IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

THE SUSTAINABLE JOURNALISM FOUNDATION *d/b/a* NONDOC MEDIA *and* WILLIAM W. SAVAGE III,

Plaintiff

v.

STATE OF OKLAHOMA, ex rel. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA,

Defendant.

Case No. CV-2021-1770

Judge Michael D. Tupper

THE UNIVERSITY'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DEPOSITION

Defendant, State of Oklahoma, ex rel. Board of Regents of the University of Oklahoma (the "University") respectfully submits this Response (the "Response") to Plaintiff's Motion to Compel Depositions (the "Motion"). In support of this Response, the University states:

INTRODUCTION

Plaintiffs ask this Court to compel the redepositions of 3230(C)(5) representatives of the University, or otherwise compel the depositions of non-party witnesses that live outside the State of Oklahoma because, Plaintiffs allege, the corporate representatives chosen by the Defendant were not properly prepared. The truth of the matter is that the representative deponents were prepared for the topics approved by this Court and rightfully refused to disclose privileged information when badgered by Plaintiffs' counsel. The information provided in the deposition was proportional to the needs of this administrative review process and the deposition occurred in good faith. In short, Plaintiffs not liking the deponent's answers is not a sufficient basis to drain further resources from the University.

I. STANDARD OF REVIEW

Pursuant to 12 O.S. 3230, one party is only entitled to depose the other once by right. *See Id.* (A)(1). To depose the same party a second time, there must be leave of court. *Id.* (A)(2)(a)(1). That said, "Courts generally disfavor second depositions, and absent a showing of need or good reason, a court will generally not require a deponent to appear for a second deposition." *Siotkas v. Top Jet, LLC*, No. 19-61051-CIV, 2020 WL 13613775, at *2 (S.D. Fla. Oct. 29, 2020) (quoting 7 Moore's Federal Practice-Civil § 30.05 (2020)).[1] To justify a second deposition, the party seeking it should demonstrate that the information sought is not "unreasonable cumulative or duplicative," "is not available from some other source," and is "proportional to the needs of the case." *Id.*

Here, the Court has not and should not strike the deposition testimony already provided, which is more than sufficient to bring this matter to a close.[2] Plaintiffs should not be allowed to reframe their attempts to breach the University's privilege as a right to a second deposition. The Motion should be denied.

II. THERE IS NO SUBSTANTIVE DISTINCTION BETWEEN THE COMPLAINTS OF THE MOTION TO COMPEL AND THE PRIOR MOTION TO STRIKE.

This is the third time the Court will read a briefing on the adequacy of the University's

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[1] And citing "*Circuit Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 690 (D. Kan. 1996) (absent showing of "need or good cause for doing so," court will generally not require deponent to appear for second deposition)."

[2] "Although Plaintiffs have brought this action pursuant to Oklahoma's State Open Records Act (the "ORA"), in analogous circumstances federal courts have routinely and consistently observed that ""[d]iscovery is generally disfavored in [Freedom of Information Act ("FOIA")] cases." *Beltranena v. US. Dep't of State*, 821 F.Supp.2d 167, 176 (D.D.C.2011); *Justice v. IRS*, 798 F.Supp.2d 43, 47 (D.D.C. 2011), aff'd, 485 Fed. Appx. 439 (D.C.Cir. 2012). Indeed, "[c]ourts permit discovery in FOIA cases [only] where a plaintiff has made a sufficient showing that the agency acted in bad faith." *Justice v. I.R.S.*, 798 F.Supp.2d at 47 (internal citations and quotations omitted). And even then, "the scope of discovery is usually limited to the adequacy of the agency's search and similar matters." *Voinche v. F.B.I.*, 412 F.Supp.2d 60, 71 (D.D.C. 2006)." *Non-Party the University of Oklahoma Foundation Inc's Emergency Motion to Quash and Request for Expedited Briefing and Consideration of Same and Brief in Support* at 2 (May 23, 2023).

3230(C)(5) deposition. There is nothing new here, and the University incorporates by reference its *Response to Plaintiffs' Motion to Strike Heidi Long's Affidavit and Testimony* as well as its *Reply in Support of the Motion for Summary Judgment*. Again, Plaintiffs complain as to how Ms. Long was prepared for her deposition, but as the deposition transcript itself shows, she possessed the information available to the University to answer the questions related to the topics permitted by the Court. While Plaintiffs attack her style of preparation, it is undisputed that Ms. Long was actually involved in the underlying Jones Day investigations and is the person with the most first-hand knowledge of the topics requested available.

