IN THE DISTRICT COURT IN AND FOR CLEVELAND COUNTY
STATE OF OKLAHOMA

THE SUSTAINABLE JOURNALISM FOUNDATION *d/b/a* NONDOC MEDIA, *and* WILLIAM W. SAVAGE III, Plaintiffs,	)
vs.	) Case No. CV-2021-1770) Judge Walkley
THE STATE OF OKLAHOMA ex rel. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, Defendant.	)

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR EXPEDITED HEARING AND PROTECTIVE ORDER TO QUASH DEPOSITION SUBPOENA OF JAMES GALLOGLY

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Plaintiffs respectfully ask this Court to deny Defendant's (the "University's") Motion for Protective Order to Quash the Deposition Subpoena of James Gallogly (the "Motion" or "Def. Mot."). The University cannot assert any privilege invoked in its motion over Gallogly's anticipated deposition testimony. Moreover, the information to which Gallogly intends to testify is not privileged to begin with, and the University has not demonstrated otherwise. Indeed, the relief the University's Motion seeks is heavily fact-dependent, but it has submitted no supporting facts.

If the Court does not deny Defendant's motion outright, Plaintiffs submit a pragmatic path forward. Specifically, Gallogly's deposition can be taken under temporary seal. Defendant can thereafter make a specific demonstration as to which portions of the deposition testimony it believes are privileged and the necessary factual and legal bases for any such assertion.

INTRODUCTION AND BACKGROUND

After the University obstructed party discovery during the entire 2022 calendar year, Plaintiffs began to pursue necessary non-party discovery.[1] On January 5, 2023, Plaintiffs informed the University of Plaintiffs' intent to take the deposition of James Gallogly, former President of the University, on February 22. The University thereafter began a campaign to prevent the deposition by contacting Gallogly the very next day, January 6, telling him it would do what was "need[ed]" to "protect" itself from his testimony.[2] Meanwhile, the University did not inform Plaintiffs that it intended to seek a protective order to quash the scheduled deposition until January 25, and, notwithstanding a meet and confer and correspondence with undersigned

[1] *See generally* Pls.' Mot. to Compel Discovery, May 20, 2022 (detailing obstruction); Pls' Reply in Sup. of Mot. to Compel Discovery, Jul. 25, 2022.
[2] Exhibit A (Ltr. from Def.s' Counsel to Gallogly, Jan. 6, 2023) ("We appreciate and trust in your continued respect of the privileges related above, and the Regents need to protect same.").

counsel, the University did not fully set forth its purported basis for seeking such an order until its Motion was filed on February 13.[3]

Gallogly is a willing witness who is represented by counsel, and the University concedes he has knowledge of facts relevant to several claims and defenses raised in this lawsuit.[4] In spite of this, the University has harassed Gallogly into a precautionary posture by implying that the University might sue him if he complies with Plaintiffs' subpoena and testifies.[5] Still, Gallogly's counsel has informed Plaintiffs' counsel that he remains willing to testify to relevant, non-privileged facts within his knowledge as soon as the Court denies Defendant's Motion for Protective Order.

The Protective Order should be denied because Plaintiffs are entitled to conduct this necessary, non-party discovery. Gallogly's anticipated testimony does not implicate any privilege held by the University. Rather, as set forth below, the University's motion is an unfortunate manifestation of its apparent belief that it can enjoy blanket protection from discovery by simply invoking the attorney-client privilege and other inapplicable protections without documenting a basis or carrying its burden of proof.

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[3] Exhibit B (Ltr. from Def.'s Counsel to Pls.' Counsel, Jan. 25, 2023) ("I intend to file a motion for protective order to quash Gallogly's deposition subpoena."); Def. Mot. at 7–13 (setting forth purported basis).

[4] Exhibit C (Ltr. from Gallogly to All Counsel, Jan. 19, 2023) at 4 ("I am now under subpoena and plan to appear and testify under oath."); *id.* at 11 ("I look forward to explaining these things in more detail under oath."); Exhibit A (Ltr. from Def.'s Counsel to Gallogly, Jan. 6, 2023) ("We anticipate this deposition will attempt to discover matters related to David Boren and both Jones Day Reports.").

[5] Exhibit A (Ltr. from Def.'s Counsel to Gallogly, Jan. 6, 2023); Exhibit B (Ltr. from Def.'s Counsel to Pls.' Counsel, Jan. 25, 2023) ("I have a duty to the Board to ensure Mr. Gallogly has not already breached his ongoing legal duties.").

STANDARD OF LAW

"Except as otherwise provided by constitution, statute or rules promulgated by the Supreme Court no person has a privilege to . . . [p]revent another from being a witness or disclosing any matter or producing any object or record." Okla. Stat. tit. 12, § 2501. Statutes relied upon by a party seeking to exclude testimony must be "strictly construed" in favor of permitting testimony. *Hinds v. Dandee Mfg. Co.*, 1952 OK 181, ¶ 6, 243 P.2d 992, 993. "Whatever the origins" of a claimed privilege, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see also Buffington v. Gillette Co.*, 101 F.R.D. 400, 404 (W.D. Okla. 1980) (finding that privileges must be narrowly construed).

A. Attorney-client privilege is a fact issue and the University's burden.

"Whether the attorney-client privilege is involved in certain testimony is a question of fact for the trial court." *Cooper v. State*, 1983 OK CR 154, ¶ 4, 671 P.2d 1168, 1172; *Hurt v. State*, 1956 OK CR 88, ¶ 5, 303 P.2d 476, 478. It is the University's burden to demonstrate facts supporting its assertion of privilege, as "the burden to establish the protected status of testimony sought to be excluded rests on the party asserting it." *Chandler v. Denton*, 1987 OK 38, ¶ 20, 741 P.2d 855, 865; *Matter of Guardianship of Walling*, 1986 OK 50, ¶ 18, 727 P.2d 586, 592. Meeting this burden requires the University "to establish each element of the privilege," including that the applicable privilege has not expired or been waived. *Jeter Enloe v. Bullseye Energy, Inc.*, No. 12-CV-411-TCK-PJC, 2016 WL 6610809, at *3 (N.D. Okla. Aug. 11, 2016). "The level of that persuasive burden should be preponderance of the evidence, like all other evidentiary decisions." Paul R. Rice, 2 Attorney-Client Privilege in the U.S. § 11:10 (Dec. 2022) (collecting cases).

