Alexander v. F.B.I.*, 192 F.R.D. 37, 40 (D.D.C.2000) (a deposition of a custodian of records may be taken in order to address concerns about the adequacy of the entity's search and compliance with a subpoena). The person who apparently directed and devised the search criteria for compliance with the subpoenas was Mr. Savage's agent; Mr. Savage, therefore, had a duty to know and understand the process sufficiently to provide meaningful information in his capacity as a Rule 30(b)(6) deponent. *Id.* at *4, 6–7 (corporations, partnerships, and joint ventures have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unequivocally answer questions about the designated subject matter).

If designated persons do not possess personal knowledge of the matters to which they might expect inquiry, the entity is obligated to prepare the designees so that they may give knowledgeable and binding answers for the organization. *Starlight Intern. Inc. v. Herlihy* 186 F.R.D. 626, 638–639 (D.Kan.1999); *Sprint Communications v. Theglobe.com, Inc.*, 236 F.R.D. 524, 527 (D.Kan.2006). “[I]f it becomes obvious during the course of a deposition that the designee is deficient, the [organization] is

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obligated to provide a substitute.” *Starlight, id.* (omitting internal citations).

Because the respondents are non-parties, MWP “must meet a burden of proof heavier than the ordinary burden imposed under Rule 26.” *Echostar*, 180 F.R.D. at 394. “Courts are required to balance the needs for discovery against the burdens imposed when parties are ordered to produce information or materials, and the status of a person or entity as a non-party is a factor to be weighed. *Id.*, citing *American Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738 (Fed.Cir.1987). As noted, however, although the respondents are non-parties to the underlying litigation, it is undisputed that they are in many respects involved in the dispute and that the outcome of the litigation is of import to them. (Mot. at 2; Rsp., fn. 1.)

*5 Mr. Savage's lack of information concerning the production of documents pursuant to subpoena and the methods of searching, together with his lack of information concerning the normal document retention policies of the company, the location and source of documents and other information which fall under the custodial rubric is an obvious failure to properly prepare for the Rule 30(b)(6) deposition.¹

Therefore, MWP shall be allowed to take a further deposition of Mr. Savage or another *fully and completely prepared* Rule 30(b)(6) representative. All fees and costs associated with the taking of this deposition will be borne by the respondents since it is their original failure to prepare the designated witness which necessitates the need for additional questioning.²

B. Adequacy of Search for Documents

MWP also claims the respondents did not search several key areas of their business where responsive documents could have been expected to be located. (Mot. at 17, *et seq.*) In particular, MWP claims that more than just two laptop computers should have been searched. In particular, MWP requests that the court compel the respondents to conduct a search of the computer of employee Alexandra Timofeeva, as well as company computer storage devices and additional computers belonging to Mr. Savage and Mr. Sinclair.

Mr. Savage's deposition testimony indicates that many of the firm's banking, accounting and shareholder records

could be expected to reside on the Timofeeva computer. (Reply at 15.) Further, Mr. Savage testified that electronic storage devices were in existence at the time of the search and that documents and other information were saved on CDs, USB drives and other devices. (Reply at 16.)

As to the additional computers belonging to Mr. Savage and Mr. Sinclair, the respondents state that the two laptop computers which were searched were the only two computers belonging to Savage and Sinclair “at the time the subpoenas were served.” The operative time period pertaining to whether Savage/Sinclair later acquired computers should have been searched is whether the computers were in existence at the time of the *response* to the subpoenas. See *erinMedia, LLC* at *4.³

Auxiliary hard drives, zip drives, USB devices, CD's and other electronic storage devices essentially perform the same function as did a file cabinet in the pre-electronic era. Therefore, the respondents have an obligation to search all such storage devices for relevant documents just as they would have had to do had all the information been printed out and stored in hard copy format. The fact that duplicate documents may have been stored and maintained in more than one place is irrelevant to the duty to search all locations where responsive documents might be found. Again, this duty is to search the electronic storage devices is specifically limited to the time period immediately prior to the respondents original response to the subpoenas.

*6 It is likely that the Timofeeva computer was the repository of a large number of documents with the potential of being relevant and responsive to the subpoenas issued by MWP. That computer, as well as all other storage devices, and any other computers used by Mr. Savage or Mr. Sinclair prior to the date of the search, should have been part of the search parameters. Therefore, a further search and production by the respondents consistent with this Order is warranted.

C. Privilege and Contents of Privilege Log

Discovery procedures set forth in the Federal Rules of Civil Procedure seek to further the interests of justice by minimizing surprise at trial and ensuring wide-ranging discovery of information. *S.E.C. v. Nacchio*, 2007 WL 219966, *4 (D.Colo.2007). To that end, Rule 26(b) permits discovery “regarding any *nonprivileged* matter, that is relevant to any party's claim or defense” or

discovery of any information that “appears reasonably calculated to lead to the discovery of admissible evidence.” See [Fed.R.Civ.P. 26\(b\)\(1\)](#) (emphasis added). The party resisting discovery on grounds of privilege or the work product doctrine bears the burden of coming forward with facts that would sustain their claim. *Nacchio* at 4; *Cf. Resolution Trust Corp. v. Heiserman*, 151 F.R.D. 367, 373 (D.Colo.1993).

By excluding “privileged” information from the broad parameters of pretrial discovery, [Rule 26](#) attempts to strike a balance between conflicting interests. Privileges further the administration of justice and “should not be set aside lightly.” See *Horton v. United States*, 204 F.R.D. 670, 672 (D.Colo.2002); *McNeil-PPC, Inc. v. Procter & Gamble Co.*, 138 F.R.D. 136, 138 (D.Colo.1991). However, privileges also have the effect of withholding relevant information from the finder of fact, and for that reason should be narrowly construed. See *Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 225 (D.D.C.1995). For the same reason, the party withholding information on the basis of privilege must make a *clear showing* that the asserted privilege applies and must establish all elements of the privilege. *National Union Fire Ins. Co. of Pittsburgh v. Midland Bancor, Inc.*, 159 F.R.D. 562, 567 (D.Kan.1994). *Cf. McCoo v. Denny's Inc.*, 192 F.R.D. 675, 683 (D.Kan.2000) (the party invoking a privilege must establish all elements of the doctrine through an evidentiary showing based on competent evidence; “the burden cannot be discharged by mere conclusory or ipse dixit assertions.”); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir.1995) (“a mere allegation that the work product doctrine applies is insufficient”).

The Federal Rules of Civil Procedure require that where a party withholds otherwise relevant information by claiming it is privileged or subject to protection as trial preparation material, that party “shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that ... will enable other parties to assess the applicability of the privilege or protection.” See [Fed.R.Civ.P. 26\(b\)\(5\)](#). In the typical case, a [Rule 26\(b\)\(5\)](#) privilege log will individually list withheld documents and provide pertinent information for each document. *Nacchio* at 9–10. In this case, the respondents have produced such a log. However, MWP argues that the log is both inadequate and incomplete and does not

provide enough information to object to the privileged designation if appropriate.

*7 The Tenth Circuit has stated

A party seeking to assert [a] privilege must make a clear showing that it applies. Failure to do so is not excused because the document is later shown to be one which would have been privileged if a timely showing had been made.... The applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document.

Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir.1984). See also *Atteberry v. Longmont United Hosp.*, 221 F.R.D. 644, 649 (D.Colo.2004).

The parties did not provide the court with the actual 124 page privilege log. The court has, however, reviewed the 52 page subset of the log MWP claims contains listings for which inadequate grounds supporting privilege designation has been provided. (Mot., Exh. 11, Att. A, p. 9; Reply at 18) (hereinafter “Log Objections”). Based upon the entries in the Log Objections the court agrees with MWP that, at least with respect to those entries, the privilege log is inadequate to accomplish the purpose of a privilege log. In many cases the documents described in the logs are missing vital information including the sender and the recipient (including information about whether one or the other is an attorney) and the date of the document. Also, on many of the entries, the “subject” (which should be a description of the document) does not in any manner indicate why such a document should be privileged. A prime example is Log Objection entry number 45782. The date on the document is “7/31/2006” with no author or recipient listed, described as “Presentation for phosphate project.” The document is classified as “Attorney–Client.” There is no attorney listed anywhere with respect to the document and the description would indicate that the document, a “presentation,” was something shared with a group.

Not all entries on the Log Objections are as deficient as 45782; however, all entries are deficient in that a meaningful examination and determination regarding the

privileged designation cannot be made on the basis of the scant information provided.

Therefore, the respondents will be required to supplement the privilege log with respect to the entries on MWP's Log Objections to provide sufficient information about each document to enable meaningful review by MWP. Alternatively, the respondents may remove the document from the privilege log and forthwith provide a copy of the document to MWP in supplemental discovery.

Related to the deficiencies in the privilege log, MWP also claims they are entitled to production of invoices issued to respondents by the Temgin/Shikemov Companies and other similarly situated documents. The respondents claim that these invoices are privileged from production.

Just because a document not otherwise privileged contains some information arguably subject to privilege does not render the whole document protected. *Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653, 660 (D.Colo.1992). With respect to invoices, for instance, which are generally not privileged, the respondents may redact privileged information and should produce the redacted copies. *See*, e.g. Fed.R.Civ.P. 26(b)(3), Advisory Note 1970, (“[i]n enforcing [the Rule 26(b)(3) protection of work product material], the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.”); *Heavin v. Owens-Corning Fiberglass*, 2004 WL 316072, *6 (D.Kan.2004). Therefore, the respondents may appropriately redact the requested invoices, supplement the privilege log as to any redactions made and are ordered to produce the redacted documents in supplemental discovery.

*8 On the issue of communications between respondents and the foreign defendants while the foreign defendants worked for MWP, respondents represent that all such documents have been produced. Again, a more detailed privilege log as Ordered herein should identify any remaining issues with respect to these communications.

D. Manner of Physical Production.

MWP argues that since there was a voluminous number of documents produced in response to the subpoenas and the documents were not in any prescribed or intelligible order, a substantial burden was placed on MWP to organize and categorize the documents received. MWP does not request that this court order the production to be organized or

indexed by respondents, however. They ask, instead, that they not be required to share in the substantial costs for producing all documents relevant to their own discovery requests. The court is not so inclined. If MWP wanted relief from the burden of organizing the material they had requested, there was no obstacle to requesting it at a time when it could have meaningfully been given. Since they did not, MWP's complaints regarding the organization, or lack thereof, of the documentation produced have been waived.

II. Bond to Cover Costs.

In *Paramount Film Distributing Corp. v. Civic Center Theatre*, 333 F.2d 358, 362 (10th Cir.1964), the Tenth Circuit determined that the decision whether to require a pre-judgment cost bond in federal court is within the trial court's discretion. Factors which may be considered in determining whether to grant a motion requiring posting of a cost bond include: (1) the merits of MWP's claims; (2) the ability or willingness of MWP to pay costs as awarded or agreed to; and (3) the substantial costs which are being incurred by respondents to comply with the document production. *Hartnett v. Catholic Health Initiatives Mountain Region*, 47 F.Supp.2d 1255, 1256 (D.Colo.1999); *Piallat v. Replogle*, 125 F.R.D. 165, 166 (D.Colo.1989).

The Colorado state court rule is to require a cost bond in cases such as this. *Radoshevich v. Central Bank of Colorado Springs*, 117 F.R.D. 434, 435 (D.Colo.1987). Colorado Revised Statutes 13-16-102 provides the Court may require a cost bond from non-residents if “satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands.” *But see, Piallat, id.*, (federal court has discretion whether to request posting of bonds and is not required to follow state statute).

The court finds that whether the court applies Colorado or federal law, a cost bond may be appropriate when the claims presented are of dubious merit, the plaintiff lacks financial responsibility, or the defendant will incur substantial expense. *Id. See Hardwoods, Inc. v. Universal Oil Products*, 493 F.Supp. 76, 77 (W.D.Mich.1980).

It is undeniable that production of 350,000 pages of discovery in this matter for the nonparties has been voluminous and expensive. The respondents state that the cost of production to date is in excess of \$2.5 million.

(Rsp. at 6.) MWP alleges that a significant portion of the skyrocketing costs of compliance with the subpoenas was a direct result of “respondents' own counsel's mis- and mal-feasance.” (Reply at 25.) MWP alleges that a refusal on the part of respondents to consult with MWP regarding search term protocols resulted in a waste of resources spent manually searching “a large number of directories...” (Reply at 26.) Since a sharing of the costs has been ordered in this case, these allegations will undoubtedly rise again.

*9 This case is intertwined with several foreign adjudications. There is no evidence before the court that MWP is unable to pay its share of costs in this matter. However, in the underlying matter proceeding in the High Court of Justice, Queen's Bench Division in the proceeding in England captioned *Emmott v. Michael Wilson Partners, Limited*, Case No.2008 Folio 1300, the court has entered a judgment freezing certain assets of MWP, precluding MWP from disposing of, assigning or diminishing the value of the asset. (Notice of Judgment, Doc. No. 106 at 1–2.) Respondents represent that the court took this action because “[t]he Court in this foreign proceeding is concerned that MWP will dispose of this disputed property and is thus attempting to safeguard it. Since MWP had previously failed to comply with the Arbiters' order seeking to protect these assets, the High Court is forced in this Judgment to enforce the Arbiters' peremptory order and freeze those assets.” *Id.* In this part of the international litigation the stage is obviously set for MWP to protest their share amount of the costs incurred in responding to the subpoenas and it does not appear that MWP has made any payment on their share to date.

Under all the circumstances of this case, the court agrees that, since further disputes over the amount of costs

appear inevitable, a bond to cover MWP's share of the costs as previously ordered is appropriate and advisable.

Wherefore it is ORDERED:

Michael Wilson & Partners Limited's Motion to Compel Further Discovery Responses [Doc. No. 100] is GRANTED in part as follows:

1. MWP shall be allowed to take a further deposition of Mr. Savage or another fully and completely prepared [Rule 30\(b\)\(6\)](#) representative. All fees and costs associated with the taking of this deposition will be born by the respondents.
2. The respondents shall institute a search of the Timofeeva computer as well as all auxiliary hard drives, zip drives, USB devices, CD's and other electronic storage devices which were in existence at the time of original compliance with the subpoenas, for documents which comply with the requests in the subpoenas. The search shall be limited to the documents and other data which was in existence prior to the date the original responses were submitted to MWP.
3. Respondents shall update and supplement their privilege log in accordance with the directives in this Order and shall submit the updated log to MWP on or before May 11, 2009.
4. MWP shall post a cost bond in the amount of one million dollars with the Clerk of the U.S. District Court, District of Colorado on or before May 11, 2009.

All Citations

Not Reported in F.Supp.2d, 2009 WL 1193874

Footnotes

- 1 MWP also complained that repeated instructions not to answer a deposition question were given to Mr. Savage by his counsel. In general, instructions to a deponent not to answer a question are proper only to assert a recognized, applicable privilege. Instructions to the deponent not to answer a question on other grounds are considered an abuse of discovery. If respondents considered MWP's questioning to be beyond the scope of a the foreign tribunal's directives, the proper procedure would have been to request an emergency hearing before this court.
- 2 Magistrate judges have the power to award attorney fees as non-dispositive discovery sanctions under [28 U.S.C. § 636](#). *Hutchinson v. Pfeil*, 1999 WL 1015557, 2 (C.A.10 (Okla. (C.A.10 (Okla.),1999)); *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1465 (10th Cir.1988) (finding district court appropriately applied clearly-erroneous or contrary-to-law standard in reviewing magistrate judge's imposition of non-dispositive discovery sanction); *GWN Petroleum Corp. v. OK-Tex Oil & Gas, Inc.*, 998 F.2d 853, 858 (10th Cir.1993) (applying abuse-of-discretion standard to district court's discovery rulings).

- 3 The court agrees with respondents that there is no “continuing duty” to respond to a [Rule 45](#) subpoena. The respondents herein are not parties to this litigation and their duty is to respond fully and completely to the subpoenas at the time the response is provided.

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2000 WL 1644154

Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Debra J. LeFAVE, Plaintiff(s),
v.
SYMBIOS, INC., a Delaware corporation,
and Lsi Logic Corporation, a
Delaware corporation, Defendant(s).

No. CIV.A. 99-Z-1217.

|
April 14, 2000.

ORDER re: Medical Records and Rule 35 Examination

COAN, Magistrate J.

*1 The matters before the court are Defendant's Motion to Compel [filed March 23, 2000] and defendants' Motion for Mental Examination Pursuant to Rule 35 F.R.C.P. [filed March 29, 2000]. Plaintiff did not respond to the Motion to Compel, but did file a response to the Rule 35 Motion on April 10, 2000.

Background

This is an employment discrimination case. Plaintiff alleges constructive termination from her job with defendant "because of sexual harassment, hostile work environment and religious discrimination." Verified Complaint, at ¶ 1. She claims "sever [sic] and lasting embarrassment, humiliation and anguish, and other incidental and consequential damages and expenses..." (*id.* at § 23), and she asks for damages to compensate her for pain and suffering. *Id.*, prayer, ¶ b.

Plaintiff, a female evangelical Christian, alleges that defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and as amended, by subjecting her to a sexually hostile working environment and one which ridiculed her and discriminated against her because of her religious beliefs. Plaintiff claims she was finally forced to leave her employment due to the hostile environment. Plaintiff requests damages, including but not limited to, back pay and attorney's fees, and damages to compensate her for "pain and suffering, emotional trauma, and ... humiliation." Verified

Complaint, prayer, ¶ b. Plaintiff has limited her request to past emotional distress damages. Pl. Resp. to Motion for Mental Examination, ¶ 11.

Defendants move to compel all of plaintiff's medical records. Plaintiff did not respond to the motion to compel within eleven days as required by the Scheduling Order, at § 12, but did argue, in response to defendant's Rule 35 motion, that her medical records were not discoverable because plaintiff had not placed her medical condition in controversy. *See* Pl. Resp., ¶ 17. Defendants also argue that the court should exercise its discretion to order plaintiff to submit to an independent psychiatric examination and personality testing under Fed.R.Civ.P. 35(a) because plaintiff has placed her mental condition "in controversy" by alleging that she has suffered embarrassment, humiliation and anguish, because she seeks damages to compensate her for pain, suffering, emotional trauma and humiliation, and because she has put her mental state at issue through her pleadings and her deposition testimony concerning treatment for a back injury, endometriosis and fibroid tumors. *See* Defs. Motion for Mental Examination ¶¶ 1, 4, 10. Plaintiff responds that she has not placed her mental condition in controversy and that defendants have not shown good cause for the examination. Rather, plaintiff argues that her claims of mental anguish, emotional distress and embarrassment and humiliation are "garden variety" claims for damages insufficient to meet Rule 35's "good cause" requirement.

