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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-15-324-C
	)	
1. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
2. THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OBJECTION TO PLAINTIFF'S MOTION TO QUASH OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively " Defendants"), object to Plaintiff's Motion to Quash or, in the Alternative, For a Protective Order Regarding Defendants' Notice of Deposition Under Fed.R.Civ.P. 30(b)(6) [Doc. No. 89]. For the reasons set forth below, Plaintiff's motion should be denied.

BACKGROUND

Plaintiff's Motion to Quash relies upon the fallacy that Defendants are seeking to depose Plaintiff's attorneys. As is apparent from the face of Defendants' deposition notice[1],

[1] Defendants filed an Amended Motion to Quash [Doc 94] on August 10, 2016, in which it numbered each matter, and added one additional category (#21). The Amended Notice states the deposition will be taken on August 26, 2016, but the parties have agreed to August 24, 2016.

no such request is being made. Defendants are seeking the deposition(s) of representatives of the United States, to testify on a variety of relevant and discoverable matters in this action. Plaintiff filed this lawsuit against the State alleging discriminatory conduct by Defendants. Plaintiff supposedly spent many years investigating the facts and speaking to witnesses, presumably collecting a great deal of information which led Plaintiff to a determination that Defendants acted in a discriminatory way. Given the dearth of actual evidence showing any discrimination, Defendants are left wondering what factual information supports Plaintiff's claims and/or their entitlement to the various types of relief sought.

Defendants are not attempting "to explore the mental impressions of counsel for the United States", which are presumably set forth as allegations in many of Plaintiff's pleadings, nor do Defendants seek to obtain information protected by the deliberative process privilege or other privileges. Defendants endeavor to question representatives of the United States (not Department of Justice ("DOJ")) on facts (not opinions) relevant to this case. During the parties' LR 37.1 conference, Plaintiff's counsel repeatedly requested that Defendants narrow the scope of various requests to the "Employment Litigation Section, Civil Rights Division, Department of Justice". When confronted with the question of whether the proposed limitation would simply result in the assertion of deliberative process, attorney-client and work product privileges, with no witnesses being produced, Plaintiff's counsel would not answer. Plaintiff's request was not made as a good faith effort to comply with the notice, produce responsive witnesses, or attempt to resolve the dispute, but instead, as shown by

Plaintiff's motion, made only to facilitate their argument that Defendants are seeking nothing more than the depositions of Plaintiff's attorneys. In fact, Plaintiff would not agree to produce a single witness to testify about any topic included in the 30(b)(6) Notice, repeatedly contending **Plaintiff is the Department of Justice**, and therefore all witnesses' testimony is protected by the various privileges. The State urges this Court to see through Plaintiff's strawman fallacy, and deny the Motion.

ARGUMENT AND AUTHORITY

The burden is on the moving party to establish entitlement to a protective order or show that a subpoena duces tecum should be quashed. *Howard v. Segway, Inc.,*2013 WL 869955 (N.D. Okla. 2012*)*, pp. 3-4, citing *Washington v. Thurgood Marshall Academy*, 230 F.R.D. 18, 21 (D.D.C. 2005); A party seeking to quash a subpoena has a particularly heavy burden, as contrasted with one who seeks only limited protection. *Howard* at *4, citing *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 669 F.2d 620, 623 (10th Cir. 1982). A party moving for a protective order must make a particularized showing of why discovery should be denied, and conclusory or generalized statements in the motion fail to meet this burden. *Smith v. United Salt Co.*, No. 1:08CV00053, 2009 WL 2929343, at *5 (W.D. Va. 9 Sept. 2009). Plaintiff has failed to make any such particularized showing. Plaintiff's reliance upon conclusory and generalized statements that Defendants seek counsel's testimony, seek information protected by privileges, and seek cumulative discovery does not meet the heavy burden required to be entitled to the requested protection.

I. Defendants are not requesting the deposition of Plaintiff's trial counsel.

Plaintiff incorrectly and repeatedly states that Defendants seek the testimony of the Plaintiff's attorneys, with the majority of its Motion citing caselaw (including *Shelton v. American Motors Corp.,* 805 F.2d 1323 (8th Cir. 1986)) dealing with a party's request to depose opposing counsel. Defendants have not requested to take the depositions of Plaintiff's attorneys. Plaintiff is under no obligation to designate its counsel as its 30(b)(6) witness. *S.E.C. v. Merkin*, 283 F.R.D. 689, 694 (S.D. Fla.),, 283 F.R.D. 699 (S.D. Fla. 2012). To the extent Plaintiff might choose to designate an attorney to answer some of the factual questions posed, that is a choice wholly within the power of Plaintiff.