The University has repeatedly misinformed the Court as to the applicable standard.[6] Its purported leading case does not involve the attorney-client privilege at all (nor the deliberative process privilege or informer's privilege) but rather the "litigation privilege," which is a carve-out from defamation liability for statements made in judicial proceedings. *See* Def. Mot. at 4 (citing *Samson Inv. Co. v. Chevallier*, 1999 OK 19, ¶ 5). The cases the University cites that do involve the attorney-client privilege support Plaintiffs' position. *See* Def. Mot. at 7 (citing *Chandler*, 1987 OK 38, ¶ 20 ("The burden to establish the privileged status of testimony sought to be excluded rests on the party asserting it."); Def. Mot. at 4 (citing *Sims v. Travelers Ins. Co.*, 2000 OK CIV APP 145, ¶ 8, 16 P.3d 468, 470 (addressing burden)). The Oklahoma Legislature's effort to insulate juries "to the extent practicable" from hearing claims of privilege, *see* Def. Mot. at 4 (citing Okla. Stat. tit. 12, § 2513(B)), does not change the fact-driven nature of the inquiry or abrogate the Oklahoma Supreme Court and Court of Criminal Appeal's controlling decisions.

B. The scope of any "deliberative process privilege" in Oklahoma is an issue of law; its application to Gallogly's anticipated testimony is a fact issue and the University's burden.

As the University has acknowledged, its argument regarding deliberative process privilege requires the Court to expand a privilege that has only previously been applied to the

[6] *See* Def. Mot. at 4 (incorrectly stating "the privileges claimed in both motions . . . . only present 'a question of law to be determined by the court'"); Def. Mot. for Summary Judgment (Feb. 13, 2023) at 9 (same); Def. Mot at 7 (incorrectly stating "the University must only show "the status occupied by the parties was that of attorney and client and that their communications were of a confidential nature"); Def. Mot. for Summary Judgment 12–13 (same).

Governor. Def. Mot. at 9. This determination is one the Court can make as a matter of law. *See Vandelay Ent., LLC v. Fallin,* 2014 OK 109, ¶ 9 & n.4, 343 P.3d 1273, 1276 & n.4.

The Court should not expand the law in this manner for the reasons set forth below in Section III. If it does, however, the question of whether the newly expanded privilege applies to Gallogly's anticipated testimony is a question of fact for which the University must meet its burden of proof. *Vandelay*, 2014 OK 109, ¶ 22 ("the burden falls on the government entity asserting the privilege"). The Supreme Court did not set forth the level of proof needed to meet this burden in *Vandelay*; Plaintiffs submit that as with the attorney-client privilege, the preponderance of evidence standard should apply to any fact determination the Court makes regarding the applicability of the deliberative process privilege over Gallogly's anticipated testimony. *See* Rice (Dec. 2022), *supra*, § 11:10.

C. The scope of the informer's privilege is an issue of law, and its inapplicability here can also be determined as an issue of law.

A threshold question regarding the University's assertion of the informer's privilege is whether the University is an entity that can claim that privilege under Okla. Stat. tit. 12, § 2510. This is an issue of statutory construction and therefore a question of law. *See, e.g., Hogg v. Oklahoma Cnty. Juv. Bureau*, 2012 OK 107, ¶ 7, 292 P.3d 29, 33 ("Ascertaining the meaning of statutory language is a pure issue of law.").

If the University is in fact an entity that can claim the informer's privilege, the subsidiary question is whether the informer's privilege operates in a manner that can justify granting the University's motion for protective order, thus preventing Gallogly from providing ***any*** deposition testimony. This requires only an interpretation of the statutory term "refuse to disclose the identity of a person." Therefore, a determination that the privilege is inapplicable can also be made as an issue of law, because if the scope of this term (i) does not encompass asserting the

privilege over a non-party's testimony, or (ii) does not contemplate the wholesale prevention of deposition testimony (as opposed to only "identities" of informers), the University's Motion can be denied to the extent it is premised on this privilege. *Id.* For the University to successfully invoke the informer's privilege, however, the Court must weigh fact evidence regarding the exceptions to the privilege embodied in Okla. Stat. tit. 12, § 2510(C). This includes a determination as to whether there has been waiver in accordance with Okla. Stat. tit. 12, § 2510(C)(1).

ARGUMENT

I. Gallogly has knowledge of relevant, non-privileged facts that are necessary to this case; this knowledge does not "belong" to the University.

A. The relief the University seeks in its Motion for Protective Order is different than the privileges it asserts over the Jones Day Reports.

The problems with the University's attempt to assert a privilege over facts known to Gallogly are both numerous and obvious. For one, as discussed below in Section II, Gallogly is neither a client nor an attorney over whom the University has authority to assert the attorney-client privilege in the first place. But even setting aside that novel facet of the University's argument, a fundamental misunderstanding of privilege pervades its Motion for Protective Order. Specifically, as set forth in Section II.A below, the University has failed to acknowledge that the attorney-client privilege is only available to it for certain confidential client ***communications*** the disclosure of which would impair ***an ongoing legal matter.*** This error has led the University to conflate (i) its still unproven assertion that attorney-client and work-product privileges protect the records (the "Jones Day Reports" — a "First Jones Day Report" involving the misreporting of University donor and financial data, and a "Second Jones Day Report" involving allegations of sexual misconduct by former University officials) sought by Plaintiffs under the Oklahoma Records Act ("ORA") with (ii) the University's new claim that the entirety of Gallogly's

deposition testimony is protected by various privileges. Despite this sleight of hand, the Court must consider each assertion separately.

