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. 15-cv-324-C**

DEFENDANTS' COMBINED RESPONSE IN OPPOSITION TO PLAINTIFF/INTERVENOR'S MOTIONS IN LIMINE

Plaintiff/Intervenor, Dr. Rachel Tudor ("Intervenor") seeks to exclude the testimony of Defendants' witnesses Dr. Don Weasenforth and Holly Newell under Fed. R. Evid. 401. Intervenor claims that Dr. Weasenforth's testimony is not relevant. Defendants, Southeastern Oklahoma State University, ("SEOSU" or "University"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), wholly disagree with Intervenor's logic and argument, and respectfully request this Court deny Plaintiff/Intervenor's Motion in Limine to Exclude Defendants' Exhibit Identified as Rachel Tudor's Personnel file from Collin College with

Incorporated brief. [Doc. 189], Plaintiff/Intervenor's Motion in Limine to Exclude Defendants' Witness Holly Newell [Doc. 190], and Plaintiff/Intervenor's Motion in Limine to Exclude Defendants' Witness Dr. Don Weasenforth. [Doc. 191].

ARGUMENT

I. DEFENDANTS' WITNESSES AND EXHIBITS ARE NOT AFTER-ACQUIRED EVIDENCE.

Intervenor's entire proposition for the exclusion of Intervenor's personnel file from Collin College, Dr. Weasenforth's testimony, and Holly Newell's testimony rests in the fundamental misunderstanding of the purpose of these witnesses and this evidence, as well as the fatally flawed argument that such testimony is after-acquired evidence. Intervenor's interpretation of Defendants' purpose for calling Dr. Weasenforth and Holly Newell is simply in error. Furthermore, Intervenor's unilateral determination that Intervenor's personnel file from Collin College is after-acquired evidence is misplaced.

Defendants have been consistently candid about the fact that they are not in possession of any after-acquired evidence. Further, Defendants have gone so far as to express that fact in writing, as well as provide assurances that should any after-acquired evidence come into Defendants' possession, that Defendants will produce that evidence immediately. *See Email to Plaintiff and Intervenor from Defendants' Counsel dated August 22, 2016,* attached as

Exhibit 1. No such evidence has been obtained to date, nor do Defendants expect such evidence to be produced prior to trial.

II. DEFENDANTS DISCLOSED INTERVENOR'S COLLIN COLLEGE PERSONNEL FILE IN AUGUST, 2016.

Intervenor asserts in support of her Motion in Limine to Exclude Defendants' Exhibit Identified as Rachel Tudor's Personnel file from Collin College with Incorporated brief ([Doc. 189]), that Defendants withheld documents from Intervenor. But in fact, Defendants produced the personnel file from Collin College to both then-Plaintiff, United States of America, and Intervenor, Dr. Tudor, nearly fourteen (14) months ago as a supplemental response to written discovery. *See Correspondence to USA and Intervenor dated Aug. 29, 2016, transmitting Collin College Personnel File,* attached as Exhibit 2.

Intervenor erroneously characterizes the file as "not produced" in her objection to Defendants exhibits. [Doc. 176]. Having been in possession of the personnel file for nearly fourteen (14) months, Intervenor and her counsel can hardly feign surprise or ambush by either these documents or testimony based on these documents. Therefore, Intervenor's objections based on non-production are invalid.

Intervenor's personnel file contains information relevant to these proceedings in that it contains evaluations of Intervenor's teaching, service and

scholarship at the position obtained immediately following her non-renewal at SEOSU. Furthermore, it contains information pertaining to Collin College's non-renewal of Intervenor. The file is relevant to both refute the allegations of Intervenor that she was a skilled professor worthy of tenure. It is also relevant to show that Intervenor's non-renewal had nothing to do with Defendants' decision not to renew her contract, thereby limiting her claim for lost wages.