Plaintiff attempts to hyperbolically bolster this argument by attaching a self-serving declaration of Vanita Gupta, another attorney in the Civil Rights Division of the U.S. Department of Justice, (whose name appears as the submitting party on most of Plaintiff's pleadings). Ms. Gupta erroneously opines, with no factual support, that Defendants seek to obtain information from DOJ that is protected by the deliberative process by asserting "the following deposition topics *appear to be intended* to seek such deliberative information...", and claiming that various matters "*seek to inquire into*" or "*may implicate*" deliberative process information.

Plaintiff's approach is misleading as to the information and testimony being sought. Defendants are not requesting the deposition of Plaintiff's trial attorney, nor have they asked DOJ to produce responsive DOJ witnesses. Defendants are simply requesting the deposition

of representative(s) of the United States, the party bringing this lawsuit, under FRCP 30(b)(6). By its very terms, Rule 30(b)(6) applies to the Government, "a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity..." The Advisory Committee notes to Rule 30(b)(6) indicate that in 1970 the Rule was specifically revised to allow for the deposition of a governmental agency. *S.E.C. v. Merkin*, 283 F.R.D. 689. There is no question that Rule 30(b)(6) authorizes Defendants to depose Plaintiff through one or more representatives designated by Plaintiff. *E.E.O.C. v. Burlington Northern*, 2008 WL 4845308. It is up to Plaintiff what representative to choose to represent itself. *See S.E.C. v. McCabe*, No. 2:13 CV 00161 TS PMW, 2015 WL 2452937, at *4 (D. Utah May 22, 2015) Additionally, "it is well established that an attorney may wear different 'hats" at different times; the mere fact of being an attorney does not mean that everything a person does is privileged. *Id*. "[Plaintiff] cannot defeat the provisions of 30(b)(6) by using an investigator with an "esq." after his name, or by subsequently naming an investigator as part of [Plaintiff's] trial team. *Id.* It is the responsibility of Plaintiff to designate a person who is not conflicted by either status or privilege issues. *Id.*

In addition, contrary to Plaintiff's claim, "permitting a litigant to use a 30(b)(6) deposition to learn facts would not cause disclosure of work product merely because a lawyer prepared the witness." *Merkin,* 283 F.R.D. at 697. Plaintiff cites to *SEC V. SBM Inv. Certificates, Inc*. No. CIV A DKC 2006-0866, 2007 WL 609888 (D. Md. Feb. 23, 2007) as

support that no deponent could answer questions about these matters without relying on the work product of attorneys in the case. However, when, as here, the party is requesting factual information, courts looking at this issue after *SBM* have found otherwise. *See E.E.O.C. v. Kaplan Higher Educ. Corp*., No. 1:10 CV 2882, 2011 WL 2115878 (N.D. Ohio May 27, 2011). These courts have determined that a party is free to designate an investigator or other agency employee as the representative, and not an attorney. In addition, a party may designate different individuals to testify as to different categories of information.

To bar the depositions would unjustifiably deprive Defendants of discovery to which it has shown it is entitled. *See EEOC v. Cal. Psychiatric Transitions,* 258 F.R.D. 391, 398 (E.D. Cal. 2009) ("When the government *[i.e.,* the EEOC] seeks affirmative relief, it is fundamentally unfair to allow it to evade discovery of materials that a private plaintiff would have to turn over."); *see also EEOC* v. *Greater Metroplex Interiors, Inc.,* No. 3-08-CV-1362-P, 2009 WL 412934, at *5 (N.D. Tex. 17 Feb. 2009) ("[Defendant is entitled to fully examine the investigator at a deposition.").

The attorney-client privilege and work product doctrines cannot be wielded as a preemptive shield to quash the depositions in advance. *United States v. Educ. Mgmt*. LLC, 2014 WL 1391179 at *7, (W.D. Pa., 2014) , "As this Court explained in *Smith v. Life Investors Ins. Co. of America*, 2009 WL 3364933 (W.D. Pa. 2009), and *EEOC v. LifeCare Management Services, Inc*., 2009 WL 772834 (W.D. Pa. 2009), such assertions must be made during the deposition on a question-by-question basis. *See also Jamison v. Miracle Mile Rambler, Inc.*,

536 F.2d 560, 565 (3d Cir. 1976). The blanket assertions made by the United States are premature." *Id.*

These principles apply with even greater force to the 30(b)(6) depositions, which on their face do not require attorney testimony at all. To the extent that attorney communications or mental impressions might be indirectly disclosed, the United States must make an appropriate objection during the course of the deposition. The mere fact that the United States has provided some discovery responses does not relieve it of its obligation under Rule 30(b)(6) to provide a witness to answer questions about those documents for purposes of clarification and interpretation. *EEOC v. LifeCare Management Services, Inc*., 2009 WL 772834 at *2.