In furtherance of its effort to conflate the privilege issues presented by its Motion with the ultimate issues in this case, the University erroneously argues that summary judgment will moot the privilege questions it has raised with respect to Gallogly's deposition. First, obviously, that argument assumes incorrectly that the University will prevail on its premature summary judgment motion. But more immediately, just as the University was wrong about the standard of law in this Motion, it relies in its Summary Judgment Motion on the same inapplicable cases discussed above in Plaintiffs' Standard of Law, Section A. *See* Defendant's Motion for Summary Judgment (Feb. 13, 2023) (citing *Samson Inv. Co.*, 1999 OK 19, n.5; *Sims*, 2000 OK CIV APP 145 ¶ 8). Moreover, the cases cited by the University as to mootness, including *Woodfork v. Nunn*, No. CIV-21-0492-HE, 2022 WL 3006847, at *1 (W.D. Okla. July 28, 2022), and *Allstate Ins. Co. v. Savage*, No. CIV 04535L, 2005 WL 1331087, at *11 (W.D. Okla. June 2, 2005), are inapplicable because the facts discoverable through Gallogly's testimony—and other party and non-party discovery—are necessary prior to briefing Summary Judgment on fact-driven issues like the privileges claimed by the University over the Jones Day Reports. *See* Def. Mot. at 4.[7]

Thompson v. Box, 1994 OK CIV APP 183, 889 P.2d 1282, *see* Def. Mot. at 4, also presents a poor factual parallel with this case. In *Thompson*, unlike here, the attorney-client relationship was uncontroverted, and did not involve evidence of a lack of confidentiality,

[7] *Thomas v. Nat'l Auto & Cas. Ins. Co.*, a case interpreting California law, does not contain a relevant holding at all, but only a statement about the intermediate appellate court's view of a discovery dispute not at issue before the Supreme Court. 1994 OK 52, n. 5.

waiver, or expiry, each of which Plaintiffs anticipate Gallogly will address in his testimony. 1994 OK CIV APP 183, at ¶¶ 11–12, 889 P.2d at 1283–84. In addition, there was no question in *Thompson*, as there is with Gallogly's testimony, whether the disputed evidence was a "communication." *Id.* The question at issue for the court in *Thompson* was not ***whether*** the evidence in question was privileged, but simply if the privileged nature of certain evidence would prevent one of the parties from proving its case. *Id.* In short, the holding in *Thompson* arose from facts that the University has not begun to establish here.

B. The Jones Day Reports are not subject to the attorney-client, work product, or informer's privileges and Gallogly has knowledge of facts that will establish this.

Gallogly has knowledge of facts that are relevant to the issue at the heart of this case—namely, whether the University violated the Open Records Act by withholding the Jones Day Reports on the assertion that they are attorney-client, or otherwise, privileged materials. Specifically, Plaintiffs anticipate that Gallogly has knowledge of facts demonstrating at least the following:

1. The Jones Day Reports were the product of an investigation that could have been conducted by non-lawyers, not legal advice from counsel. *See* Ex. C at 2–3.

2. Portions of the Jones Day Reports could never be attorney-client communications at all because they are not communications with attorneys, but rather routine correspondence between non-attorney employees of the University. *See* Ex. C at 4–5.

3. One or both of the Jones Day Reports were not kept confidential, or any applicable privilege was otherwise waived. *See* Ex. C at 5–7.

4. Any applicable attorney-client privilege has expired under the doctrine of attorney-client privilege unique to public entities like the University. *See* Ex. C at 6–7, 8–9; Okla. Stat. tit. 12, § 2502(B)(7).

5. The Jones Day Reports were not prepared in anticipation of litigation, as would be required for the University to invoke the work product privilege. *See* Ex. C at 5–6.

6. The identity of any "informers" could, if necessary and appropriate, be segregated and redacted from the two Jones Day Reports. *See* Ex. C at 6.

7. That in his recollection, the second Jones Day Report *does not name* victims[8] of former President David Boren's alleged sexual misconduct. *See* Ex. C at 6. These final two points directly contradict the University's representations to this Court. *See, e.g.*, Def. Mot. for Summary Judgment (Feb. 13, 2023) at 1, 2–3, 18.

Gallogly's testimony is just one piece of evidence Plaintiffs seek to discover in this case. However, his unique position as former President of the University with knowledge of the facts surrounding the retention of Jones Day, the nature of the investigations undertaken by the law firm, and the contents of the Jones Day Reports make him an important fact witness, and his stated desire to assist the Court with this matter should not be undermined by the University's baseless Motion.

C. Information a former employee learns on the job does not "belong" to his employer unless there is an agreement in place that says so.

The University twice makes the extraordinary claim that "any" information Gallogly learned while in his role as University President "belongs" to the University, and not to Gallogly. Def. Mot. at 13, 14. This has no legal basis, subverts Gallogly's autonomy, and ignores well-developed law concerning the principal-agent relationship.

When a relationship between an employee and employer ends and there is no restrictive covenant (for instance, a nondisclosure agreement) in place, the common law duty owed by the former employee to his employer is exceedingly minimal. An agent's duty of loyalty does not supersede his ability to resign and terminate the agency relationship. *See* Restatement (Third) of

[8] Excluding Jess Eddy. According to an excerpt of the Second Jones Day Report previously obtained by NonDoc from Mr. Eddy, Mr. Eddy is named in the Second Jones Day Report after he spoke publicly about being interviewed by Jones Day investigators. *See* Tres Savage, *Jones Day Assessment: Jess Eddy "Generally Credible" on Boren Allegation*, NonDoc (May 28, 2019), https://nondoc.com/2019/05/28/jones-day-assessment-jess-eddy-generally-credible-on-boren-allegation/.

Agency, §§ 1.01 cmt. f, 3.10. And in the absence of a contract, *see id.* § 8.07, or other extenuating circumstances not relevant here, the duty of loyalty will not thereafter survive the termination of an agency relationship itself.

Weeks v. Indep. Sch. Dist. No. I-89 of Oklahoma Cnty., OK., Bd. of Educ., does not say otherwise. In that case, the question was whether an attorney could contact ***current*** employees of an organization *ex parte*. 230 F.3d 1201, 1208 (10th Cir. 2000). As Plaintiffs have explained to the University, *see* Ex. D (Ltr. from Plfs.' Counsel to Def.'s Counsel, Feb. 1, 2023), this case is not relevant, and an overwhelming weight of authority makes clear that it is permissible for Plaintiffs to speak to a ***former*** employee of the University like Gallogly. Defendant has even conceded this point, Def. Mot. at 3, yet continues to cite *Weeks* for a proposition it does not support.

