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

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

PLAINTIFF UNITED STATES' OPENING MOTION AND INCORPORATED BRIEF TO QUASH OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER REGARDING DEFENDANTS' NOTICE OF DEPOSITION UNDER FED. R. CIV. P. 30(b)(6)

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I. Introduction and Background

Plaintiff United States of America ("United States") hereby moves the Court, pursuant to Federal Rule of Civil Procedure 26(c) ("Rule 26(c)"), for a protective order regarding certain matters identified in Defendants' Notice of 30(b)(6) Deposition, served on July 28, 2016.[1] Defendants' Notice is almost entirely an effort to explore the mental impressions of counsel for the United States and to mine privileged communications among Department of Justice ("DOJ") attorneys to gain information about decisionmaking and documents protected by government deliberative process privilege, attorney-client privilege and the work product doctrine. Even if a deposition of counsel were justified here, which it is not, many of the matters identified do not meet the requirements set forth in Federal Rules of Civil Procedure 26 and 30 because the information sought is protected by a privilege or the work product doctrine, cumulative, or will be overly burdensome to produce. The United States seeks an order quashing the Notice in its entirely, or, in the alternative, to substantially limit its scope, and a stay if a decision on the merits of Plaintiff's Motion is not issued prior to the date for which the deposition is noticed.

[1] Pursuant to Local Rule 37.1, the United States and Defendants held a telephone conference on August 5, 2016, in which they discussed Defendants' Notice at length and, while Defendants may still be considering the United States' offers to produce writings in lieu of testimony on Matters 1 and 8, it appeared that the parties would not be able to reach agreement with respect to the other matters in the Notice. Because the United States is mindful that the deposition discussed herein is scheduled for August 24, 2016, the United States has filed this motion but has informed Defendants that it remains open to further discussion aimed at resolving the dispute.

Discovery in this case began approximately one year ago. Defendants have taken the deposition of Dr. Tudor over two consecutive days, one of which was a full day. Over the past year, the United States has produced all non-privileged documents and information in the possession of the United States that are responsive to Defendants' discovery requests, including information and documents regarding the United States' pre-suit investigation, and the United States continues to supplement its responses as appropriate.[2] To date, hundreds of pages of documents have been produced by the United States. Defendants have sought, and conducted, depositions of two current and former employees of the U.S. Equal Employment Opportunity Commission (EEOC) in connection with this case. ECF No. 60.

All of that notwithstanding, and despite the United States' privilege assertions, Defendants served the United States with a Notice of 30(b)(6) deposition on July 28, 2016, which seeks information on many of the same matters already explored in written discovery and in the depositions of EEOC investigators. ECF No. 78 (hereinafter, "Notice"). The Notice also identifies numerous topics that seek to inquire about the investigative processes undertaken by the Equal Employment Opportunity Commission ("EEOC") and DOJ prior to the initiation of this lawsuit, which are entirely irrelevant to the determination of any fact related to the claims and defenses asserted in this lawsuit. The deposition is noticed for August 24, 2016.

[2] The United States continues to defend its privilege assertions in briefing on Defendants' Motion to Compel Discovery Responses. *See* ECF Nos. 67, 75 and 83.

II. Legal Standard

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 Court should issue an order prohibiting or substantially limiting the discovery sought in the Notice because it improperly seeks the deposition of trial counsel, fails the tests of relevance and proportionality set forth in Federal Rule of Civil Procedure 26(b)(1), and seeks to inquire into matters that are protected from disclosure by the attorney-client privilege, the government deliberative process privilege, the attorney work product doctrine, and the common interest rule. Below, the United States sets forth the legal arguments that apply generally to many of the matters in the notice, and thereafter discusses and describes its specific objections to each matter in the Notice.

III. Argument

a. Defendants Cannot Show that Deposition of Counsel is Justified Here.

Under Title VII of the Civil Rights Act of 1964, as amended, ("Title VII") the Civil Rights Division of DOJ functions as a law enforcement agency, bringing affirmative cases under Title VII through the authority of the Attorney General of the

United States.[3] 42 U.S.C. § 2000e(5)(f). In that capacity, attorneys in the Civil Rights Division's Employment Litigation Section may both investigate a charge of discrimination under Title VII referred to DOJ by the EEOC and be assigned as trial counsel for the United States if the Attorney General authorizes filing suit based on such a charge, and that was the case here. *See* ECF No. 67-1 at 1 (identifying Allan Townsend as having investigated the claims made by Intervenor against Defendants). As such, a Fed. R. Civ. P. 30(b)(6) ("Rule 30(b)(6)") deposition notice that seeks information about the United States' pre- or post-suit evaluation of an affirmative Title VII case effectively seeks the deposition of trial counsel. In closely analogous situations, courts have found that such a deposition is inappropriate. *See, e.g., Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 630, 637 (D. Kan. 2000) (granting motion to quash notice of deposition).