More importantly, however, Plaintiffs complaints are not relevant to the underlying issue before the Court. For example, how does one engagement letter identifying the "University of Oklahoma" as the client versus the "Board of Regents of the University" help this matter? See Motion at 5. Elsewhere, Ms. Long identified the month the University became aware it needed to retain Jones Day, but Plaintiffs complain she could not recall the moment. *Id.* at 5-6. Plaintiffs also acknowledge Susanna Gattoni's unfortunate passing, but demand information she alone possessed. *Id.* These unhelpful observations and demands for additional information are simply not proportional to the needs of the case nor likely to lead to the discovery of relevant and admissible evidence. 12 O.S. § 3226(B)(1)(a).

The Court should remain mindful, however, that much of the information Plaintiffs complain as not available during the deposition were from topics excluded by the Court. By interweaving complaints that Ms. Long would not answer questions that were privileged or outside the Court designated topic areas, Plaintiffs attempt to create the façade of an obstructed deposition. Take, for example, the random document Jess Eddy provided Plaintiffs that was purportedly his intake summary. Motion at 6. There are no topics provided that would have put the University on

notice to prepare the representative deponent to speak as to Jess Eddy as a witness. Quite the opposite. This Court struck the only topic that could have related to that line on inquiry: "The manner in which the University has conducted investigations into reports of sexual misconduct by its employees and executive officers since January 1, 2013." (Proposed Topic 3). For that same reason, Plaintiffs complaint that Ms. Long would not testifying on the Title IX—also encompassed by Topic 3—should fall on deaf ears. See Motion at 9-10. In fact, most of the Motion to Compel seeks to compel the University to answer topics related to how the Jones Day Report was created, even though the Court left topics related to how the Reports themselves were handled—presumptively to explore disclosure.

Additionally, Plaintiffs ignore the over 1600 pages of document discovery provided to them that outline the procedures and policies for open records requests, sexual misconduct investigations, and provide background information that is not privileged. For example, the University produced the only disclosure of information to U.S. News and World Report related to alumni data by producing the letter from the University; however, Plaintiffs could not establish that information disclosed therein derived from the Jones Day Report because it was not. And the University has been forthright about other disclosures to the Oklahoma Bureau of Investigation throughout this litigation, but such disclosure was made pursuant to a Joint-Interest Agreement and the Informer's Privilege (which specifically contemplates disclosure to law enforcement, See 12 O.S. § 2510). Consequently, neither of these disclosures have breached the privileges and further exploration of waiver is duplicative of the information already in Plaintiffs possession.

This Court should follow the decision in *Norman v. Mercy Memorial Health Center Inc.*, where the Oklahoma Court of Civil Appeals found that the trial court acted in its discretion to deny a second deposition of the same witness. There, the appellate court noted the testimony was already

provided by a deposition and "there was no evidence he would have testified differently in a second deposition." 2009 OK CIV APP 55, ¶ 13. The Court also noted that any prejudice was relieved by the fact this was a matter to be tried to the Court rather than a jury. *Id.* Here, cumulation of document production and the depositions provide make a second deposition duplicative and a waste of judicial resources. *See Barten v. State Farm Mut. Auto. Ins. Co.*, No. CV-12-0399-TUC-CKJ, 2014 WL 4722492, at *5 (D. Ariz. Sept. 23, 2014) ("[T]he Court agrees with the magistrate judge's conclusion that a further deposition would do little to uncover the truth, and, as noted, it does not appear to the Court to be necessary for any motion in limine. The Court holds that the magistrate judge's Order denying the re-opening of Barten's deposition is not clearly erroneous or contrary to law."). Plaintiffs have not provided sufficient justification for this redeposition. The Motion should be denied.

III. THE MOTION IS SUBSTANTIVELY THE SAME AS PLAINTIFFS FAILED ATTEMPT TO SOLICIT PRIVILEGED INFORMATION THROUGH THE DEPOSITION OF JAMES GALLOGLY AND THE 3230(C)(5) DEPOSITIONS.

Plaintiffs have two substantive issues with their Motion to Compel. First, it still seeks the same prohibited information as the attempted Gallogly and 3230(C)(5) depositions topics the Court already ruled were either privileged or not relevant to this administrative review. As previously noted, the University has already endured more than it would through the analogous federal scheme. For these reasons, the Motion should be denied.

A. The Motion seeks the same information the Court withheld from disclosure.

Plaintiffs previously sought to depose the former President of the University, James Gallogly. *See generally, the University's Motion for Expedited Hearing and Protective Order to Quash Deposition of James Gallogly* (Feb. 13, 2023). The University objected based on the grounds that former employees of the University may not disclose its privileged information, and

the information retained by Gallogly relevant to the request of the Petition—"[a]ny and all reports created by the law firm Jones Day for the University of Oklahoma related to David Boren or Jim 'Tripp' Hall." Petition ¶ 18—would be privileged information. *Id.* at 3. The Court agreed finding: "The information sought from the deposition of James Gallogly relates to the Jones-Day Report is privileged. The privilege belongs to the University solely and cannot be waived by James Gallogly. The University declines to waive the privilege and therefore any information obtained by James Gallogly through his receipt of the Jones-Day Report in his capacity as President of the University cannot be produced through testimony of Gallogly."