If there is a restrictive covenant in place that would prevent Gallogly from speaking freely about his time as University president, the University should produce that agreement for the Court's and Plaintiffs' inspection.[9] Because it appears there is no such agreement, *see, e.g.*, Ex. C (Letter from Gallogly to All Counsel, Jan. 19, 2023) at 2 (describing Gallogly's employment contract), the University's claim that "any purportedly relevant information Mr. Gallogly has is information that belongs to the University" is entirely without merit.

II. The University has offered no basis for its claim that Gallogly's deposition cannot go forward due to the University's attorney-client privilege.

The cases cited by the University do not support its position that a business or public entity can assert the attorney-client privilege over information held by and sought from a former

[9] Plaintiffs immediately sent the University a discovery request seeking any such agreement after the University implied in a letter that such an agreement might be in place. *See* Ex. D (Ltr. from Plfs.' Counsel to Def.'s Counsel, Feb. 1, 2023) at 1. However, Mr. Gallogly has since stated no such agreement exists. Ex. C (Ltr. from Gallogly to All Counsel, Feb. 19, 2023) at 2.

employee. Instead, the cases contemplate a situation with little relevance, namely, whether the privilege can be asserted over ***communications*** between a former employee and counsel for that person's former employer that are ***held by*** and ***sought from*** the employer or counsel—and for a public body, the disclosure of such communications must ***impair an ongoing legal matter***. These distinctions are dispositive.

A. The University's asserted attorney-client privilege may protect certain confidential client communications in ongoing legal matters—not facts.

Oklahoma's attorney-client privilege statute reflects the universal common law limitation that the privilege may be asserted only over certain "confidential *communications*," that are "made for the purpose of facilitating the rendition of professional legal services to the client." Okla. Stat. tit. 12, § 2502(A)(5) (emphasis added). For a public entity like the University, the communications must concern "a pending investigation, claim or action" and the Court must find "that disclosure will seriously impair [its] ability . . . to process" that matter "in the public interest." Okla. Stat. tit. 12, § 2502(D)(7). The University has not made ***any*** demonstration that Gallogly's testimony would implicate "communications" that would seriously impair its ability to process an ongoing matter in the public interest.

"Communications," as the University concedes, are comprised of "the client's confidential disclosures and the attorney's advice." *See Chandler*, 1987 OK 38; Def. Mot. at 7. In other words, "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). "'A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his

communication to his attorney.'" *Id.* (citation omitted); *see also* Leo H. Whinery, 3 Okla. Prac., Okla. Evidence § 36.14 (2d ed. Sept. 2022) ("First, and perhaps foremost, the privilege applies only to communications and not their informational content. Accordingly, a person may be required to divulge information in a deposition . . . even though it may be the subject of a confidential communication by a client to the attorney.").

Not once in its Motion does the University explain how Gallogly's deposition testimony would disclose "communications" at all, let alone "the client's confidential disclosures and the attorney's advice." Instead, tellingly, the University refers exclusively to the potential disclosure of "information" within Gallogly's knowledge.[10] But information (for instance) about the nature and existence of a law firm's employment by a client is not privileged. "The fact [of retention] is preliminary, in its own nature, and establishes only the existence of client and counsel, and therefore, might not necessarily involve the disclosure of any communications arising from that relation, after it was created." *Chirac v. Reinicker*, 24 U.S. 280, 295 (1826); *see generally* Rice, *supra* (Dec. 2022) ("The fact of retention or the existence of an attorney-client relationship is not confidential information protected by the attorney-client privilege.") (collecting cases).

This is not a minor point: the nature of the University's retention of legal counsel and the relationship that ensued is potentially dispositive of the University's claim of attorney-client

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[10] *See* Def. Mot. at 7 ("Gallogly cannot have relevant *information* that is not privileged."); *id.* at 13 ("the University informed Plaintiffs on January 25, 2023, that any *information* in Gallogly's possession . . . retains its privileged and confidential nature"); *id.* ("Plaintiffs were aware of the private nature of the *information* Gallogly possessed since, at least October 20, 2020"); *id.* at 14 ("Plaintiffs presumptively hope that Gallogly will . . . disclose University *information*"); *id.* ("the only *information* relevant to this litigation is privileged"); *id.* ("any purportedly relevant *information* Gallogly has is *information* that belongs to the University"); *id.* ("Plaintiffs cannot seek *information* from Gallogly"); *id.* ("Gallogly may have learned privileged *information*"); *id.* at 16 ("If Plaintiffs wish to learn *information* relevant to this case, they should issue a representative notice to the University.") (emphasis added throughout).

privilege over the Jones Day Reports, because the attorney-client privilege does not apply when "an attorney is simply acting as a conduit for factual information or business advice." *See Atoka Precision Mach. Shop, LLC v. Peerless Ins. Co.*, 2013 WL 817279, *1 (E.D. Okla. 2013). "Documents which are investigative reports prepared in the ordinary course of business, as opposed to 'in anticipation of litigation,' are discoverable notwithstanding the fact that they were generated by an attorney." *See id.* Privilege claims are routinely rejected for investigations that could equally be performed by non-lawyers, *see id.*, because these investigations do not involve communications "made for the purpose of facilitating the rendition of professional legal services to the client." Okla. Stat. tit. 12, § 2502(B).

Another out-of-jurisdiction case cited by the University purportedly on this point, *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), undercuts its theory of the case entirely. In that case, Diversified sought to protect from discovery a memorandum and report prepared for that litigant by the law firm Wilmer, Cutler & Pickering. Due to some financial irregularities, "the Board of Directors of Diversified concluded that it should cause an investigation to take place . . . [Wilmer] was hired to make that investigation." *Id.* at 600. The memorandum was "a statement of historical matters and an outline of how [Wilmer] proposed to conduct the investigation. . . . As to the method of investigation, [Wilmer] proposed to interview individuals, including employees of Diversified." *Id.* This resulted in a report, which gave "a full and detailed report of the investigation; it identified persons who had been interviewed and set out the substance of what they had said. . . . [and] contained a number of recommendations." *Id.* at 601. In reviewing the case, the Eighth Circuit noted, as Plaintiffs have asserted repeatedly, that "[a] communication is not privileged simply because it is made by or to a person who

happens to be a lawyer," *id.*, and "'work product' must have been obtained 'in anticipation of litigation or for trial.'" *Id.* at 603.