II. Defendants are requesting the deposition to disclose underlying facts.

Plaintiff further alleges the topics requested by Defendants are privileged and subject to government deliberation protection/work product protection. However, in the Western District, this Court has allowed deposition inquiries regarding the factual investigations, and the information compiled and considered in an investigation. See *E.E.O.C. v. Burlington Northern*., No. CIV-07-734-D, 2008 WL 4845308 (W.D. Okla. June 23, 2008). Any information compiled by an agency that is relevant to the damages already suffered or other appropriate equitable relief is also a legitimate source of inquiry during a 30(b)(6) deposition. *Id.*at *3. The Western District also noted that claims of privilege can be properly asserted during the deposition, as appropriate; there is no need to determine these issue prior to the deposition. *Id.*

In *SEC v. Kramer*, 778 F.Supp. 2d 1320 (M.D. Fla. 2011), similar arguments were made as in this case: namely, that the information sought qualified as attorney-work product, the defendant could learn the facts by other means, the documents had already been produced, the agency had no independent knowledge of the facts, and either agency counsel or an investigator prepared by agency counsel would need to appear as the 30(b)(6) witness for the government. The Court in *Kramer* explained that the need for protection usually cannot be determined before the examination begins, and that "a blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent's claim of privilege." *Id.* At 1328. In addition, a party could move for a protective order if the need actually arose during a deposition. The Court considered the arguments of work product and deliberative process, but found that the defendant sought to discover only the facts underlying the claim and not the mental impressions of the counsel. *Id.* By allowing a deposition, the court is not overruling any objections based on privilege; rather any rulings on privilege prior to a deposition would be premature. *Kaplan*, 2011 WL 2115878 at *3, *see also United States v. Hodgson*, 492 F.2d 1175, 1177 (10th. Cir. 1974), stating "A general refusal to cooperate is not enough. [A party] must normally raise the privilege as to each record sought and each question asked so that at the enforcement hearing the court can rule with specificity.") Here, Plaintiff may assert its objections based on privilege during the deposition and it is Plaintiff's

burden to prove the asserted privilege applies. *Kaplan* at *3, *see also United States v. Dakota*, 197 F.3d 821, 825 (6th. Cir. 1999).

In the case at hand, Defendants are requesting this 30(b)(6) deposition to determine underlying facts related to this case, not to ascertain deliberative process or work product. To the extent Defendants question the witness as to these underlying facts, this deposition should be allowed. If during the deposition Plaintiff determines questions seek privileged information, Plaintiff can assert the privilege and move for a protective order, if necessary.

III. Defendants' Notice seeks discoverable information.

Plaintiff alleges Defendants seek information that does not meet the relevance and proportionality standards of FRCP 26(b) but does not specify a single request that falls outside of permissible discovery. While Rule 26 does not define what is deemed relevant for purposes of the rule, relevance has been "broadly construed to encompass any possibility that the information sought may be relevant to the claim or defense of any party." *EEOC v. Sheffield Fin. LLC,* No. 1:06CV889, 2007 WL 1726560, at *3 (M.D.N.C. 13 June 2007) (quoting *Merrill v. Waffle House, Inc.,* 227 F.R.D. 467, 473 (N.D. Tex. 2005)); *see also* Fed. R. Evid. 401. The district court has broad discretion in the determination of relevance for discovery purposes. *Watson v. Lowcountry Red Cross, 974* F.2d 482, 489 (4th Cir. 1992).

Certainly, any *facts* gleaned during investigations regarding this case are discoverable, yet Plaintiff fails to identify any justification for preventing such discovery. Plaintiff also makes the blanket assertion that the importance of the discovery sought in Defendants' notice

"cannot overcome the burden of requiring the United States to prepare and present a witness all [sic] of the identified matters." Understandably, Plaintiff provides no factual basis for its assertion of "burden", nor does it give any specifics regarding the amount of time required, or other evidence of burden. Comparing Plaintiff's supposed burden to the burdens it has repeatedly placed on Defendants (including requesting thousands of documents which have no real relevance to this case, and requiring hundreds of hours endured by Defendants, their witnesses, and their counsel, to prepare and present witnesses for depositions in which, regardless of the witness' lack of knowledge on a multitude of areas of inquiry, Plaintiff has repeatedly forced the witnesses to suffer through a full day of untenable questioning), Plaintiff's "burden" assertion fails.