Undeterred, Plaintiffs sought a 3230(C)(5) deposition concerning fourteen (14) topic areas, which the University objected to for various reasons, including privilege. *The University's Emergency Motion for Discovery Conference and Protective Order* (May 22, 2023). Before the hearing, Plaintiffs informally provided fourteen (14) newly proposed topics to the University, which were provided to the Court at the hearing. *Ex. 1*, Weeks Ltr. (May 31, 2023). The parties argued the merits of the newly proposed topics, and the Court only permitted topics related to the actual handling of the Jones Day Reports themselves, rather than the substantive content of the reports. [3] This was done to permit some discovery into any potential disclosure or breach of the

[3] More specifically, this Court struck:
Proposed Topic 3: "The manner in which the University has conducted investigations into reports of sexual misconduct by its employees and executive officers since January 1, 2013." (Proposed Topic 3);
Proposed Topic 4: "The manner in which the University has collected and externally reported data about alumni and donors since January 1, 2015."
Proposed Topic 5: "The manner in which the University has investigated, disciplined, and/or terminated University personnel since January 1, 2013."
Proposed Topic 8: "The University's payment(s) to Jones Day in 2018 and 2019 for work it conducted related to the Jones Day Reports."
Proposed Topic 9: "The University's decision(s) in 2018 and 2019 that Jones Day had completed the work the University hired it to conduct."
Proposed Topic 14: "David Boren's severance and/or separation from the University."
Proposed Topic 15: "The University's responses to the information disclosed in the Jones Day Reports, including follow-up investigations and any implementation of recommendations made

privileges at issue, the only issue remaining in regards to the privilege issue. .

Regardless, within the motions to quash the Gallogly Deposition and the 3230(C)(5) topics, the University has maintained the same arguments. The substantive information within the Jones Day Reports, including the process for their creation, is covered by several privileges that cannot be waived by former employees. Further, those reports contain information that was provided to the Oklahoma Bureau of Investigation, which resulted in a grand jury inquiry, directly inline with the informer's privilege. And those Reports were utilized by the Board of Regents to make decisions affecting the University through its privilege of deliberative process. Finally, it would be a violation of the due process of witnesses to the Reports to assure them confidentiality but disclose that information within this proceeding or elsewhere. *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) ("[d]ue process thus implies an assurance of confidentiality with respect to certain forms of personal information possessed by the state.") (bracket in original). The due process implications are further compounded by the right of certain witnesses to take legal action against the University as "retaliation" for disclosing confidential information protected by Title IX. For these reasons, the Court has time and again prohibited discovery beyond how the Jones Day Reports themselves were handled as it relates to disclosure. The question of privilege was asked and answered.

As demonstrated by Plaintiffs laundry list of "prohibits witness testimony" at page 13 of the Motion, they simply refuse to accept that the University can and does retain privilege over the information within the Jones Day Report.

The Response to the Motion for Summary Judgment filed by Plaintiffs heavily relied upon

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by Jones Day, from July 2018–present."
Compare *Ex. 2*, Summary Order (June 6, 2023) with *Ex 1*, Weeks Ltr. (May 31, 2023) and *Ex. 3*, Notice of Deposition (June 5, 2023).

the Baylor case, where disclosure was found due to Baylor University. There, the United States District Court found that Baylor University properly retained a law firm to conduct a Title IX investigation. **The Court determined the resulting report was, in fact, privileged:**

> In this case, the evidence clearly demonstrates that Baylor was seeking legal advice when it engaged Pepper Hamilton in September 2015. The initial engagement letter indicated that Pepper Hamilton was hired "to conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues through the lens of specific cases." (Pls.' Mot. to Compel Ex. A, Dkt. 93–1, Client Engagement Letter). Although the letter does not use the phrases "legal advice," "legal assistance," or the like, there is no magic phrase that must be included in an engagement letter to invoke the attorney-client privilege. The letter plainly indicates that Baylor hired a law firm to review its compliance with federal law—in other words, to obtain legal advice.

Doe 1 v. Baylor Univ., 320 F.R.D. 430, 436–37 (W.D. Tex. 2017). And, unlike the University herein, Baylor voluntarily waived its privilege, as it "**released two documents summarizing the results of the Pepper Hamilton investigation, a thirteen-page summary of the investigation and its conclusions entitled 'Findings of Fact,' and another ten-page list of recommendations titled 'Report of External and Independent Review, Recommendations**.'" *Baylor Univ.*, 320 F.R.D. at 434 (emphasis added). No such waiver has occurred here, yet Plaintiffs blindly ignore their own authority supports the privilege attached to these Reports.