III. DR. DON WEASENFORTH'S TESTIMONY IS RELEVANT TO THE PROCEEDINGS.

Intervenor moves to exclude, "the documents referred to as Tudor's Personnel File from Collin College, regarding which Dr. Weasenforth would testify, [was] not previously disclosed to Plaintiff/Intervenor Tudor" in her Motion in Limine to Exclude Defendants' Witness Dr. Don Weasenforth [Doc. 191, p. 2, fn 1]. Intervenor's misrepresentation is demonstrable. As stated above, Defendants produced the personnel file from Collin College on August 29, 2016 in supplemental response to written discovery. (*See* Ex. 1).

Dr. Don Weasenforth's testimony is relevant to the veracity of Intervenor's claims that she is a qualified professor worthy of tenure. Dean Weasenforth was Intervenor's direct supervisor at Collin College. Intervenor herself has claimed through her pleadings and her testimony that her teaching and scholarship were superior to her colleagues and warranted tenure at

SEOSU. In addition, Intervenor will attempt to present expert testimony addressing Intervenor's qualifications for tenure. This argument has placed her subjective opinion of her own teaching ability at issue. Dr. Weasenforth's testimony will directly challenge the veracity of Intervenor's lofty opinion of her abilities, and will explain why the administration at Collin College determined that Intervenor was not qualified to be a professor at their institution, as well as the reason they chose not to renew her contract.

The entirety of this case lies in the inherent subjectivity of Defendants' decision not to grant tenure and promotion to Intervenor. One of the tendered reasons for said denial was the lacking nature of her scholarship and service. Intervenor seeks to refute this contention with declarations from colleagues in her response to Defendants' Motion for Summary Judgment ([Docs. 205-17, 205-18, 205-25]), therein claiming her teaching, service and scholarship were worthy of tenure. Defendants should be given the same opportunity to present testimony, (not only from current or former SEOSU faculty, but from a dispassionate third-party such as Dr. Weasonforth, who actually evaluated Intervenor's work and also found it deficient), to the jury demonstrating that Intervenor's subjective view of her abilities is skewed.

In addition to Dr. Weasenforth's testimony on Intervenor's tenure at Collin College and the reason for her non-renewal, his testimony is relevant because it goes to directly refute Intervenor's alleged mitigation of damages.

The reason for the non-renewal from Collin College had nothing to do with the alleged actions of Defendants or their tenure decision. Intervenor was non-renewed by Collin College for her subpar teaching ability, not Defendants unrelated decision not to grant Intervenor tenure based on a substandard portfolio. Intervenor obtained employment at a comparable rate of pay and was incapable of maintaining that employment. The moment Intervenor attained a position of comparable pay, her claim for lost wages should cease to accrue. Defendants have done nothing to interfere with her securing or maintaining a teaching position after her non-renewal from SEOSU.

IV. HOLLY NEWELL'S TESTIMONY IS RELEVANT TO THE PROCEEDINGS.

Holly Newell is the Sponsored Programs Compliance Officer at Seminole State College, and was involved in Intervenor's application and interview process at Seminole State College. Her testimony is relevant because it directly refutes Intervenor's alleged mitigation of damages. Intervenor has alleged that she has attempted to seek employment, supposedly nation-wide, following both of her non-renewals (at SEOSU and Collin College). She has minimal documentation to support her claim of diligent job searching in 2011-2012, and alleges the only interview she was able to obtain after her non-renewal from Collin College was at Seminole State College, but was not offered a job.

The common-law doctrine of avoidable consequences, or the duty to mitigate, applies in all damages litigation. A party may not recover for damages reasonably avoidable under the circumstances through mitigation. Thus, a fired plaintiff must look with reasonable diligence for other substantially comparable work and must accept such employment pending the outcome of litigation. In the Title VII context, a victim breaches the duty to mitigate only by refusing a job substantially equal to the job from which the victim was fired or for which the victim was not hired. *See Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982). A victim is required to seek work in another field only after the unavailability of work in the victim's chosen field is apparent. *See Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986). The defendant bears the burden of establishing a breach of the duty to mitigate. *McClure v. Independent School District No. 16*, 228 F.3d 1205, 1214 (10th Cir. 2000).