While the Federal Rules of Civil Procedure do not categorically prohibit any type of deposition, and in fact courts are reluctant to do so, courts in the Tenth Circuit have viewed attempts to depose counsel as an exception to these general rules. *See, e.g., Simmons Foods, Inc.* at 630. Although the Tenth Circuit does not have a definitive case

[3] Under Title VII's enforcement scheme, the EEOC and DOJ share authority for the enforcement of Title VII with respect to state and local governmental employers. As set forth in Title VII, the EEOC receives and investigates charges of discrimination against state and local governmental employers. 42 U.S.C. § 2000e(5)(f). Following an investigation of such a charge, the EEOC determines whether there is reasonable cause to believe that the state or local governmental employer violated Title VII. If the EEOC finds cause to believe that a Title VII violation has occurred, it attempts to remedy the violation through the statutory conciliation process. If the EEOC determines that efforts to conciliate a Title VII charge against a state or local government are unsuccessful, the EEOC formally refers the charge and its investigative file to DOJ because DOJ is the sole federal entity that has authority to sue state and local government employers.

on the standard, courts frequently rely on the factors articulated in *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1326 (8th Cir. 1986), to evaluate whether a deposition of counsel should be permitted. *See Simmons*, 191 F.R.D. at 630; *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001) (implying that the Tenth Circuit has adopted the *Shelton* test). The *Shelton* standard allows the deposition of counsel where:

> (1) no other means exist to obtain the information except to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Id. The burden is on the party seeking the deposition to establish that the criteria are met. *Simmons*, 191 F.R.D. at 630 (citing *Shelton* at 1326).[4]

Defendants cannot establish the *Shelton* criteria here.[5] In many instances, discussed in more detail below, there are other sources for the limited amount of relevant, non-privileged information Defendants are seeking. Of course, as contemplated by the second *Shelton* factor, most of the information Defendants are seeking may or may not be relevant but is privileged and cannot be disclosed through any means of discovery.

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[4] In *Simmons*, the court stated its understanding that in the Tenth Circuit, even if the *Shelton* factors are met, a court may still prohibit the deposition of counsel in some instances, and that *Boughton* does not require lower courts to utilize a definitive test (such as the *Shelton* criteria) in every case where opposing counsel's deposition is sought. *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 630-31 (D. Kan. 2000) (citing *Boughton v. Cotter Corp.*, 65 F.3d 823, 829-31 (10th Cir. 1995)).

[5] Although Defendants are likely to compare their Notice with the United States' efforts to depose Charles Babb, the two situations are distinguishable because: (1) Mr. Babb is not counsel in this case; (2) the information to be discovered from him is no longer privileged; and (3) Mr. Babb is actually a fact witness to many of the underlying events in the case. A dispute between the parties about Mr. Babb's deposition is currently pending before the Court. *See* ECF Nos. 68, 76 and 84.

Finally, the information Defendants seek is far from crucial. The United States has produced extensive documentation and information to support its claims, Defendants have a wealth of their own information to draw from in attempting to marshal defenses, and many of the matters in the Notice closely resemble written discovery requests that Defendants propounded months ago and to which the United States has responded.

Of course, even if Defendants overcame all of the *Shelton* factors, the other usual barriers to deposing opposing counsel strongly disfavor allowing it here. "The deposition of opposing counsel is often met with skepticism because routinely allowing such depositions could encourage 'delay, disruption of the case, harassment, and unnecessary distractions into collateral matters.'" *Nelson v. Hardacre*, 312 F.R.D. 609, 613 (D. Kan. 2016) (applying *Shelton*, distinguishing cases that involved the intended depositions of counsel whose involvement in each case was multifaceted and prohibiting deposition of counsel) (internal citation omitted). Perhaps foremost, deposing a member of the trial team during the last two weeks of discovery would severely disrupt preparation of the case. *Id.* at 620 (finding pretrial delays would result from allowing deposition of counsel). And requiring counsel to prepare a non-lawyer or another attorney who is not a member of the trial team on the spectrum of matters identified in the Notice (which would take substantial time and effort) does not alleviate these issues because no deponent could answer questions about these matters without relying on the work product of attorneys in the case. *See EEOC v. McCormick & Schmick's Seafood Restaurants, Inc.*, No. CIV.A. WMN-08-CV-984, 2010 WL 2572809, at *5 (D. Md. June 22, 2010)

