

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

RACHEL TUDOR,	)	
	)	
Plaintiff,	)	
v.	)	CASE NO. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

**UNITED STATES OF AMERICA’S MOTION FOR A PROTECTIVE ORDER  
REGARDING DEFENDANTS’ POST-JUDGMENT SUBPOENAS DUCES  
TECUM AND REQUEST FOR PRODUCTION OF DOCUMENTS**

**I. Introduction**

The United States of America (“United States”) hereby moves the Court, pursuant to Federal Rule of Civil Procedure 26(c), for a protective order regarding the subpoenas duces tecum, dated August 3, 2018, sent by Defendants Southeastern Oklahoma State University and Regional University System of Oklahoma (“Defendants”) to former Plaintiff-Intervenor’s counsel Dr. Jillian Weiss and the Transgender Legal Defense and Education Fund (“TLDEF”), and a Request for Production sent by Defendants to Dr. Tudor on August 3, 2018 (collectively, “Document Requests”).<sup>1</sup> The United States has resolved its underlying claims against Defendants in this litigation, but retains its interest in protecting its privileged communications with the recipients of the Document Requests, even as a third party to those Requests. To prevent the disclosure of responsive yet privileged communications, the United States seeks a protective order or other such relief as the Court may deem appropriate to ensure the ongoing confidentiality of such communications. Dr. Weiss, TLDEF, Dr. Tudor, and Defendants have all consented to the relief the United States is requesting through this Motion.

---

<sup>1</sup> While it is unclear whether the Court has granted Defendants leave to conduct post-judgment discovery, the United States assumes that it has for purposes of this motion.

## II. Background and Argument

Prior to filing its Complaint in this case, the United States entered into a common interest agreement with then-Plaintiff-Intervenor's counsel, Jillian Weiss.<sup>2</sup> The purpose of that agreement was to allow the United States and Plaintiff-Intervenor to communicate in furtherance of their joint interest. The United States later entered into a common interest agreement with Ezra Young when Dr. Tudor engaged him as her primary counsel; that agreement had the same purpose as the previous one.<sup>3</sup> The parties to those agreements covenanted to protect all communications between and among the United States, Dr. Tudor, and their attorneys relating to any litigation of the case or settlement discussions, even if the parties' interests diverged and the agreement terminated. The United States and Defendants entered into a settlement agreement in late summer 2017 and the United States has not participated in the remaining parties' litigation in any way since that time. Upon execution of the settlement agreement, the United States, recognizing the divergence of its interests from those of Dr. Tudor, terminated its common interest agreement with Dr. Tudor. Nevertheless, the parties' respective obligations to protect covered communications survive the termination of the common interest agreement.

---

<sup>2</sup> The United States assumes familiarity with the procedural history of this case and will not recount it except to the extent necessary for purposes of this Motion.

<sup>3</sup> The United States also asserted the common interest rule based on these agreements in previous filings, and those assertions were not specifically challenged. *See* ECF No. 89.

As the Court and parties are well aware, after the United States dismissed its case in connection with the settlement agreement, Dr. Tudor continued litigation against Defendants through trial and this Court issued a judgment in Dr. Tudor's favor. ECF No. 293. At that point, Dr. Weiss, TLDEF, and Dr. Tudor (through Mr. Young) each filed a motion for attorneys' fees and costs. ECF Nos. 299-306.

On August 3, 2018, Defendants sent subpoenas duces tecum with return dates of August 21, 2018 to Dr. Weiss and TLDEF. ECF No. 328 (Exs. 1 and 2). Also on August 3, 2018, Defendants issued a Request for Production to Dr. Tudor. *See* Ex. A. All three of these Document Requests seek essentially the same information:<sup>4</sup>

All documentation which supports your Motion for Attorneys' Fees [Doc. 306], costs, and/or expenses, including but not limited to, all contracts, contemporaneous and non-contemporaneous time entries, receipts, invoices, correspondence, and all other documentation supporting the requested fees, costs and expenses.

Although Dr. Weiss, TLDEF, and Mr. Young ("Producing Parties") have informed the United States they do not intend to produce any privileged materials, Defendants stated that they could not determine whether they would seek the production of responsive, privileged documents until the Producing Parties provide them with privilege

---

<sup>4</sup> The Request for Production is worded slightly differently and asks for:

All documentation which supports your Motion for Attorneys' Fees [Doc. 303] and Brief in Support of Costs [Doc. 300], costs, and/or expenses, including, but not limited to all contracts, contemporaneous and non-contemporaneous time entries, receipts, invoices, correspondence, and all other documentation supporting the requested fees, costs, and expenses.