The appellate court thus concluded that neither document was privileged work product or attorney-client communications. "The work that [Wilmer] was employed to perform could have been performed just as readily by non-lawyers aided to the extent necessary by a firm of public accountants." *Id.* And, as to the work-product privilege "it is obvious that [Wilmer's] work was not done in preparation for any trial . . . although, of course all parties concerned must have been aware that the conduct of employees of Diversified . . . might ultimately result in litigation of some sort in the future." *Id.* at 604. Rather, Wilmer had been hired "simply because the Board of Directors of Diversified wanted to know what had actually been going on and wanted to frame policies and procedures that in the future would protect it against repetitions of the prior misdeeds, if any, of its employers." *Id.*[11]

The parallel between the memorandum and report in *Diversified* and the Jones Day Reports are clear. *See* Ex. C (Letter from Gallogly to All Counsel, Jan. 19, 2023) at 4–7. There are likewise some similarities between the fact information Plaintiffs anticipate Gallogly will testify to, and the memorandum in *Diversified*, except, unlike the memorandum, the evidence from Gallogly will be fact testimony—not a communication, as in *Diversified.* Even so, the *Diversified* court had "no difficulty in upholding the action of the district court in refusing to accord protection to [the memorandum]. . . . It did little more than reveal the relationship between the parties, the purpose for which Law Firm had been engaged, and the steps which the Firm intended to take in discharging its obligation to Diversified." *Id.* at 603.

[11] The court did not even need to reach the issue of waiver, though it had been raised by the party seeking disclosure, because it found no privilege existed in the first place. *Id.*

For the sake of argument, even if the University were able to claim a privilege over some information in Gallogly's knowledge, it would now have waived that privilege at least with respect to its engagement of Jones Day, because the University put its engagement letters into the record through its Motion for Summary Judgment. Def. Mot. for Summary Judgment (Feb. 13, 2023), Ex. 3, 4. "To the extent that communications arguably protected by the attorney-client privilege may be involved in that data, a motion for judgment based on [those communications] waives the privilege." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *see e.g.*, *Parson v. Farley*, 352 F. Supp. 3d 1141, 1153 (N.D. Okla. 2018) (unsealing dispositive briefs and their exhibits).

B. The University has not identified any cases supporting its theory that it can assert the attorney-client privilege over facts known to Gallogly.

Though the University discusses the Jones Day Reports at length, the protection it seeks through the instant motion is not for those reports, but for information contained within Gallogly's memory. This, alone, distinguishes the facts at hand from the out-of-jurisdiction cases upon which the University relies. *See* Def. Mot. at 14–15. The familiar scenario in those cases—a litigant seeking confidential client communications held by an attorney or their client—is simply not implicated here.

For example, *In re Allen* involved a litigant who sought discovery from counsel for a public entity about an interview that counsel conducted with a former employee of that entity. 106 F.3d 582, 605 (4th Cir. 1997) (applying federal law); *see* Def. Mot. at 14. The notes and the attorney's recollection of that interview—which, importantly, are both records of communication with counsel, not mere "information"—were held by the attorney for the public entity, not the former employee. *Id.* at 606. The assertion of privilege in *In re Allen* was thus markedly different than the unorthodox attempt made by the University here to reach out and assert privilege over information known to a former employee. The same can be said of the only case

in Defendant's footnoted string-cite in which a court held that the privilege applied. *See Admiral Ins. Co. v. United States Dist. Ct. for. Dist. of Arizona*, 881 F.2d 1486, 1489 ("[P]laintiffs sought production of the statements given by Kinney and Gardner to Admiral's counsel.") (applying federal law).

In re Grand Jury Subpoena is similarly inapplicable. *See* Def. Mot. at 15. In that case, the government sought attorney-client communications between two attorneys employed by a hospital and an employee of that hospital. 144 F.3d 653, 658 (10th Cir. 1998) (applying federal law). The question before the court was whether the employee himself could assert the privilege—not whether a corporate or public entity could reach out and assert the privilege on his behalf. *Id.* Not only is the case of little relevance here, but the holding even as to that question—the former employee did, in fact, have a limited attorney-client relationship with corporate counsel—demonstrates the untenable position the University has staked out, which ignores the well-established boundaries of attorney-client privilege. *See id.* at 659 ("Our holding is an extremely limited one and does not extend to communications made while third parties were present, nor does it extend to communications in which both corporate and individual liability were discussed.").

Likewise, neither *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985), nor any of the cases cited in the quoted portion of that opinion involve a business or public entity asserting the privilege over information in a former employee's memory prior to a deposition. *See* Defs. Mot at 15. In *Commodity Futures Trading Comm'n*, the Court was asked to decide the bankruptcy-specific question of whether trustees of a corporation in bankruptcy could waive the attorney-client privilege over communications between the debtor corporation and its counsel. *Id.* at 345. Even the *dicta* quoted by the University provides no parallel between

that case and this one; if anything, the Court's holding that the new trustees can, in fact, waive the privilege falls (vaguely) in favor of Plaintiffs since the trustees in that scenario would be the ones that hold the information being sought. The remaining out-of-jurisdiction bankruptcy cases in the quoted portion of the University's citation to *Commodity Futures Trading Comm'n* provide no additional insight into the relevance of that case to Defendant's Motion, which involves neither trustees nor debtors, and in which the question is decidedly not whether the University can waive a privilege asserted by Gallogly. *See* Def. Mot. at 16 (citing *In re O.P.M. Leasing Services, Inc.* 670 F.2d 383 (2d Cir. 1982); *Citibank v. Andros*, 666 F.2d 1192 (8th Cir. 1981)).