(although 30(b)(6) topics were styled as inquiries about factual information, court quashed notice because it would yield protected information, and the need to prepare a proxy would result in an undue burden, particularly where the noticing party could obtain the underlying factual information through other discovery means); *SEC v. SBM Inv. Certificates, Inc.*, No. CIV A DKC 2006-0866, 2007 WL 609888, at *24 (D. Md. Feb. 23, 2007) (neither an SEC attorney nor someone prepared by an SEC attorney would be required to provide deposition testimony because either type of witness would reveal attorney work product); *SEC v. Rosenfeld*, No. 97 CIV. 1467 (RPP), 1997 WL 576021, at *3-4 (S.D.N.Y. Sept. 16, 1997) (granting motion to quash 30(b)(6) notice issued to SEC in SEC enforcement action, and finding that even if counsel were not designated as a witness, witness preparation would entail disclosure of the SEC attorneys' legal and factual theories as regards the alleged violations of laws and their opinions as to the significance of documents, credibility of witnesses, and other matters constituting attorney work product); *cf. EEOC v. Pointe at Kirby Gate, LLC*, 290 F.R.D. 89, 91 (W.D. Tenn. 2003) (where non-attorneys would have the information sought by the 30(b)(6) notice, the noticing party was permitted to take the testimony of a non-attorney EEOC employee rather than that of EEOC counsel to avoid intruding into privileged areas). As many other courts have recognized, a court should not require the deposition of trial counsel who investigated a case, or deposition of non-trial counsel who was prepared by trial counsel because of the inherent intrusions into attorney mental impressions and work product that it involves. The same is true here.

b. Even if Defendants Could Overcome the Heavy Burden Needed to Depose the United States' Counsel, the Court Should Still Bar Deposition on Most Matters in the Notice.

1. The Testimony Defendants Seek Does Not Meet the Relevance and Proportionality Standards of FRCP 26(b).

For information to be discoverable, it must be relevant and proportional to the case. FRCP 26(b)(1). Proportionality is assessed by looking at:

> the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Id. Many of the matters included in Defendants' Notice fail the threshold standard of relevance because they seek to inquire about the investigative processes of the EEOC and DOJ prior to initiation of the instant lawsuit, topics that have no bearing on whether the Defendants discriminated against Dr. Tudor. Defendants apparently wish to conduct a deposition of the United States simply because it is a plaintiff, without acknowledging that the United States Department of Justice was not a firsthand participant or even witness to the facts underlying this case. DOJ was not part of the actions that created the basis for the lawsuit, and its actions in investigating the lawsuit are not relevant to any pending claims or defenses. Notably, in the briefing on Defendants' recent motion to compel production of documents relating to these investigatory processes (ECF No. 67), Defendants acknowledged that they are required to show a need for the information requested, yet they failed to identify a single element of any claim or defense in this case to which such information is relevant, despite their burden to do so in order to overcome

the United States' privilege objections. ECF No. 67 at 11. That failure speaks volumes regarding the lack of relevance of this information to any issue a factfinder will be required to evaluate in this litigation.

In light of the absence of relevance, the benefit or importance of the discovery sought in Defendants' Notice cannot overcome the burden of requiring the United States to prepare and present a witness all of the identified matters. As a result, Defendants cannot establish that the requested discovery is proportional to the needs of the case, and the matters identified and discussed below are not subject to discovery.

2. Each Matter in Defendants' Notice is Objectionable and Should be Stricken or Substantially Narrowed for Other Reasons.

> *Matter 1: Dollar amounts claimed by Plaintiff, itemized/broken down by item(s) or dollar amounts, for Dr. Tudor including "the damages [Tudor] has suffered including, but not limited to, lost income, loss of enjoyment of life, and damage to her professional reputation," as well as "any further relief necessary to make Dr. Tudor whole;" and the "United States' costs and disbursements in this action."*

There can be no purpose for seeking the United States' testimony on this subject except to evaluate the reasoning of counsel or determine what facts counsel did and did not consider in calculating damages, so any responsive information will be protected by the attorney work product doctrine. Further, this matter is cumulative because the United States must provide a damages calculation under Fed. R. Civ. P. 26(a), and while the United States will update its written calculation (which is subject to change as discovery continues) and Defendants are considering this offer in lieu of testimony, it is simply not possible to prepare a witness to testify beyond what will be in the United States' written

damages calculation without disclosing privileged information. *See, e.g.*, *EEOC v. Texas Roadhouse, Inc.*, No. CIV.A. 11-11732-DJC, 2014 WL 4471521, at *4 (D. Mass. Sept. 9, 2014) (FRCP 30(b)(6) testimony on damages calculations was not appropriate, and information could be obtained through other discovery means). Thus, the United States requests that the Court prevent Defendants from obtaining deposition testimony on Matter 1.

> *Matter 2: The new policies, practices, and programs Plaintiff seeks to be implemented by RUSO and SEOSU.*

This topic is cumulative in that Defendants already requested this information through written discovery, and it is premature in the sense that the United States has not yet completed discovery that will allow it to formulate appropriate injunctive relief. In fact, more than four weeks before Defendants served the Notice, the United States had noticed a Rule 30(b)(6) deposition of Defendants for August 16, 2016 (now set for August 26, 2016) that will explore, among other things, the Defendants' respective roles in preventing and correcting discrimination and harassment, but until the United States has all of the information it needs, it cannot respond.[6]

> *Matter 3: The specific training Plaintiff wants RUSO and SEOSU to provide to employees.*

The United States objects to this matter for the same reasons it objects to Matter 2, *supra*.