*See* Ex. A.

logs. Because Defendants declined to provide the United States with assurances that they would not challenge assertions of common interest privilege and because some courts have held that parties seeking to prevent the disclosure of documents in response to a subpoena duces tecum must do so prior to the subpoena's response date, *see, e.g., Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs., Inc.*, No. CIV-09-70-R, at \*1 (W.D. Okla. May 18, 2010), *rev'd on other grounds*, 651 F.3d 1219 (10th Cir. 2011), the United States is compelled to file its Motion now (and prior to reviewing any privilege logs prepared by the Producing Parties) or risk waiving its privilege.

Federal Rule of Civil Procedure 26(c)(1) provides 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, including one or more of the following: (A) forbidding the disclosure or discovery; . . . (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters .

..

The United States worked closely with Plaintiff-Intervenor's various counsel up until the interests of the United States and Dr. Tudor diverged. As a result, responsive materials such as correspondence and time entries that support the Producing Parties' claims for fees and costs may include communications with the United States or reveal the content of communications with the United States, including the strategy, thought processes and mental impressions of its counsel as shared with Dr. Tudor's counsel. These communications and their contents are subject to the common interest rule, and their

disclosure could result in waiver of the privilege.<sup>5</sup> “[T]he confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.” *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (internal citations and quotation marks omitted) (discussing attorney-client privilege). *See also Leblanc v. Texas Brine Co., LLC*, No. CIV-16-1026-D, 2017 WL 913801, at \*5 (W.D. Okla. Mar. 7, 2017), *appeal dismissed sub nom. Texas Brine Co., LLC & Occidental Chem. Corp.*, 879 F.3d 1224 (10th Cir. 2018) (providing third party to subpoena with the opportunity to conduct a privilege screening prior to the subpoenaed party producing responsive materials).

While the United States fully recognizes that many responsive materials will not be protected, in an effort to maintain the privilege, the United States requests that the Court require the Producing Parties to initially produce solely to the United States any responsive materials that reference the United States or its counsel in any way, along with a proposed privilege log that identifies any of those materials that it believes to be covered by the common interest rule.<sup>6</sup> The United States will then quickly review those

---

<sup>5</sup> One exception to the general rule that only the subpoenaed party may challenge a subpoena is “where the challenging party asserts a privilege with respect to the materials subpoenaed.” *Leblanc v. Texas Brine Co., LLC*, No. CIV-16-1026-D, 2017 WL 913801, at \*2 (W.D. Okla. Mar. 7, 2017), *appeal dismissed sub nom. Texas Brine Co., LLC & Occidental Chem. Corp.*, 879 F.3d 1224 (10th Cir. 2018).

<sup>6</sup> The Producing Parties, for practicality’s sake, may elect to produce all responsive materials initially to the United States for review rather than segregating those that refer to the United States or its counsel.

materials and the proposed privilege log to determine whether it wishes to propose any revisions to that log on the basis of the common interest rule. At that point, the Producing Parties shall be required to revise their privilege logs as requested by the United States and may produce the non-privileged materials and logs to Defendants. Should Defendants wish to challenge the assertions of privilege, the United States shall be provided the opportunity to defend the privilege alongside the Producing Parties. The United States anticipates that its privilege review can be completed within seven days of receipt of materials from any Producing Party. This proposal will allow any discovery to proceed while avoiding any waiver, even inadvertent waiver, of privilege over the United States' communications with Dr. Tudor and her counsel.

### **III. Conclusion**

For the reasons described above, the United States respectfully requests that the Court grant the United States' Motion for a Protective Order.

Respectfully submitted,

Date: August 17, 2018

JOHN M. GORE  
Acting Assistant Attorney General  
Civil Rights Division

DELORA L. KENNEBREW  
Chief  
Employment Litigation Section

MEREDITH L. BURRELL (MD no number issued)  
Deputy Chief  
Employment Litigation Section

/s/ Shayna Bloom

SHAYNA BLOOM (DC Bar No. 498105)

VALERIE MEYER (AZ Bar No. 023737)

Senior Trial Attorneys

Employment Litigation Section

Civil Rights Division

United States Department of Justice

950 Pennsylvania Avenue, NW

Patrick Henry Building, Fourth Floor

Washington, DC 20530

Telephone: (202) 616-9100

Facsimile: (202) 514-1005

Shayna.Bloom@usdoj.gov

Valerie.Meyer@usdoj.gov

**CERTIFICATE OF SERVICE**

I certify that I served this document on all counsel of record through the Court's electronic filing system on the date below.