The sole case identified by the University in which a court applied Oklahoma law to an assertion of attorney-client privilege is distinguishable on its facts on the same basis. In *Davis v. PMA Companies, Inc.*, No. CIV-11-359-C, 2012 WL 3922967 (W.D. Okla. 2012), plaintiff took three depositions of current managers or officers employed by the defendant. The plaintiff claimed that because he himself was a former manager employed by defendant, he could waive any applicable attorney-client privilege. The court's handling of the attorney-client privilege claims over the depositions in *Davis* provides a potential template for Gallogly's anticipated testimony. The court applied a careful analysis, *see id.* at *7 (noting "[w]ith respect to the attorney-client privilege, distinguishing between facts and communications is critical . . . deponents must disclose known facts"), and issued rulings on specific questions and answers, which each warranted separate consideration.

As the above should make clear, the law does not permit the University to assert a "blanket" privilege over a non-party deposition. *In re Grand Jury Proc.*, 616 F.3d 1172, 1183 (10th Cir. 2010) ("The party must bear the burden as to specific questions or documents, not by

making a blanket claim."). The Oklahoma legislature did not intend to provide litigants with a mechanism for stopping non-party depositions from taking place entirely, especially on a barebones assertion that all anticipated testimony from a deponent would be privileged. Non-party depositions involve fact testimony by their nature—especially as compared with other types of discovery that might specifically seek communications. Indeed, the only case Plaintiffs are aware of in which an Oklahoma court has allowed a litigant to reach out and stop non-party evidence from being entered in a case on the grounds of attorney-client privilege involved discovery of a videotape of a conversation between an attorney and his client, taken by a hidden surveillance camera without the attorney or client's knowledge. *Lively v. Washington Cnty. Dist. Ct.*, 1987 OK CR 266, ¶ 4, 747 P.2d 320, 32. But that situation—involving surreptitiously recorded ***communications***—is not implicated here. Plaintiffs seek fact discovery through Mr. Gallogly's deposition and should be permitted to proceed.

C. The University cannot "instruct" Gallogly; if it does, Gallogly is as free as any other witness to ignore such "instruction."

As both parties are aware, Gallogly is not a party to the case and is represented by his own counsel. The University's statement that it "anticipates instructing Gallogly not to answer" any question posed by Plaintiffs at deposition is therefore an unfortunate manifestation of the University's inappropriate campaign to exercise extrajudicial leverage over the witness. *See* Def. Mot. at 16. This is not a question of Gallogly "waiving" the University's privilege, which the University has not established in the first place—it is merely an attempt to obstruct fact testimony to which Plaintiffs are entitled. As such, Plaintiffs respectfully submit that the Court's order denying the University's motion make clear that the University does not have authority to instruct Gallogly during his testimony. Absent a showing of an ongoing fiduciary duty or contractual obligation between Gallogly and the University restricting the topics to which he

may testify under subpoena—which the University has not made—it appears such an instruction from the Court is warranted and will prevent obstruction.

III. Gallogly's anticipated testimony is not protected by a "deliberative process privilege."

A. The Court should find as a matter of law that the scope of Oklahoma's deliberative process privilege does not extend to testimony willingly given by a former University President.

In Oklahoma, the deliberative process privilege has only been applied on a qualified basis to the Governor as a component of his executive privilege. Plaintiffs have previously demonstrated this limitation, *see* Plfs.' Mot. to Compel Discovery (May 20, 2023), at 6, and Defendant concedes it, *see* Def. Mot. at 9. The Oklahoma Supreme Court's decision in *Vandelay Ent., LLC v. Fallin* was premised on the separation of powers clause in the Oklahoma constitution, OK Const. Art. 4 § 1, and the unique powers granted to the Governor in Article 6, OK Const. Art. 6 §§ 1–6. 2014 OK 109, ¶¶ 13–15, 29, 343 P.3d 1273, 1277–1279. The Supreme Court was explicit that its holding involved a qualified "deliberative process component of executive privilege," *id.* 2014 OK 109 at ¶ 26, not a free-floating deliberative process privilege like that asserted by the University.

There is no indication in *Vandelay*, nor in the only other Oklahoma case Defendant cites on this point, that the executive privilege extends to protect the communications of any other chief executive in the state—let alone a body like the Board of Regents. The quoted portion of *State ex rel. Oklahoma State Bd. Of Med. Licensure & Supervision v. Rivero*, 2021 OK 31, ¶ 77. 489 P.3d 36, 63 & n. 89, in Defendant's Motion is *dicta*, and does not refer to an executive privilege at all, but rather to executive ***sessions*** that occur under the Administrative Procedures Act, Okla. Stat. tit. 75, § 309(D). In fact, the result of that case was the Supreme Court's reversal

of a trial court's overly restrictive application of a protective order that had prevented the use of records generated during an administrative proceeding. *Id.*; *see* Def. Mot. at 10.

Critically, even if the scope of executive process privilege did extend beyond the Governor to reach a public body like the University of Oklahoma—and it does not—Gallogly, as former President of the University would hold that privilege; he could therefore assert it himself if he wished. *See Kizer v. State*, 1970 OK CR 11, 468 P.2d 56, 58 (it is "elementary" that privilege over "confidential communication is for the benefit of the [privilege holder] and not for a third party"); Leo H. Winery, 3 Okla. Prac., Okla. Evidence § 35.03 (2d ed. Sept. 2022) ("In the case of privileged communications the rules are enforced only at the option of the holder of the privilege and may not be invoked by a third party.").

The University's attempt to invoke a blanket executive privilege on Gallogly's behalf is contrary to the purpose of that privilege, which is to protect an executive's own ability to solicit and receive confidential deliberative advice. *Vandelay*, 2014 OK 109 at ¶ 29; *see U.S. v. Reynolds*, 345 U.S. 1, 7–8 ("There must be a formal claim of privilege, lodged *by the head of the department* . . . after actual personal consideration *by that officer*") (emphasis added). It is especially inappropriate for the University to invoke the privilege on the President's behalf, because, in Defendant's analogy between the Governor's Office and the University, it has highlighted the ***legislative*** function of the Board of Regents. Def. Mot. at 10 (stating Board of Regents has "'the power to pass all rules and regulations'" for the University) (citation omitted). As such, the separation of powers concern in *Vandelay* is not implicated.