Analysis

Medical Records

*2 Defendants request copies of all of plaintiff's medical records for any condition. The court was not apprised of the time frame of defendant's request. Plaintiff has produced some psychological counseling records (Defs. Motion to Compel ¶ 7), but has refused to produce medical releases for the remainder of her medical records, contending that her medical treatment is not at issue, and that defendants should not be permitted a broad fishing expedition into her personal records. Pl. Resp. to Motion for Mental Examination, at ¶ 17.

Defendants contend that they are entitled to the requested information because it is relevant to their defenses against plaintiff's claim for emotional distress damages. Defendants argue that plaintiff has placed

her mental condition at issue by requesting damages for emotional distress, thereby waiving any otherwise applicable privileges.

The court notes as an initial matter that federal privilege law governs the issues presented as plaintiff's claims for relief arise under a federal statute, Title VII. Fed.R.Evid. 501.

Federal common law recognizes a psychotherapist-patient privilege. In *Jaffee v. Redmond*, 116 S.Ct. 1923, 1931 (1996) the Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." The *Jaffee* court declined to define the contours of the privilege, however, noting that such definition was more appropriately resolved on a case-by-case basis. *Id.* at 1932. The Tenth Circuit has followed *Jaffee* with respect to the acknowledgment of a psychiatrist-patient privilege. See *United States v. Glass*, 133 F.3d 1356, 1359 (10th Cir.1998).

Neither the Supreme Court nor the Tenth Circuit, however, has recognized a physician-patient privilege under federal common law. See *Whalen v. Roe*, 429 U.S. 589, 602, n. 28 (1977) ("physician-patient privilege is unknown to the common law."); see, also, *Jaffee*, 116 S.Ct. at 1928 (discussing the need for a psychotherapist-patient privilege and noting that unlike the physician-patient relationship, the psychotherapist-patient relationship is dependent upon an atmosphere of confidence and trust). Accordingly, the court's inquiry regarding the discoverability of plaintiff's general medical records is governed by relevancy standards contained in Fed.R.Civ.P. 26 and considerations of confidentiality.

Fed.R.Civ.P. 26(b) provides that parties may obtain discovery of any non privileged matter which is relevant to the subject matter of the pending action. Under Fed.R.Civ.P. 26(c) the court may exercise its discretion to enter a protective order to preclude certain discovery or to conditionally allow the requested discovery.

The court finds that defendants are entitled to discovery of the identities of plaintiff's health care providers and her medical records for a period of five years prior to the events giving rise to plaintiff's complaint and continuing to the present time. See *Lanning v.*

Southeastern Pennsylvania Transportation Authority, 1997 WL 597905 (E.D.Pa.1997)(motion to compel production of the plaintiff's medical and psychiatric records granted). Medical records information is relevant to plaintiff's claim for emotional distress damages. The information is further relevant to the preparation of defendants' defenses against plaintiff's emotional distress damages claim, because her medical records may reveal stressors unrelated to defendants which may have affected plaintiff's emotional well being. The records will be produced under a confidentiality order.

*3 Since plaintiff has produced some psychological counseling records, it does not appear that discovery of plaintiff's psychological records is at issue. If plaintiff has not produced all of her psychotherapy records¹ those communications are clearly privileged under *Jaffee*, except to the extent that the privilege may have been waived. The question before the court is whether plaintiff's prayer for emotional distress damages in conjunction with her Title VII claims constitutes a waiver of her psychotherapist-patient privilege when she does not intend to offer expert psychotherapist testimony.

In *Jaffee*, the Supreme Court noted that the psychotherapist-patient privilege could be waived, see 116 S.Ct. at 1931, n. 14, but expressly rejected the qualification placed on the privilege by the Seventh Circuit Court of Appeals that would have allowed a court to weigh the patient's interest in privacy against an opposing party's evidentiary need for disclosure:

As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.'

Jaffee, 116 S.Ct. at 1932 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (discussing attorney-client privilege).

The *Jaffee* court did not specifically address the issue of whether a person can waive the psychotherapist-patient privilege by initiating a legal action in which she claims damages for emotional distress. *Glass* also does not resolve the issue, but the Tenth Circuit addressed the question

of waiver in the pre-*Jaffee* decision of *Dixon v. City of Lawton*, 898 F.2d 1443 (10th Cir.1990). In *Dixon*, the plaintiff brought a 42 U.S.C. § 1983 action against police officers arising out of the shooting death of her son. After the jury found in favor of the defendants on plaintiff's civil rights claims, plaintiff appealed, asserting, inter alia, that the trial court erred in admitting into evidence portions of plaintiff's medical records which plaintiff claimed were privileged. The court assumed without deciding that a psychotherapist-patient privilege existed under the federal common law, but adopted the approach set forth by the Supreme Court in Model Rule 504,² and found that the privilege did not apply because plaintiff had made a claim for emotional distress damages suffered by her son prior to his death. *Id.* at 1450–51. Model Rule 504 would have created a psychotherapist-patient privilege, subject to specified exceptions, one exception being that the privilege would not have applied to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relied upon the condition as an element of his claim or defense. Model Rule 504(d)(3); *Dixon*, 898 F.2d at 1450. Thus, under the governing law in the United States Court of Appeals for the Tenth Circuit, plaintiff has waived her psychotherapist-patient privilege with respect to any communications between her and her psychotherapist as those communications may lead to the discovery of admissible evidence regarding plaintiff's present claim for emotional distress damages. The court notes that the law in the Tenth Circuit does not distinguish between a plaintiff who intends to rely on the testimony of a treating psychotherapist in support of her case and one who does not.

*4 The court finds that *Jaffee* does not mandate a different result. The *Dixon* court did not balance plaintiff's interest in privacy against the need for evidentiary disclosure of the medical records, as prohibited by *Jaffee*, but rather adopted the rule that a plaintiff who relies on her mental condition as an element of her claim may not assert the psychotherapist-patient privilege to preclude a defendant from obtaining discovery of her mental health records. Accordingly, assuming that plaintiff's communications with her psychotherapist occurred during the relevant time period, defendant is entitled to discovery of plaintiff's psychotherapy records.

Rule 35 Examination

Rule 35(a), Fed.R.Civ.P states:

When the mental or physical condition (including the blood group) of a party, ...is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner...The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Rule 35(a), Fed.R.Civ.P.

In *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964), the Supreme Court stated that the “in controversy” and “good cause” requirements of Rule 35 would not be satisfied by conclusory allegations contained in pleadings, or by assertions of mere relevance to the case. Rule 35 requires an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.

The court must initially determine whether defendants have made an affirmative showing that plaintiff has placed her mental condition “in controversy” by making claims for pain and suffering and emotional distress damages. After reviewing defendants' motion and plaintiff's response, the court declines to find that a plaintiff who makes claims of emotional distress damages in an employment discrimination case to have placed her mental condition “in controversy” within the meaning of Rule 35(a), Fed.R.Civ.P.

The second requirement of Rule 35(a) is good cause. The majority of courts will not find good cause to require a plaintiff to submit to a medical examination unless, in addition to a claim for emotional distress damages, one or more of the following factors is also present: (1) plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder,

(3) plaintiff has claimed unusually severe emotional distress; (4) plaintiff has offered expert testimony in support of his claim for emotional distress damages; and (5) plaintiff concedes that his mental condition is “in controversy” within the meaning of [Fed.R.Civ.P. 35\(a\)](#). See [Turner v. Imperial Stores](#), 161 F.R.D. 89, 93–95 (S.D.Cal.1995) (citations omitted); [Smith v. J.I. Case Corp.](#), 163 F.R.D. 229, 230 (E.D.Penn.1995) (citations omitted); [Bridges v. Eastman Kodak Co.](#), 850 F.Supp. 216, 221–222 (S.D.N.Y.1994).

*5 Here, plaintiff has asked for damages for pain and suffering, embarrassment and humiliation. Plaintiff has not asserted a separate cause of action for intentional or negligent infliction of emotional distress. Plaintiff does not allege a specific mental or psychiatric injury or disorder, nor does she claim unusually severe emotional distress. Plaintiff has not indicated that expert testimony will be offered to support her emotional distress claims and, plaintiff has not conceded that her mental condition is “in controversy” within the meaning of [Fed.R.Civ.P. 35\(a\)](#). Accordingly, even if defendants had been able to show that plaintiff placed her mental or psychological condition in controversy, defendants cannot meet the good cause requirement of [Rule 35](#).

Footnotes

- 1 The court uses the term “psychotherapist” generically to include a psychologist, psychiatrist, counselor or other mental health therapist.
- 2 Model Rule 504 was one of nine privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the [United States and by the Supreme Court](#). See [56 F.R.D. 183, 240–44 \(1972\)](#); [Trammel v. United States](#), 445 U.S. 40, 47 (1980). Congress rejected the proposed individual privilege rules in favor of [Fed.R.Evid. 501](#). [Trammel](#), 445 U.S. at 47.

Order

For the reasons set forth herein, it is

ORDERED that defendant's Motion to Compel Production of Medical Records [filed March 23, 2000] is granted. Plaintiff shall produce copies of all medical records within her possession or control or provide the identities of health care providers and signed releases for her medical records to counsel for defendant within ten (10) days of this order. Any of plaintiff's medical or psychiatric records produced are subject to the confidentiality order previously entered in this case. It is further

ORDERED that defendants' Motion for Mental Examination Pursuant to [F.R.C.P. 35](#) [filed March 29, 2000] is denied.

All Citations

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United States District Court,
D. Kansas.

MILLENNIUM MARKETING
GROUP, LTD., et al., Plaintiffs,
v.
SIMONTON BUILDING
PRODUCTS, INC., et al., Defendants.

Civil Action No. 08–2198–JWL–DJW.

|
Aug. 4, 2009.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

[DAVID J. WAXSE](#), United States Magistrate Judge.

*1 Pending before the Court is Plaintiffs' Motion to Compel Production of Documents (doc. 54). Plaintiffs seek an order compelling Defendant Fortune Brands, Inc. ("Fortune Brands") to produce various documents responsive to Plaintiffs' First and Second Requests for Production of Documents. Fortune Brands served written responses and objections to those requests in December 2008, and indicated in those written responses that it would produce certain documents. Shortly after Fortune Brands served its written responses but before Fortune Brands produced any of its responsive documents, the Court dismissed a number of Plaintiffs' claims. Fortune Brands then informed Plaintiffs that it would not produce any documents responsive to Plaintiffs' requests for production because none of those documents was relevant to any of the remaining claims and defenses in the case.

Plaintiffs now move to compel Fortune Brands to produce the documents that it indicated in its December 2008 written responses that it would produce. For the reasons set forth below, the Motion to Compel is granted in part and denied in part.

I. Introduction and Nature of the Matter Before the Court

A. Background Information

This case involves claims for trade secret misappropriation, breach of contract, and unjust enrichment. It is brought against Simonton Building Products, Inc. ("SBPI") and a related company, Simonton Holdings, Inc. ("Simonton Holdings") (collectively referred to as "Simonton"). The lawsuit is also brought against Fortune Brands, which is the company that acquired SBPI and its parent company SBR, Inc. ("SBR") through a series of mergers that took place in 2006. SBPI is a vinyl window manufacturer.

B. General Allegations of the Complaint

Plaintiffs' Amended Complaint alleges the following: The individual Plaintiffs Orin Johnson and Gary Jones developed a flash-free thermoplastic welding system for thermoplastic window frames, which they patented in 1999.¹ The patented inventions are collectively referred to as the "Am–Rad Flash–Free Thermoplastic Welding System."² Johnson and Jones subsequently assigned ownership of the patents to Plaintiff Am–Rad, Inc. ("Am–Rad").³ Plaintiff Millennium Marketing Group ("Millennium") was retained to help market the patents.⁴

In 2004, Millennium, acting as marketing agent for Johnson, Jones, and Am–Rad, began discussions with SBPI "for the purpose, among other things, of seeking licensing protection, marketing consultation and/or procurement of venture capital" to promote the Am–Rad Flash–Free Thermoplastic Welding System.⁵ On April 8, 2004, Millennium entered into a "Non–Disclosure and Non–Use Agreement ("NDNU Agreement") with SBPI to protect all proprietary and trade secret information exchanged between the parties. Pursuant to the NDNU Agreement, each party agreed not to use "proprietary information belonging to the other party for its own purposes."⁶ Several months later, SBPI and Plaintiffs entered into a license agreement ("License Agreement") for the license and use of the Am–Rad Flash–Free

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Thermoplastic Welding System.⁷ Pursuant to the License Agreement, as amended on July 15, 2005, Plaintiffs Johnson, Jones and Am–Rad granted SBPI an exclusive license “to prove out the Am–Rad Flash–Free Welding Technology, with a subsequent exclusive right to adapt the welding technology into a production process.”⁸

*2 The Amended Complaint further alleges that although the License Agreement did not require Plaintiffs “to assist SBPI in its efforts to prove out, develop and adapt the Am–Rad Flash–Free Thermoplastic Welding Technology into a production process,” Johnson, Jones, and Am–Rad entered into “a relationship of confidence and trust and fiduciary relationship, as well as an implied agreement and/or an existing joint venture or partnership with SBPI and/or SBR, to assist and jointly work with SBPI and/or SBR to develop and adapt the technology into a production process for the parties' joint ownership and profit.”⁹ Plaintiffs assert that throughout the parties' joint development of the technology, “Johnson, Jones and Am–Rad developed and possessed certain confidential and proprietary information and trade secrets” that were shared with Defendants.¹⁰ Plaintiffs claim that instead of using the developed technology for the parties' joint ownership and profit, Defendants filed new patent applications (“Simonton Patent Applications”) to the exclusion of Plaintiffs and failed to enter into the joint venture as agreed.¹¹

Fortune Brands acquired SBPI and SBR in 2006 through a series of mergers (“the Merger”).¹² Plaintiffs allege that Defendant Simonton Holdings is the successor in interest to SBR and succeeded to SBR's liability for the acts alleged by Plaintiffs.¹³

With respect to trade secrets and confidential information, the First Amended Complaint asserts the following general allegations:

Johnson, Jones and Am–Rad developed and possessed certain confidential and proprietary information and trade secrets, including, but not limited to, know-how, techniques, methods, processes, test results, knowledge based on experiments and tests, and other information relating to and

enabling a method of manufacturing a thermoplastic fenestration product (window frames) and an apparatus for manufacturing a fenestration product ... some of which was subsequently developed and/or refined through the parties' joint efforts ... (hereinafter the “Confidential Information and Trade Secrets”).¹⁴

The First Amended Complaint further alleges that in reliance on Defendants' repeated assurances, Plaintiffs “disclosed their Confidential Information and Trade Secrets ... to help and assist SBPI and/or SBR in the development of the technology.”¹⁵ “The apparatus, processes and technology disclosed and proposed by the Simonton Patent Applications were ... based upon the Confidential Information and Trade Secrets, as well as the parties' joint efforts made in reliance on ... the parties' confidential and fiduciary relationship and implied agreement and/or existing joint venture...”¹⁶

C. Count IV—Breach of the NDNU Agreement

In Count IV, which asserts breach of the NDNU Agreement, Plaintiffs allege that SBPI breached the NDNU Agreement by disclosing Plaintiffs' “Confidential Information and Trade Secrets” to third parties, including Fortune Brands, and using that information for its own purposes.¹⁷

D. Count VII—Unjust Enrichment

*3 In support of their unjust enrichment claim, Plaintiffs allege that “[t]hrough their joint efforts and the use of the Confidential and Trade Secret information, SBPI and/or SBR and Plaintiffs were able to successfully develop and adapt Plaintiffs' technology into a production process...”¹⁸ Plaintiffs further allege:

SBPI and [Simonton Holdings] (as SBR's successor in interest) acknowledged and accepted the benefits conferred by Johnson, Jones and Am–Rad through their Confidential Information and Trade Secrets, as well as their services, consultation and efforts contributed to jointly develop and adapt the technology into a production process for the parties' joint

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ownership and profit, and then stole the Confidential Information and Trade Secrets and the fruits of the parties' joint efforts, breached their fiduciary duties (among others), secretly filed the Simonton Patent Applications (the apparatus, processes and technology of which were the result of and based upon the Confidential Information and Trade Secrets and the services, consultation and efforts they rendered), and falsely claimed that the Simonton Patent Applications and the apparatus, processes and technology disclosed and proposed therein were the result of SBPI's and/or SBR's independent, but parallel research and development and belonged to SBPI, alone, and that such apparatus, processes and technology were not the result of or based on the Confidential Information and Trade Secrets, as well as their joint efforts, thereby excluding Johnson, Jones and Am-Rad from the ownership of and profit from such technology, and any enhancements and improvements thereto.¹⁹

Plaintiffs contend that Defendants were unjustly enriched in the amount of the value of the benefits they conferred on Defendants, including the value of “the Confidential Information and Trade Secrets, their services, consultation and effort to develop and adapt the technology into a production process, the technology itself, as proposed and disclosed in the Simonton Patent Applications.”²⁰

E. Counts IX through XI—Trade Secret Misappropriation
 Plaintiffs allege the following with respect to their claimed trade secrets:

Johnson, Jones and Am-Rad developed and possessed certain trade secrets, including, but not limited to, know-how, techniques, methods, processes, test results, knowledge based on experiments and tests, and other information relating to and enabling a method of manufacturing a thermoplastic fenestration product (window frames) and an apparatus for manufacturing a fenestration product some of which was subsequently developed and/or refined through the parties' joint efforts, as described above.²¹

Plaintiffs further allege that in violation of the Kansas, Minnesota and West Virginia Uniform Trade Secrets Acts, “Defendants misappropriated Johnson's Jones' and Am-Rad's trade secrets by ... using and/or disclosing such trade secrets without Johnson's, Jones' and Am-Rad's express or implied consent.”²²

F. The Discovery at Issue

*4 Plaintiffs served their First Set of Requests for Production of Documents (“First Requests”) on Fortune Brands on November 21, 2008. Fortune Brands served written responses to the First Requests on December 24, 2008. Plaintiffs served their Second Set of Requests for Production of Documents (“Second Requests”) on Fortune Brands on November 26, 2008. Fortune Brands served written responses to the Second Requests on December 29, 2008. The First Requests consisted of 83 requests, while the Second Requests consisted of 11 requests.