IV. Defendants' topics should not be stricken or narrowed further.

As to several topics, Plaintiff contends testimony would be cumulative since they have, or will, produce written documentation. (*Matters 1, 2, 3, 9, 10, 13)* Certainly Defendants are entitled to question witnesses about documents produced in this case, just as Plaintiff has been allowed to thoroughly question Defendants' witnesses. The availability of information from other sources does not by itself insulate the targeted source from discovery. See *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 126 (D.D.C. 2005) ("By its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery."). And it is the party seeking discovery, not the party or other person that is the object of it that determines the sequence and types of discovery devices

used. See Fed. R. Civ. P. 26(d)(2). Plaintiff's claim of cumulative discovery does not insulate Plaintiff from producing a witness to testify on these matters.

Matter 1 seeks testimony regarding damages sought by Plaintiff. Plaintiff gives no reasoning for why Defendants are not entitled to question a witness about damages sought by Plaintiff, regardless of any documentation that has been produced. The fact that Plaintiff must provide a damages calculation doesn't remove Defendants' opportunity to question Plaintiff's witness about damages. Plaintiff's reliance upon *EEOC v. Texas Roadhouse, Inc*., 2014 WL 4471521, at *4 (D.Mass. Sept.9, 2014) is misplaced and misleading. In *Texas Roadhouse*, the Court held that a 30(b)(6) deposition on damages sought by Plaintiff (and reflected in Plaintiff's Rule 26(a)(1) Disclosures), was unnecessary because **the information could be obtained in the deposition of EEOC's expert on damages.** Here, Defendants don't have that ability, and thus, a 30(b)(6) deposition regarding damages is necessary. Any information compiled by an agency that is relevant to the damages already suffered or other appropriate equitable relief is also a legitimate source of inquiry during a 30(b)(6) deposition. *E.E.O.C. v. Burlington Northern*,.at *3.

Matters 2 and 3 seek testimony regarding the policies, practices, programs and training sought by Plaintiff. Plaintiff contends these various matters are premature because "the United States has not yet completed discovery that will allow it to formulate appropriate injunctive relief." If Plaintiff will agree to present its witnesses to address these two matters

after the discovery deadline, Defendant will defer these topics until an agreed upon date after September 1, 2016.

Matters 4 -7: Plaintiff does not dispute that Defendants are entitled to question witnesses about the facts underlying the claim. Instead, Plaintiff merely contends "some of the responsive testimony...will be privileged" , and asks the court to enter a protective order regarding the privileged areas. As set forth in Sections I and II of Defendants' Response, Plaintiff may assert privilege, where necessary, during the deposition.

Matter 8 seeks the identities of persons involved in making decisions regarding the conciliation process. Plaintiff fails to meet its burden burden of making a particularized showing of why this discovery should be denied. On one hand it appears Plaintiff claims it doesn't have this information but then proceeds to assert potential privilege. If Plaintiff possesses this information, Defendant is entitled to question Plaintiff's witness about it.

Matter 9 : Plaintiff claims this matter is cumulative because the United States provided its allegations in the Joint Status Report. Plaintiff does not dispute that Defendants are allowed to question Plaintiff about the facts underlying these claims, but instead, once again, falls back on their claim that the only testimony being sought is protected/privileged information. As set forth in Sections I and II of Defendants' Response, Plaintiff may assert privilege, where necessary, during the deposition.

Matter 10: Defendants concede this matter is overly broad as written, and will attempt to reach an agreement with Plaintiff regarding a more narrow topic description.

Matters 11 and 14 seek information regarding Tudor's health care professionals, mental treatment, counseling, and emotional condition. Plaintiff contends it has no such information, and further, the information is protected by Tudor's asserted privileges. These matters have to some extent been addressed by the Court, or will be addressed by the Court in ruling upon Plaintiff-Intervenor's motion to quash. Therefore, Defendants will withdraw these topics from their notice until the matters have been addressed.