Here, Defendants bear the burden to refute Intervenor's alleged attempts to mitigate her damages. Intervenor has only identified Collin College as an employer following her non-renewal from SEOSU, and Seminole State College as the only interview she has obtained since her non-renewal from Collin College. Therefore, Defendants should be allowed to present evidence and testimony directly refuting Intervenor's attempts to mitigate her damages.

CONCLUSION

For the reasons set forth above, Defendants, respectfully request this Court deny Plaintiff/Intervenor's Motion in Limine to Exclude Defendants' Exhibit Identified as Rachel Tudor's Personnel file from Collin College with Incorporated brief. [Doc. 189], Plaintiff/Intervenor's Motion in Limine to Exclude Defendants' Witness Holly Newell [Doc. 190], and Plaintiff/Intervenor's Motion in Limine to Exclude Defendants' Witness Dr. Don Weasenforth. [Doc. 191].

Respectfully submitted,

/s/ Timothy M. Bunson
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2017, 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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From: Kindanne Jones
To: Meyer, Valerie (CRT); Townsend, Allan (CRT); Burrell, Meredith (CRT); Bloom, Shayna (CRT)
Cc: Dixie Coffey; Jeb Joseph; Lori Cornell; Ezra Young; Jillian T. Weiss, Esq.
Subject: RE: Follow-up on our 30(b)(6) Conference
Date: Monday, August 22, 2016 6:58:11 PM

DOJ/Tudor Team,

Thank you for your consideration of Southeastern's IT person. To be candid, I'm not sure if or when he will be willing to travel to DC in light of his wife's surgery. (I know I said earlier it was his daughter's surgery but I received further information today corrected that detail – it is his wife who is having surgery.) I have not discussed the question of travel with him but we will certainly make him available for deposition in Oklahoma City. The matters Southeastern's IT person would testify to would be matters 1, 2, 3, 4 and 18 to the extent you seek ESI information regarding from Southeastern that is not privileged.

I think it might be best to have another conversation regarding these other matters. We are clearly making progress but somethings might be best to hash out in conversation rather than emails.

For example, we don't object to your inquiries into Southeastern and RUSO's litigation hold practices, in general and there may be some inquiries regarding the hold that are specific to this matter that are not necessarily objectionable. But, I do object to questions regarding conversations/communications between attorneys and clients regarding the litigation hold implemented . For example, a question regarding whether IT could or did implement a litigation hold on electronic calendars entries would not be objectionable but questions regarding conversations between counsel & the client regarding the hold would be. An example for non-ESI issue would be handwritten notes. General questions regarding the retention and hold process regarding handwritten notes are fine. But you have already been informed that Stubblefield's notes have been preserved and a privilege asserted. Dr. Stubblefield testified about the presence of her notes. I do not understand what you are seeking, besides standard practices. It would be helpful to discuss this before we file a motion for protective order.

With regard to the issue of spoliation, DOJ has no reason to believe there has been spoliation, at least from defendants. The only party involved who should actually be held responsible for "spoliation" is Tudor, who admittedly failed to retain any electronic information she has. And of course, she has known about the possibility of litigation probably before any other party. If memory serves, Tudor destroyed all evidence on her computer that might be helpful to this case and has made no effort to recover this information. I also seem to recall Tudor's counsel admitting she had completely failed to advise Tudor of her duty to preserve documents.

With regard to e-mail searches, I'm certain this is an issue Jeb can address when he returns. If Jeb can't clear this up then I'm sure we can present an IT person who can testify but this doesn't really seem like something where testimony is required. I'm probably oversimplifying the issue but whether defendants' searched for the ESI version of documents that had been produced in hard copy seems like a simple question for a discovery conference, not a deposition.

Exhibit 1

As we discussed, we have no objection to matter 18. I have not received a copy of Dr. McMillan's deposition so I cannot address whether you have accurately portrayed his testimony regarding Exhibit 50 but I recall telling you that to the extent it is available we should be able to tell you if and where the email was saved and if it was or is presently identified as read or unread by the individuals listed in matter 18.