In its written responses to the First Requests, Fortune Brands asserted a number of general objections to all of the requests, along with various specific objections to certain requests. However, Fortune Brands indicated that it would, without waiving any of its objections, produce documents responsive to First Requests No. 1–6, 20–28, 30–40, 43, 45–52, 54, 56–59, 66–75, 77 and 79–83.²³ Additionally, in response to First Requests No. 7–19, 29 and 76, Fortune Brands stated that it would produce, without waiving its objections, a certain subset of “relevant” or “relevant, representative non-privileged” documents. Only in response to First Requests No. 41 and 42 did Fortune Brands stand on its objections and state that it would produce no documents. In response to First Requests No. 44, 53, 55, 60–65 and 78, Fortune Brands either stated that “no such documents [or things] exist” or that it had no responsive documents in its possession, custody or control. Thus, Fortune Brands indicated it would produce documents responsive to 71 out of the 83 requests contained in the First Requests.

In its written responses to the Second Requests, Fortune Brands asserted a number of general and specific objections. In response to Second Requests No. 1–6, Fortune Brands indicated that no responsive documents exist. In response to Second Requests No. 7–11, it indicated that it would produce, without

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waiving its objections, various “non-privileged” or “non-privileged representative” documents. Thus, Fortune Brands represented that it would produce documents responsive to 5 of the 11 requests contained in the Second Requests. Overall, then, Fortune Brands indicated that it would produce documents in response to 76 of the total 94 requests contained in both the First and Second Requests. Fortune Brands did not produce any documents at the time it served its written responses in December 2008.

G. Dismissal of Certain Claims

Plaintiffs' Amended Complaint, filed on August 11, 2008, asserted eleven causes of action against one or more of the Defendants, as follows:

Count I Breach of fiduciary duty against SBPI and Simonton Holdings;

Count II Breach of implied covenant of good faith and fair dealing against SBPI and Simonton Holdings;

Count III Breach of the License Agreement against SBPI;

Count IV Breach of the NDNU Agreement against SBPI;

Counts V–VI Tortious interference against Fortune Brands and Simonton Holdings;

*5 Count VII Aiding and abetting breach of fiduciary duty against Fortune Brands and Simonton Holdings;

Count VIII Unjust enrichment against all three Defendants; and

Counts IX–XI Misappropriation of trade secrets against all three Defendants.

On January 6, 2009, before Fortune Brands had the opportunity to produce any documents responsive to the First or Second Requests, the Court granted Defendants' Motion to Dismiss in part. The Court dismissed Counts I–III (breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, and breach of the License Agreement), none of which was asserted against Fortune Brands.²⁴ The Court also dismissed Counts V–VII (tortious interference and aiding and abetting) against Fortune Brands and Simonton Holdings.²⁵ The

Court ruled that those seven claims were not ripe for decision in this Court because they were “inextricably linked to the question of whether [SBPI's] two new patents enhance or improve upon Am–Rad's existing patents,” a question that is before the Patent and Trademark Office (“PTO”).²⁶ The inventions that are the subject of SBPI's new patents are referred to as the “Precision Controlled Welding Technology.”²⁷

In dismissing the above claims, the Court expressly rejected Plaintiffs' suggestion “that even claims that rely on the unripe issue should be allowed to proceed through discovery to preserve evidence until the PTO has issued its determination.”²⁸ The Court noted that because “ripeness is a jurisdictional issue,” discovery would not be allowed on any of those claims dismissed on ripeness grounds.²⁹

The Court also dismissed Count VIII (unjust enrichment) as to Fortune Brands, but not as to SBPI and Simonton Holdings.³⁰ The Court declined to dismiss Count IV (breach of the NDNU Agreement) and Counts IX–XI (misappropriation of trade secrets).³¹

As a result of Judge Lungstrum's Order, the only claims remaining against Fortune Brands are Count VIII for unjust enrichment and Counts IX–XI for trade secret misappropriation.³²

H. Fortune Brand's Subsequent Decision to Not Produce Any Documents

At the time the Court entered its January 6, 2009 Order, Fortune Brands had not yet produced any of the documents that it represented in its December 24 and 29, 2008 written responses it would produce. Shortly after the Court's January 6, 2009 Order was entered, Fortune Brands notified Plaintiffs that it would not be producing *any* documents in response to Plaintiffs' requests because the scope of discovery had changed in light of the Court's Order. Fortune Brands informed Plaintiffs that its document review had not revealed any documents relevant to the remaining claims. While Fortune Brands recognized that the trade secret misappropriation claims were still filed against it, it questioned whether Plaintiffs' claims were valid because Plaintiffs have allegedly failed to identify any trade secret information that they disclosed

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to Fortune Brands which Fortune Brands could have misappropriated.

II. Compliance with D. Kan. Rules 37.1(a) and 37.2

*6 As a threshold matter, the Court must determine whether Plaintiffs, as the moving party, have complied with the requirements of D. Kan. Rules 37.1(a) and 37.2. Defendants contend that Plaintiffs have failed to comply with both Rules.

D. Kan. Rule 37.1(a) states that any motion brought under Federal Rule of Civil Procedure 37 which is directed at requests for production or other discovery requests “shall be accompanied by copies of ... the portions of ... the requests or responses in dispute.”³³ D. Kan. Rule 37.2 provides that the Court will not entertain any motion to resolve a discovery dispute pursuant to Federal Rule of Civil Procedure 37 unless the movant has made a “reasonable effort to confer” with the opposing party.³⁴ Furthermore, D. Kan. Rule 37.2 states that the certification required by Rule 37 “shall describe with particularity the steps taken by all counsel to resolve the issues in dispute.” In addition, it explains that a “reasonable effort to confer” requires the parties to “converse, confer, compare views, consult and deliberate, or in good faith attempt to do so.”³⁵

Defendants argue that Plaintiffs have not complied with D. Kan. Rule 37.1(a) because Plaintiffs attach all 94 requests for production to their Motion but fail to identify any specific request as being in dispute. Defendants assert that Plaintiffs have not made any attempt to revise or narrow the expansive scope of their requests in light of the Court’s January 6, 2009 order dismissing many of their claims.

Defendants also argue that Plaintiffs have failed to confer as required by D. Kan. Rule 37.2, asserting that Plaintiffs did not attempt to discuss each of the 94 document requests, or, for that matter, any particular request. Defendants contend that the parties’ discussion revolved around (1) trade secrets, and (2) the merger of Fortune Brands with SBPI and SBR and the circumstances surrounding that merger.

The Court is not persuaded by Fortune Brands’ arguments, and finds that Plaintiff have satisfied the requirements of both rules. Plaintiffs attach to their

Motion both the First and Second Requests for Production in their entirety. Plaintiffs move to compel Fortune Brands to produce those documents that Fortune Brands indicated in its December 24 and 29, 2008 written responses that it would produce. As Plaintiffs point out, those are documents responsive to First Requests No. 1–40, 43, 45–52, 54, 56–59, 66–77, 79–83 and Second Requests No. 7–10. (While Fortune Brands also indicated it would produce documents in response to Second Request No. 11, Plaintiffs have chosen not to include that in their Motion to Compel.) The Court finds no fault in Plaintiffs attaching all 94 requests, even though only 75 are at issue. The Court therefore holds that Plaintiffs have complied with D. Kan. Rule 37.1(a).

The Court also holds that Plaintiffs have complied with D. Kan. Rule 37.2. Plaintiffs have included in their opening brief a “Certification of Compliance” which indicates that their counsel had both telephone and e-mail communications with Fortune Brands’ counsel regarding whether the dismissal of some of Plaintiffs’ claims affected the scope of discovery requests that could be served upon Fortune Brands.³⁶ The e-mails attached to Plaintiffs’ opening brief support that certification.³⁷ The Court does not believe it was necessary for counsel to discuss each particular request, when it was clear that the parties’ positions were diametrically opposed, with Plaintiffs contending that *all* of the requests are relevant to the remaining claims and defenses, and Defendants contending that *none* of the requests is relevant.

*7 Having determined that Plaintiffs complied with D. Kan. Rules 37.1(a) and 37.2, the Court will now proceed to determine the merits of the parties’ dispute.

III. The Parties’ Arguments

Plaintiffs assert they are entitled to an order compelling Fortune Brands to produce the documents it “agreed” it would produce in its December 24 and 29, 2008 written responses to the First and Second Requests for Production. Plaintiffs present two primary arguments in support of their motion. First, Plaintiffs argue that Fortune Brands “already agreed to produce the responsive documents and cannot, after the time for stating objections has expired, attempt to withhold documents it previously agreed to produce.”³⁸ Secondly, Plaintiffs argue that the documents Fortune Brands “agreed to produce” in its December 2008 responses are relevant to

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the remaining claims and/or defenses in the case and must therefore be produced.

Fortune Brands, on the other hand, argues that the proper scope of discovery must conform to the remaining claims and defenses in the case and that it has not waived its right to object to the relevancy of these documents. It argues that once a court dismisses certain claims, as Judge Lungstrum did in this case, relevancy must be determined in light of the specific claims and defenses that remain in the case. In addition, Fortune Brands points out that Judge Lungstrum expressly rejected Plaintiff's suggestion that they be allowed to conduct discovery on the unripe claims that were dismissed. Finally, Fortune Brands argues that none of the documents that it indicated it would produce in its December 2008 responses is relevant to the remaining claims or defenses. Thus, Fortune Brands asks the Court to deny the Motion to Compel.

IV. Did Fortune Brands Waive the Right to Assert Relevancy Objections by Stating in Its December 2008 Written Responses That It Would Produce Documents?

Federal Rule of Civil Procedure 26(b)(1) states that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to *any party's claim or defense*.”³⁹ Thus, the claims and defenses in the case define the scope of permissible discovery. While it true that this Court typically deems any objections not asserted in a party's initial response to a discovery request to be waived,⁴⁰ the Court does not find waiver applicable here, where the Court dismissed a number of the claims from the lawsuit shortly *after* the written responses and objections were served, but before any documents were actually produced.

A common sense reading of Rule 26(b)(1) dictates that relevance must be determined *based on the claims and defenses that are in the case at the time the documents are produced*. Moreover, courts have repeatedly held that it is proper to deny discovery of information that is relevant only to claims or defenses that have been dismissed or stricken, unless the information sought is otherwise relevant to the remaining claims, defenses or issues in the case.⁴¹

*8 When Fortune Brands served its initial responses and objections in December 2008, all eleven counts were still in the case, and its responses and objections were made in

light of those eleven counts. However, within a few weeks of serving those responses and objections, Counts I–III and V–VII were dismissed altogether, and Count VIII was dismissed as to Fortune Brands. Based on these facts, the Court holds that it was proper for Fortune Brands to withdraw its prior responses and inform Plaintiffs that certain documents would no longer be produced because they were no longer relevant as to the claims remaining in the case. Moreover, the Court finds that Fortune Brands acted promptly in communicating its position to Plaintiffs on January 15, 2009, only nine days after Judge Lungstrum issued his January 6, 2009 Order dismissing the claims.⁴² While it would have been wise for Fortune Brands to serve written amended or supplemental responses containing their new relevance objections, the Court will not find waiver under such circumstances. To do so would place form over substance. This is especially true in light of Judge Lungstrum's ruling that Plaintiffs were not allowed to conduct discovery on the unripe claims, i.e., Counts I–III and V–VII.

Based on the foregoing, the Court rejects Plaintiffs' argument that Fortune Brands waived its relevance objections by not asserting them in its written December 24 and 29, 2008 responses, and holds that Fortune Brands properly asserted its relevancy objections after Judge Lungstrum entered his dismissal Order on January 6, 2009. The Court will now proceed to decide the merits of Fortune Brands' relevance objections and determine what, if any, documents responsive to the First and Second Requests Fortune Brands must produce.

V. Are the Documents Relevant to Any of the Remaining Claims or Defenses?

A. The Standard for Determining Relevance

Relevancy is broadly construed, and a request for discovery should be considered relevant if there is “any possibility” that the information sought may be relevant to the claim or defense of any party.⁴³ Consequently, a request for discovery should be allowed “unless it is clear that the information sought can have no possible bearing” on the claim or defense of a party.⁴⁴

When the discovery sought appears relevant on its face, the party resisting the discovery has the burden to establish that the requested discovery does not come within the scope of relevance as defined under Rule

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26(b)(1), or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.⁴⁵ Conversely, when the relevancy of the discovery request is not readily apparent on its face, the party seeking the discovery has the burden to show the relevancy of the request.⁴⁶ As noted above, relevance is determined in light of the claims and defenses in the case, and “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”⁴⁷

B. Application of the Relevance Standard to the Facts of this Case

*9 Based on the foregoing, the Court's ruling will focus only on those documents that Fortune Brands indicated in its December 24 and 29, 2008 responses that it would produce, and the Court's inquiry will be limited to determining whether those documents are relevant to any of the *five remaining* claims, i.e., breach of the NDNU Agreement against SBPI (Count IV), unjust enrichment claim against SBPI and Simonton Holdings (Count VIII), and misappropriation of trade secrets against all Defendants (Counts IX–XI).⁴⁸

If the Court determines that this discovery appears relevant on its face, Fortune Brands will have the burden to show how the documents are not relevant or are of such marginal relevance that the potential harm occasioned by the discovery would outweigh the presumption in favor of their production. On the other hand, if the documents are not facially relevant, Plaintiffs will have the burden to show relevancy.

Fortune Brands indicated that it would produce documents in response to 76 of the requests for production. Plaintiff has moved to compel Fortune Brands to produce documents in response to 75 of those requests. (As noted above, Plaintiffs do not include Second Request No. 11 in their Motion, even though Fortune Brands indicated in its December 29, 2008 written response that it would produce documents in response to that request.) Consequently, those are the only documents and requests at issue in the Motion to Compel, and the Court must determine whether to uphold Fortune Brands' relevance objections as to each of those 75 requests.

C. Analysis

1. First Requests No. 1–6 and 59

These requests seek correspondence between Fortune Brands and Plaintiff Orin Johnson; Plaintiff Gary Jones; Plaintiff Am–Rad; Plaintiff (now dismissed) Millennium; Johnson and Jones' former counsel, Paul Sween; and Millennium's former counsel Bruce Mayfield. Fortune Brands stated in its December 24, 2008 responses to these requests that it would “produce responsive documents to the extent any exist.”

The Court finds that this discovery appears relevant on its face with respect to the remaining claims in this lawsuit. Furthermore, the Court finds that Fortune Brands has not shown how these documents are irrelevant. Nor does Fortune Brands attempt to demonstrate any potential harm that would result if it is required to produce these documents or how that harm would outweigh the ordinary presumption in favor of their production.⁴⁹ Thus, the Court grants the Motion to Compel as to these requests, and Fortune Brands shall produce all documents responsive to First Requests No. 1–6 and 59 within *twenty (20) days* of this Order.

2. First Requests No. 7–19 and 29

First Requests No. 7–19 and 29 request all correspondence and documents [exchanged] between Fortune Brands and various named individuals “from January 1, 2004 to the present regarding the AM–Rad Flash–Free Technology, the Precision Controlled Welding Technology, Simonton Welding Technologies, the License Agreement, Johnson, Jones, Am–Rad, Millennium, the Simonton Patent Applications, the Merger, and/or any of the litigation between the parties.” In its December 24, 2008 written responses to these requests, Fortune Brands asserted various objections, but stated that it would produce “relevant Merger documents that relate to the Am–Rad Flash–Free Technology and the Precision Controlled Welding Technology.” The Court must thus determine whether “Merger documents that relate to the Am–Rad Flash–Free Technology and the Precision Controlled Welding Technology” remain relevant to any of the remaining claims or defenses in this case.

*10 Plaintiffs assert that “[t]hese requests were and are reasonably calculated to lead to the discovery of admissible evidence in light of Plaintiffs' trade secret

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claims against the Defendants and their claims against Simonton for unjust enrichment and breach of the NDNU Agreement.”⁵⁰ Plaintiffs maintain that “[s]uch discovery could show, for example, just what these Simonton employees communicated to Fortune Brands about the specified subjects before, during, and after the Merger.”⁵¹ Plaintiffs also state that the individuals named in these requests are all current or former Simonton employees. In addition, Plaintiffs explain that their unjust enrichment claim is based on the following:

Plaintiffs claim that when Simonton merged with Fortune Brands, it (Simonton) was unjustly enriched by the information and services Plaintiffs provided to Simonton related to the Am–Rad Flash–Free Technology and the Precision Controlled Welding Technology (which Plaintiffs' jointly developed with Simonton for their joint ownership and profit), by receiving a higher price from Fortune Brands than it would have received without such information and services.⁵²

Thus, Plaintiffs argue that any documents relating to the Simonton–Fortune Brands merger, including those relating to the Am–Rad Flash–Free Technology and the Precision Controlled Weld Technology, are highly relevant to Plaintiffs' unjust enrichment claim.

The Court will first consider the relevance of “Merger documents that relate to the Am–Rad Flash–Free Technology.” As noted above, the term “Am–Rad Flash–Free Technology” refers to the inventions that Johnson and Jones patented in 1999 and later sold to Am–Rad.⁵³ Fortune Brands argues that inventions described in issued patents do not have trade secret status because the information contained therein is publicly disclosed once the patent is issued. Thus, Fortune Brands argues that any documents that relate to the Am–Rad patents are not relevant to Plaintiffs' trade secret misappropriation claims. In a similar vein, Fortune Brands also argues that these documents are not relevant to Plaintiffs' claim for breach of the NDNU Agreement, because that claim is based on allegations that SBPI disclosed *confidential information and trade secrets* to third parties and used them for SBPI's own purposes. It also argues that the same is true with respect to Plaintiffs' unjust enrichment claim, which is based on SBPI and Simonton Holdings' alleged acceptance and misuse of Plaintiffs' *confidential information and trade secrets*. Fortune Brands reasons

that if the Am–Rad Flash–Free Technology is no longer confidential or a trade secret (because it is the subject of the two issued patents), then Merger documents relating to that technology are no longer relevant to the breach of the NDNU Agreement or unjust enrichment claims.

