

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

IN RE SUBPOENA OF
FELESHIA PORTER

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Case No.: 16-MC-009-RAW

DR. RACHEL TUDOR'S
MOTION TO QUASH SUBOENA OR,
IN THE ALTERNATIVE,
TO TRANSFER TO THE
WESTERN DISTRICT OF OKLAHOMA
WITH INCORPORATED BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

INTRODUCTION.....5

GOOD FAITH CONFERRAL.....6

STATEMENT OF FACTS.....7

SUMMARY OF ARGUMENT.....11

ARGUMENT.....12

 I. THE PORTER SUBPOENA SHOULD BE QUASHED BECAUSE ITS SUBJECT
 MATTER IS PROTECTED BY PSYCHOTHERAPIST-PATIENT PRIVILEGE.....12

 II. TRANSFER OF THIS MOTION TO THE WESTERN DISTRICT OF
 OKLAHOMA IS APPROPRIATE.....17

 III. SANCTION OF DEFENDANTS AND/OR DEFENDANT’S COUNSEL IS
 APPROPRIATE.....19

TABLE OF AUTHORITIES

Cases

<i>Allender v. Raytheon Aircraft Co.</i> , 220 F.R.D. 661 (D.Kans. 2004).....	22
<i>Atlantic Inv. Management, LLC v. Millenium Fund I, Ltd.</i> , 212 F.R.D. 395 (N.D. Ill. 2002).....	13
<i>Braley v. Campbell</i> , 832 F.2d 1504 (10 th Cir. 1987).....	21
<i>Builders Ass’n of Greater Chicago v. City of Chicago</i> , 2002 WL 1008455 (N.D.Ill. May 13, 2002).....	23
<i>Carpet Studios Div. of Source Advantage, Ltd. v. Sater</i> , 465 F.3d 642 (6 th Cir. 2006).....	22
<i>Donaldson v. Clark</i> , 819 F.2d 1551 (11 th Cir. 1987).....	21
<i>Fitzgerald v. Casil</i> , 216 F.R.D. 632 (N.D. Cal. 2003)	15
<i>Landry v. Air Line Pilots Ass’n</i> , 901 F.2d 404 (5 th Cir. 1990).	16
<i>Hamilton v. Boise Cascade Express</i> , 519 F.3d 1197 (10 th Cir. 2008).....	22
<i>Huck v. City of Oak Forest</i> , 185 F.R.D. 526, 529 (N.D.Ill. 1999).....	13
<i>In re Subpoena to Paul G. Cassell</i> , 2016 WL 3645166 (D.Utah June 30, 2016).....	18
<i>In re Terra Int’l</i> , 134 F.3d 302 (5 th Cir. 1998).	16
<i>Jaffee v. Redmond</i> , 518 U.S. 1, 15 (1996).	13
<i>Ortiz-Carballo v. Ellspermann</i> , 2009 WL 961131 (M.D.Fla. 2009)	15

Parker Compound Bows, Inc. v. Hunter’s Manufacturing Company, Inc.,
2015 WL 7308655 (N.D.Ohio Nov. 19, 2015).....18, 19

Resolution Trust Corp. v. Dabney,
73 F.3d 262 (10th Cir. 1995).....21

Roberts v. Clark County School District,
312 F.R.D. 594 (D.Nev. 2016).....15

Ruhlmann v. Ulster County Dep’t of Social Servs.,
194 F.R.D. 445 (N.D.N.Y. 2000)14, 15

Shirazi v. Childtime Learning Center, Inc.,
2008 WL 4792694 (W.D.Okla. Oct. 31, 2008)15

Stevenson v. Stanley Bostitch, Inc.,
201 F.R.D. 551, 553 (N.D.Ga. 2001)15

United States v. Glass,
133 F.3d 1356 (10th Cir. 1998).....13

United States et al. v. Southeastern Oklahoma State University et al.,
5:15-cv-00324-C (W.D.Okla. filed Mar. 30, 2014).....5
2015 WL 4606079 (W.D.Okla. July 10, 2015).....18

Rules

28 U.S.C. §1927.....12, 20, 21, 22

Federal Rule of Civil Procedure 26.....6, 12, 16

Federal Rule of Civil Procedure 45.....*passim*

Local Rule 7.1.....6

INTRODUCTION

Dr. Rachel Tudor is currently engaged in active litigation in the Western District of Oklahoma against her former employers, Southeastern Oklahoma State University and the Regional University System of Oklahoma (“Defendants”). *United States et al. v. Southeastern Oklahoma State University et al.*, 5:15-cv-00324-C (W.D. Okla. filed Mar. 30, 2014). The United States filed the underlying Title VII enforcement action to redress sex discrimination and retaliation that Dr. Tudor, a transgender woman, was subjected to by Defendants. Dr. Tudor intervened in the underlying case, added an additional claim alleging she was subjected to a hostile work environment, and is thus a party in that matter.

Without waiting for the court in the underlying action to resolve a pending motion regarding Dr. Tudor’s psychotherapist-patient privilege, Defendants presented two subpoenas upon Ms. Feleshia Porter, Dr. Tudor’s former therapist.