On matter 5, we should be able to enter into a stipulation regarding policies and procedures which were in effect during the time period specified in your email. Please submit the proposed stipulation regarding the policies. With regard to the Scoufos file, it is my understanding that our bates stamped number 1013-1300 is a true and correct copy of the document Dr. Scoufus provided to Dr. Stubblefield on or about August 17, 2011. It looks like these matters are resolved.

With regard to matters 15 & 16, Exhibits 30 & 117 were prepared and submitted to the EEOC by Southeastern in response to EEOC's initial request for information when Tudor filed her charge of discrimination. If I understand, this is not in dispute. I do not understand what further information you require regarding these documents. You have not only deposed but interviewed all witnesses you wanted to regarding these matters. Southeastern's position was laid out in the statement. That witnesses have conflicting recollections 5 years later is simply a fact we will all have to deal with. You have questioned the persons with first-hand knowledge. If they do not recall or their recollections vary, there is no one else to refresh their recollections. As to Exhibits 85 & 115 (Tudor's evaluation), you have inquired of the witnesses who signed these documents. Again, their memory is all that we have. You cannot get a different answer out of Southeastern. It would be nice if Southeastern could simply pick and choose between the different recollections and memories but I'm not aware of any authority compelling it do so. I'm certain you will point out all discrepancies, regardless of their significance or relevance when this matter goes to jury trial. Ultimately, it will be for the jury to decide what happened. However, to be clear, it is these types of lost memories and inconsistent recollections that, at least in part, form the basis for our claim for laches. DOJ/EEOC sat on this case for years, while memories faded and witnesses retired. You had the authority and manipulated the running of the statute of limitations. Now, you claim we must pick and choose between the inconsistent memories. Please show me the law that supports this position. These inquiries are cumulative. You have all the non-privileged information we have. I know of no authority that compels defendants to now be forced to select between these faded and/or inconsistent memories only so you can point out the fact that one memory is inconsistent with another. Please let me know if you have any authority for this position. Otherwise it is our position this inquiry is cumulative and unduly burdensome.

With regard to matters 8 & 13, affirmative defenses and defenses, our position is no different than yours. We should not be required to simply marshal the evidence for you. [Doc. 89, pp. 18-20] Your request is cumulative and simply seeks our work product. I have advised you, we have no evidence to support the claim of after-acquired evidence at this time and assured you that if such evidence is discovered we will let you know. I also told you we are not seeking this type of evidence at this time. Hence there is no one or information to produce on this matter. The failure to exhaust is a legal defense that has been discussed and was outlined in our motion to dismiss. With the exception of the failure to promote/denial of tenure claims, Tudor did not properly or timely exhaust administrative remedies. As you were quick to point out during our conversation last week, DOJ

appears to have acknowledged this problem while Tudor has not. Therefore, to be clear, the failure to exhaust defense is directed at Tudor's claims and our evidence is the charge of discrimination and related documents.

The issue of damages is still in full discovery but you have the evidence we have regarding Tudor's failure to mitigate. She refused the offer & advice she was given to withdraw her tenure application, work on her portfolio and reapply in two years. In addition, Tudor failed to seek work for several months even though she knew her employment with Southeastern was not going to be renewed. Also, Tudor made no serious effort to seek a tenure track position after leaving her employment with Southeastern. Counsel for DOJ and Tudor have had ample opportunity to explore the facts regarding the offer and advice she was provided with the multiple witnesses who have been interviewed and deposed. Any further discovery on this topic is cumulative. The other two types of information are not within defendants' scope of knowledge. This information that has been acquired from Tudor and through discovery of third parties and it has been provided to you. Finally, because neither Tudor or DOJ have provided full information regarding damages, defendants have not had the opportunity to fully develop this defense and other issues may arise.