[6] The United States' FRCP 30(b)(6) deposition of Defendants was originally noticed for August 16, 2016, but at Defendants' request, on August 8, 2016, the United States agreed to move it to August 26, 2016.

Matter 4: Documents containing, reflecting, or referencing communications between USA/Equal Employment Opportunity Commission ("EEOC") and Tudor prior to the EEOC's issuance of its Determination regarding Tudor's charge.

To the extent Defendants are requesting testimony about the general category of documents identified here, it should be self-evident that the United States, through the Department of Justice, simply cannot testify about communications that the EEOC had. Therefore, the United States limits its response to that portion to the "USA" portion of this topic. With that limitation, some of the responsive testimony, such as internal documents reflecting communications among DOJ attorneys, will be privileged.[7] The government deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The privilege also covers documents that contain factual information if the government employees who created the documents chose what facts to include in them based on what they believed would be relevant to the agency's decisionmaking process. *See, e.g.*, *Leopold v. Central Intelligence Agency*, 89 F. Supp. 3d 12, 21-22 (D.D.C. 2015). And courts, including the Tenth Circuit, have held that government deliberations concerning whether to initiate litigation, or pursue a

[7] Defendants previously stipulated that communications among DOJ employees are not discoverable and need not be listed on a privilege log. Ex. 3 to the United States' Response to Defendants' Motion to Compel Discovery Responses, ECF No. 75-3.

particular course of action in litigation, are protected by the deliberative process privilege. *See Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 939 (10th Cir. 2005).[8]

Here, for example, there may be documents that "reference" DOJ attorneys' communications with Dr. Tudor but are not discoverable based on the government deliberative process privilege and/or attorney work product doctrine. For documents that are not privileged, any testimony beyond the documents themselves will be attorney-client privileged. The Court should issue a protective order on this topic.

> *Matter 5: Documents containing, reflecting, or referencing communications between USA/EEOC and Tudor after the EEOC's issuance of its Determination regarding Tudor's charge, but prior to EEOC's conclusion that conciliation had failed.*

Matter 5 is not the proper subject of deposition testimony for the same reasons described in the discussion of Matter 4, *supra*. Materials other than those that the United States has already produced may be responsive but also attorney-client privileged and part of the governmental deliberative process. Thus, this matter should not be the subject of Rule 30(b)(6) testimony.

> *Matter 6: Documents containing, reflecting, or referencing communications between USA/EEOC and any RUSO or SEOSU employee*

[8] The United States is attaching, with this filing, a declaration from Vanita Gupta which asserts governmental deliberative process privilege with respect to nine of the Matters identified in the Notice. *See* Ex. A. Although the United States has attempted to narrow its assertion of governmental deliberative process privilege to those few matters, as noted in Paragraph 7 of the declaration, other Matters may be privileged to the extent the Defendants' questioning seeks pre-decisional, deliberative information., The United States is not waiving that privilege should it become applicable in other Matters during the course of a deposition.

prior to the EEOC's issuance of its Determination regarding Tudor's charge.

The United States objects to this topic for the same reasons it objects to Matter 4. Additionally, here, since employees of Defendants would be parties to any such communication, the United States' testimony would add nothing but the impressions of counsel, which is attorney-client privileged and is not properly the subject of deposition testimony. The United States requests that the Court disallow deposition testimony on this topic.

Matter 7: Documents containing, reflecting, or referencing communications between USA/EEOC and any RUSO or SEOSU employee after the EEOC's issuance of its Determination regarding Tudor's charge, but prior to EEOC's conclusion that conciliation had failed.

The United States objects to this topic and incorporates by reference its arguments with respect to Matters 4, 5 and 6, *supra*.

Matter 8: The identity of all persons involved in making decisions on behalf of (a) USA, (b) EEOC, and (c) Tudor with respect to the conciliation process for the EEOC Charge.

To the extent that this notice is requesting the Rule 30(b)(6) testimony of the United States (and Defendants seem to have acknowledged, by issuing a separate notice to the EEOC, that DOJ and EEOC are not the same entity), asking who made decisions for the EEOC during conciliation, which has concluded, is outside the scope of the notice, even if the United States had that information, which it does not. Similarly, asking who made decisions for Dr. Tudor is outside the scope; Defendants already took Dr. Tudor's deposition over the course of two days and had the opportunity to explore that topic at length. The United States simply does not know who was "involved in

making decisions on behalf of" EEOC and Tudor "with respect to the conciliation process." Communications between the United States and Tudor after the litigation began would be protected by attorney-client privilege and the common interest rule.

