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**

MOTION TO STRIKE PLAINTIFF/INTERVENOR DR. RACHEL TUDOR'S DEPOSITION DESIGNATIONS

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), ("Defendants"), request the Court strike certain depositions designations from the Plaintiff/Intervenor Dr. Rachel Tudor's Deposition Designations (Doc. No. 218). In support thereof, Defendants state as follows:

BACKGROUND

1. Plaintiff filed her Exhibit and Witness List (Doc. 110) on August 19, 2016.

2. The Court entered a modified Scheduling Order on June 13, 2017 (Doc. 142).

3. The Final Pretrial Report (Doc. 207) was filed on October 17, 2017.

4. In accordance with the modified Scheduling Order (Doc. 142), Plaintiff filed her Deposition Designations (Doc. 218) on October 25, 2017, in which she designated deposition testimony of twenty-two (22) witnesses.

ARGUMENT AND AUTHORITIES

PROPOSITION I: Designated Deposition Testimony is Unauthorized by the Federal Rules Because Plaintiff's Witnesses are Available to Testify Live at Trial.

The use of depositions in a court proceeding is governed by Rule 32 of the Federal Rules of Civil Procedure. Rule 32 governs the *use* of depositions at trial "as though the witness were then present and testifying…," and not the introduction of such depositions as evidence. Fed. R. Civ. P. 32 Advisory Committee Notes. Further, any such *use* must be in accordance with either: 1) impeachment as permitted by the Federal Rules of Evidence; 2) any purpose with regard to an officer or other designated representative of a party; 3) a finding that the deposed witness is unavailable for trial; or 4) if part of a deposition is offered, the opposing party is allowed to introduce other parts out of fairness. *See* Fed. R. Civ. P. 32(a). Any attempts to admit deposition testimony must meet the Federal Rules of Evidence.

The United States Court of Appeals for the Tenth Circuit has held that "deposition testimony is ordinarily inadmissible hearsay, although Rule 32(a) creates an exception to the hearsay rules… The proponent of the deposition bears the burden of proving that it is admissible under Rule 32(a)" *Garcia-Martinez v. City & County of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004)(quotation marks and citations omitted). "The preference for a witness's attendance at trial is axiomatic. **When the key factual issues at trial turn**

on the credibility and demeanor of the witness, we prefer the finder of fact to observe live testimony of the witness." *Id.* (quotation marks and citations omitted) (emphasis added).

In this case, Plaintiff/Intervenor has designated isolated passages from twenty-two (22) witnesses: Charles Babb, Bryon Clark, Cathy Conway, Charla Hall, James Knapp, Douglas McMillan, Larry Minks, John Mischo, Kathy Nusz, Richard Ogden, Randy Prus, Sharon Robinson, Lucretia Scoufos, Jesse Snowden, Claire Stubblefield, Rachel Tudor, Ross Walkup, Charles Weiner, Whitney Popchoke, Austin Harman, Chris Roeseller, and James Habas. None of these witnesses are known to be unavailable. Defendants, in fact, expect that these witnesses will appear and testify in person at the trial of this matter[1], and Plaintiff's counsel has represented to Defendants' counsel that he believes each of these witnesses to be available. The introduction of this deposition testimony is therefore unnecessary and cumulative.

No deposition testimony can be introduced as evidence in place of actual testimony where the witness can take the stand, as preferred in *Garcia-Martinez*. Any possible use of this testimony would be for impeachment or contradictory purposes, or possibly to refresh a witness' recollection. Impeachment documents or materials are *not* admissible as evidence at trial until after the witness impeached has been afforded the opportunity to explain or deny the prior statement and the opposing party has had an opportunity to interrogate the witness on the subject. Even then it should only be offered

[1] As set forth in Proposition II, three of these witnesses were not listed on Plaintiff's Witness List, nor listed in the Final Pretrial Report, and therefore should not be permitted to testify in person or by deposition.

into evidence if it is required for the interests of justice. *See* Fed. R. Evid. 613(b). Further, any portions of deposition testimony used to refresh a recollection are not admissible by the party using them to refresh the witness's recollection; only the opposing party is allowed to introduce such documentation or portions thereof into evidence. Fed. R. Evid. 612.

Plaintiff/Intervenor has not made any proffer to the Court regarding the unavailability of these witnesses warranting introduction of their depositions. Further, the testimony of these witnesses would be sworn under oath as they take the stand in the courtroom, thus, there would be no need to introduce prior deposition testimony of these witnesses. No interest of justice requires the introduction of the proffered designations. The introduction of this evidence is unnecessarily cumulative and a waste of the Court's and jury's time. As it is preferable for the Court and jury – the finder of fact – to hear and observe live testimony of the witnesses, Defendants respectfully request the Court to strike Plaintiff's deposition designations as outlined herein.

PROPOSITION II: Plaintiff/Intervenor's Designation of Deposition Testimony of Austin Harman, Chris Roeseller, and James Habas is Unauthorized by Fed. R. Civ. P. 26, this Court's Initial Scheduling Order (Doc. 39), and the Final Pretrial Report (Doc. 207).