B. The University has not carried its burden of demonstrating that any "deliberative process privilege" would apply to Mr. Gallogly's testimony.

If, however, the Court decides to dramatically expand the scope of the executive privilege to cover the deliberative process of the Board of Regents, the applicability of that privilege to

any portion of Gallogly's testimony is a question of fact for which the University holds the burden. To prevent Gallogly's deposition, the University would have to show that Gallogly's testimony would, in its entirety, pertain to advice that was (1) both pre-decisional and "deliberative (i.e. involve[ing] personal opinions, as opposed to purely factual, investigative material," (2) between "senior executive branch official[s]," (3) that those officials knew or had a reasonable expectation would remain confidential, and (4) that confidentiality was maintained. *Vandelay*, 2014 OK 109 at ¶¶ 24–25. Moreover, Plaintiffs would be entitled to an opportunity to overcome that showing by demonstrating (1) a substantial or compelling need for the disclosure, and (2) that the need for disclosure outweighs the public interest in maintaining confidentiality in the advice. *Vandelay*, 2014 OK 109 at ¶¶ 24–25. The University, which incorrectly claims that this showing can be established as a matter of law, Def. Mot. at 4, has made no such factual showing in support of its motion and has therefore failed to meet its burden.

IV. Gallogly's anticipated testimony is not protected by the informer's privilege.

A. The University cannot claim the informer's privilege over Gallogly's anticipated testimony because its investigators were not law enforcement officers and the University was not conducting a law enforcement investigation.

The University has set forth no reason Gallogly cannot testify to the facts related to Jones Day investigation or the Jones Day Reports. First, the University does not and cannot ***hold*** an informer's privilege over this information because it is not the body that conducted a law enforcement investigation into the Second Jones Day Report. (There is no indication in the record that a law enforcement investigation occurred as to matters addressed in the First Jones Day report.). The plain text of the statute establishing the informer's privilege confirms this:

> A. The United States, state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible

> violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting the investigation.
>
> B. The privilege under this section may be claimed by an appropriate representative of the public entity to which the information was furnished.

Okla. Stat. tit. 12, § 2510. Subsection B controls who can claim the privilege; specifically, "The privilege under this section may be claimed by an appropriate representative of the public entity *to which the information was furnished.*" Okla. Stat. tit. 12, § 2510(B) (emphasis added). This requires review of Subsection A, which defines the relevant information as "the identity of a person *who has furnished* information . . . to a law enforcement officer or member of a legislative committee or staff." Thus, the University cannot claim that it is an "entity to which [] information" that falls under this privilege was "furnished," by an informer, because Jones Day is neither a "law enforcement officer" nor a "member of legislative committee or its staff." Likewise, Gallogly is neither of those things, and the University has advanced no theory of how the phrase "refuse to disclose" allows it to prevent testimony of another person.

Second, the University cannot claim the informer's privilege over the identities of individuals interviewed by Jones Day because the informer's privilege statute applies only to the identities of those who have "assist[ed] in an investigation of a possible violation of a law to a law enforcement officer," Okla. Stat. tit. 12, § 2510. The threshold question is not, as the University claims, whether the University provided one (notably, not both) of the Jones Day Reports to law enforcement, but rather whether informers "assist[ed]" in a law enforcement investigation by virtue of agreeing to be interviewed by Jones Day. The University has stretched this provision beyond its plain meaning; its attempt to claim the privilege is not grounded in the statutory text.

B. To the extent the University can claim the informer's privilege at all, that assertion is not grounds to sustain its Motion.

Even if the University did hold an informer's privilege—and it does not—that privilege would not function to stop Gallogly's deposition from taking place. The plain statutory language states that only identity is privileged; other information is not included except to the extent that disclosure would disclose an informer's identity. Okla. Stat. tit. 12, § 2510(A); *see* Whinery, *supra*, §§ 41.01–41.02 (2d ed. Sept. 2022) ("As noted in § 41.01, the privilege protects only the *identity of the informer* and not the *information* itself."). As such, the privilege cannot be invoked to entirely prevent the fact testimony Plaintiffs anticipate Gallogly will provide.

V. The pragmatic path forward is to allow Gallogly's deposition to be taken under temporary seal with a set expiration date and require Defendant to show cause why any portion of his testimony should remain sealed.

The University's motion is baseless and should be overruled; the Court should order that the deposition can proceed and that the transcript may be used freely by either party.

In the alternative, the Court should permit the deposition to go forward, but place the transcript and any exhibits under temporary seal for a period of ten days. During this period, counsel for Defendant can designate portions of the transcript and exhibits it believes should remain under seal, along with the basis for any such continued sealing. If the parties do not agree on these designated portions, Defendant should be obligated to demonstrate to the Court why any contested portions should remain under permanent seal, and Plaintiffs may respond.

CONCLUSION

Because the University has failed to meet its burden to establish any reason that Gallogly's deposition should not go forward, its Motion for Protective Order must be denied. The Court should therefore issue an order clarifying for all parties that it finds Gallogly's anticipated testimony highly relevant to the ultimate issues in this case, that the University has

failed to establish that any privilege attaches to Gallogly's testimony, and that no contractual agreement or fiduciary duty prevents Gallogly from testifying regarding facts known to him as a result of his time as University President.

In the alternative, the deposition should take place under temporary seal and Defendant should show cause why any portion of the transcript should remain sealed.