Turning back to the Plaintiffs' list, Plaintiffs are upset they could not inquire into:

- Communications with the University's counsel, Jones Day which the University maintains however that such information is patently covered by attorney-client privilege as shown by *Baylor*.

- Identification of interviewees within the Report. However, the University would have to divulge information within the Jones Day Reports to provide the requested information, which would breach the privileges;

- Whether Jones Day interviewed David Boren. However, the University would have to divulge information within the Jones Day Reports to provide the requested information, which would breach the privileges;
- The manner in which the information within the Reports was communicated internally. But that information is not relevant to the underlying matter and certain non-privileged information related to this inquiry as phrased in the Motion was provided for in the deposition.
- Whether the University acted upon information within the Reports in responses. But, again, this would implicitly disclose of information within the Reports that is privileged; and,
- When the University was alerted to the misconduct of that is subject of the second Report. This request is directly opposed to the Informer's privilege and would require the disclosure of information within the Reports that is privileged.

Taken together, there is simply no room for these areas of exploration as they (1) are not probative to the matter before the Court, and (2) otherwise seek privileged information.

B. Plaintiffs' complaints as to the University's deposition objections lack basis in law.

In the quoted portions of the Motion, Plaintiffs requested that the University more thoroughly explain the basis of its instruction for the deponent not to answer and complain that no factual basis was given for the privilege objections. Motion at 11-16. Awkwardly, however, Plaintiffs a few pages later take the opposite position: University's counsel explained too much while objecting. Motion at 18.

Additionally, Plaintiffs general complaints about deposition conduct and snippets of decisions from federal courts do not conform to this court's order regarding the deposition and the Oklahoma Discovery Rules. For purposes of this deposition, the University had to continually enforce the limits of the topics provided by Court order. For that particular purpose, the Oklahoma

Discovery Code provides that objections and instructions not to answer are appropriate: "A party may instruct a deponent not to answer only when necessary to preserve a privilege or work product protection, **to enforce a limitation on evidence directed by the court**, to present a motion under paragraph 2 of this subsection, or to move for a protective order under subsection C of Section 3226 of this title." 12 O.S. § 3230(D). Additionally, the Oklahoma Discovery Code authorizes:

> All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; however, the examination shall proceed, with the testimony being taken subject to the objections.

Plaintiffs' frustration that the University would not allow them to maneuver into protected topics is not justification for additional depositions.

There is also no established definition of speaking objections or their exact prohibition under Oklahoma law. As the Western District of Oklahoma quoted the Oklahoma Court of Criminal Appeals to state: "[W]hat amounts to a speaking objection can vary from courtroom to courtroom." *Meyer v. Crow*, No. CIV-20-1125-J, 2021 WL 6773139, at *14 (W.D. Okla. Nov. 15, 2021), *report and recommendation adopted*, No. CIV-20-1125-J, 2022 WL 289174 (W.D. Okla. Jan. 31, 2022). However, there the Court stated that the objection at issue did "not rise to the level of either coaching or an improper speaking objection," because nothing with the comments "suggested an answer to the witness." *Id.* Just so here, none of the complained of objections informed the witness's answer; instead, they were functionally form objections that properly adhered to the scope of inquiry set by this Court.

C. Plaintiffs failed to seek relief at the time of the deposition.

For all of Plaintiffs complaints about how ineffective the representative deposition purportedly was, at no point did Plaintiffs cease the deposition to reserve time and seek a protective

order. According to the Motion, Plaintiffs knew within "only minutes into the deposition" that the University was obstructing its questions. Motion at 9. Yet, they continued to take the deposition undeterred. If Plaintiffs were truly on notice that the deposition was obstructed from the early minutes (in a deposition that lasted over the next several hours) they should have terminated the deposition, leaving it open, and sought an order from the Court. See 12 O.S. § 3230.

IV. THE COURT LACKS JURISDICTION TO COMPEL THE OTHER WITNESSES THROUGH THE ALTERNATIVE RELIEF REQUESTED BY PLAINTIFFS.

As an alternative remedy, Plaintiffs request three (3) individuals be presented for deposition, none of which were requested prior to their Response to Summary Judgment being due or within any Rule 13(d) Affidavit. More specifically, Plaintiffs seek the depositions of Bobby Mason, Anil Gollahalli, and Susanna Gattoni. *Ex. 4*, Weeks Eml. (July 13, 2023). Two of those individuals were members of the University's Office of Legal Counsel, while the other worked in the Title IX Office. None are employees of the University any longer or reside within the State of Oklahoma.[4]

In addition to the merits issues above, the Court lacks jurisdiction over non-parties that live out-of-state. The Motion is frivolous because Plaintiffs failed to use any mechanism under the Oklahoma Discovery Code to put these witnesses under the jurisdiction of the Court.