Date: August 17, 2018

/s/ Shayna Bloom  
Shayna Bloom

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

RACHEL TUDOR,

Plaintiff,

v.

Case No. 15-cv-324-C

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, and

THE REGIONAL UNIVERSITY  
SYSTEM OF OKLAHOMA,

Defendants.

**DEFENDANTS' FIRST REQUEST FOR PRODUCTION  
OF DOCUMENTS TO DR. RACHEL TUDOR**

TO: Dr. Rachel Tudor  
Ezra Young  
Law Office of Ezra Young  
30 Devoe, 1a  
Brooklyn, NY 11211-6997  
*Attorney for Plaintiff*

Defendants, Southeastern Oklahoma State University ("SEOSU") and The Regional University System of Oklahoma ("RUSO"), serve this Request for Production upon Plaintiff, Dr. Rachel Tudor under the provisions of Federal Rules of Civil Procedure, Rule 45. Responses to this Request for Production must be served on Defendants' counsel no later than thirty (30) days after service.

**INSTRUCTIONS**

1) In answering these discovery requests, you are requested to furnish all information which is in your possession, custody or control, including information in the possession of your attorneys or other persons directly or indirectly employed or

retained by you, or anyone else acting in your behalf or otherwise subject to your control.

2) If any of the following discovery requests cannot be answered in full, please answer it to the fullest extent possible, explaining why you cannot answer the remainder, and stating any information or knowledge which you have concerning the unanswered portion.

3) These discovery requests shall be deemed continuing so as to require further and supplemental answers if you obtain information with respect to the subject matter of any of these discovery requests which renders your answers thereto incomplete, inaccurate or in any way misleading.

4) When any claim of privilege is asserted in responding to any discovery asked for in these requests, identify the nature of the privilege which is being claimed and provide the following information for each item in a "privileged items log" or similar format:

- a. the type of document;
- b. the general subject matter of the document;
- c. the date of the document;
- d. the author(s) of the document, and the author's title;
- e. the addressee(s) and any other recipient(s) of the document, and their titles;
- f. the custodian of the document;
- g. the number of pages of the document; and

h. the type of privilege asserted.

### DEFINITIONS

- 1) When used in these discovery requests, the words "you," "your," "Intervenor," "Plaintiff" or "Plaintiff-Intervenor" include, in addition to the named counsel these discovery requests are directed, its counsel and all of its agents, servants, employees, representatives, affiliates, private investigators, and others who are in possession or may have obtained information for or on behalf of the party to whom these discovery requests are directed.
- 2) The terms "allegation" and "allegations" mean the allegations contained in the Complaint.
- 3) The words "person" and "persons" include, without limitation, individuals, associations, partnerships and corporations.
- 4) The term "document" is used herein in its customary broad sense and means any kind of printed, recorded, written, graphic or photographic matter, including originals, drafts, copies, non-identical copies or reproductions, summaries, reports, data compilations and tabulations, whether stored by mechanical, photographic or electronic means (including data processing of all types). The term "document" includes, but is not limited to, the following: any writing, drawing, graph, chart, plat, map, photograph, motion picture film, phonograph record, tape and video recording, any information contained in any computer although not yet printed out, or any other records or data compilations from which information can be obtained.

5) "Identify" or "Describe" when used with respect to an individual means to state such individual's name, address, telephone number, occupation or profession, job title, and the name, address and telephone number of such individual's employer.

6) "Identify" or "Describe" when used with respect to an organization (e.g., a corporation, partnership or association) means to state the name of such organization, type of such organization, and the address and telephone number of its principal place of business.

7) "Identify" or "Describe" when used with respect to a document means to describe such document with sufficient particularity in order to enable one to describe it adequately in a Request for Production of Documents. Each such document identification shall state the type of document (e.g., letter, memorandum, telegram, etc.), the date such document was signed, prepared, sent and/or received, the identities of the sender and recipient(s) or addressee(s), and the present location and custodian of such document. In lieu of such document identification, you may produce with your answers to these discovery requests a legible copy of the document you are asked to identify, indicating the Interrogatory to which the document is responsive.