The Court agrees with Fortune Brands that information contained within a patent is considered public information, and can no longer be deemed a trade secret subject to protection.⁵⁴ That principle, however, does not necessarily render these documents irrelevant. Fortune Brands indicated it would produce documents “relating” to the Am–Rad Flash–Free Technology. It is possible that such documents could still contain confidential information that was not specifically disclosed in the patents. Thus, it is conceivable that the documents could be relevant to Plaintiffs' trade secret misappropriation claims. Moreover, the Court finds persuasive Plaintiffs' argument that the documents relating to the Am–Rad Flash–Free Technology could be relevant to their unjust enrichment claim. Given the liberal scope of relevance at the discovery stage, the Court holds that “Merger documents that relate to the Am–Rad Flash–Free Technology” should be produced.

*11 The Court will now consider the relevance of “Merger documents that relate to the Precision Controlled Welding Technology.” As stated above, the phrase “Precision Controlled Welding Technology” refers to the inventions that are the subject of the Simonton Patent Applications.⁵⁵ Plaintiffs allege in their Amended Complaint that the Simonton Patent Applications “disclose and propose claims that are enhancements of or improvements” to the Am–Rad Flash–Free Technology and that the Simonton Patent Applications violate the terms of the License Agreement.⁵⁶ Plaintiffs further allege that the technology disclosed and proposed by the Simonton Patent Applications was based on Plaintiffs' confidential information and trade secrets as well as the parties' joint venture to develop technology for the parties' joint ownership.”⁵⁷

Fortune Brands contends that “Merger documents that relate to the Precision Controlled Welding Technology” are not relevant because they pertain only to the unripe claims in Counts I–III (breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, and breach of the License Agreement), and V–VII (tortious

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interference and aiding and abetting), all of which the Court dismissed. As Judge Lungstrum held, those claims are not ripe because they are “inextricably linked to the question of whether Simonton's two new patents enhance or improve upon Am–Rad's existing patents,” a question that is before the PTO.⁵⁸

The Court finds Fortune Brands' argument persuasive. Moreover, Plaintiffs fail to explain how these documents are relevant to the remaining claims. The Court therefore denies the Motion to Compel with respect to “Merger documents that relate to the Precision Controlled Welding Technology.”

3. First Requests No. 20–28 and 30–32

First Requests No. 20–28 seek correspondence and documents relating to the research, development, production, or use of the Am–Rad Flash–Free Technology, Precision Controlled Welding Technology, and “any other Simonton Welding Technologies involving radiant heat.” First Requests No. 30–32 seek all correspondence and documents between Fortune Brands and Simonton from January 1, 2004 to the present regarding the Am–Rad Flash–Free Technology, Precision Controlled Welding Technology or “any other Simonton Welding Technology involving radiant heat.” In its December 24, 2008 responses to these requests, Fortune Brands stated that it would produce “non-privileged responsive documents to the extent any exist.”

Plaintiffs' only specific reference to these requests is found in their reply brief, where they make the conclusory assertion that “[s]uch requests are clearly reasonably calculated to lead to the discovery of admissible evidence regarding the claims or defenses of any party considering that Plaintiffs have trade secret claims pending against both Simonton and Fortune Brands, as well as a claim for breach of the NDNU agreement and unjust enrichment against Simonton.”⁵⁹

*12 The Court cannot say that these requests seek documents that are relevant on their face. Furthermore, the Court does not find Plaintiffs' conclusory explanation sufficient to meet their burden of showing how they are relevant. The Court therefore denies the Motion to Compel as to these requests.

4. First Requests No. 33–37

First Requests No. 33–37 seek all correspondence, agreements, and documents between (1) Fortune Brands, and (2) certain companies and their employees, officers, directors, attorneys, subsidiaries or independent contractors, from 2004 to the present, which relate to the Am–Rad Flash–Free Technology, Precision Controlled Welding Technology “or any other Simonton Welding Technologies involving radiant heat.” The companies listed are U–R–B–A–N GmbH & Co. Maschinenbau KG; Great Lakes Window, Inc.; GLW, Inc.; ThermaTru Corporation; Sashlite, LLC; and Willi Sturtz Maschinenbau GmbH. In its December 24, 2008 responses, Fortune Brands stated that it would produce “relevant, representative, non-privileged responsive documents to the extent any exist” or “non-privileged responsive documents to the extent any exist.”

The parties do not discuss the relevancy of these particular requests in their briefing. The Court finds that the relevance of these documents is not apparent from the face of the requests. Because Plaintiffs do not discuss these requests, the Court finds that Plaintiffs have not met their burden to show their relevancy. The Motion to Compel is therefore denied as to these requests.

5. First Requests No. 38–40

First Requests No. 38–40 seek all contracts and agreements entered into between Fortune Brands and Simonton regarding the AM–Rad Flash–Free Technology, Precision Controlled Welding Technology, or any other Simonton Welding Technologies for the period 2004 to the present. Fortune Brands indicated in its December 24, 2008 responses that it would produce “non-privileged responsive documents to the extent any exist.”

None of the parties discuss the relevancy of these requests in their briefing. For the same reason discussed above with respect to First Requests No. 33–37 the Court denies the Motion to Compel as to these requests.

6. First Request No. 43

This request seeks “all correspondence, documents, disclosures and/or filings of any kind made to the United States Securities and Exchange Commission” regarding the Merger or acquisition of any Simonton entity. Defendant stated in its December 24, 2008 response that it

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would produce “non-privileged responsive documents to the extent any exist.”

None of the parties discuss the relevancy of this request in their briefing. For the same reason discussed above with respect to First Requests No. 33–37, the Court denies the Motion to Compel as to this request.

7. *First Requests No. 45–48*

First Requests 45 and 46 seek all installation, operation, repair and service logs and manuals pertaining to the Am–Rad Flash–Free Technology, the Precision–Controlled Welding Technology and any Simonton Welding Technologies involving radiant heat, for all production lines at Simonton. Fortune Brands indicated in its December 24, 2008 responses that it would produce “non-privileged representative responsive documents to the extent any exist.”

*13 First Requests No. 47 and 48 seek “all correspondence, spreadsheets, and documents regarding costing information, cost savings analysis, and/or any other financial analysis” relating to the Am–Rad Flash–Free Technology and precision Controlled Welding Technology. Fortune Brands stated in its December 24, 2008 responses that it would produce “non-privileged responsive documents to the extent any exist.”

None of the parties discuss the relevancy of these requests in their briefing. For the same reason discussed above with respect to First Requests No. 33–37, the Court denies the Motion to Compel as to these requests.

8. *First Requests No. 49 and 52*

First Request No. 49 seeks all correspondence, spreadsheets and documents regarding “costing information, cost savings analysis, and/or any other financial analysis relating in any way to the License Agreement.” First Request No. 52 seeks all “business plans, strategic plans, projections, budgets, and/or annual forecasts for or regarding the License Agreement and any correspondence and documents related thereto.” Fortune Brands stated in its December 24, 2008 responses to these requests that it would “produce non-privileged responsive documents to the extent any exist.”

Fortune Brands contends that these documents are no longer relevant because Judge Lungstrum dismissed

Plaintiffs' claim for breach of the License Agreement. Plaintiffs, however, contend that discovery relating to the License Agreement and the parties' performance under that agreement is still relevant because that information pertains to one of Defendants' affirmative defenses. In their joint Answer, Defendants asserted a “Third Defense” in which Defendants state that Plaintiffs' unjust enrichment claim is barred by various valid written contracts between the parties, including the NDNU and License Agreements.⁶⁰ Defendant's Third Defense states that (1) the written contracts governed the disclosure of confidential information between the parties and how it was to be used by the parties; and (2) any assistance or confidential information that Plaintiffs provided Defendants, which Plaintiffs claim benefitted and unjustly enriched Simonton, was provided pursuant to the terms of those agreements.⁶¹ The Third Defense asserts that the unjust enrichment claim is barred by the existence of the express written contracts.⁶²

Plaintiffs argue in their Motion to Compel that “a central issue in this case will be what services, information, trade secrets and technology [were] provided and developed under the License Agreement, on the one hand, versus what services, information, trade secrets and technology [were] provided and developed under the parties' separate agreement, on the other.”⁶³ Plaintiffs maintain that they “are clearly entitled to discovery from Fortune Brands relating to the License Agreement, as such discovery might lead to admissible evidence to, among other things, combat Defendants' affirmative defense based on the License Agreement.”⁶⁴

*14 Fortune Brands, on the other hand, argues that to be deemed relevant, documents relating to the License Agreement and Defendants' Third Defense must pertain to “Plaintiffs' assertion that Plaintiffs performed ‘additional services’ at Simonton's request and for Simonton's benefit that Plaintiffs were not required to do under the terms of the License Agreement.”⁶⁵ Fortune Brands argues that none of the requested documents relate to the services that Plaintiffs claim they performed outside of the License Agreement, and, thus, the documents are not relevant.

The Court finds that the particular documents requested relating to the License Agreement in these requests, i.e., cost savings analyses, business and strategic plans,

projections, budgets, and annual forecasts, are not relevant to Defendants' Third Defense or the unjust enrichment claim. Judge Lungstrum explained in his January 6, 2009 Memorandum and Order that Kansas law forbids unjust enrichment claims "when a written contract governs the issue."⁶⁶ Judge Lungstrum construed Plaintiffs' unjust enrichment claim as one "based on contact not governed by the express agreements," and Plaintiffs conceded in their opposition to the Motion to Dismiss that they are seeking recovery for only those benefits they conferred to Simonton *outside* of the parties' express agreements.⁶⁷ This is consistent with Defendant's Third Defense.

The Court agrees with Fortune Brands that to be considered relevant to the unjust enrichment claim, discovery relating to the License Agreement must relate to what benefits (including confidential information, trade secrets and technology) and services were provided to Simonton *outside of the License Agreement*. The requests at issue, however, pertain to far different topics: cost savings analyses, business and strategic plans, projections, budgets, and annual forecasts pertaining to the License Agreement. They do not relate to the scope of the License Agreement nor do they pertain to any benefits or services that may have been provided outside of the License Agreement. Merely because the requested documents relate in some way to the License Agreement does not render them relevant.

In sum, the Court finds that Plaintiffs have failed to show how these documents are relevant to any of the claims or defenses remaining in the case. The Court therefore denies the Motion to Compel as to First Requests No. 49 and 52.

9. First Requests No. 50 and 51

First Requests No. 50 and 51 seek all business and strategic plans, projections, budgets, and annual forecasts regarding the Am-Rad Flash-Free Technology and the Precision-Controlled Welding Technology. Fortune Brands' December 24, 2008 responses indicated that it would produce "non-privileged responsive documents to the extent any exist."

Neither side discusses these requests. The Court finds that the relevance of this discovery is not apparent on its face and that Plaintiffs have not shown how the documents are relevant to any of the remaining claims or defenses.

Thus, the Court denies the Motion to Compel as to First Requests No. 50 and 51.

10. First Requests No. 54 and 56–58

*15 First Request No. 54 seeks "all roll out plans and schedules to roll out the Precision Controlled Welding Technology on any of Simonton's production lines" and any related correspondence and documents. First Request No. 56 seeks all quality control charts and any documents relating to quality control for the Precision Controlled Welding Technology. First Requests No. 57 and 58 seek all reports, studies and surveys regarding the Precision Controlled Welding Technology and Am-Rad Flash-Free Technology, along with any related correspondence. Fortune Brands stated in its December 24, 2008 responses that it would "produce responsive documents to the extent any exist."

Neither side discusses these requests. The Court finds that the relevance of this discovery is not apparent on its face and that Plaintiffs have not shown how the documents are relevant to any of the remaining claims or defenses. Thus, the Court denies the Motion to Compel as to First Requests No. 54 and 56–58.

11. First Requests No. 66–69 and 73

These requests pertain to the 2006 Merger, in which Fortune Brands acquired SBPI and its parent company SBR. First Request No. 66 seeks "all documents exchanged with or given to any Simonton entity relating to or during the course of the Merger" regarding the Am-Rad Flash-Free Technology. First Request No. 67 asks for the same types of documents regarding the Precision Controlled Welding Technology. Fortune Brands stated in its December 24, 2008 responses that it would "produce non-privileged responsive documents to the extent any exist."

The Court finds that these documents would be almost identical to the "Merger documents that relate to the AM-Rad Flash-Free Technology" and "the Merger documents that relate to the Precision Controlled Welding Technology," which are the subject of First Requests No. 17–19 and 29. For the same reasons discussed above in connection with those requests, the Court finds that the documents requested in First Request No. 66 are relevant to the remaining claims, while those sought in First Request No. 67 are not relevant. The Motion to

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Compel is therefore granted as to First Request No. 66 and denied as to First Request No. 67. Within *twenty (20) days* of the date of this Order, Fortune Brands shall produce all non-privileged documents responsive to First Request No. 66

First Request No. 68 seeks all “internal documents ... documenting the legal due diligence undertaken by you as a part of the Merger with regard to the Am–Rad Flash–Free Technology, Precision Controlled Welding Technology, and/or other intellectual property relating to any other Simonton Welding Technologies.” In its December 24, 2008 response, Fortune Brands objected on the basis of attorney-client privilege and work product, but indicated it would produce “non-privileged responsive documents to the extent any exist.”

Plaintiffs assert that they are not seeking any attorney-client privileged or work product documents, and, to the extent Fortune Brands has any privileged documents responsive to this request, it may provide a privilege log. Further, Plaintiffs contend that the non-privileged documents sought are relevant to their remaining unjust enrichment claim. They explain that SBPI stated in its interrogatory responses that all due diligence review regarding the Merger was conducted by Fortune Brands, and that SBPI's employees provided documents to Fortune Brands in connection with that due diligence review.⁶⁸ Plaintiffs contend that the requested documents may show that Fortune Brands paid a higher price for Simonton because of the services and information Plaintiffs provided to Simonton relating to the AM–Rad Flash–Free Technology and the Precision Controlled Welding Technology.

***16** The Court finds that Plaintiffs have made at least a plausible argument that the requested documents with regard to the AM–Rad Flash–Free Technology have the potential to be relevant to Plaintiff's unjust enrichment claim. Although the relevance appears fairly tenuous, the Court finds that the documents may have “a possible bearing” on the unjust enrichment claim. The Court therefore grants the Motion to Compel as to “internal documents ... documenting the legal due diligence undertaken by [Fortune Brands] as a part of the Merger with regard to the Am–Rad Flash–Free Technology.” Within *twenty (20) days* of the date of this Order, Fortune Brands shall produce all responsive non-privileged documents with regard to the Am–Rad Flash–

Free Technology and a privilege log for any responsive documents withheld on the basis of privilege or work product.

The Court fails to see how due diligence documents relating to the Precision Controlled Welding Technology would be relevant. For reasons similar to those stated above with respect to First Requests No. 7–19 and 29 and the Precision Controlled Welding Technology, the Court denies the Motion to Compel as to due diligence documents relating to the Precision Controlled Welding Technology.

In addition, the Court finds that Plaintiffs have failed to show how due diligence documents concerning “other intellectual property relating to any other Simonton Welding Technologies” are relevant to any of the remaining claims or defenses. The Court therefore denies the Motion to Compel as to those documents.

First Request No. 69 seeks all documents relating “to any and all intellectual property identified in the previous Request [First Request No. 68] that was considered and/or included in the Merger including ... documents evidencing the value given to each piece of intellectual property.” Fortune Brands objected to producing attorney-client privileged or work product documents but indicated it would produce “non-privileged responsive documents to the extent any exist.”

Plaintiffs contend that these documents are relevant with respect to Plaintiffs' unjust enrichment damages. Plaintiffs allege that Simonton was unjustly enriched by the services and information related to the Am–Rad Flash–Free Technology and the Precision Controlled Welding Technology which Plaintiffs provided to Fortune Brands. Plaintiffs further allege that Fortune Brands paid Simonton a higher price because of those services and information. Thus, Plaintiffs argue that these documents are relevant to determining the amount of Simonton's unjust enrichment.

For the same reasons discussed above with respect to First Request No. 68, the Court grants the Motion to Compel to the extent this request seeks documents relating to the Am–Rad Flash–Free Technology, but denies it to the extent it seeks documents relating to any other intellectual property. Fortune Brands shall produce all responsive non-privileged documents with regard to the Am–Rad

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Flash-Free Technology and any necessary privilege log within *twenty (20) days* of the date of this Order.

*17 First Request No. 73 seeks “the Stock Purchase Agreement and all documents related to or “executed as a part of the closing of the Merger.” Plaintiffs contend that the Stock Purchase Agreement and Merger closing documents will help them determine the amount of Simonton's unjust enrichment. The Court finds that the relevancy of this discovery is not apparent on its face and finds that Plaintiffs' conclusory explanation is not sufficient to show how it is relevant. The Court therefore denies the Motion to Compel as to First Request No. 73.

12. First Requests No. 70–72

These requests seek all agreements in effect from 2002 to the present between Fortune Brands, and certain individuals. They also seek the personnel files of certain Fortune Brands employees and any documents relating to the termination or resignation of those employees. Fortune Brands responded that it would “produce non-privileged responsive documents to the extent any exist.”

Neither side discusses these requests in their briefing. The Court finds that the relevance of this discovery is not apparent on its face and that Plaintiffs have not shown how the documents are relevant to any of the remaining claims or defenses. The Court therefore denies the Motion to Compel as to First Requests No. 70–72.

13. First Requests No. 74–76 and 79–80

Plaintiffs do not specifically discuss or address these requests in their briefing. The relevance of this discovery is not facially apparent, and Plaintiffs fail to show how the documents are relevant to the remaining claims or defenses. The Court therefore holds that Plaintiffs have failed to meet their burden to show how these documents are relevant. The Motion to Compel is therefore denied as to these requests.

14. First Request No. 77

First Request No. 77 seeks all “correspondence and documents between [Fortune Brands] and any testifying consultant or expert, including the information required by the Court's Scheduling Order.” Fortune Brands indicated in its December 24, 2008 response that it would

produce “non-privileged responsive documents to the extent any exist.”