A. This Court generally lacks jurisdiction over individuals of other states.

The Court lacks jurisdiction over non-parties located out of state:

> In the present case, while Defendant may have had some leverage or bargaining power over the non-resident witnesses, Defendant had no legal means to compel the non-resident witnesses to come to Oklahoma to give testimony in compliance with the orders. Nor did the court have the power to require Defendant to produce these non-resident non-party witnesses for deposition in Oklahoma. **The "subpoena powers of Oklahoma courts stop at the state line."**

[4] It is with great sadness the University must advise the Court the Ms. Gattoni unexpectedly and recently passed away.

Blue Tee Corp. v. Payne Well Drilling, Inc., 2005 OK CIV APP 109, ¶ 10, 125 P.3d 677, 679, *disapproved of on other grounds by Crest Infiniti, II, LP v. Swinton*, 2007 OK 77, ¶ 10, 174 P.3d 996 (quoting *Lovett v. Wal–Mart Stores, Inc.*, 2001 OK CIV APP 9, ¶ 12, 18 P.3d 387, 389). For example, in *Craft v. Chopra*, the Oklahoma Court of Civil Appeals analyzed the difference between discovery obtained upon out-of-state materials of a party and a non-party witness located out of state. *Craft v. Chopra*, 1995 OK CIV APP 135, 907 P.2d 1109, 1111. There, the *Chopra* Court noted that minimum-contacts to establish personal jurisdiction apply to "a *party*, more particularly a *party defendant*, not a *witness* as in the present case." 1995 OK CIV APP 135, 907 P.2d at 1111 (emphasis in original). Instead, the court found that "neither the Oklahoma Pleading Code, § 2004.1, nor the comments thereto, extend the reach of Oklahoma discovery process beyond the state boundaries." *Id.* The Court went on to discuss the limits of the discovery process in Oklahoma both statutorily and at common law: First, the Court turned to 12 O.S. § 2004.1(A)(1)(c), which is only "permits service of subpoenas only '*within the state*,' and the commentary to that section reinforces the '*statewide*' limits of the Oklahoma courts' subpoena powers." *Chopra*, 1995 OK CIV APP 135, 907 P.2d 1109, 1111. Next, the court looked to other states, which also recognize the "intra-state limits of state court's process powers." Id. (internal citations omitted). Put simply, "**a state court cannot require the attendance of a witness who is a nonresident of and is absent from the state**." *Chopra*, 1995 OK CIV APP 135, 907 P.2d 1109, 1111 (quoting *In re Special Investigation No. 219*, 445 A.2d at 1085) (emphasis added).

The bare minimum of the due process clause requires notice of hearing where one's interests are at stake. For example, where subpoenas are authorized—which is not in the instant motion as subpoenas are limited to service the within the State—at a minimum, the party seeking such information must serve the subpoena on the "person named therein [which] shall be made by

delivering or mailing a copy thereof to such person." 12 O.S. §2004.1. This provision goes on to outline all of the opportunities the non-parties have to quash the subpoena. § 2004.1(C); *see Waddle v. Waddle*, 1994 OK CIV APP 1, 868 P.2d 751, 753 ("Service of the subpoena is personal, and must be made in accordance with § 2004.1 to the person named therein."). The subpoena process affords due process; what Plaintiffs is attempting does not.

The Oklahoma Supreme Court has outlined the requirements of due process relating to notice of hearings, stating:

> The terms of the Fourteenth Amendment to the U.S. Constitution and those of Article 2, section 7 of the Oklahoma Constitution forbid the state from depriving any person of life, liberty, or property without due process of law. While the core element of due process is the right to be heard,40 that element would have no value unless advance notice is afforded of the hearing at a meaningful time and in a meaningful manner. The person to be affected must be fairly and timely apprised of what interests are sought to be reached by the triggered process. Notice and opportunity to be heard must be provided in such a way that a person can intelligently decide in advance whether to appear at the hearing and contest the matters in issue or acquiesce in their in absentia resolution and assume the risk from consequences attendant upon a default.
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> ****
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> Notice is a *sine qua non* element of personal jurisdiction, without which the court wields no authority over the persons sought to be haled before it. The classic statement of constitutionally adequate notice is that which is reasonably calculated, under the circumstances, to inform interested persons of the pending litigation and to afford them an opportunity to advocate their interest in the cause. Notice that satisfies due process performs two functions. It not only informs interested persons that litigation is pending (in the sense of telling them that it exists and informing them of time and place where the forensic battle will be waged), but also affords them an opportunity to present a defense against the adversary's claim. At the bare minimum, a constitutionally adequate notice must apprise one of the antagonist's pressed demands and of the result consequent upon default. In order to accomplish that task, notice must provide one with more than the naked logistics of the hearing. For intelligently framing one's defense a person must know what issues one will be confronted with. In deciding whether to appear at the

> hearing to defend against issues presented for resolution or default and suffer the consequences, one must at every critical stage of the proceedings be provided with (1) notice at a meaningful time and in a meaningful manner, (2) a realistic opportunity to appear and be heard, and (3) the opportunity meaningfully to participate in the proceedings.