Plaintiff/Intervenor has improperly designated deposition testimony of three (3) witnesses, Austin Harman, Chris Roeseller, and James Habas (Doc. 218 at 1-2, 4). These witnesses were not previously disclosed on her Final Witness and Exhibit List (Doc. 110), nor the Final Pretrial Report (Doc. No. 207), and therefore should be stricken.

Federal Rule of Civil Procedure 26 requires a party to provide certain initial disclosures automatically, including (i) the name, address, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, and (ii) a copy of all documents that the disclosing party may use to support its claims or defenses. See Fed. R. Civ. P. 26(a)(1)(A)-(B). Rule 26 also requires that a party supplement its initial disclosures throughout the course of litigation at appropriate intervals whenever it learns that the information originally turns out to be incomplete or incorrect. See Fed. R. Civ. P. 26(e) (1).

To ensure compliance with Rule 26, Rule 37 provides that when a party fails to comply with Rule 26(a) without substantial justification, the party "is not, unless such failure is harmless, permitted to use as evidence at trial…or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1); see also *Jacobson v. Deseret Book Co.*, 287 F.3d 939, 952-53 (10th Cir. 2002). The non-moving party has the burden of showing that they were substantially justified in failing to comply with Rule 26(a)(1).

The Tenth Circuit has stated "[a] final witness list, like initial disclosures, should not become an uncertain or moving target. Both the final pretrial order and initial disclosures are designed to encourage 'self-editing and…reasonably fair disclosure to the court and opposing parties of [counsel's] real trial intentions.'" Cf. *Monfore v. Phillips*, 778 F.3d 849, 851 (10th Cir. 2015) (counsel's reluctance to make hard decisions should not come at the expense or increase the burdens of the opposing party). The Final Pretrial Order serves the purpose of ensuring "the economical and efficient trial of every

case on its merits without chance or surprise." *Hull v. Chevron U.S.A., Inc*., 812 F.2d 584, 588 (10th Cir. 1987).

Plaintiff's attempt to submit additional witnesses at this late stage in the litigation cannot be construed as an "appropriate interval" as required by Fed. R. Civ. P. 26. Further, the Court has set out a Scheduling Order providing for deadlines, including ***final*** exhibit and witness lists to be exchanged. In this Court's initial Scheduling Order, the Court warned the parties that "[e]xcept for good cause shown, no witness will be permitted to testify and no exhibit will be admitted in any party's case in chief unless such witness or exhibit was included in the party's filed witness or exhibit list." *See* (Doc. 39 at 1). These witnesses were not included in those filings.

Proposing additional witnesses at this late stage does not provide Defendant adequate time and notice to defend this case. Plaintiff could have included this information on her Final Witness and Exhibit List (Doc. 110) or the Final Pretrial Report (Doc. No. 207), but chose not to include this information. Plaintiff was clearly aware of these witnesses[2], as their depositions were taken before the Final Pretrial Report was due. Defendants have prepared their defense and allocation of attorney and client resources based on reliance on the Final Pretrial Report (Doc. No. 207) filed with this Court. Disclosure of additional witnesses is not harmless, it is prejudicial to Defendant at this late stage, and as such, Plaintiff's additional witnesses (and any related exhibits), *i.e.* deposition designations for Austin Harman, Chris Roeseller, and James Habas, should be stricken.

[2] In fact, Plaintiff/Intervenor attended the deposition of Austin Harman and Chris Roeseller. *See* Ex. 1.

CONCLUSION

Defendants respectfully request this Court enter an order striking the deposition designations of witnesses that are available to appear live, (either in person or via remote live-stream conferencing), and the deposition designations of witnesses that were not previously disclosed by Plaintiff-Intervenor on her Final Witness and Exhibit List (Doc. 110) or the Final Pretrial Report (Doc. 207).

Respectfully submitted,

/s/ Dixie L. Coffey
DIXIE L. COFFEY, OBA #11876
JEB E. JOSEPH, OBA #19137
KINDANNE JONES, OBA #11374
TIMOTHY M. BUNSON, OBA#31004
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
Email: jeb.joseph@oag.ok.gov
Email: kindanne.jones@oag.ok.gov
Email: tim.bunson@oag.ok.gov
Attorneys for Defendants Southeastern Oklahoma State University and The Regional University System of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 31st 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:

Ezra Young
Law Office of Ezra Young
30 Devoe, 1a
Brooklyn, NY 1121
Email: ezraiyoung@gmail.com
Attorney for Plaintiff

Brittany Novotny
NATIONAL LITIGATION LAW GROUP, PLLC
42 Shepherd Center
2401 NW 23rd Street
Oklahoma City, OK 73107
Email: bnovotny@nationlit.com
Attorney for Plaintiff

Marie E. Galindo
1500 Broadway, Ste. 1120
Lubbock, TX 79401
Email: megalindo@thegalindolawfirm.com
Attorney for Plaintiff

/s/Dixie L. Coffey
Dixie L. Coffey