The Court finds this request to be relevant on its face—at least when it is limited to the claims and defenses that remain in the case following Judge Lungstrum's January 8, 2009 Order. Fortune Brands fails to show how these documents are not relevant. Thus, the Court grants the Motion to Compel with respect to this request. Within *twenty (20) days* of the date of this Order, Fortune Brands shall produce all non-privileged responsive documents to the extent they relate to the claims or defenses remaining in the case. To the extent Fortune Brands withholds any responsive documents on the basis of privilege or work product immunity, it shall provide a privilege log by that same date.

15. First Request No. 81

First Request No. 81 seeks all “documents, correspondence, and things that are encompassed in, or were intended to be included in, the categories of documents and things identified in your initial disclosures.” In its December 24, 2008 response, Fortune Brands stated that it would “produce non-privileged responsive documents to the extent any exist.”

*18 The Court finds First Request No. 81 to be relevant on its face. [Rule 26\(a\)\(1\)\(A\)\(ii\)](#), which governs initial disclosures, places an affirmative duty on litigants to provide “a copy—or a description of category and location—of all documents ... and tangible things that the disclosing party has in its possession, custody, or control and *may use to support its claims or defenses.*”⁶⁹ Thus, the request seeks documents that Fortune Brands may use to support its claims or defenses. As such, any responsive documents would be directly relevant to “any party's claim or defense” and would clearly fall within the scope of discovery allowed by [Rule 26\(b\)\(1\)](#). Accordingly, the Court grants the Motion to Compel as to this request. Fortune Brands is directed to produce copies of all nonprivileged documents and things that (1) were encompassed by, or included in, the categories which Fortune Brands identified in its initial disclosures, and (2) which Fortune Brands may use to support any claims or defenses remaining in the case after Judge Lungstrum's January 6, 2009 Order. To the extent Fortune Brands withholds any responsive documents on the basis

of privilege or work product immunity, it shall provide a privilege log within that same time frame.

16. First Request No. 82

First Request No. 82 seeks all documents that support any of Fortune Brands' "claimed (or soon to be claimed) damages." In its December 24, 2008 response, Fortune Brands stated that it would "produce non-privileged responsive documents to the extent any exist."

The parties do not discuss this request in their briefing; however, it appears relevant on its face. While the Court is not aware that Fortune Brands is claiming any damages in this lawsuit, the Court will grant the Motion to Compel. To the extent that Fortune Brands is claiming damages, it shall produce all non-responsive documents and provide any required privilege log within *twenty (20 days)* of the date of this Order.

17. First Request No. 83

This request seeks all correspondence and documents relating to "the retrofitting of any machines or welders from radiant heat technologies back to any other welding technology." The parties do not discuss this request in their briefing. The Court finds that the relevance of this discovery is not apparent on its face and that Plaintiffs have not shown how it relevant to any of the remaining claims or defenses. The Court therefore denies the Motion as to First Request No. 83.

18. Second Requests No. 7–10

Second Requests No. 7–10 seek various documents relating to the 2005–2008 sales of windows made using the Precision Controlled Welding Technology, including invoices, bills of sale, shipping information, and accounting information. In its December 29, 2008 responses, Fortune Brands stated that it would produce only "non-privileged representative responsive documents from which the number of windows made using the Precision Control Welding Technology [for each year requested] can be determined."

*19 As discussed above, documents relating to the Precision Control Welding Technology pertain to the unripe dismissed claim for breach of the License Agreement. The documents appear to have no relevancy to the remaining claims, and Plaintiffs do not even attempt

to explain how these particular documents are relevant to any remaining claims or defenses. The Court therefore denies the Motion to Compel as to Second Requests No. 7–10.

VI. Expenses and Fees Incurred in Connection with this Motion

Plaintiffs do not request that they be reimbursed for the expenses or attorney's fees they have incurred in connection with the filing of their Motion to Compel. The Court must nevertheless consider whether to make such an award.

[Federal Rule of Civil Procedure 37\(a\)\(5\)](#) governs the award of fees and expenses in connection with motions to compel. Generally speaking, it requires the Court to award reasonable expenses and attorney's fees to a prevailing party unless the position of the non-prevailing party was substantially justified or other circumstances make an award of expenses unjust.⁷⁰ If a motion to compel is granted in part and denied in part, the court may apportion the reasonable expenses for the motion.⁷¹ Courts have generally held that a party's position (i.e., motion, request, response, or objection) is "substantially justified" within the meaning of [Rule 37](#) if it is "justified to a degree that could satisfy a reasonable person,"⁷² or where "reasonable people could differ as to the appropriateness" of the objection or response.⁷³ Whether to impose sanctions when a court grants in part and denies in part a motion to compel, lies within the court's sound discretion, and the court must consider on a case-by-case basis whether the party's position was substantially justified or whether other circumstances make the imposition of sanctions inappropriate.⁷⁴

The Court finds that many of Fortune Brands' relevance objections and a significant portion of its response to the Motion to Compel were substantially justified. The Court therefore holds that it would be inappropriate to assess expenses or fees against Fortune Brands. Accordingly, each party shall pay his/its own expenses and fees incurred in connection with Plaintiffs' Motion to Compel.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Compel Production of Documents (doc. 54) is granted in part and denied in part, as set forth herein.

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IT IS FURTHER ORDERED that all documents required to be produced as a result of this Order shall be produced, and any privilege log shall be provided, within *twenty (20) days* of the date of this Order.

IT IS FURTHER ORDERED that each party shall bear his/its own expenses and attorney's fees incurred in connection with this Motion to Compel.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 2407723

Footnotes

- 1 First Am. Compl. (doc. 18) ¶¶ 10–12.
- 2 *Id.* ¶ 12.
- 3 *Id.*
- 4 *Id.* ¶ 15.
- 5 *Id.*
- 6 *Id.* ¶ 16.
- 7 *Id.* ¶ 17.
- 8 *Id.* ¶ 18.
- 9 *Id.* ¶ 22.
- 10 *Id.* ¶¶ 25 & 26.
- 11 *Id.* ¶¶ 29, 30 & 33.
- 12 *Id.* ¶ 34; Defs.' Answer (doc. 46) ¶ 34.
- 13 First Am. Compl. (doc. 18) ¶ 35.
- 14 *Id.* ¶ 25.
- 15 *Id.* ¶ 26.
- 16 *Id.* ¶ 33.
- 17 *Id.* ¶ 54.
- 18 *Id.* ¶ 79.
- 19 *Id.* ¶ 81.
- 20 *Id.* ¶ 84.
- 21 *Id.* ¶¶ 86, 93 & 98.
- 22 *Id.* ¶¶ 88, 92 & 97.
- 23 In some of those responses, Fortune Brands indicated that it would produce “non-privileged documents” or responsive documents “to the extent they exist.”
- 24 Jan. 6, 2009 Mem. and Order (doc. 43) at 8.
- 25 *Id.*
- 26 *Id.*
- 27 Fortune Brands' Resp. to Mot. to Compel (doc. 62) at 11.
- 28 Jan. 6, 2009 Mem. and Order (doc. 43) at 8.
- 29 *Id.* (citing [Park Lake Res., LLC v. U.S. Dep't of Agric.](#), 378 F.3d 1132, 1135 (10th Cir.2004) (ripeness is a jurisdictional issue).
- 30 *Id.* at 10.
- 31 *Id.* at 10–11.
- 32 *Id.* at 13.
- 33 D. Kan. Rule 37.1(a).
- 34 D. Kan. Rule 37.2.
- 35 *Id.* In a similar vein, Fed.R.Civ.P. 37(a)(1) provides that any motion to compel discovery “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”

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- 36 See Certification of Compliance with [Fed.R.Civ.P. 37\(a\)\(1\)](#) and [D. Kan. Rule 37.2](#) (doc. 55) at 15.
- 37 See Exs. F and G, attached to Pls.' Supp. Mem. (doc. 55).
- 38 Pls.' Mem. in Supp. of Mot. to Compel (doc. 55) at 1.
- 39 [Fed.R.Civ.P. 26\(b\)\(1\)](#) (emphasis added).
- 40 See, e.g., [Gispon v. Southwestern Bell Tel. Co.](#), No. 08–2017–EFM–DJW, 2009 WL 790203, at *6 (D.Kan. Mar. 24, 2009); [Cardenas v. Dorel Juvenile Group, Inc.](#), 230 F.R.D. 611, 621 (D.Kan.2005); [Sonnino v. Univ. of Kan. Hosp. Auth.](#), 220 F.R.D. 633, 657 (D.Kan.2004).
- 41 See, e.g., [Oppenheimer Fund, Inc. v. Sanders](#), 437 U.S. 340, 351–52 (1978) (“[I]t is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken ... unless the information sought is otherwise relevant to issues in the case.”); [Lewis v. ACB Bus. Servs., Inc.](#), 135 F.3d 389, 402 (6th Cir.1998); [City of Owensboro, Ky. v. Ky. Util. Co.](#), No. 04–CV–87(M), 2007 WL 4239460, at *2 (W.D. Ky Nov. 29, 2007).
- 42 See Pls.' Mem. in Supp. of Mot. to Compel at 8 and January 2009 e-mails between counsel in which Fortune Brands clearly states its position regarding the irrelevance of any documents that pertain to the newly dismissed claims. See *id.*, Ex. F.
- 43 [Jones v. Wet Seal Retail, Inc.](#), 245 F.R.D. 724, 725 (D.Kan. .2007); [Cardenas](#), 232 F.R.D. at 382; [Owens](#), 221 F.R.D. at 652.
- 44 [Jones](#), 245 F.R.D. at 725; [Cardenas](#), 232 F.R.D. at 382; [Owens](#), 221 F.R.D. at 652.
- 45 [Cardenas](#), 232 F.R.D. at 382; [Owens](#), 221 F.R.D. at 652.
- 46 [Cardenas](#), 232 F.R.D. at 382; [Owens](#), 221 F.R.D. at 652.
- 47 [Fed.R.Civ.P. 26\(b\)\(1\)](#).
- 48 The Court's inquiry is limited in this regard because Plaintiffs have moved only to compel Fortune Brands to produce the documents it “agreed” to produce in its December 24 and 29, 2008 responses. Plaintiffs do not move to compel the production of any other documents nor do they move the Court to overrule any of the objections that Fortune Brands made in its December 2008 responses. To the extent Plaintiffs make arguments about those other objections, the Court will not address those arguments.
- 49 See [Cardenas](#), 232 F.R.D. at 382 (when the discovery sought appears relevant on its face, the party resisting discovery has the burden to show that the requested discovery does not come within the scope of relevance as defined under [Rule 26\(b\)\(1\)](#), or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure); [Owens](#), 221 F.R.D. at 652 (same).
- 50 Pls.' Reply (doc. 66) at 9.
- 51 *Id.*
- 52 *Id.* at 6.
- 53 See First Am. Compl. (doc. 18) ¶¶ 10–12.
- 54 See [BondPro Corp. v. Siemens Power Generation, Inc.](#), 463 F.3d 702, 706 (7th Cir.2006) (“Publication in a patent destroys the trade secret....”); [On-Line Tech., Inc. v. Bodenseewerk Perkin–Elmer GmbH](#), 386 F.3d 1133, 1141 (Fed Cir.2004) (“After a patent has issued, the information contained within it is ordinarily regarded as public and not subject to protection as a trade secret.”).
- 55 See Fortune Brands' Resp. to Mot. to Compel (doc. 62) at 11.
- 56 Am. Compl. (doc. 18) ¶ 32.
- 57 *Id.* ¶ 33.
- 58 Mem. and Order (doc. 43) at 8.
- 59 Pls.' Reply (doc. 66) at 3.
- 60 See Defs.' Answer (doc. 46), Third Defense.
- 61 *Id.*, Third Defense, ¶¶ 10–16.
- 62 *Id.*, ¶ 16.
- 63 Pls.' Reply (doc. 66) at 10.
- 64 *Id.* at 10–11.
- 65 Fortune Brands' Resp. to Mot. to Compel (doc. 62) at 14.
- 66 See Mem. and Order (doc. 43) at 9 (citing [Fusion v. Neb. Aluminum Castings, Inc.](#), 934 F.Supp. 1270, 1275 (D.Kan.1996); [Whan v. Smith](#), 130 Kan. 9, 285 P. 589, 591 (1930)).
- 67 *Id.*

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- 68 See SBPI's Resp. to Interrogs. No. 10–12, attached as Ex. H to Pls.' Reply (doc. 66).
- 69 Fed.R.Civ.P. 26(a)(1)(A)(ii) (emphasis added).
- 70 *Gipson v. Southwestern Bell Tel. Co.*, No. 08–2017–EFM–DJW, 2009 WL 790203, at *19 (D.Kan. Mar. 24, 2009) (citing Fed.R.Civ.P. 37(a)(5)(A) & (B)).
- 71 *Id.* (citing Fed.R.Civ.P. 37(a)(5)(C)).
- 72 See, e.g., *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 12 (1st Cir.2005); *Gipson v. Southwestern Bell Tel. Co.*, No. 08–2017–EFM–DJW, 2009 WL 790203, at *19 (D.Kan. Mar. 34, 2009); *Cardenas v. Dorel Juvenile Group, Inc.*, No. 04–2478–KHV–DJW, 2005 WL 3503625, at *2 (D.Kan. Dec. 22, 2005).
- 73 *Maddow v. Procter & Gamble Co., Inc.*, 107 F.3d 846, 853 (11th Cir.1997); *Gipson*, 2009 WL 790203 at *19; *ICE Corp. v. Hamilton Sundstrand Corp.*, No. 05–4135–JAR, 2008 WL 833509, at * 1 (D.Kan. Mar. 27, 2008). In a similar context, the Supreme Court has said that “substantially justified” does not mean “justified to a high degree,” but only “justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (construing government's obligations under Equal Access to Justice Act).
- 74 *Gipson*, 2009 WL 790203, at *19; *Moss v. Blue Cross and Blue Shield of Kan., Inc.*, 241 F.R.D. 683, 699 (D.Kan.2007) (citations omitted).

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2009 WL 4927618

Only the Westlaw citation is currently available.
United States District Court,
D. Colorado.

Sonja MORRIS, Plaintiff,
v.
CITY OF COLORADO SPRINGS d/b/
a Memorial Health System, Defendant.

Civil Action No. 09-cv-01506-PAB-MEH.
|
Dec. 18, 2009.

Attorneys and Law Firms

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[Virginia Mary Jeffrey](#), Colorado Springs City Attorney's Office, [Edward John Butler](#), [Raymond Myles Deeny](#), Sherman & Howard, L.L.C., Colorado Springs, CO, for Defendant.

ORDER ON DEFENDANT'S MOTION TO COMPEL

[MICHAEL E. HEGARTY](#), United States Magistrate Judge.

*1 Pending before the Court is Defendant's Motion to Compel Production of Medical Releases and for Sanctions [filed November 16, 2009; docket # 24]. The matter is briefed and has been referred to this Court. Oral argument would not materially assist the Court in adjudicating this motion. For the reasons stated below, the Court **denies** the Motion to Compel as premature.

I. Background

Plaintiff filed this lawsuit claiming Defendant violated Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and her First Amendment right to petition for redress from sexual harassment suffered in the workplace, which caused her "pecuniary damages" and "severe emotional distress." See Complaint, docket # 1. More specifically, the Plaintiff, a nurse, alleges that she suffered a hostile work environment when a doctor hit her on the back of the head twice and threw a bloody

piece of body tissue at her during surgery; then, after she complained internally and served a notice of claim pursuant to the Colorado Governmental Immunity Act, the Plaintiff claims that she was improperly removed from the "Heart Team." *Id.* Defendant denies Plaintiff's claims.

Following the exchange of discovery requests, Defendant filed the within Motion to Compel seeking executed releases for Plaintiff's medical records regarding her claim for emotional distress damages. See docket # 24. Defendant argues that Plaintiff has put her psychological history at issue by making numerous and specific allegations regarding the emotional distress she claims to have suffered as a result of Defendant's conduct. *Id.* at 6. Plaintiff responds to the motion claiming that she will provide the medical records once she has possession of them, and that [Rule 34 of the Federal Rules of Civil Procedure](#) does not require production of medical records, since the records are not in the Plaintiff's possession, custody or control. See docket # 27. Defendant replies arguing that Plaintiff's production of the medical records is insufficient, since such records may be incomplete depending upon which records the Plaintiff chooses to provide. See docket # 35. Defendant seeks an award of attorney's fees for filing the motion.

II. Discussion

In this Title VII case, federal privilege law controls, and no physician-patient privilege exists under federal law. *Whalen v. Roe*, 429 U.S. 589, 602 n. 28 (1977) ("The physician-patient ... privilege is unknown to the common law."); see also *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir.2004) (holding that HIPAA regulations do not create a federal physician-patient privilege). In the absence of a privilege, Plaintiff's medical records are governed by issues of relevance and confidentiality commonly addressed in civil lawsuits.

Here, there is no dispute about the relevance of the requested medical records. The Plaintiff states that she is willing to provide the records to Defendant once they come into her possession. Rule 26 permits discovery that is "reasonably calculated to lead to the discovery of admissible evidence." [Fed.R.Civ.P. 26\(b\)\(1\)](#) (2009). In addition, medical records fall within the scope of confidential documents under [Fed.R.Civ.P. 26\(c\)](#), which can be addressed through the entry of an appropriate protective order.¹ Thus, the only discussion remaining

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is whether compelling the executed authorization(s) requested by Defendant is the appropriate method of obtaining this discovery.

*2 The Defendant argues that production of the medical records, once received by the Plaintiff, would be insufficient and contends that production of executed releases for the medical records would be a more efficient way to obtain relevant discoverable information. The Plaintiff's only challenge to Defendant's request is that she need not produce executed releases because Rule 34 does not require such production. Plaintiff cites *Neal v. Boulder*, 142 F.R.D. 325, 327 (D.Colo.1992) for the proposition that there is no basis under Rule 34 allowing a court to compel the production of executed medical releases, since a plaintiff typically has no custody or control over the records.