Dated: February 28, 2023

Respectfully submitted,

Kathryn E. Gardner

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CERTIFICATE OF SERVICE

I hereby certify Plaintiffs' Response to Defendant's Motion for Expedited Hearing and Protective Order to Quash Subpoena of James Gallogly was mailed this 28th day of February 2023, by depositing it in the U.S. Mail, postage prepaid to counsel of record for Defendant:

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EXHIBITS A & C

to

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR EXPEDITED HEARING AND PROTECTIVE ORDER TO QUASH DEPOSITION SUBPOENA OF JAMES GALLOGLY

FILED UNDER SEAL PURSUANT TO COURT ORDER DATED FEBRUARY 21, 2023

EXHIBIT B

WHITTEN BURRAGE

January 25, 2023

VIA EMAIL: kgardner@rcfp.org
Ms. Kathryn Gardner
Reporters Committee for Freedom of the Press
110 S. Harford Ave., Ste. 2524
Tulsa, OK 74120

Re: *Sustainable Journalism Foundation et al. v. State of Oklahoma et al.*, CV-21-1770 (Cleveland Cnty. Dist. Ct); James Gallogly – Deposition Date, Correspondence, and Communications

Ms. Gardner:

Let this letter serve as a response to your email dated January 6, 2023. I can confirm that I am available for the deposition of James Gallogly on February 22, 2023, but I intend to file a motion for protective order to quash Mr. Gallogly's deposition subpoena.

As your clients are aware, Mr. Gallogly is the former president of the University of Oklahoma and acquired privileged and confidential information belonging to the Board of Regents of the University of Oklahoma (the "Board") in that role. Mr. Gallogly consequently is not at liberty to waive the privileged-nature or confidentiality of information in his possession by virtue of his prior role as President. More specifically, the President is a role "having a managerial responsibility on behalf of the organization." *Weeks v. Indep. Sch. Dist. No. I-89 of Oklahoma Cnty., OK., Bd. of Educ.*, 230 F.3d 1201, 1208 (10th Cir. 2000) (citing Oklahoma Rule of Professional Responsibility 4.2). Because the only information relevant to this litigation is privileged, confidential, or otherwise exempt from disclosure per the Oklahoma Open Records Act, any purportedly relevant information Mr. Gallogly has is information that belongs to the Board; alternatively stated, you cannot seek information from Mr. Gallogly for any "matter within the scope of the agency or employment, made during the existence of the relationship" that would be relevant in this litigation. *Weeks*, 230 F.3d 1209. For that reason, there is no good faith basis for deposing Mr. Gallogly as those communications remain protected at law and any attempt to solicit Mr. Gallogly's breach of those obligations is not permitted within the Oklahoma Discovery Code. As a licensed attorney, I believe Mr. Gallogly understands these obligations and I hope he would not reveal any information on his own volition.

Nonetheless, your desire to depose Mr. Gallogly a year and half into this litigation made me curious about the timing. My hope is this inquiry will reveal that neither you nor your client have inappropriately approached Mr. Gallogly about such information after you all had notice of its privileged and confidential nature. Nonetheless, I have a duty to the Board to ensure Mr. Gallogly has not already breached his ongoing legal duties. To that end, please remit to my office all correspondence with Mr. Gallogly, including his counsel or other agent(s), in your or your clients' possession. I am also requesting you and your clients identify any conversation(s) with Mr. Gallogly, including time, date, length, summary and medium (call, text, email, etc.) from

512 North Broadway Avenue, Suite 300, Oklahoma City, Oklahoma 73102
p 405.516.7800 *f* 405.516.7859 www.whittenburragelaw.com

May 12, 2019, to present.

If you are unwilling to voluntarily provide this information, then treat these requests as interrogatories and requests for production with written responses due per the Oklahoma Discovery Code. If I do not receive confirmation that there were no prior correspondence or conversations with Mr. Gallogly before Friday, February 3, 2023, I will include withholding this information as another basis for the Court to grant our protective order and quash the deposition subpoena.

I look forward to hearing from you.

Sincerely,

WHITTEN BURRAGE

Michael Burrage

EXHIBIT D

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February 1, 2023

Michael Burrage
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mburrage@whittenburragelaw.com

VIA EMAIL

Dear Mr. Burrage:

Thank you for confirming your availability for the deposition of James Gallogly on February 22, 2023. This letter responds to the issues and demands you raise in your letter dated January 25, 2023.

To start, you have stated no basis for the university to obtain a protective order precluding Mr. Gallogly's testimony. Mr. Gallogly, a non-party, has information relevant to several claims and defenses raised in this lawsuit and, accordingly, the deposition is proper. *See* Okla. Stat. tit. 12, § 3226(A)(1). Mr. Gallogly, who left his university position in 2019 and who is not represented by university counsel, can testify to any relevant, non-privileged topics.

Moreover, your claim that any communications between undersigned and Mr. Gallogly are improper is not well-founded. *See* OK ST RPC Rule 4.2, Comment 7 ("Consent of the organization's lawyer is not required for communication with a former constituent."); *see also Fulton v. Lane*, 1992 OK 25, 829 P.2d 959 (because former employees may not speak for or bind the corporation, ex parte communications with former corporate employees are not prohibited); *Goodeagle v. United States*, No. CIV-09-490-D, 2010 WL 3081520, at *4 (W.D. Okla. Aug. 6, 2010); *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2013 WL 2147463, at *2 (N.D. Okla. May 15, 2013); *Floyd v. Sonic Drive-In of Coweta, LLC*, No. CIV-07-135-SPS, 2008 WL 11513030, at *1 (E.D. Okla. Mar. 13, 2008). For these reasons, the supposed authority you cite in your letter is inapposite. *See Weeks v. Indep. Sch. Dist. No. I-89 of Okla. Cnty.*, 230 F.3d 1201 (10th Cir. 2000) (disqualifying plaintiff's attorney for engaging in ex parte communications with defendant's employees while they were still employed by defendant).

Our understanding is that there is no obstacle to Mr. Gallogly's participation in the noticed deposition. However, in an abundance of caution we have attached a courtesy copy of additional discovery requests directed to your client that we will be mailing to you today.

As for your demands that undersigned counsel and our clients respond to requests for information and documents, we note that such informal requests fail to satisfy the requirements of Okla. Stat. tit. 12, § 2005. If and when we are served, we will respond or object within the 30-day period prescribed by law. *See* Okla. Stat. tit. 12, §§ 3233, 3234.

Additionally, we received your second letter dated January 31, 2023. We have not received the referenced correspondence from Mr. Gallogly, but I presume we will discuss that matter on our call as well.

We look forward to speaking with you soon and will provide our availability for a phone call in the email attaching this letter.

Thank you.

Sincerely,

Kathryn E. Gardner

Lin Weeks

CC:

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