This matter also could include objectionable questions because any responsive information regarding internal DOJ decisionmaking would be rendered non-discoverable by the governmental deliberative process privilege. That said, the United States, through the Department of Justice, was not a party to the conciliation and did not make any decisions with respect to that process, and has offered to formally state that in writing if Defendants will agree to withdraw the topic, which would render the United States' argument on this point moot.

> *Matter 9: Each specific action taken by RUSO and/or SEOSU which USA contends constituted discrimination in violation of Title VII.*

This matter is cumulative and not the proper topic of Rule 30(b)(6) deposition. The United States wrote, in the Joint Status Report filed in this case on July 21, 2015, that Plaintiffs allege that Defendants "discriminated against Dr. Tudor on the basis of sex, in violation of Title VII, when (1) they denied Dr. Tudor's 2009 application for tenure and promotion and (2) refused to let her apply for tenure and promotion in 2010. Plaintiffs further allege that Defendants retaliated against Dr. Tudor in violation of Title VII when they refused to let her apply for tenure and promotion in 2010." ECF No. 35 at 1-2.

Beyond that, Defendants apparently seek to discover how the United States "intends to marshall the facts, documents and [statements] in its possession, and to discover the inferences that [the United States] believes properly can be drawn from the

evidence it as accumulated." *SEC v. Morelli,* 143 F.R.D. 42, 47 (S.D.N.Y.1992) (disallowing deposition of agency attorney, or proxy prepared by attorney, because topics would yield attorney work product, and allowing contention interrogatories instead). Such information, not surprisingly, is protected by the attorney work product doctrine. There is no set of questions Defendants could ask on this matter that would not amount to a deposition about counsel's opinions and impressions. On that basis, the United States objects to this matter.

Matter 10: The facts USA believes support the contentions in the lawsuit.

This matter is cumulative and overly burdensome and seeks attorney work product. Defendants have tried to elicit this same information in an interrogatory, and the United States objected, in motion practice regarding that interrogatory, on the same basis. *See* United States' Response to Defs.' Mot. to Compel Discovery Responses at 18 (discussing Interrogatory Nos. 11 and 12; *see also Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502-03 (D. Kan. 2006)). The same rationale applies here. The United States is not required to provide its thoughts on all of the evidence it has adduced, because that information is protected by the work product doctrine. *See, e.g.*, *EEOC v. McCormick & Schmick's Seafood Restaurants, Inc.*, No. CIV.A. WMN-08-CV-984, 2010 WL 2572809, at *5 (D. Md. June 22, 2010) (finding that despite defendants' insistence that it only sought factual information, defendants were actually seeking EEOC's counsel's interpretation of the facts and how they chose to proceed in preparing their case and granting the EEOC's motion for a protective order to that end). If the matter were

limited to one area of inquiry, for example, a single allegation, it might be possible for Defendants to overcome privilege and work product concerns by showing that such information was not available elsewhere and that the need was crucial, but that is not the case here. Finally, the phrasing is so broad that it would be difficult, if not impossible, to properly prepare any individual to testify to this topic. The United States request that the Court disallow exploration of this topic during a Rule 30(b)(6) deposition.

Matter 11: Information regarding health care professionals who have treated Tudor is the last ten years.

Again, the United States has addressed this in its response to Defendants' Motion to Compel Discovery Responses. ECF No. 75 at 14. Dr. Tudor, who is a party to this case in her own right, has objected to production of these medical records for a variety of reasons, including the psychotherapist-patient privilege. She has expressed those objections in response to a separate set of Requests for Production that the Defendants served on her. The United States agrees with Dr. Tudor's objections but since Dr. Tudor—not the United States—has this information and holds any applicable privilege over it, the United States should not be obligated to provide testimony on it, nor can it properly provide such testimony once Dr. Tudor has asserted the privilege. In addition, attorney-client privilege and the common interest rule protect any post-complaint communications between Tudor and her counsel and the United States on this matter.

Matter 12: The identity of the persons interviewed by Plaintiff, the time/date(s) those interviews took place, and who was present for each.

The United States objects to this matter on the basis that it is overbroad in its definition of "Plaintiff." In the parties' August 5 meet and confer, Defendants agreed that this matter could be limited to the identification of persons interviewed *regarding Dr. Tudor*, but contended that the United States should contact other Executive Branch offices and agencies aside from the office within DOJ that investigated and is litigating this case to determine whether anyone in those agencies ever interviewed anyone about Dr. Tudor. This request is not proportional to this case. First, case law rejects the notion that the entire Executive Branch is subject to party discovery simply because one entity within the federal government brings an enforcement action.. *See SEC v. Biopure Corp.*, No. 05-00506 (RWR/AK), 2006 WL 2789002, at *4 (D.D.C. Jan. 20, 2006) (finding "no support for Biopure's proposition that because the SEC [Government] is a party, then other branches of the Government such as the FDA should also be treated as a party"). Moreover, when one federal agency brings suit, non-party federal agencies are only subject to the plaintiff agency's discovery obligations in limited circumstances, not applicable here. Courts have sometimes required production from a non-party federal agency when the plaintiff agency and the non-party agency were involved in a joint investigation of the subject matter of the litigation or have coordinated regarding separate investigations of the subject matter. *See United States v. Finnerty*, 411 F. Supp. 2d 428, 432-433 (S.D.N.Y. 2006). Similarly, the fact that the Civil Rights Division's