So, further discussions are probably warranted though I know the clock is ticking. It appears the major remaining issues relate to privilege communications/attorney work product and the litigation hold; ESI search inquiries – which can hopefully be cleared up with a discussion with Jeb; matters 16 & 17 which are cumulative; and 8 & 13 regarding the "factual basis" inquiries. Please let me know if you think we can clear up these matters. Also, if we need more time to do so, perhaps we could set the rest of the deposition off. Jeb should be back in the office tomorrow, if he's not too ill. I look forward to hearing from you tomorrow.

Thanks for your commitment to working on these issues.

Kindy

From: Meyer, Valerie (CRT) [mailto:Valerie.Meyer@usdoj.gov]
Sent: Monday, August 22, 2016 10:57 AM
To: Kindanne Jones; Townsend, Allan (CRT); Burrell, Meredith (CRT); Bloom, Shayna (CRT)
Cc: Dixie Coffey; Jeb Joseph; Lori Cornell; Ezra Young; Jillian T. Weiss, Esq.
Subject: RE: Follow-up on our 30(b)(6) Conference

Dear Kindy:

Thank you for the update.

Exhibit 1

With respect to our response to your Daubert motion regarding Dr. Parker, thank you for confirming that our deadline to respond is September 1. We will file something with the Court stating that the parties agree that September 1 is our deadline to respond so that the Court does not treat your Daubert motion as a motion in limine for purposes of the briefing schedule.

Regarding your request to postpone a portion of Friday's 30(b)(6) deposition of Defendants, could you please identify the matter numbers you are requesting to postpone? We do not oppose a postponement of some of the matters given the conflict for your IT representative (for example, matters 4 and 12 regarding the backup of ESI) but want to be certain we understand and agree as to which matters will proceed on Friday. We appreciate your willingness to extend our deadline to respond to your anticipated Motion for Summary Judgment should information related to the postponed 30(b)(6) topics be relevant to our summary judgment response. We also may request that you make your IT representative available for deposition in Washington, DC (at the time we produce Drs. Parker and Brown for their depositions) in order to conduct all three out-of-time depositions at the same time.

As a follow-up to our conversation last week and your August 19 message below, the United States is willing to further narrow several matters in its amended 30(b)(6) notice. As you know, the amended notice is the result of our willingness to narrow the topics once already, which we did based on Defendants' stipulation that RUSO and Southeastern are a single employer for purposes of this case. Based on your representations to us during our call, we are willing to further narrow some matters if Defendants stipulate to certain facts as set forth below.

Matters 1 and 9: As we explained to you during our call, we are entitled to know whether Defendants followed applicable document retention policies as they pertain to Dr. Tudor's internal grievances, her complaints to the U.S. Department of Education and the U.S. Equal Employment Opportunity Commission, and this case. In addition to the lack of clarity regarding the existence of Dr. Stubblefield's notes of witness interviews she conducted as part of her investigation of Dr. Tudor's complaint, it is unclear whether other ESI was retained or not. For example, Defendants previously advised us that calendar entries prior to 2012 did not exist, yet several emails containing calendar meeting invitations or acceptances prior to 2012 were part of the ESI Defendants produced pursuant to the Court's Rule 502(d) Order, which seems inconsistent with a lack of calendar entries. To assist us in understanding what information should have been retained under Defendants' own policies and practices, what actually was retained, and what should have been produced, we are entitled to inquire about Defendants' document retention practices and policies. Therefore, we cannot further narrow this topic.

Matters 2 and 10: As we understand it, Defendants take the position that all information about their litigation hold practices and policies is not discoverable because you contend that litigation holds are subject to attorney-client privilege and are attorney work product. Defendants also take the position that they reasonably anticipated litigation once they received notice of Dr. Tudor's DOE complaint. First, the United States does not agree that the steps Defendants took to preserve documents is privileged information. Indeed, the Defendants have produced documents showing some of the steps they took to preserve documents. (Pl. Ex. 113). Second, our 30(b)(6) notice requests information about litigation hold policies and practices not only related to this case, but

also generally, and information about general practices in the absence of reasonably-anticipated litigation is not privileged. Third, as we explained during our call, we are concerned about Defendants' failure to preserve evidence, including Dr. Stubblefield's notes. Information about when Defendants instituted a litigation hold in this case, as well as the scope and distribution of that hold, is relevant to the issue of spoliation. Therefore, we cannot further narrow this topic.