8) "Identify" or "Describe" when used with respect to a fact or facts includes, in addition to the recitation of such specific fact or facts, (1) the identification of all documents which substantiate the fact or from which the fact is drawn; and (2) the identification of any other evidence, including the substance of any testimony or statement of any person or party upon which your knowledge of the fact is founded, or which supports the fact.

9) "Identify" or "Describe" when used with respect to a statement or communication means to identify the person making the statement or communication, the date it was made, the identity of the person or persons to whom the communication was made, who witnessed the same, the specific contents of the communication and the place where it was made.

10) "Identify or "Describe" when used in connection with an act mean to provide the identity of the act, the specific nature of the act, the date and place of the act and the identities of the individuals present.

11) "Communication" means any oral, written, mechanical, electronic, or other transmission of words, symbols, numbers or depictions to a person, entity, file or repository as data or information, including, without limitation, correspondence, memoranda, telephone conversations, notes, recordings, transcriptions of meetings or telephone conversations, or any other document that recorded or reflected any such communication.

12) The word "transaction" refers to any agreement, contract, promise, oral communication, exchange of assets, monies, services, labor, equipment, documents, or writings, sale, loan, gift, transfer, note, mortgage, security agreement, the conduction of any business negotiation, management, meeting, conference, function and any interaction between two or more persons by which one person can derive impressions or information from the conduct, condition, or language of the other, and vice versa, which did or did not change the condition, asset or knowledge or any person directly or indirectly involved.

13) "And" and "or" shall be construed both disjunctively and conjunctively.

14) In construing these discovery requests, the singular shall include the plural and the plural shall include the singular. Any pronoun means the masculine, feminine and neuter gender and the singular or plural as in each case may be appropriate. The use of a verb in any tense shall be construed as the use of the verb in all tenses as is necessary to bring within the scope of an Interrogatory all responses that might otherwise be construed to outside its scope.

15) "RUSO" shall refer only to the Regional University System of Oklahoma, its agents, employees, and/or board members.

16) "SEOSU" shall refer only to Southeast Oklahoma State University, its agents, and/or employees.

17) "DOJ" shall refer to the United States of America, the United States Department of Justice together with its individuals, associations, partnerships and corporations

### REQUESTS FOR PRODUCTION

**REQUEST NO. 1:** All documentation which supports your Motion for Attorneys' Fees [Doc. 303] and Brief in Support of Costs [Doc. 300], costs, and/or expenses, including, but not limited to all contracts, contemporaneous and non-contemporaneous time entries, receipts, invoices, correspondence, and all other documentation supporting the requested fees, costs, and expenses.

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](mailto:dixie.coffey@oag.ok.gov)

Email: [jeb.joseph@oag.ok.gov](mailto:jeb.joseph@oag.ok.gov)

Email: [kindanne.jones@oag.ok.gov](mailto:kindanne.jones@oag.ok.gov)

Email: [tim.bunson@oag.ok.gov](mailto: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 3rd day of August 2018, a true and correct copy of the foregoing document was sent via U.S. Mail, postage prepaid, certified return receipt requested to:

Ezra Young  
Law Office of Ezra Young  
30 Devoe, 1a  
Brooklyn, NY 11211-6997  
Email: ezraiyoung@gmail.com  
*Attorney for Plaintiff*

I further certify that on this date a true and correct copy of the foregoing document was sent via U.S. Mail, postage prepaid to the following:

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*

Charles J. Watts  
600 N. Walker, Ste. 101  
Oklahoma City, OK 73102  
Email: cjwattslaw@yahoo.com  
*Attorney for Transgender Legal Defense &  
Education Fund*

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

Jillian Weiss  
527 Hudson Street  
PO Box 20169  
New York, NY 10014  
*Former Attorney for Plaintiff-Intervenor*

/s/Dixie L. Coffey  
Dixie L. Coffey



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA  
313 N. E. 21<sup>ST</sup>  
OKLAHOMA CITY, OK 73105

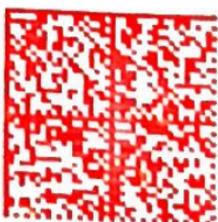
PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT  
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE  
**CERTIFIED MAIL**



91 7199 9991 7039 1900 3024

Ezra Young  
Law Office of Ezra Young  
30 Devoe, 1a  
Brooklyn, NY 11211-6997

1121136697 0039



U.S. POSTAGE PITNEY BOWES  
ZIP 73105 \$006.88<sup>0</sup>  
02 4M  
0000350897 AUG 03 2018