Employment Litigation Section brought this suit does not render every other agency of the federal government subject to discovery.[9]

This matter also seeks testimony that is protected by privilege. Lower courts in analogous cases have held that the governmental deliberative process privilege encompasses internal agency policies pertaining to the conduct of investigations. For example, in *EEOC v. Texas Roadhouse, Inc.*, No. 11-11732-DJC, 2014 WL 4471521, at *6 (D. Mass. Sept. 9, 2014), defendants sought Rule 30(b)(6) testimony from the EEOC concerning, among other matters, "the EEOC's internal directives regarding the handling or investigation of systemic discrimination charges and the conciliation process [privilege]." *Id.* at *6. The court granted the EEOC's motion for a protective order with respect to this matter, holding that such information "is protected by the governmental deliberative process." *Id*.

Similarly, the information sought by Matter 12 is protected by the deliberative process privilege. Who the United States decided to interview, as well as when and in what order, shows the mental processes of counsel for the United States, and is not subject to disclosure in a deposition or during discovery at all. To the extent there are certain witnesses who have information relevant to the claims and defenses at issue in

[9] Of course, some analogous cases might hold that the EEOC was subject to discovery in this case, but as the United States points out in this brief, the EEOC has already produced documents and witnesses in this case, and it is also the subject of a separate Rule 30(b)(6) notice.

this litigation, those witnesses have been identified in Initial Disclosures, which the United States will supplement as appropriate.

Further, Defendants have not drawn any temporal distinctions here. Prior to the EEOC's issuance of its letter of determination, this information would be protected by governmental deliberative process privilege as well as the work product doctrine. After the charge had been referred to DOJ by the EEOC, but before suit was brought, the same privileges would apply, in addition to attorney-client privilege. Post suit, attorney-client privilege would apply as well.

> *Matter 13: Oral or written statements by RUSO or SEOSU, (or their employees), that Plaintiff believes evince or support any allegation or claim.*

The United States objects to this topic based on overbreadth, vagueness, and ambiguity. Defendants already have asked for all statements which support the United States' refusal to admit that Defendants had not violated Dr. Tudor's rights. ECF No. 67-1 at 22 (United States' Response to Defs.' Request for Production No. 14. The United States produced responsive documents. Matter 13 represents an effort to "drill down" on the previous requests to discover what the United States believes, the response to which would be attorney work product. It is also unclear whether "oral statement" includes any statements that the United States alleges have been made, statements that are written somewhere in the record, statements in recorded interviews or deposition transcripts, or some or all of those.

Matter 14: Information about Plaintiff-Intervenor's physical, mental, or emotional condition, treatment, care, counseling, treatment, and/or hospitalizations over the past ten years.

The United States objects to this topic for the same reasons it objects to Matter 11, and incorporates its response to that matter by reference.

Matter 15: Tudor's communications with the United States Department of Justice ("DOJ") and/or other offices, departments, or agencies of Plaintiff.

The United States, through the Department of Justice, cannot prepare a witness to testify as to what communications Dr. Tudor may have had with several agencies of the United States over an unlimited period of time. This topic is so lacking in particularity that it could include testimony on Dr. Tudor's visits to the Social Security Administration to obtain a copy of her Social Security card, or interactions with the U.S. Postal Service, which is unduly burdensome and completely irrelevant. Even if this topic were limited to interactions about this case, the United States simply cannot testify to every office Dr. Tudor might have contacted. Again, Defendants already took Dr. Tudor's deposition over the course of two days and had the opportunity to explore that topic at length if they had wished to do so. Taking the analysis a step further, even if the matter were limited to 2007 to the present, and to DOJ's Civil Rights Division, Employment Litigation Section, as the United States offered to do during the meet and confer, the United States has already produced all non-privileged information responsive to this request, and additional information will be protected by attorney-client privilege and the common interest rule. Therefore, the Court should not permit exploration of this matter during a Rule 30(b)(6) deposition.

> *Matter 16: The statutes, rules, regulations, "dear colleague letters," policies, position statements, and/or other guidance relied upon by Plaintiff in making its determinations regarding Tudor's charge.*

The information Defendants seek here is protected by government deliberative process privilege, attorney work product doctrine and attorney-client privilege. The United States is under no obligation to reveal to Defendants what it relied upon in making determinations about Dr. Tudor's charge, and this topic is a bare attempt to get at the United States' attorneys' mental processes in preparing the United States' case. This topic should be stricken from the Notice.