Booth v. McKnight, 2003 OK 49, ¶¶ 18, 20-21 (emphasis added); see also J & J Sports Prods., Inc. v. Spears, No. CIV-18-126-D, 2023 WL 3066173, at *6 (W.D. Okla. Apr. 24, 2023) ("Due process 'requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.'").

Because neither Anil Gollahalli nor Bobby Mason are parties to this proceeding, their deposition cannot be compelled without notice of the proceedings. Plaintiffs have failed to seek letters rogatory or otherwise place the identified non-parties under the jurisdiction of this Court. As such, it is a violation of their due process rights to compel their testimony without opportunity to object and be heard.

B. The Oklahoma Discovery Code does not permit Plaintiffs to designate the university's representative who is not a managing agent

The Oklahoma Supreme Court has identified two (2) methods recognized for taking depositions of non-person entities in Oklahoma, neither of which apply to former employees that reside out-of-state nor particular departments within an entity. Following the Oklahoma Discovery Code is required here as "former employees may not speak for or bind" the University. *Cf. Fulton v. Lane*, 1992 OK 25, ¶ 1.

Option 1: The University designates someone who consents to be the representative.

This is the route Plaintiffs opted to use prior to their Response to the Motion for Summary Judgment becoming due. Plaintiffs are, consequently, aware that a party may issue a 3230(C)(5) deposition notice that describes "with reasonable particularity the matters on which examination

is requested." The entity then must designate someone "**who consent[s] to testify on its behalf**." 12 O.S. § 3230 (C)(5)(emphasis added). That person then testifies "as to matters known or reasonably available to the organization." *Id.* There is no indication that any of the individuals identified by Plaintiffs consented to have their testimony taken on the University's behalf, which would leave one other option for Plaintiffs.

Option 2: Plaintiffs select a current managing agent of the University.

"The former requires the individual named in a notice to be a director, officer, managing agent, or some other individual who is authorized to speak for the corporation." *Crest Infiniti, II, LP v. Swinton*, 2007 OK 77, ¶ 6. As it stands, none of the individuals identified by Plaintiffs have ongoing employment with the University, are not directors, officers, or managing agents of the University, and none are residents of Oklahoma.

V. THE UNIVERSITY IS OWED ATTORNEY FEES FOR DEFENDING AGAINST THIS MOTION.

Motions seeking to compel discovery are subject to 12 O.S. 3237, which provides:

> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

12 O.S. § 3237 (A)(4). The purpose of Section 3237 is similar to Section 2011 of the Oklahoma Code of Civil Procedure, as the "sanctions are 'designed as a tool to compel production of evidence, compensate adversaries for unnecessary expense and deter misconduct.'" *Hopkins v. Byrd*, 2006 OK CIV APP 132 ¶ 12 (quoting *Payne v. Dewitt*, 1999 OK 93 n. 7). As the Oklahoma Supreme Court has observed, Section 3237 is designed to "compel production of evidence," while also compensating "adversaries for unnecessary expense and deter misconduct." *Payne*, 1999 OK

93 n. 7.

That is precisely what occurred in the University's primary authority, as the *Chopra* Court affirmed the award of attorney fees as there was no justification for the motion seeking to compel out-of-state witnesses through a discovery motion. More specifically, the Court stated:

> Finding no statutory authority in either the Oklahoma Pleading Code or the Oklahoma Discovery Code contemplating extra-territorial effect of Oklahoma discovery process, we thus hold SGH entitled to costs and a reasonable attorney fee in defending Craft's attempted discovery because Craft's attempted discovery of documents by subpoena addressed to the non-resident SGH was not well-founded in fact or law. 12 O.S. § 2011; *First National Bank & Trust Co. of Vinita v. Kissee*, 859 P.2d 502 (Okla.1993).

Craft v. Chopra, 1995 OK CIV APP 135, 907 P.2d 1109, 1112.

Here, the conduct is egregious as Plaintiffs have specific knowledge that the witnesses are no longer within the State or employed by the University years before this Motion or the even the motion for summary judgment was filed:

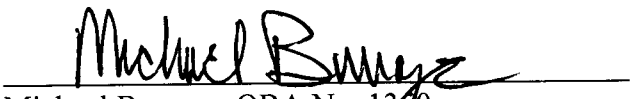
- "In May, OU's longtime equal opportunity coordinator and Title IX coordinator **Bobby Mason departed OU for a newly created position of vice president for institutional compliance at Texas State University**." Tres Savage, *Feds, faculty and audit cause Title IX changes at OU*, NonDoc (Sep. 15, 2020) https://nondoc.com/2020/09/15/feds-faculty-audit-cause-ou-title-ix-changes/ (emphasis added).;

- "Meanwhile, the University of Oklahoma will be searching for a new top lawyer. Longtime general counsel and Vice President **Anil Gollahalli is leaving OU to become the chief legal officer and general counsel for the Big 10 Conference**." Tres Savage, *Kevin Stitt names Bob Ross to the OU Board of Regents*, NonDoc (Mar. 30, 2022) https://nondoc.com/2022/03/30/bob-ross-appointed-ou-board-of-regents/ (emphasis added).