Matter 12, as narrowed by agreement, seeks the identities of persons interviewed by Plaintiff regarding Dr. Tudor. Contrary to Plaintiff's assertion, Defendants do not contend Plaintiff must inquire of the entire Executive Branch to adequately respond to this request. As delineated by Defendants during the conference, if Plaintiff has the ability to determine with moderate effort, that United States agencies other than Department of Justice engaged in interviews regarding Dr. Tudor, then such information is discoverable via a 30(b)(6) deposition. As Plaintiff notes, Courts have sometimes required production from a non-party federal agency when the agencies were involved in a joint investigation or have coordinated investigations. *United States v. Finnerty*, 411 F.Supp. 2d 428, 432-433 (S.D.N.Y. 2006). As to privileged information, Plaintiff can assert the privilege objection where necessary and appropriate.

Matter 13 - oral or written statements by RUSO or SEOSU (or their employees) that support Plaintiff's allegations and claims. Plaintiff's sparse objection based on overbreadth, vagueness and ambiguity falls way short of meeting the requisite burden of making a

particularized showing of why this discovery should be denied. In fact, Plaintiff raised no objection to this topic during the parties' conference, and thus any potential objection should not be permitted. Plaintiff has never represented that it has produced all responsive statements. Further, Defendants are entitled to question Plaintiff's 30(b)(6) witness about these statements.

Matter 15 seeks testimony regarding Tudor's communications with DOJ and other agencies of Plaintiff. Defendants previously agreed this request was limited to communications regarding subject matter potentially relevant to this lawsuit. As set forth above regarding Matter 12, if Plaintiffs have knowledge of, or reason to believe, that Dr. Tudor engaged in communications with other federal agencies, during a time period of 2006 to present, then Plaintiff must present a witness regarding those communications. Plaintiff can certainly inquire of Dr. Tudor if it needs some assistance in determining which of its federal agencies communicated with Dr. Tudor.

Matters 16 and 17 seek discoverable information. Plaintiff again relies on its claim of privileges, which can be asserted at the appropriate time during the deposition. Plaintiff's contention that to the extent materials were issued publicly, they are available to Defendants, does not satisfy Plaintiff's obligation of producing the requested documentation, and witnesses to testify about it. Plaintiff must, at the very least, identify the responsive documentation, and provide the public sources where this information can be obtained.

Matter 18 seeks information about lawsuits filed against institutions of higher education in which Plaintiff has sought reinstatement and/or tenure; Matter 19 seeks information about lawsuits by Plaitiff based on one's transgender status; and Matter 20 seeks information about related consent decrees. As Defendants explained in the parties' conference, "threatened to be filed" specifically relates to actions in which consent decrees were entered in lieu of litigation. Defendants also are willing to narrow to lawsuits based upon some type of discrimination, but not limited to Title VII. Plaintiff certainly has access to the requested information, and thus, should be required to adequately respond to Defendants' notice. Plaintiff has failed to explain why these requests are overly broad or burdensome, and thus has failed to satisfy its heavy burden of showing justification for the requested protection.

CONCLUSION

For the reasons set forth above, Defendants respectfully request the Court deny Plaintiff's request to quash Defendants' Rule 30(b)(6) Notice to the United States, and further request the Court deny Plaintiff's request, in the alternative, to severely limit the scope of Defendants' Notice.

Respectfully submitted,

/s/Dixie L. Coffey
DIXIE L. COFFEY, OBA #11876
KINDANNE JONES, OBA #11374
JEB E. JOSEPH, OBA #19137

Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, OK 73105
Telephone: 405.521.3921
Facsimile: 405.521.4518
Email: dixie.coffey@oag.ok.gov
kindanne.jones@oag.ok.gov
jeb.joseph@oag.ok.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August 2016, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Allan Townsend Delora Kennebrew Meredith Burrell Valerie Meyer US Dept of Justice Civil Rights Division-DC 950 Pennsylvania Avenue NW Rm 49258 PHB Washington, DC 20530 Email: allan.townsend@usdoj.gov delora.kennebrew@usdoj.gov meredith.burrell@usdoj.gov valerie.meyer@usdoj.gov *Attorneys for Plaintiff*	Brittany Novotny 401 N. Hudson Ave Oklahoma City, OK 73102 Email: brittany.novotny@gmail.com *Attorney for Intervenor Plaintiff*

Jillian Weiss Ezra Young Law Office of Jillian T. Weiss, P.C. P.O. Box 642 Tuxedo Park, NY 10987 Email: jtweiss@jtweisslaw.com eyoung@jtweisslaw.com *Attorney for Intervenor Plaintiff*	

/s/ Dixie Coffey
Dixie Coffey