> *Matter 17: The statutes, rules, regulations, "dear colleague letters," policies, position statements, and/or other guidance issued by DOJ in the years 2006 through present specifically regarding the protection of transgender persons' rights in employment and education, and all such rules or guidance actually issued by DOJ specifically to institutions of higher education regarding transgender issues from 2006 through present.*

Initially, DOJ does not "issue" statutes, and the Civil Rights Division's Employment Litigation Section does not issue regulations. To the extent that Defendants seek testimony regarding policies, position statements and guidance that was not issued publicly, or that they seek testimony regarding the deliberations or reasons behind publicly-issued polices, that information is privileged. Courts examining Rule 30(b)(6) notices to government agencies have found advisory opinions protected by deliberative process privilege. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). To the extent these materials were issued publicly, particularly to institutions of higher education such as Defendants, they are available to Defendants and

in that way, this matter does not meet the proportionality requirement of Fed. R. Civ. P. 26 and is unnecessarily burdensome.

> *Matter 18: All lawsuits filed (or threatened to be filed) by Plaintiff against institutions of higher education in which reinstatement and or an award of tenure was sought by Plaintiff.*

This topic is vague and ambiguous in its use of the phrase "threatened to be filed." This could mean matters the United States investigated, matters in which the United States issued a findings letter, or matters in which the United States issued a notice of suit approval. It also does not define "Plaintiff," and because the plaintiff is the United States of America, it could mean the entire federal government, in which case it is overly burdensome and lacks proportionality under Rule 26. It is also overbroad, with no temporal limitation. Thus, the United States cannot properly prepare a witness on this topic. Even if Defendants reformulated this topic, any responsive information would have no probative value to the allegations in this case. The United States respectfully requests that the Court bar inquiry into this matter by Defendants.

> *Matter 19: All lawsuits filed (or threatened to be filed) by Plaintiff seeking relief based on individuals' transgender status.*

This topic is overly burdensome to the extent that, as with the previous topic, it may include the entire government of the United States, which includes many entities that file lawsuits, most of which have no relevance here. Furthermore, it fails the proportionality test of Rule 26 because these other lawsuits have no discernible relevance to this case. Even if Title VII lawsuits filed by the Civil Rights Division regarding transgender people were relevant, which the United States argues they are not, this is not

the proper subject of Rule 30(b)(6) deposition because testimony regarding matters that are not public will be protected by the governmental deliberative process privilege. The United States is willing to provide a written answer to a narrowed version of this topic, limited to Title VII cases actually filed by the Civil Rights Division from 2006 to the present if that will resolve this dispute, but otherwise, the United States moves for a protective order on this topic.

> *Matter 20: All consent decrees and/or settlement agreements entered by DOJ with any party(ies) from 2006 to present regarding claims or charges of discrimination based on individuals' transgender status.*

Once more, this topic is overly burdensome to the extent that it includes all of the U.S. Department of Justice. For example, as written, this topic would require a witness to testify about cases brought under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which, absent a showing to the contrary, are certainly not relevant to this case. Responsive information is neither easily accessible nor relevant to this case. The United States requests that the Court disallow exploration of this matter during a deposition.

III. Conclusion

For the reasons described above, the United States respectfully requests that the Court quash Defendants' Rule 30(b)(6) Notice to the United States, or, in the alternative, limits the scope in the ways outlined in detail *supra* in this Motion. The United States further requests that the Court stay the deposition, currently noticed for August 24, 2016, pending resolution of this dispute.

Respectfully submitted,

Date: August 10, 2016

VANITA GUPTA
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Civil Rights Division

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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 10, 2016 */s/* Shayna Bloom

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

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

DECLARATION AND CLAIM OF PRIVILEGE ON BEHALF OF THE UNITED STATES OF AMERICA

1. I, Vanita Gupta, am the Principal Deputy Assistant Attorney General for the Civil Rights Division ("Division") of the United States Department of Justice (DOJ). As the Principal Deputy Assistant Attorney General, I am the senior management official of the Civil Rights Division. As a part of my official duties, I am responsible for the overall supervision of the Division's enforcement of the federal statutes and regulations that fall within the Division's mission, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Among the matters under my supervision is *United States and Tudor v. Southeastern Oklahoma State University and the Regional University System of Oklahoma*, Civil Action No. 5:15-CV-00324-C. The statements made in this declaration are based upon my personal knowledge as well as information obtained during the course of my official duties.

2. I have been informed that Defendants Southeastern Oklahoma State University (SEOSU) and the Regional University System of Oklahoma (RUSO) seek to depose the United States pursuant to Rule 30(b)(6) of the Federal Rules of Civil

Procedure on a variety of specific topics, many of which seek testimony regarding information that is protected from disclosure under the government deliberative process privilege.