A review of cases addressing whether a court may order production of executed medical releases reveals a split of authority. The first view primarily looks to the plain language of Rule 34 to conclude that records not in the party's possession may not be compelled and that Rule 34 does not permit the Court to order the party's signature on a medical release form. See, e.g., *Neal*, 142 F.R.D. at 327; see also *Clark v. Vega Wholesale, Inc.*, 181 F.R.D. 470, 472 (D.Nev.1998). The second view generally permits an order compelling a signature on a release form when the party has placed his or her medical condition at issue in the case. See *Williams v. NPC Int'l, Inc.*, 224 F.R.D. 612, 613 (N.D.Miss.2004); see also *Adams v. Ardcor*, 196 F.R.D. 339, 344 (E.D.Wis.2000). However, even courts that compel authorizations from the plaintiff typically require the defendant first to seek the documents directly from the third party who has custody of the documents. *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. 426, 429 (D.Kan.2007) ("It is only after the individuals or entities object on grounds of privilege or otherwise fail to produce the documents pursuant to subpoena that the Court will

consider a motion requesting (1) the Court compel the entity to produce the documents pursuant to Rule 45; or (2) compel the party to execute appropriate releases pursuant to the Court's general powers to enforce its own orders"); see also *Johnson v. Kraft Foods North Am., Inc.*, 236 F.R.D. 535, 540 (D.Kan.2006) (same).

This Court has previously determined that authorization for the release of medical records should not be routinely compelled, even when it may be the most efficient manner for such discovery. See *Cutting v. United States*, No. 07-cv-02053-REB-MEH, 2008 WL 1775278, *2 (D.Colo. Apr. 14, 2008) (unpublished). In *Cutting*, the Court ordered the plaintiffs to provide executed authorizations for medical records, but only after determining that such method would be more efficient since the matter involved more than 90 medical providers. *Id.* Here, no such special circumstances exist. The briefing reveals that the Plaintiff has discussed her emotional health with only one medical provider. Docket # 24 at 5; docket # 24-2 at 8. Under these circumstances, the Court will follow the reasoning of *Neal*, *Thorman*, and *Johnson* and require the Defendant first to seek Plaintiff's medical records pursuant to Rule 45. If production of the records pursuant to subpoena is refused, the Court will then entertain a motion to compel the production of the requested medical records.

III. Conclusion

*3 Accordingly, for the reasons stated above, it is hereby ORDERED that Defendant's Motion to Compel Production of Medical Releases and for Sanctions [filed November 16, 2009; docket # 24] is **denied** at this stage of the litigation. In addition, Defendant's request for attorney's fees in this matter is denied.

All Citations

Not Reported in F.Supp.2d, 2009 WL 4927618

Footnotes

- 1 The Court notes that it has entered a Protective Order in this matter regarding the exchange of confidential documents in this case.

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Oklahoma.

UNITED FOOD AND COMMERCIAL
WORKERS UNION, et al., Plaintiff,

v.

CHESAPEAKE ENERGY
CORPORATION, et al., Defendants.

No. CIV-09-1114-D.

|
June 22, 2012.

Attorneys and Law Firms

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ORDER

TIMOTHY D. DeGIUSTI, District Judge.

*1 Before the Court is the Lead Plaintiff's Motion to Compel [Doc. No. 222] Defendants to comply with the Court's January 6, 2012 Order [Doc. No. 167] ("January 6 Order") which granted in part and denied in part Lead Plaintiff's earlier motion to compel. Lead Plaintiff contends that Defendant Aubrey McClendon ("McClendon") failed to comply with the January 6 Order by redacting substantial portions of documents

he was required to produce as a result of the Court's ruling. Lead Plaintiff also asks the Court to compel McClendon to answer Interrogatory Nos. 1(h) and (k) and Interrogatory No. 2, contending the January 6 Order requires him to do so. Lead Plaintiff also seeks to compel Defendants Chesapeake Energy Corporation, McClendon, Marcus C. Rowland, Michael A. Johnson, Richard K. Davidson, Frank A. Keating, Breene M. Kerr, Charles T. Maxwell, Merrill A. Miller, Jr., Donald L. Nickles, and Frederick B. Whittemore (collectively, the "Chesapeake Defendants") to produce certain documents which they contend are protected from discovery by the attorney-client privilege. McClendon and the Chesapeake Defendants timely responded to the motion, and Lead Plaintiff filed a reply.

By Order of April 9, 2012 [Doc. No. 228], the Court granted Defendants' request to submit for the Court's *in camera* review both unredacted and redacted copies of the documents produced by McClendon. The parties timely complied.

Having reviewed the January 6 Order and having examined *in camera* the documents at issue, the Court finds that no further hearing or briefing is required to resolve this issue or the other contentions raised by Lead Plaintiff's current motion. Accordingly, the Court orders as follows with respect to Lead Plaintiff's motion.

I. McClendon's production of documents and propriety of redactions:

In the January 6 Order, the Court addressed Lead Plaintiff's Request for Production of Documents No. 2, which sought documents reflecting Defendant McClendon's personal financial information as of July 9, 2008. Defendant McClendon initially objected to producing certain requested material on the grounds that it was not relevant and/or that it sought private and sensitive confidential information. In its Order, the Court concluded that Lead Plaintiff's request was excessive in its scope, and limited the documents to be produced by McClendon. January 6 Order at p. 8. Specifically, the Court directed that Defendant McClendon produce documents responsive only to Request No. 2(a) and (d), and denied Lead Plaintiff's motion as to the remaining subparts of Request No. 2.

Request No. 2 seeks production by McClendon of documents and communications "concerning your

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liquidity or financial ability, as of July 9, 2008, to satisfy the margin calls that resulted in the sale of substantially all of your shares of Chesapeake stock,” and then lists eight categories, identified as subparts (a) through (h). In the Order, the Court granted the motion only as to two of those categories, subparts (a) and (d), which request production of: “(a) bank, brokerage, or other financial account statements,” and “(d) financial statements identifying your assets, liabilities, or income.” The motion was denied as to the other subparts of Request No. 2.

*2 Lead Plaintiff contends that, although McClendon produced documents consisting of a July 31, 2008 financial statement and numerous bank, brokerage or other financial account statements, he has substantially redacted information from these documents. Lead Plaintiff contends the redactions are improper because they reflect his determination of what he believes is relevant and within the scope of permissible discovery pursuant to [Fed.R.Civ.P. 26](#). Lead Plaintiff argues that McClendon may not unilaterally determine relevance for discovery purposes, and only the Court can make that determination. In response, McClendon argues that the redacted material consists only of information which is not responsive to Document Request No. 2(a) and (d) or is within the categories of requested documents which the Court's January 6 Order ruled were beyond the scope of discovery.

The documents produced by Defendant McClendon in response reflect that he produced a July 31, 2008 “Statement of Financial Condition” which is responsive to subpart (d). This consists of Bates Stamp Nos. 159508–159512. The balance of the more than 400 pages of produced documents reflect various bank, brokerage and other financial account statements, as requested in Document Request No. 2(a). The Court has reviewed these documents in detail, and finds that, with a few exceptions, the redacted information is properly excluded because it is either outside the time frame contemplated by the express request, or it reflects information which falls into subparts (b), (c), (e), (f), (g), and (h) of Request No. 2. In the January 6 Order, the Court expressly denied Lead Plaintiff's motion to compel production of documents in those categories.

With respect to the July 31, 2008 financial statement, Defendant McClendon has properly redacted information

related to his financial condition in other time periods, including March of 2008 and June of 2007. These time periods are outside the scope of the document request. Defendant McClendon has also redacted information regarding personal non-liquid assets as well as others in which he has an interest. The financial statement places a dollar value on such assets, but that information cannot reasonably be construed as reflecting his “liquidity or financial ability, as of July 9, 2008,” to satisfy margin calls. Furthermore, a substantial part of the redacted information falls within the subparts of Document Request No. 2 which the Court previously found too broad and beyond the scope of permissible discovery. Accordingly, that information is properly redacted. With respect to McClendon's liabilities, the same conclusions render the redacted information either unresponsive to the document request or beyond the scope of the January 6 Order. The Court finds that such redactions are proper and consistent with the January 6 Order.

The balance of the documents produced reflect brokerage and/or bank account statements which are responsive to Document Request No. 2(a). A substantial number of these statements contain no entries or information related to the July 9, 2008 date which is identified in the document request. Instead, the majority of these account statements reflect only a beginning and ending balance for the month of July, 2008. A review of the unredacted statements establishes that McClendon did not redact information which could reasonably be construed as demonstrating his liquidity or financial ability to satisfy margin calls as of July 9, 2008, which is the information sought in Document Request No. 2(a). The redactions of these documents are proper, as the redacted information is not responsive to the document request.

*3 However, there are some portions of other bank or brokerage account statements which specifically identify cash transactions immediately prior to or after July 9, 2008. Although these transactions may not clearly reflect McClendon's liquidity on July 9, 2008, it is possible that this information could lead to the discovery of admissible evidence, and it is thus arguably within the scope of permissible discovery. The Court therefore concludes that, with respect to certain pages of the redacted documents produced by McClendon, he should produce partially unredacted pages which reflect these entries. The specific entries which fall into this category are identified by

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the following Bates stamp numbers reflected on the documents:

- Bates No. 159527: This page contains cash transfers to and from a Wachovia Securities Futures Account, and it reflects transfers on July 7, 2008 and several dates thereafter which appear to increase or decrease the amount of cash in the account. The Court concludes that Defendant McClendon should produce a partially unredacted version of this page, to the extent the page reflects cash transfers from July 7, 2008 through July 9, 2008. The remaining information shown on this account may remain redacted.

- Bates Nos. 159644, 159649, 159650: These pages reflect, in part, the “cash & short term” asset allocation in a J.P. Morgan Private Bank account. The statement does not reflect transactions on specific dates, but includes only information reflecting the cash assets at July 1, 2008 and July 31, 2008. To the extent this reflects cash which may show Defendant McClendon's liquidity at the relevant date of July 9, 2008, these portions of the account statement are arguably subject to discovery and should be produced in an unredacted form showing only the cash portion. The other information on these pages may remain redacted.

- Bates No. 159655: This page contains information regarding a Wells Fargo account, and contains a limited amount of information reflecting cash in the account as of July 31, 2008. It also reflects cash income for the month of July, 2008. While there are no transactions on or near July 9, 2008 or during the days immediately preceding and following that date, the current value and income summary for cash is arguably discoverable, and Defendant McClendon should produce an unredacted copy showing this information on the page in question. The remaining information on this page may remain redacted.

- Bates Nos. 159671–159673 and 159675–159676: These pages contain entries reflecting cash transfers or withdrawals in a Kirkpatrick Bank account. Several entries appear on July 9, 2008 and during the days immediately preceding that date. These entries are arguably responsive to the request for documents reflecting Defendant McClendon's liquidity on July 9, 2008. Accordingly, these pages should be partially unredacted to reflect transactions on July 9, 2008 and

for the period of five days preceding July 9, 2008. Other portions of these pages and the balance of the Kirkpatrick Bank statement shall remain redacted, as they contain no information within the scope of the document request.

- *4 • Bates Nos. 159693–159695: These pages are a portion of Defendant McClendon's statement of account with Banc of America Investment Services, Inc., and the total portfolio value was not redacted. However, Defendant McClendon redacted from these two pages the “cash and cash equivalents” line showing a total for the July 2008 period, and that entry appears to be within the scope of the document request. An unredacted copy reflecting these entries should be produced, and the balance of the information may remain redacted.

- Bates No. 159707: This page reflects a portion of a Citi commodity/futures account. On this page, there are cash transaction entries on July 8 and July 9, 2008, and these have been redacted. The Court finds that these transactions should be reflected in a partially unredacted copy of the document page produced.

- Bates No. 159866: This page is a portion of an account statement with RBC Wealth Management. Entries reflecting “cash and money market” values and the beginning and ending balances for the same in July 2008 have been redacted. Because this information arguably is relevant to the issue of liquidity on July 9, 2008, the Court finds a partially unredacted copy of this page, showing these cash values and the change in the same during July should be produced.

- Bates No. 159869: This page is also a portion of the RBC Wealth Management account, and reflects some cash deposits in July of 2008. These have been redacted from the produced documents. There is one entry on this page, dated July 7, 2008, which reflects a cash deposit. The Court finds that a copy of this page, including this entry, should be produced, but the remainder of the page may remain redacted.

- Bates No. 159878: This page reflects a separate account with RBC Wealth Management, and the statement also reflects an activity summary showing, in part, “cash/money market activity.” These specific entries have been redacted. To the extent this information could arguably show liquidity on the relevant date, a copy of this page,

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with these entries unredacted, should be produced. The balance of the page may remain redacted.

- Bates No. 159919: This page reflects a portion of a Wachovia Securities statement of account for July of 2008, and the page reflects some cash transfers to or from the account. One entry reflects a date of July 7, 2008, and the Court finds it discoverable. Accordingly, a copy of this page, with an unredacted line showing this transaction, should be produced.

- Bates No. 159923: This page also is a portion of the July, 2008 Wachovia Securities statement, and it appears to reflect a cash transaction on July 7. The Court finds that this entry, which was redacted, is arguably within the scope of discovery. Accordingly, a copy of this page, reflecting an unredacted line showing this entry, should be produced. The remaining information need not be disclosed.

The Court has reviewed in detail the documents produced and has compared the redacted documents with those submitted for the Court's *in camera* review. Having done so, the Court concludes that, with the exceptions noted above, Defendant McClendon has substantially complied with the Court's January 6, 2012 Order. Accordingly, Lead Plaintiff's motion to compel his compliance is granted only as to the specific above-listed items. Otherwise, the motion is denied.

II. McClendon's Answers to Interrogatory Nos. 1(h), 1(k), and Interrogatory No. 2:

*5 Lead Plaintiff contends that, although the January 6 Order did not expressly address McClendon's responses to interrogatories, the ruling set forth therein addressed the objections to the discovery sought, and it requires McClendon to answer Interrogatory Nos. 1(h), 1(k), and 2. Lead Plaintiff correctly notes that the Court rejected the Chesapeake Defendants' objection to the interrogatories as premature, and contends that such ruling applies to the same objection asserted by McClendon. In response, McClendon argues that some of information sought by the interrogatories was determined by the Court to be overly broad and beyond the scope of discovery. With respect to other information, he contends his response to the document production requests constitutes an appropriate answer to the interrogatory.

A. Interrogatory No. 1(h) and (k):

Interrogatory No. 1 asks McClendon to "identify all documents" concerning McClendon's purchases, sales, or holdings of Chesapeake securities in margin accounts or otherwise, and his "liquidity or financial ability as of July 9, 2008 to satisfy the margin calls that resulted in the sale of substantially all of your shares of Chesapeake stock, including, but not limited to, all documents" concerning 15 identified topics, listed as subparts (a) through (o) of the interrogatory. In other words, this Interrogatory asks him to identify or list essentially the same documents which are sought for production in Document Request No. 2.

Currently at issue in Lead Plaintiff's motion are subparts (h) and (k) of Interrogatory No. 1. Subpart (h) asks McClendon to identify documents reflecting "your bank, brokerage, or other financial account statements," and subpart (k) asks him to identify documents consisting of "financial statements identifying your assets, liabilities, or income." See Interrogatories submitted as Exhibit 2 to Declaration of David W. Hall [Doc. No. 223] in Support of Lead Plaintiff's current motion.

McClendon initially objected to Interrogatory No. 1, noting in part that it is duplicative of Lead Plaintiff's document requests. He also objected on privacy and relevancy grounds. These are essentially the same objections he asserted to Document Request No. 2, and these objections were addressed in the January 6 Order. Because the scope of Interrogatory No. 1 is essentially the same as Document Request No. 2, the January 6 Order limiting the scope of permissible discovery applies equally to the interrogatory and its subparts. Subparts (h) and (k) are substantially the same as subparts (a) and (d) of Document Request No. 2, and the Court's January 6 ruling requiring the production of responsive documents also applies to the Interrogatory requesting that McClendon "identify" those same categories of documents. The other subparts of Interrogatory No. 1 are beyond the scope of permissible discovery for the reasons set forth in the January 6 Order. To the extent Lead Plaintiff now seeks McClendon's response to those subparts, its motion is denied.

*6 With respect to subparts (h) and (k) of Interrogatory No. 1, the Court held in the January 6 Order that the information sought therein is properly within the scope of discovery. As the Court concluded herein, *supra*, McClendon has substantially complied with the January

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6 Order by producing responsive documents in redacted form. The documents produced identify the financial statements, bank and brokerage statements, and related accounts sought by Interrogatory No. 1(h) and (k). However, McClendon did not provide a *list* of those materials in a written response to this interrogatory. Although it seems unnecessary for him to do so because the documents have been produced,¹ he should amend the interrogatory answer and provide a list of the documents responsive to Interrogatory No. 1(h) and (k).

B. Interrogatory No. 2:

In Lead Plaintiff's Interrogatory No. 2, McClendon is asked to provide the following information:

For each document you identify in response to Interrogatory No. 1, state (i) whether it was provided to Chesapeake, (ii) if it was provided to Chesapeake, on what date it was provided, and (iii) if a date certain is not known as to when the document was provided to Chesapeake, state whether the document was provided to Chesapeake prior to the Offering.

Lead Plaintiff's Interrogatories, Exhibit 2 to Declaration of David W. Hall [Doc. No. 223] in Support of Lead Plaintiff's current motion. McClendon objected to this interrogatory, contending it is overly broad, unduly burdensome, and is not calculated to lead to the discovery of admissible evidence. He also objected on grounds that it is duplicative of document requests and that it seeks private and confidential information, as well as information protected by the attorney-client privilege and work-product doctrine.

Interrogatory No. 2 and McClendon's objection thereto were not expressly addressed in the January 6 Order or the hearing preceding that order. However, as Lead Plaintiff argues, this interrogatory asks only whether the documents McClendon produced were provided to Chesapeake and, if so, the date they were provided and/or whether the documents were provided prior to the July Offering.

The Court finds that, to the extent McClendon has not previously answered Interrogatory No. 2, he should do so. The information sought therein is reasonably calculated to

lead to the discovery of evidence admissible at trial, as one of the issues involves the extent to which the Chesapeake Defendants were aware of McClendon's financial liquidity at the time of the Offering. McClendon is directed to answer Interrogatory No. 2 within 14 days of the date of this Order.