CONCLUSION

In conclusion, the University requests the Court deny Plaintiffs' Motion and award it the associated attorney fees, expenses, and costs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October 2023, a true and correct copy of the foregoing was hand delivered to:

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EXHIBIT

1

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May 31, 2023

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VIA EMAIL

Re: *Sustainable Journalism Foundation v. State of Oklahoma ex rel. Board of Regents of the University of Oklahoma (Cleveland County case no. CV-2021-1770)*

Dear Counsel,

I write in advance of Friday's meet and confer regarding Defendant's May 22, 2023, Emergency Motion for Discovery Conference and Protective Order (Defendant's "Protective Order Motion"). Plaintiffs have reviewed Defendant's Reply in Support of its Protective Order Motion, filed May 30, and note Defendant's statement that "the topics described [in Plaintiff's Opposition to and Motion to Strike Defendant's Emergency Motion], which may have been reasonable, are not the topics provided in the notice."

Given that understanding, and in the interest of reaching a set of agreed deposition topics prior to the parties' hearing on Defendant's Protective Order Motion, Plaintiffs propose the following revision to the topics listed in the Notice of Deposition served on Defendant on May 18, 2023.

1. The Board of Regents' prior practice(s) in responding to requests it has received under the Open Records Act that seek records related to or regarding investigations conducted within the University.

2. The Board of Regents' decision to withhold the records at issue in this case.

3. The manner in which the University has conducted investigations into reports of sexual misconduct by its employees and executive officers since January 1, 2013.

4. The manner in which the University has collected and externally reported data about alumni and donors since January 1, 2015.

5. The manner in which the University has investigated, disciplined, and/or terminated University personnel since January 1, 2013.

6. The University's decision(s) to hire Jones Day in 2018 related to the Jones Day Reports.

7. Whether drafts of the Jones Day Reports were presented to the Board of Regents or others within the University.

8. The University's payment(s) to Jones Day in 2018 and 2019 for work it conducted related to the Jones Day Reports.

9. The University's decision(s) in 2018 and 2019 that Jones Day had completed the work the University hired it to conduct.

10. The University's coordination or cooperation, if any, with law enforcement entities related to the investigations conducted by Jones Day from July 2018–present.

11. The University's engagement in or anticipation of litigation related to the Jones Day Reports from July 2018–present.

12. The University's disclosure and dissemination of the Jones Day Reports or portions of the Jones Day Reports.

13. The University's receipt, disclosure, and dissemination of information contained in the Jones Day Reports or portions of the Jones Day Reports.

14. David Boren's severance and/or separation from the University.

15. The University's responses to the information disclosed in the Jones Day Reports, including follow-up investigations and any implementation of recommendations made by Jones Day, from July 2018–present.

* * *

While Plaintiffs continue to believe that the topics served May 18, 2023, were written narrowly and each directly relevant to issues in the case and expressly reserve all rights as to same, they are nonetheless willing to proceed with the deposition currently scheduled for June 9, 2023, using the above-listed topics, provided that Defendant withdraws its Protective Order Motion.

Please respond as soon as possible with Defendant's response to the above proposal, and any further counter-proposal to narrow the issues raised in Defendant's Protective Order Motion ahead of the Friday's meet and confer to allow the parties to engage in a productive discussion.

Regards,

/s/ Lin Weeks
Lin Weeks
Reporters Committee for Freedom of the Press

Counsel for Plaintiffs

EXHIBIT

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IN THE DISTRICT COURT OF CLEVELAND COUNTY, STATE OF OKLAHOMA

NonDoc et al Meeks
Plaintiff(s) Attorney(s) for Plaintiff(s)

Case No. CV-21-1770

—VS—

State ex rel Oklahoma Burrage
Board of Regents
Defendant(s) Attorney(s) for Defendant(s)

SUMMARY ORDER

Date: 6/5/23 Court Reporter _____ Judge: LMW

Based upon review of pleadings herein, ct determines the scope of the §3230(5) deposition to include & is limited to topics #1, 2, 6, 7, 10, 11, 12 & 13 of Pl's proposed topics.