3. As the senior management official of the Division, I have been authorized by the Attorney General of the United States to assert the governmental deliberative process privilege on behalf of the United States in the Division's enforcement proceedings and in other matters in which disclosure of the Division's deliberative information is sought. I am submitting this declaration as a formal assertion of that privilege in support of the United States' motion to quash and/or for a protective order relating to Defendants' deposition notice.

4. My formal assertion of the deliberative process privilege is based on my personal knowledge of the deliberative and decision-making processes of the Division, including the manner in which enforcement matters are identified, investigated, and evaluated; my personal knowledge of many of the deliberations that occurred in the United States' evaluation of the claims in this case, set forth in my July 26, 2016 declaration; and my personal review of the notice of deposition, made pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, filed in this case by SEOSU and RUSO. I understand the deposition notice was served via ECF on the United States on July 28, 2016.

5. The operation of the DOJ as a federal law enforcement agency requires the free expression by DOJ employees of their analyses, advice, recommendations and conclusions made in conjunction with the DOJ's enforcement responsibilities. The frank and candid exchange of ideas and thorough evaluation of the merits of respective positions is vital to informed and effective decision-making by DOJ. Without the assurance of confidentiality, the ability of DOJ employees to fully identify and evaluate competing ideas and options by expressing to each other their analyses and judgment regarding these ideas and options would be impaired.

6. Defendants seek the testimony of a deponent who would testify about matters relating to the pre-decisional deliberations internal to DOJ, and pre-decisional deliberations between DOJ and the Equal Employment Opportunity Commission (EEOC). Specifically, the following deposition topics appear to be intended to seek such deliberative information:

a. Matters 4, 5, 6 and 7 seek to inquire into documents, which would necessarily include governmental internal documents, that "reflect" or "reference" communications with Dr. Rachel Tudor or Defendants' employees at various points prior and subsequent to the EEOC's issuance of its Letter of Determination, as well as prior to the United States' filing of this lawsuit;

b. Matter 8 appears to seek to inquire into the DOJ's decision-making process contemporaneous to the conciliation process for Dr. Tudor's charge;

c. Matter 16 seeks to inquire into the DOJ's legal theory of this case;

d. Matter 17 appears to seek to inquire into guidance issued by the DOJ in the years 2006 through present specifically regarding the protection of transgender persons' rights in employment and education and explicitly includes, as an area of inquiry, guidance and policies that have only been issued internally; and

e. Matters 18 and 19 appear to seek to inquire into internal deliberations and decisions about litigation.

7. In addition to these specific matters, many other matters in the deposition notice may implicate pre-decisional governmental deliberations. However, given the vague and ambiguous nature of those other matters as drafted, it is unclear whether Defendants intend to inquire into internal governmental decision-making processes or documents. To the extent that Defendants do so with regard to other matters in the notice not specifically identified above, responsive information would be protected by the deliberative process privilege.

8. Upon my personal consideration, I approve the assertion of the governmental deliberative process privilege with regard to Matters 4, 5, 6, 7, 8, 16, 17, 18 and 19 of Defendants' Rule 30(b)(6) deposition notice, to the extent that questions regarding those matters seek to inquire into pre-decisional governmental deliberations. I also approve the assertion of the governmental deliberative process privilege as to other matters to the extent Defendants seek to inquire into pre-decisional governmental deliberations.

9. I have determined that the assertion of the governmental deliberative process privilege in these circumstances advances the purpose of said privilege, in that it promotes the candid discussions among personnel within the Department of Justice necessary for effective decision-making and protects the integrity of Department of Justice decisions.

10. Additionally, I have determined that disclosure of the advice, opinion, facts, and recommendations contained in or selected for pre-decisional governmental deliberation that Defendants may seek through testimony regarding these deposition matters would materially impair DOJ's decision-making concerning its enforcement of Title VII. Specifically, I have determined that such disclosure would discourage open and frank discussion within DOJ, and it would inhibit open and frank inter-agency communication between DOJ and other Executive Branch agencies with statutory authority to investigate allegations of unlawful discrimination and to refer unresolved meritorious claims to the DOJ for further enforcement, including EEOC. If DOJ and EEOC officials and staff anticipate that their frank and open exchange of information and ideas in the course of their pre-decisional deliberations concerning enforcement and policy decisions are subject to subsequent disclosure, the vigorousness of their debate and their explanations of their recommendations will be tempered. This tempering is detrimental to the policy-making process, enforcement of anti-discrimination laws, as well as the public interest.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: 8-8-16

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division
United States Department of Justice

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

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

[PROPOSED] ORDER

Upon consideration of the United States' Motion and Incorporated Brief to Quash or, In the Alternative, for a Protective Order Regarding Defendants' Notice of Deposition Under Fed. R. Civ. P. 30(b)(6), the Court hereby grants the Motion and orders that the Notice of Deposition is hereby quashed and a protective order is issued as to the entire Notice.

_____
ROBIN J. CAUTHRON
United States District Judge