Matters 3 and 11: We are entitled to find out what efforts Defendants made in connection with responding to our Requests for Production, particularly with respect to ESI. While Defendants produced a significant amount of ESI once compelled to do so by the Court, questions remain about the manner in which the searches were conducted. For example, well prior to the production of ESI in June 2016, Defendants conducted a "test search" of Dr. Prus's email account, the results of which did not include a single email between Dr. Prus and Dr. Scoufus. Based on the June 2016 ESI production, however, we know that there were several emails between Drs. Prus and Scoufus that were, presumably, retained in Dr. Scoufus' email account. As a result, it is not clear to us whether the "test search" of Prus and other efforts by Defendants to locate responsive documents met their discovery obligations under the Federal Rules of Civil Procedure. We also do not know, for example, whether Defendants searched for the ESI versions of documents that they produced in hard copy only (as was requested by the United States). ESI versions of documents produced in hard copy might contain metadata that would shed light on the identity of the drafters, for instance (*see* Matter 15 below). Therefore, we cannot further narrow this topic.

Matter 18: As we explained to you during our call, Dr. McMillan testified that he did not receive the emails contained in Exhibit 50. This matter, which primarily seeks metadata regarding those emails, seeks information which may prove or disprove that assertion. Therefore, we cannot further narrow this topic.

Matters 4 and 12: It is our understanding that Defendants have no objection to these topics.

Matter 5: In its Requests for Admission propounded on July 8, 2016, the United States sought admissions from Defendants that would have eliminated the need for additional authentication of multiple documents. Defendants' denials, partial denials, or incomplete responses necessitate further authentication of those documents. If Defendants will stipulate as to the authenticity of all of the documents identified below, or the identical copies of those documents that contain Defendants' bates numbers, then the United States will withdraw Matter 5. Please note that if Defendants decline this offer, the United States may seek authentication of additional documents produced by Southeastern in response to the United States' Requests for Production during the 30(b)(6) deposition.

- Defendants' responses to our Requests for Admission did not adequately identify the years during which the contents of Southeastern's Academic Policies and Procedures Manual ("APPM") produced to the EEOC during its investigation were in effect. As a result, we request that Defendants stipulate that the following portions of the APPM were in effect during the 2008-2009, 2009-2010, and 2010-2011 academic years. If part of the APPM was not in effective during all three of those academic years, please advise us of the dates so that we may work together to craft a stipulation that is accurate and meets our authentication needs.

  - EEOC000252-EEOC000428
  - EEOC00300-301 (Pl. Ex. 6)
  - EEOC000303-349 (Pl. Ex. 7)
  - EEOC000265 (Pl. Ex. 31)
  - Defendants' Bates Range 006929-6931 (Pl. Ex. 33)
  - Defendants' Bates Range 006955-6956 (Pl. Ex. 34)
  - EEOC000299-300 (Pl. Ex. 51)
- Similarly, we request that Defendants stipulate that certain portions of the RUSO Policy Manual referenced in Requests for Admission 7(a) and 8(a) (DOJ000016-133) were in effect during the 2008-2009, 2009-2010, and 2010-2011 academic years. Again, if this is not accurate, please identify the dates so that we may work together to craft a stipulation that is accurate and meets our authentication needs.
  - Chapter 3 (Academic Affairs)
  - Chapter 5.1 (Equal Opportunity)
  - Chapter 5.2 (Affirmative Action)
  - Chapter 5.6 (Sexual Harassment)
  - Chapter 5.7 (Racial and Ethnic Policy)
- We request that Defendants stipulate that EEOC000734-001020 (or the identical copies of these documents with Defendants' bates numbers) is a true, correct, and complete copy of all documents provided by Lucretia Scoufos to Claire Stubblefield on August 17, 2011 in connection with Dr. Stubblefield's investigation of Dr. Rachel Tudor's grievance and described by Dr. Scoufos as Dr. Tudor's complete file from Southeastern's School of Arts and Sciences (See EEOC000824).