JUDGE

EXHIBIT

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Cynthia Norman

From: Lin Weeks <lweeks@rcfp.org>
Sent: Thursday, July 13, 2023 4:33 PM
To: Michael Burrage; Austin R. Vance; Drew Neville
Cc: blake johnson; Cheri Cooksey
Subject: NonDoc v. OU - additional OU deponents

Counsel,

The University's designees on June 9, Ms. Long and Mr. Barger, were not knowledgeable as to some of Plaintiffs' noticed topics. However, through Ms. Long and Mr. Barger's testimony, it became clear that others currently or previously employed by the University possess the information sought at Plaintiffs' deposition. Please provide a date or dates that the following individuals can attend a deposition on the below topics:

Anil Gollahalli:
(1) the University's decision to engage Jones Day with respect to the first Report and the terms and scope of that engagement;
(2) how the University made its decision to assert privileges or exemptions to withhold disclosure of either or both Reports in response to Plaintiffs' ORA requests;
(3) the facts forming the foundation for the asserted applicability of those privileges and/or exemptions; and
(4) the University's dissemination or disclosure of the first Report, or the information contained therein, to individuals or entities outside the Office of Legal Counsel.

Susanna Gattoni:
(1) the University's decision to engage Jones Day with respect to the second Report and the terms and scope of that engagement;
(2) how the University made its decision to assert privileges or exemptions to withhold disclosure of the second Report in response to Plaintiffs' ORA requests;
(3) the facts forming the foundation for the asserted applicability of those privileges and/or exemptions;
(4) the University's dissemination or disclosure of the second Report, or the information contained therein, to individuals or entities outside the Office of Legal Counsel; and
(5) any representations of confidentiality made to witnesses and information relating to those witness' reliance on the representations.

Bobby Mason:
(1) any receipt of information that led to the University's decision to retain Jones Day to generate the second Report;
(2) any relevant reports or complaints made to the Title IX office;
(3) the University's disclosure of the second Report to David Boren and/or other subjects of or witnesses to the second report; and
(4) matters related to the "Intake Summary" provided to Jess Eddy.

Regards,
Lin

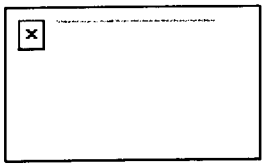

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EXHIBIT

4

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.	)	No. CV-2021-1770
THE STATE OF OKLAHOMA ex rel. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, Defendant.	)	

NOTICE OF DEPOSITION

To Defendant, *The State of Oklahoma ex rel. Board of Regents of the University of Oklahoma*, c/o:

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Please take notice that Plaintiffs, *The Sustainable Journalism Foundation d/b/a NonDoc Media and William W. Savage III*, will take the deposition upon oral examination of Defendant, *The State of Oklahoma ex rel. Board of Regents of the University of Oklahoma*, a governmental agency, through such public officials, employees, or other persons as Plaintiffs designate under Okla. Stat. tit. 12, § 3230(C)(5). The deposition will take place on **Friday, June 9, 2023,** at **9:00 a.m.** at the offices of Overman Legal Group, PLLC, located at 809 NW 36th Street, Oklahoma City, OK 73118. The deposition will take place before an officer authorized to administer oaths and will continue from day to day until completed. The deposition will also be recorded on video.

Pursuant to the Court's Order dated June 5, 2023, the matters on which examination is requested at the deposition are:

1. The Board of Regents' prior practice(s) in responding to requests it has received under the Open Records Act that seek records related to or regarding investigations conducted within the University. (Proposed Topic 1 in Letter from L. Weeks to Def.'s Counsel, May 31, 2023, hereinafter "Proposed Topic __".)

2. The Board of Regents' decision to withhold the records at issue in this case. (Proposed Topic 2.)

3. The University's decision(s) to hire Jones Day in 2018 related to the Jones Day Reports. (Proposed Topic 6.)

4. Whether drafts of the Jones Day Reports were presented to the Board of Regents or others within the University. (Proposed Topic 7.)

5. The University's coordination or cooperation, if any, with law enforcement entities related to the investigations conducted by Jones Day from July 2018–present. (Proposed Topic 10.).

6. The University's engagement in or anticipation of litigation related to the Jones Day Reports from July 2018–present. (Proposed Topic 11.)

7. The University's disclosure and dissemination of the Jones Day Reports or portions of the Jones Day reports. (Proposed Topic 12.)

8. The University's receipt, disclosure, and dissemination of information contained in the Jones Day Reports or portions of the Jones Day Reports. (Proposed Topic 13.)

You are required to deliver the names of the persons so designated and the subject of their testimony prior to or at the commencement of the deposition to Blake Johnson (blakejohnson@overmanlegal.com) and Lin Weeks (lweeks@rcfp.org).

DATED: June 5, 2023

By:

/s/ Lin Weeks

Blake Johnson, OBA No. 32433
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Counsel for Plaintiffs