III. Documents withheld by the Chesapeake Defendants as subject to attorney-client privilege:

Lead Plaintiff also argues that the Chesapeake Defendants have improperly withheld from production certain documents which the Chesapeake Defendants contend are protected by the attorney-client privilege. The Chesapeake Defendants produced a privilege log reflecting a description of each document withheld, and it reflects that 1,839 documents² have been designated as reflecting privileged communications.

*7 Lead Plaintiff argues that these documents are not protected from discovery because the Chesapeake Defendants have not provided sufficient information to satisfy their burden of showing the documents are privileged. Furthermore, Lead Plaintiff argues the Chesapeake Defendants have waived the attorney-client privilege by asserting that they acted with due diligence in connection with the Offering and disclosures and information contained therein. Lead Plaintiff argues that, because some of the Chesapeake Defendants stated that they sought and received the advice of counsel regarding the content of the disclosures contained in the offering materials, they have asserted a defense based on the advice of counsel and, as a result, have waived the attorney-client privilege. Even if a waiver is not found on that basis, Lead Plaintiff argues that documents identified as drafts of filings with the Securities Exchange Commission ("SEC") and drafts of press releases related to the 2008 Offering are not protected by the attorney-client privilege because they are public filings or intended for public view.

In response, the Chesapeake Defendants argue they have provided information sufficient to satisfy their burden regarding assertion of the privilege. They also contend that they have not waived the attorney-client privilege because, contrary to Lead Plaintiff's argument, their due diligence defense is not dependent upon the advice of counsel. Furthermore, they argue that drafts of SEC filings and press releases which reflect the legal advice of counsel are protected by the privilege.

A. Adequacy of Chesapeake Defendants' assertion of the attorney-client privilege:

As the parties acknowledge, the attorney-client privilege “protects ‘confidential communications by a client to an attorney made in order to obtain legal assistance’ from the attorney in his or her capacity as a legal advisor.” *United States v. Phelan*, 3 F. App'x 716, 718 (10th Cir.2001) (unpublished opinion) (quoting *Matter of Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 278 (10th Cir.1983)). “The privilege ‘is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’ “ *Id.* (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (internal quotation omitted)). “To be protected by the attorney-client privilege, a communication between a lawyer and client must relate to legal advice or strategy.” *Phelan*, 3 F. App'x at 718 (citing *United States v. Johnston*, 146 F.3d 785, 794 (10th Cir.1998)).

As Lead Plaintiff argues, the party asserting the attorney-client privilege has the burden of establishing its applicability. *F.D.I. C. v. United Pacific Ins. Co.*, 152 F.3d 1266, 1276 n. 6 (10th Cir.1998). The party must bear the burden as to specific documents, and not by making a “blanket claim.” *In re Foster*, 188 F.3d 1259, 1264 (10th Cir.1999). Thus, the party must describe in detail the “documents or information sought to be protected.” *McCoo v. Denny's, Inc.*, 192 F.R.D. 675, 680 (D.Kan.2000). To satisfy that burden, the party must “provide sufficient information to enable the court to determine whether *each element* ” of the privilege is satisfied. *Id.* (emphasis in original); see also *Lindley v. Life Investors Ins. Co. of America*, 267 F.R.D. 382, 389 (N.D.Okla.2010). The privilege applies“(1) [w]here legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except [where] the protection be waived.” *McCoo*, 192 F.R.D. at 691 (citations omitted); see also *New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 425 (D.Kan.2009).

*8 Rule 26 of the Federal Rules of Civil Procedure permits a party to withhold information from discovery on the grounds of privilege if the withholding party expressly asserts the privilege and, in doing so, it

describes the “nature of the documents, communications, or tangible things not produced or disclosed ... in a manner that, without revealing information itself privilege or protected, will enable other parties to assess the claim.” Fed.R.Civ.P. 26(b)(5)(A). Production of a sufficiently detailed privilege log satisfies this requirement. *Metzger v. American Fidelity Assurance Co.*, 2007 WL 3274922, at *1 (W.D.Okla. Oct. 23, 2007) (unpublished opinion); *Horton v. United States*, 204 F.R.D. 670, 673 (D.Colo.2002). There is no prescribed format for a privilege log. See Fed.R.Civ.P. 26, advisory committee's note, subsection (b) (1993 Amendments).

In this case, the privilege log submitted by the Chesapeake Defendants is very detailed. It describes each document for which the privilege is asserted, and identifies its date as well as its authors and recipients, and clearly identifies those who are attorneys. In addition, each document for which the privilege is asserted describes in general the content of the document and states that it solicits legal advice, provides legal advice, or contains notes or comments of counsel reflecting legal advice. The privilege log also provides a description of each document sufficient to allow opposing counsel and the Court to understand the nature and purpose of the communication reflected therein. The Court concludes that, contrary to Lead Plaintiff's suggestion, the Chesapeake Defendants have not asserted a blanket claim of privilege, but have provided a detailed assertion. The Court finds the privilege log prepared by the Chesapeake Defendants contains detail sufficient to satisfy the burden of showing the elements of the attorney-client privilege. The detail with which the privilege log is presented does not, however, necessarily mean each document reflected thereon is subject to the attorney-client privilege. The Court must first determine whether the privilege has been waived and, if not, whether its scope permits withholding the documents at issue.

B. Waiver of the privilege:

As the parties agree, the attorney-client privilege may be waived under certain circumstances. Among those circumstances is the reliance by a party on the advice of counsel as an element of his claim or defense in the litigation at issue. To constitute such reliance, the party must attempt to disprove a claim, or support a defense, by relying on and offering evidence of legal advice. *In re Lott*, 424 F.3d 446, 454 (6th Cir.2005); *Coregis Insurance Co. v. Law Offices of Carole F. Kafriksen, P.C.*, 57 F.

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App'x 58, 60, n. 3 (3d Cir.2003) (unpublished opinion); *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir.1987). As Lead Plaintiff argues, the Tenth Circuit has acknowledged that courts have held reliance on counsel in such circumstances may constitute a waiver of the attorney-client privilege. *Frontier Refinery, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 700 (10th Cir.1998) (discussing several circumstances in which waiver has been found, and noting that reliance on counsel has been held by some courts to constitute a waiver).

*9 The Chesapeake Defendants argue that the waiver on which Lead Plaintiff relies is not present in this case because they have not asserted reliance on the advice of counsel as a defense, nor do they rely on evidence of otherwise privileged legal communications to support a defense. As they contend, their due diligence defense does not require that they rely on communications with counsel to demonstrate that they acted with due diligence in connection with the Offering. Instead they must show that their actions, not those of counsel, demonstrate the reasonableness of their investigation. *In re WorldCom, Inc. Securities Litigation*, 346 F.Supp.2d 628, 662 (S.D.N.Y.2004). As the court observed in *WorldCom*, “a defendant will not be liable upon a showing that he had *after reasonable investigation, reasonable ground to believe and did believe*, at the time such part of the registration statement became effective, *that the statements therein were true* and that there was no omission to state a material fact required to be stated therein necessary to make the statements not misleading.” *Id.* (citing 15 U.S.C. § 77k(b)(3)(A) (emphasis in original)).

As the Chesapeake Defendants also note, there is a distinction in securities litigation between the due diligence defense and the reliance defense. While the former does not require proof of reliance on counsel, the latter may do so, and it may, in some instances, lead to a waiver of the attorney-client privilege. See *WorldCom*, 346 F.Supp.2d at 663. However, the Chesapeake Defendants argue that the affirmative defense set forth in their answer is not a reliance defense but that it tracts the due diligence defense expressly set forth in 15 U.S.C. § 77k(b)(3)(A). See Chesapeake Defendants' Answer [Doc. No. 80], at page 14. In contrast, the separate reliance on counsel defense is set forth in 15 U.S.C. § 77k(b)(3)(C), and the Chesapeake Defendants expressly state they do not rely on that defense in this case.

Having reviewed the parties' arguments and the Chesapeake Defendants' Answer and affirmative defenses, the Court concludes that the Chesapeake Defendants have not asserted reliance on counsel in a manner that has been recognized by courts as waiving the attorney-client privilege. There is no indication that the Chesapeake Defendants intend to introduce evidence reflecting otherwise privileged attorney-client communications to support their contention that they acted with due diligence. Nor is there a contention suggesting that the Chesapeake Defendants intend to argue that their conduct was based on information or advice provided by legal counsel. The Court finds that, under the circumstances of this case, they have not waived the attorney-client privilege.

C. Privilege communications regarding drafts of SEC filings and press releases:

As Lead Plaintiff notes, the Chesapeake Defendants' privilege log reflect that some of the documents withheld as protected by the attorney-client privilege are drafts of materials ultimately filed with the SEC and drafts of press releases issued on or about the date of the Offering. Lead Plaintiff contends that, because the SEC filings were ultimately publicly filed, they cannot qualify as privileged and confidential communications. Similarly, Lead Plaintiff argues a press release is intended for public distribution and cannot, by its nature and purpose, constitute a confidential communication between a client and its attorney. In response, the Chesapeake Defendants point out that, as the privilege log reflects, the foregoing drafts were communicated to their counsel for the purpose of obtaining legal advice regarding their content. Furthermore, the Chesapeake Defendants note that the privilege log indicates these documents reflect notes and/or comments from their attorneys.

*10 The parties have cited several court decisions addressing the application of the attorney-client privilege to publicly filed documents. Lead Plaintiff argues that the authority compels a conclusion that the privilege does not apply to drafts of documents which, in whole or in part, are contained in documents ultimately filed with the SEC. See, e.g., *Christman v. Brauvin Realty Advisors, Inc.*, 185 F.R.D. 251, 256–57 (N.D.Ill.1999) (ordering production of drafts related to SEC forms and proxy statements); *SEC v. Roberts*, 254 F.R.D. 371, 379 n. 6 (N.D.Cal.2008). Lead Plaintiff also submits authority holding that draft press releases are not privileged because “a press release,

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by its very nature, is meant for the public eye and is not privileged.” *Freeport–McMoran Sulphur, LLC v. Mike Mullen Energy Equipment Resource, Inc.*, 2004 WL 1299042, at *8 (E.D. La. June 3, 2004) (unpublished opinion).

However, the Chesapeake Defendants also cite authority in which courts have held that attorney-client privilege and work-product protections can attach to drafts of documents, regardless of whether the final versions of the documents were later made public. See *Roth v. Aon Corp.*, 254 F.R.D. 538, 541 (N.D.Ill.2009) (“even when a final product is disclosed to the public, the underlying privilege attached to drafts of the final product remains intact”); *Holland v. Island Creek Corp.*, 885 F.Supp. 4, 8 (D.D.C.1995) (drafts of final documents were privileged, except to the extent the draft was disclosed to third parties). As the Chesapeake Defendants point out, the Northern District of Oklahoma has held a “request for discovery of all drafts of documents which were ultimately disclosed to the public in final form impinges on the attorney-client privilege. The drafting process is often the type of communication at the core of the attorney-client privilege. It often involves deciding what positions to assert and what information should or should not be revealed along with the reasons for these decisions.” *Herd ex rel. Herd v. Asarco Inc.*, 2002 WL 34584902, at *2 (N.D. Okla. April 26, 2002) (unpublished opinion).

The Court has closely reviewed the authorities, and finds they support the general rule that drafts of documents ultimately publicly filed or disseminated continue to be protected by the attorney-client privilege absent certain circumstances. First, the draft must have been prepared by the attorney or forwarded to the attorney with a request for legal advice concerning its content, or it must contain the attorney's notes and/or comments regarding its content. The fact that a copy of a document was distributed to the client's attorney, without a request for legal comment or advice and without responsive comments or notes made by the attorney, does not render it privileged. See, e.g., *Freeport–McMoran*, 2004 WL 1299042, at *6. However, as noted by the court in *Freeport–McMoran*, a draft of an SEC Form 10–Q sent to the client's attorney remains privileged where “it contains handwritten comments of [the attorney] relating to the inclusion of” certain information in the document, and the cover memorandum accompanying it “solicited the advice of” the attorney regarding its content. *Id.*

*11 As the Chesapeake Defendants acknowledge, where a document prepared by an attorney at the request of his client is voluntarily disclosed to an adverse party, the privilege may be waived. See *In re Quest Communications International, Inc.*, 450 F.3d 1179, 1185 (10th Cir.2006). In *Quest*, the company asserted the attorney-client privilege as to drafts of certain documents. The Tenth Circuit rejected its assertion because the attorney had produced the drafts to the Department of Justice and the SEC. *Id.*, at 1181–82. Preliminary drafts of documents which are ultimately revealed to third parties are not protected by the privilege. *Lindley v. Life Investors Ins. Co. of America*, 267 F.3d 382, 386 (N.D.Okla.2010). However, the “privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.” *Id.*

Accordingly, the Court finds the attorney-client privilege remains applicable to drafts of documents which were prepared or reviewed by the attorney at the request of the client, documents submitted to the attorney with a request for legal advice regarding its content, or which contain notes or comments of the attorney regarding the document's content. The Court finds no persuasive basis for excluding such documents from the protection of the attorney-client privilege on the basis that a final version of the document was publicly filed with the SEC or submitted to the press. On the other hand, final versions of publicly disseminated documents which were distributed to the attorney as well as other corporate officers or employees, without soliciting legal advice or comment or approval, would not be privileged.

Based on the privilege log's detailed description of the documents for which the privilege is claimed by the Chesapeake Defendants, the Court finds the documents are properly withheld from production. The description of each document includes a reference to its submission for the purpose of obtaining legal advice or comment and/or its receipt from the attorney, including references to documents including attorney notes or comments. These documents satisfy the attorney-client privilege requirements. The Court thus generally finds these documents properly withheld as privileged. There are, however, some entries in which the author or recipient is not clearly identified as an attorney, although the descriptions of such documents state that they reflect the comments of an attorney, and specifically identify the attorney who made those comments.

Nevertheless, with respect to this narrow sub-set of documents, the Court cannot determine the veracity of the Chesapeake Defendants' description of the withheld documents without examining each such document for which a privilege is claimed. Accordingly, to the extent Lead Plaintiff—after further consultation with opposing counsel—believes in good faith that such documents are not subject to the protection of the privilege, it may so notify the Court, specifically identifying the documents in question. In that event, the Court will direct the Chesapeake Defendants to submit copies of the challenged documents so that the same may be reviewed *in camera*.

IV. Conclusion:

*12 For the foregoing reasons, Lead Plaintiff's motion [Doc. No. 222] is granted in part, denied in part,

and reserved in part. The motion is granted as to the documents identified by the Court herein as redacting certain information produced by McClendon in response to Document Request No. 2(a) and (d). Defendant McClendon shall produce the partially unredacted pages identified by the Court and shall do so no later than July 13, 2012. The motion is reserved to the extent Lead Plaintiff notifies the Court that a dispute remains as to certain documents for which the attorney-client privilege is asserted, as explained herein. In all other respects, the motion is denied.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2370637

Footnotes

- 1 Pursuant to [Fed.R.Civ.P. 33\(d\)](#), a party responding to interrogatories may produce documents which are responsive to the inquiry in lieu of providing a written answer. However, the Rule requires that the party provide a written description of the responsive documents.
- 2 This number is based on the privilege log submitted by the Chesapeake Defendants, which appears as Exhibit 7 to the David W. Hall Declaration [Doc. No. 223] in support of Lead Plaintiff's current motion. Each document withheld on privilege grounds is identified by a number, and the last number listed is 1,839. It is not clear whether each identifying number relates to a single page or whether the identifying number involves documents having multiple pages.

2002 WL 31296430

United States District Court, S.D. New York.

U.S. INFORMATION SYSTEMS, INC. and
Odyssey Group, Inc., and Blue Diamond
Fiber Optic Networks, Inc., Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION
NUMBER 3, AFL-CIO, A & R Electrical
Maintenance, Inc., ADCO Electrical Corporation,
Five Star Electric Corporation, Forest Electric
Corporation, IPC Communications, Inc.,
and Nead Information Systems, and Hugh
O'Kane Electric Company, LLC, Defendants.

No. 00Civ.4763(RMB)(JCF).

|
Oct. 11, 2002.

Electrical contractors who employed members of a communication workers' union sued competitors and an electrical workers' union, alleging conspiracy to violate antitrust laws by excluding from the market contractors who employed members of the communication workers' union. On a defense motion to compel discovery, the District Court, [James C. Francis IV](#), United States Magistrate Judge, held that: (1) letters sent by an electrical contractor's retained counsel to an assistant district attorney were prepared in anticipation of litigation, and thus, initially qualified as protected work product, but the privilege was waived by the disclosure to the assistant district attorney, but (2) communications at meetings between the retained counsel and an attorney, at which they discussed the contractor's hiring the attorney, qualified as protected work product and were shielded from discovery.

Motion granted in part and denied in part.

West Headnotes (5)

- [1] **Federal Civil Procedure**
🔑 Work Product Privilege; Trial
Preparation Materials

Letters sent by an electrical contractor's retained counsel to an assistant district attorney were prepared in anticipation of litigation, and thus, initially qualified as protected work product, even though the letters concerned an entity which was not ultimately named as a defendant in the contractor's antitrust conspiracy litigation; counsel was retained to act as litigation counsel, she expected a lawsuit, and she hoped that her letters would foment parallel litigation by the district attorney's office, or at least lead to an exchange of information that would be useful in the contractor's case. [Fed.R.Civ.Proc., 23\(b\)\(3\)](#).

[1 Cases that cite this headnote](#)

[2] **Federal Civil Procedure**

🔑 Waiver

Work product privilege initially protecting letters written by an electrical contractor's retained counsel was waived when the letters were sent to an assistant district attorney in hopes of fomenting parallel litigation by the district attorney's office, or at least leading to an exchange of information that would be useful in the contractor's anticipated antitrust conspiracy litigation; the disclosure of information in the letters was made without any assurance that the communications would be kept confidential, and was made under circumstances that increased the likelihood that the work product would come into the possession of the contractor's adversaries. [Fed.R.Civ.Proc., 23\(b\)\(3\)](#).