Matters 15 and 16: With respect to Plaintiff's Deposition Exhibits 30 and 117, fact witnesses have provided conflicting testimony regarding these documents or have been unable to recall facts about these documents, such as who drafted them. We believe that the opportunity for Defendants, as institutions, to prepare to testify about this topic may provide information and recollections beyond that which the fact witnesses offered during their earlier depositions. In addition, we are entitled to know which of the conflicting facts offered by fact witnesses that the Defendants will adopt as organizations. Therefore, we cannot narrow this topic.

Matters 6 and 7: As we explained to you during our call, Dr. Stubblefield's deposition testimony indicated that she took handwritten notes during each witness interview she conducted as part of her investigation of Dr. Tudor's complaint. Her testimony also indicated that these notes would have been retained in her file unit, to which no one other than Dr. Stubblefield had a key. When we requested the production of these notes, which had not previously been produced, Defendants told us that they had produced all non-privileged notes and provided the United States with a brief privilege log that indicated that some of Dr. Stubblefield's notes may have been withheld. More recently, in response to the United States' First Set of Requests for Admissions, the Defendants stated that they had "produced all of Dr. Stubblefield's existing notes made in the course of her investigation of Dr. Tudor's complaints and/or grievances that still exist." Furthermore, Dr. Stubblefield testified to recording some witness interviews and Dr. Scoufos testified that Dr. Stubblefield recorded her interview, but no such recordings have been produced. It is unclear when such recordings and notes last existed or whether they still exist and whether Dr. Stubblefield (as

Affirmative Action Officer) has any different or additional document retention obligations as compared to other employees of Defendants. Although Dr. Stubblefield has provided her recollection of events, the United States is entitled to know whether Defendants, as institutions, adopt the same version of events and will make the same assertions about the existence of such documents and recordings now that they have had the opportunity to search for those items.

Matters 8 and 13: Defendants take the position that the United States is not entitled to know their factual basis for the affirmative defenses and defenses they asserted in their Answers, contending that it would reveal attorney work product for them to provide those facts. The United States believes that this is too broad an application of the attorney work product doctrine, and that our request for factual information is appropriate. Defendants asserted multiple affirmative defenses in their Answers, including failure to exhaust administrative remedies, failure to conciliate in good faith, failure to mitigate damages, laches, after-acquired evidence, and lack of a single employer relationship between RUSO and Southeastern (which defense Defendants have now withdrawn by stipulating that RUSO and Southeastern are a single employer). Defendants now represent that they have "no evidence" to support the after-acquired evidence but apparently intend to preserve that defense in the event additional discovery arises to support it. If Defendants withdraw their after-acquired evidence defense altogether, then the United States would not explore this particular defense during its deposition. Absent such a withdrawal, we are willing to narrow the scope of this matter to the following affirmative defenses or defenses: Failure to exhaust administrative remedies, failure to conciliate in good faith, failure to mitigate damages, laches, and after-acquired evidence.

Matter 14: The United States is willing to withdraw this matter in light of Defendants' response to Interrogatory 17.

Matter 19: As we clarified for you during our call, we are entitled to know which individuals the designees communicated with in preparation for the depositions (other than attorneys providing legal advice) and do not intend to intrude upon attorney-client communications relating to the preparation of the designees.

If you will agree to any of the stipulations set forth above, please let us know by noon on Wednesday, August 24.