[6 Cases that cite this headnote](#)

[3] **Federal Civil Procedure**

🔑 Work Product Privilege; Trial
Preparation Materials

Communications at meetings between an electrical contractor's retained counsel and an attorney, at which they discussed the contractor's hiring the attorney, qualified as protected work product, even though

the communications were oral, not written.
[Fed.R.Civ.Proc., 23\(b\)\(3\).](#)

[1 Cases that cite this headnote](#)

[4] Federal Civil Procedure

 [Waiver](#)

Revelation of work product to an attorney during discussions concerning the retention of his firm in ongoing litigation did not waive the work product privilege; the meetings took place under a confidentiality agreement.
[Fed.R.Civ.Proc., 23\(b\)\(3\).](#)

[4 Cases that cite this headnote](#)

[5] Federal Civil Procedure

 [Work Product Privilege; Trial Preparation Materials](#)

Electrical contractors' competitors and an electrical workers' union being sued for an alleged conspiracy to violate antitrust laws failed to show a substantial need for information disclosed by a plaintiff's retained counsel during discussions concerning the retention of an attorney's firm, and thus, the work product privilege shielded such information from disclosure; information regarding the factual basis for the claims against the defendants had been available through various forms of discovery, and analysis by plaintiffs' counsel of the information was subject to the most stringent protection.
[Fed.R.Civ.Proc., 23\(b\)\(3\).](#)

[1 Cases that cite this headnote](#)

MEMORANDUM AND ORDER

FRANCIS, Magistrate J.

*1 An attorney can claim work product protection for materials generated in anticipation of litigation but can also forfeit that protection by disseminating the materials in a way that may allow access by an adverse party. The pending motion in this case involves two instances

in which the parties dispute whether the work product doctrine applies in the first place and, if it does, whether the protection has been waived.

Background

The plaintiffs in this action are electrical contractors who employ workers represented by the Communications Workers of America, AFL-CIO (the "CWA") to install telecommunication systems for commercial customers. The plaintiffs allege that the defendants—who include the International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO ("Local 3") and a number of electrical contractors—conspired to violate the antitrust laws by excluding from the market contractors who, like the plaintiffs, employ workers who are members of the CWA rather than Local 3.

In the course of discovery, two work product disputes surfaced. First, the plaintiffs identified on their privilege log five documents (the "Coppotelli documents"), the final versions of which were sent by plaintiff U.S. Information Systems, Inc. ("USIS") to Blake Coppotelli, who was then an Assistant District Attorney in the Manhattan District Attorney's Office. With respect to each of these documents, the plaintiffs asserted a "common interest privilege" and work product protection. The defendants have objected, arguing that transmission of the documents to Mr. Coppotelli waived any work product protection.

Second, after leaving the District Attorney's Office, Mr. Coppotelli became employed by Kroll Associates, a litigation support group. Thereafter, plaintiffs' counsel contacted him to discuss the possibility of Kroll providing services to the plaintiffs in connection with this action. When defendants' counsel asked questions at deposition concerning the substance of those discussions, plaintiffs' counsel objected, asserting work product protection. Again, the defendants argue that the work product doctrine does not apply or that its protection has been waived.

After the defendants filed letter motions to compel discovery, I reviewed the Coppotelli documents *in camera*. I also conducted an evidentiary hearing to give counsel the opportunity to lay a factual foundation for the application of the work product doctrine. The evidence presented by the parties shall be discussed below in connection with the analysis of each issue.

Discussion

A. Coppotelli Documents

Laura G. Weiss, one of the attorneys for the plaintiffs, testified at the evidentiary hearing. Beginning in 1998, she was outside counsel to USIS, advising that company with respect to potential litigation concerning its conflicts with Local 3 and with competing contractors. (Tr. 10-12).¹ She learned from press releases that the Manhattan District Attorney's Office had conducted investigations that resulted in indictments and ultimately in guilty pleas for bid-rigging and extortion in the construction industry. (Tr. 13). On the basis of that information, she concluded that it would be beneficial to communicate with the District Attorney's Office, both in the hope of receiving information in return and to prompt that office to take action that might ultimately benefit USIS. (Tr. 14-15). Accordingly, she drafted a letter to Assistant District Attorney Coppotelli, then the Chief of the Labor Racketeering Bureau, describing certain events. (Tr. 16, 21). In the belief that such a letter would be more persuasive if it came from a lay person rather than attorney, she drafted it for the signature of an officer of USIS. (Tr. 16).

*2 Ms. Weiss testified that the letter was designed to serve a dual purpose. On one hand, it was aimed at encouraging the District Attorney's Office to take action. On the other hand, it was intended to memorialize information for use in future litigation. As the equivalent of a memorandum to the file, it would be used to educate incoming co-counsel, to inform USIS personnel of relevant facts, and perhaps to prepare non-party witnesses to give testimony. (Tr. 17-20). Based in part on her own experience as an Assistant District Attorney in Brooklyn, Ms. Weiss expected that the contents of the letter would be kept confidential by the District Attorney's Office. (Tr. 23-24). Four of the five Coppotelli documents—those designated numbers 38, 46, 47, and 49 on the plaintiffs' privilege log—are permutations of this letter. The fifth, document number 43, is a follow-up communication, again signed by an officer of USIS, providing additional information to Mr. Coppotelli.

The plaintiffs have withheld the Coppotelli documents on the ground that they are shielded from discovery by the work product doctrine. In response, the defendants argue that the documents were not prepared in anticipation of litigation and, even if they were, any protection

was forfeited when the letters were transmitted to Mr. Coppotelli.

1. Qualification as Work Product

The party asserting the protection of the work product doctrine bears the burden of proof. See *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir.1996); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 223 (S.D.N.Y.2001); *Madanes v. Madanes*, 199 F.R.D. 135, 150 (S.D.N.Y.2001). The source of the doctrine is *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), where the Supreme Court held that notes taken by a defendant's attorney concerning witness interviews were protected from discovery by the plaintiff. *Id.* at 510. The Court reasoned that “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he ... prepare his legal theories and plan his strategy without undue and needless interference.” *Id.* at 510-11. These principles were subsequently codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which protects from discovery materials “prepared in anticipation of litigation or for trial.” Fed.R.Civ.P. 26(b)(3).

In order to qualify for work product protection, the materials at issue need not have been prepared primarily or exclusively to assist in litigation. See *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir.1998). Rather, they will fall within the scope of the work product doctrine if “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Id.* at 1202 (emphasis in original) (quoting Charles Alan Wright, Arthur R. Miller and Richard L. Marcus, 8 *Federal Practice and Procedure* § 2024, at 343 (1994)). Conversely, a document will not be deemed work product if it was composed for a business purpose and “would have been created in essentially similar forum irrespective of litigation.” *Id.*

*3 [1] In light of these standards, the Coppotelli documents qualify as work product. While I am skeptical of Ms. Weiss' testimony that she expected to treat the documents as memoranda to the file and use them for witness preparation, they were nevertheless prepared in anticipation of litigation. Ms. Weiss had been specifically retained by USIS to act as litigation counsel. She clearly expected USIS to ultimately be involved in a lawsuit and

hoped that the Coppotelli letters would either foment parallel litigation by the District Attorney's Office or at least lead to an exchange of information that would be useful in USIS's own case. The Coppotelli letters, then, were drafted "because of" the prospect of litigation and come within the work product doctrine.

This conclusion is not undermined by the fact that the Coppotelli documents concern an incident involving a contractor who was not ultimately named as a defendant in this case. Documents do not lose work product immunity simply because intervening circumstances prevent the originally intended litigation from coming to fruition. See *Adlman*, 134 F.3d at 1197-98, 1200 n. 4 (documents prepared in anticipation of litigation that would have been triggered by transaction protected even where transaction not consummated). By the same reasoning, work product protection is not lost merely because the litigation actually commenced differs in form from that previously anticipated.

2. Waiver

[2] The immunity afforded by the work product doctrine may be waived by dissemination of protected materials to a third-party. But because the purpose of the doctrine is to prevent one party from benefitting from the work performed by its opponent's attorney, waiver will occur only when disclosure substantially increases the likelihood that the adversary will obtain the information. See *In re Grand Jury Proceedings*, No. M-11-189, 2001 WL 1167497, at *20 (S.D.N.Y. Oct.3, 2001); *Verschoth v. Time Warner, Inc.*, No. 00 Civ. 1339, 2001 WL 546630, at *3 (S.D.N.Y. May 22, 2001); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y.1995).

As noted above, the plaintiffs withheld the Coppotelli documents on the basis, in part, of the "common interest privilege." But, "[t]he joint defense privilege or common interest rule is not really a separate privilege. Rather, it is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship." *Bruker v. City of New York*, No. 93 Civ. 3848, 2002 WL 484843, at *4 (S.D.N.Y. March 29, 2002) (citation omitted). This common interest exception also logically applies to the work product doctrine. If the party asserting the privilege and the third party to whom work product materials have been disclosed share a

common interest, then the disclosure does not increase the likelihood that the disclosed information will fall into the hands of their common adversary. See *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466-67 (11th Cir.1984) (information shared between private plaintiff and EEOC in preparation for joint trial); *United States v. A.T. & T. Co.*, 642 F.2d 1285, 1229-1300 (D.C.Cir.1980) ("with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary"); *In re Visa Check/MasterMoney Antitrust Litigation*, 190 F.R.D. 309, 314-15 (E.D.N.Y.2000); *Information Resources, Inc. v. Dun & Bradstreet Corp.*, 999 F.Supp. 591, 591-92 (S.D.N.Y.1998) (collecting cases).

*4 Likewise, when a party is compelled to disclose documents to a government agency, work product immunity is not necessarily forfeited. See *Information Resources*, 999 F.Supp. at 592; *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y.1979); *Reinfeld v. Riklis*, No. 87 Civ. 6736, 1991 WL 41659, at *1 (S.D.N.Y. March 21, 1991); cf. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-36 (2d Cir.1993) (selective, voluntary disclosure of work product to SEC waived protection).

But work product immunity is lost when a party simply makes a "voluntary submission of material to a government agency to incite it to attack the informant's adversary." *Information Resources*, 999 F.Supp. at 593.

A well-travelled route to achieving relief in civil litigation has been to persuade the government to take action against a party and thereby gain, if possible, the advantage of collateral estoppel in later civil litigation against that party. The party who travels that route should not be protected from disclosure of its statements.

Three Crown Limited Partnership v. Salomon Brothers, Inc., No. 92 Civ. 3142, 1993 WL 277182, at *2 (S.D.N.Y. July 21, 1993). In such circumstances the party asserting work product and the government agency are not allies: they have not agreed on a common strategy, much less commenced joint or even parallel litigation. See *Information Resources*, 999 F.Supp. at 593 ("the plaintiff and the government were neither adversaries nor allies

when the documents were submitted”); *D'Ippolito v. Cities Service Co.*, 39 F.R.D. 610, 610 (S.D.N.Y.1965) (“The government is not a party to this lawsuit, and the disclosure of the document cannot be termed as an interchange of information between counsel on the same side of the litigation.”). Moreover, disclosure in this context increases the probability that the work product will be obtained by the informant's adversary. If the disclosing party's lobbying effort is successful and the government initiates a prosecution, then the work product could be disclosed in a public trial. See *Sidari v. Orleans County*, No. 95-CV-7250, 2000 WL 33407343, at *8 (W.D.N.Y. Oct.3, 2000) (work product immunity waived for tape provided to F.B.I. with expectation that it would be used at trial); *Litton Systems, Inc. v. A.T. & T. Co.*, No. 76 Civ. 2512, 1979 WL 1612, at *2 (S.D.N.Y. March 30, 1979) (work product protection waived by disclosing witness interview reports to district attorney where witnesses could be expected to testify if criminal proceedings commenced.) Even short of trial, a prosecutor may well disclose information when it would be advantageous to law enforcement. For example, if the District Attorney's Office in this case concluded that the incident described in the Coppotelli documents was connected with broader illegal activity, it might well confront the entity identified in the Coppotelli communications with the information provided by USIS in hopes of inducing cooperation.

*5 Thus, the work product protection that would otherwise shield the Coppotelli documents from discovery has been waived. USIS made an unsolicited, uncompelled disclosure of the information to the District Attorney's Office. It did so without any assurance, formal or informal, that the communications would be kept confidential. And, it did so under circumstances that increased the likelihood that the work product would come into the possession of its adversary. USIS shall therefore produce the Coppotelli documents.²

B. Litigation Support

Some time after USIS sent him the letters discussed above, Mr. Coppotelli left the District Attorney's Office and joined Kroll Associates, a firm that provides forensic and other litigation support services. (Tr. 25-26). Ms. Weiss met him at a lecture that he gave at the Yale Club about issues in the construction industry, and she broached the topic of Kroll providing services for the plaintiffs who,

by this time, had filed the instant action. (Tr. 25-26). Ms. Weiss subsequently had two meetings with Mr. Coppotelli and one of the principals of USIS at which they discussed the possibility of hiring Kroll. (Tr. 26, 37-39). During these discussions, Mr. Coppotelli did not reveal any information that he had learned during his tenure in the District Attorney's Office. (Tr. 42). Although no written agreement was executed, the parties to the meetings explicitly agreed that their communications would be kept confidential. (Tr. 27, 37). Ultimately, it appears that the plaintiffs did not retain Kroll. (Tr. 39).

During the course of the deposition of the USIS officer who was present at these meetings, defendants' counsel asked him about what took place. Plaintiffs' counsel directed the witness not to answer on the basis of the work product doctrine. The defendants now argue that the doctrine does not apply because it covers only documents and tangible things and not oral communications and because disclosure to a third party like Mr. Coppotelli would waive the protection in any event.

1. Qualification as Work Product

[3] The defendants are correct, of course, that Rule 26(b)(3) provides immunity only for “documents and tangible things” otherwise qualifying as work product. But there is more to the work product doctrine than is encompassed by the Rule. See *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.1985); 6 *Moore's Federal Practice* § 26.70[2][c] (3d ed.2000). To the extent that the doctrine, as originally articulated in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), is broader than the Rule, it nevertheless remains good law. See *Alexander v. Federal Bureau of Investigation*, 192 F.R.D. 12, 17 (D.D.C.2000); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D.W.Va.1995). This principle applies to intangible work product: an attorney's analysis made in anticipation of litigation which has not been memorialized. Such work product is immune from discovery just as if it had been reduced to writing. See *Hickman*, 329 U.S. at 505, 509-11 (protecting mental impressions of attorney, whether or not memorialized); *United States v. One Tract of Real Property*, 95 F.3d 422, 428 n. 10 (6th Cir.1996) (“Although courts most commonly apply the work product privilege to documents and things, the Supreme Court in *Hickman* made clear that disclosure of the opinions or mental processes of counsel may occur when nontangible work product is sought through depositions, interrogatories, and requests

for admissions.”); *Alexander*, 192 F.R.D. at 17; *Maynard*, 160 F.R.D. at 87; *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 579 (S.D.N.Y.1960).

*6 This makes good sense. The fortuity of whether an attorney's thought processes have been memorialized should not determine whether they are laid bare to his or her adversary. The principle that an opponent should not benefit from an attorney's own efforts would be equally applicable in either circumstance. Moreover, the protection of Rule 26(b)(3) could itself be thwarted if instead of obtaining work product documents created by an attorney, the adversary could simply obtain the same information by deposing the attorney. Accordingly, the communications at the meetings between plaintiffs' counsel and Mr. Coppotelli that reflect the thought processes of counsel are within the scope of the work product doctrine.

2. Waiver

[4] Nor does Mr. Coppotelli's presence at these meetings constitute a waiver of the immunity. The work product doctrine protects not only materials prepared by a party or its attorney, but also those prepared by the party's representative, including any consultant or agent.

[T]he [work product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

United States v. Nobles, 422 U.S. 225, 238-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (footnote omitted). See also *Weinhold v. Witte Heavy Lift, Inc.*, No. 90 Civ.2096, 1994 WL 132392, at *2 (S.D.N.Y. April 11, 1994). These same practical considerations dictate that work product immunity not be deemed waived when an attorney shares it with a consultant for purposes of possible engagement in anticipation of litigation. If the attorney's analysis of the case cannot be revealed to the consultant without risking a

finding of waiver, then any decision concerning retention of the consultant would be completely uninformed.

Moreover, divulging work product to the prospective consultant under a confidentiality agreement does not substantially increase the risk of disclosure to the adversary. The consultant has a strong incentive to comply with the agreement since breaching it would surely result in the inability to attract clients in the future.

Therefore, the revelation of work product to Mr. Coppotelli during discussions concerning retention of his firm in this case did not constitute a waiver.

3. Substantial Need

[5] That, however, does not end the analysis. Even materials subject to the work product doctrine may be discoverable “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed.R.Civ.P. 26(b)(3). But even where such a showing has been made, a court must “protect against disclosure of the mental impressions ... of an attorney or other representative of a party concerning the litigation.” *Id.*; see also *Adlman* 134 F.3d at 1197.

*7 Here, the defendants have made no showing of substantial need. Information regarding the factual basis for the plaintiffs' claims has been available through various forms of discovery, and the analysis by plaintiffs' counsel of that information is subject to the most stringent protection.

Conclusion

For the reasons set forth above, the defendants' motion to compel is granted to the extent that the plaintiffs shall produce the Coppotelli documents and denied insofar as the plaintiffs need not reveal the substance of discussions in which counsel explored with Mr. Coppotelli the possibility of his firm providing litigation services.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31296430, 171 L.R.R.M. (BNA) 2526

Footnotes

- 1 "Tr." refers to the transcript of the hearing held on September 19, 2002.
- 2 Documents no. 38, 43, and 49 appear to have actually been transmitted to Mr. Coppotelli. Documents no. 46 and 47 are drafts and therefore could conceivably be subject to a distinct work product analysis. See *Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92, 104 (S.D.N.Y.2002) (drafts of disseminated document constitute work product); *Riddell Sports, Inc. v. Brooks*, No. 92 Civ. 7851, 1995 WL 20260, at *2 (S.D.N.Y. Jan.19, 1995) (same); *A.F.L. Falck, S.p.A. v. E.A. Karay Co.*, 131 F.R.D. 46, 49 (S.D.N.Y.1990) (same). But the plaintiffs have made no such argument with respect to these documents, and the drafts appear identical to the letters ultimately transmitted in all but the most superficial details. Therefore, all of the Coppotelli documents shall be produced.

End of Document

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