Sincerely,
Valerie Meyer

From: Kindanne Jones [mailto:kindanne.jones@oag.ok.gov]
Sent: Monday, August 22, 2016 10:47 AM
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Subject: RE: Follow-up on our 30(b)(6) Conference

Exhibit 1

Thanks Allan. My motion for protective order is almost ready but I'll hold off. It would be great if we can work this out.
Also, I have learned that one of the witnesses who is in the best position to testify on some of the 30(b)(6) deposition topics may not be available. SOSU's IT representative's daughter is having surgery this week (August 24 & 25) and I don't know whether he will be available on the 26. I feel confident he won't be prepared by the 26. Also, I have just received word that Jeb (who has been out of the office) is ill and his return may be delayed. This will further hinder our ability to fully prepare and present the IT/ESI component of the 30(b)(6) as this is his area of expertise and he is most familiar with those issues in this case.
Would you consider agreeing to continue at least that portion of the deposition to a later date. I know it may be until after discovery cut-off. Of course, if it turns out that you need some information from that deposition to respond to any summary judgment that is filed, we would not object to an extension of your time to respond for that reason.
Finally with regard to your question regarding the deadline to respond to the Daubert motion, it is fine with us that you have until September 1 or 2 to respond now that we have an agreement to take Dr. Parker's deposition at a later time.

Kindy

From: Townsend, Allan (CRT) [mailto:Allan.Townsend@usdoj.gov]
Sent: Monday, August 22, 2016 7:36 AM
To: Kindanne Jones; Meyer, Valerie (CRT); Burrell, Meredith (CRT)
Cc: Dixie Coffey; Jeb Joseph; Lori Cornell
Subject: RE: Follow-up on our 30(b)(6) Conference

Kindy,
We have given more thought to the 30(b)(6) notice in light of our conversation last week. We are finishing up our written position now and plan to send you something later today (hopefully this morning).

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

Exhibit 1

Twitter: @CivilRightsAAG | @CivilRights

From: Kindanne Jones [mailto:kindanne.jones@oag.ok.gov]
Sent: Friday, August 19, 2016 2:36 PM
To: Townsend, Allan (CRT); Meyer, Valerie (CRT); Burrell, Meredith (CRT)
Cc: Dixie Coffey; Jeb Joseph; Lori Cornell
Subject: Follow-up on our 30(b)(6) Conference

Greetings DOJ team,
Have you given any thought to narrowing any of the topics/matters contained in your 30(b)(6) notice we discussed Tuesday? I'll be working on the motion to quash/protective order later today and through the weekend and would like to avoid any unnecessary disputes.
Also, even though it is not wholly related to your 30(b)(6) notice, I have confirmed that at this time, we have no evidence to support the "after-acquired evidence" affirmative defense. It was asserted in the answer to preserve the defense and avoid the need to amend. In light of current circumstances, we will not be pursuing the defense, unless information that is currently unknown is discovered. Of course, we understand the significance of the date of discovery the evidence and do not intend to spend significant time seeking information that will fit into this category. If circumstances do change, we will advise you accordingly. I hope this puts your minds at ease and alleviates any need to engage in further discovery on this matter.
I look forward to hearing from you on narrowing your 30(b)(6).
Kindy

Kindanne C. Jones
Deputy Attorney General
Litigation Division
Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
405.522.2920 - Office
405.521.4518 - Fax

Exhibit 1

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

August 29, 2016

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Allan K. Townsend
c/o Kay Sewell, Assistant U.S. Attorney
U.S. Attorney's Office for the
Western District of Oklahoma
210 W. Park Ave., Ste. 400
Oklahoma City, OK 73102

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

Dear Counsel:

Pursuant to my email of this date, enclosed is a disc containing Bates Nos. CC1-CC1083, which I inadvertently omitted from Defendants' document production of March 4, 2016 in response to RFP #1. As stated, I apologize for any inconvenience this may have caused. Thank you for your courtesy and understanding. Should you have any problems with the disc or any questions, please do not hesitate to contact us.

Respectfully,

Lori Cornell

Lori Cornell
Paralegal to Dixie L. Coffey and Jeb E. Joseph Assistant Attorneys General

/lcc

Exhibit 2