The First Porter Subpoena was served on Ms. Porter on July 11, 2016, and noticed Ms. Porter of a deposition to be conducted in Dallas, Texas on July 26, 2016; it further compelled Ms. Porter to produce documents at the deposition. Dr. Tudor filed a motion to quash and transfer the First Porter Subpoena related motions on July 18, 2016 with the Northern District of Texas (the court of compliance for the First Porter Subpoena). On July 19, 2016 the Northern District of Texas issued a stay and set briefing on the transfer issue in August 2016. On July 27, 2016 Defendants sent an email to Dr. Tudor’s counsel claiming they had withdrawn the First Porter Subpoena and thus Dr. Tudor’s motions before the Northern District of Texas were mooted and further requested that Dr. Tudor’s counsel advise Ms. Porter of the withdrawal. Dr. Tudor’s counsel filed a notice advising of Defendants’ withdrawal of the First Porter Subpoena with the Northern District of Texas of Defendants’ on the morning of July 28, 2016. Within minutes, the Northern District of Texas dismissed Dr. Tudor’s pending motions as moot.

Less than five minutes after the Northern District of Texas dismissed Dr. Tudor’s motion as moot, Defendants filed a notice of the Second Porter Subpoena with the Western District of Oklahoma. The Second Porter Subpoena was transmitted to Ms.

Porter via facsimile on the evening of July 28, 2016. The Second Porter Subpoena compels Ms. Porter to be deposed in Durant, Oklahoma on August 11, 2016 and further compels Ms. Porter to produce the same exact documents sought under the First Porter Subpoena, which had been subject to the stay issued by the Northern District of Texas.

Dr. Tudor now moves this Court to quash the Second Porter Subpoena on the grounds of psychotherapist-patient privilege, or, in the alternative, to transfer this Motion to Quash to the Western District of Oklahoma (the “Issuing Court”) so that the Issuing Court can resolve the Motion to Quash in accordance with its ruling on the pending motion related to that privilege.

The Second Porter Subpoena notices a deposition and compels production in Durant, Oklahoma, so the Eastern District of Oklahoma is the “Compliance Court” for the Porter Subpoena pursuant to Fed. R. Civ. P. 45. Ms. Porter is not a party to the underlying action and is currently unrepresented; she is in agreement with the relief sought and consents to transfer to the Western District of Oklahoma.

Dr. Tudor further requests that this Court enter a protective order and stay of the noticed August 11, 2016 deposition of Ms. Porter to allow time for this Court (or, if transferred, the Western District of Oklahoma) to consider Dr. Tudor’s request.

Dr. Tudor further requests that this Court sanction Defendants and/or Defendants’ counsel for inexcusably multiplying proceedings, engaging in forum shopping, and running afoul of Fed. R. Civ. P. 45(c)’s mandate that counsel issuing a subpoena to a non-party witness take reasonable steps to avoid imposing an undue burden.

GOOD FAITH CONFERRAL

Pursuant to Federal Rule of Civil Procedure 26(c) and Local Rule 7.1, counsel for Dr. Tudor has in good faith conferred with counsel for Defendants in a sincere attempt to resolve differences without court action. Dr. Tudor’s counsel’s office is located in Tuxedo Park, New York, and Defendants’ counsel’s office is located in Oklahoma City, Oklahoma. The distances between these offices rendered an in person conference infeasible. A series of telephonic conferences was held on the morning of August 1, 2016. Ezra Young, Dixie Coffey, and Jeb Joseph, counsel for Defendants in the

underlying matter, conferred but could not reconcile the parties' disagreement over the Second Porter Subpoena. Specifically, Dr. Tudor believes that psychotherapist-patient privilege has not been waived; Defendants claim that the privilege has been waived.

During a telephonic conference with the United States on July 28, 2016, Allan Townsend advised that the United States does not oppose this Motion. Dr. Tudor's counsel also conferred with Ms. Porter (who is unrepresented); Ms. Porter does not object to transfer of the subpoena-related motions to the Western District of Oklahoma.

STATEMENT OF FACTS

Dr. Tudor is a transgender woman who was diagnosed with a condition now known as gender dysphoria by Ms. Feleshia Porter in April 2007. Ms. Porter is a licensed psychotherapist (Exhibit A). Shortly after her diagnosis, Dr. Tudor ended her treatment with Ms. Porter. Dr. Tudor's therapy sessions with Ms. Porter were limited in scope—these sessions were narrowly focused on diagnosis of Dr. Tudor's gender dysphoria and assisting Dr. Tudor with a referral for hormone treatment and surgical care to treat Dr. Tudor's gender dysphoria (Exhibit B, Declaration of Rachel Tudor ("Tudor Dec.") ¶ 5). Dr. Tudor's treatment by Porter ended prior to Tudor encountering the hostilities, discrimination, and retaliation at issue in the underlying case. (Exhibit B, Tudor Dec. ¶ 6).

The underlying case is a Title VII enforcement action filed by the United States against Defendants in the Western District of Oklahoma in March 2015. The United States alleges that Defendants engaged in unlawful sex discrimination and retaliation against Dr. Rachel Tudor. Dr. Tudor intervened in the underlying case in early April 2015. As Plaintiff/Intervenor, Dr. Tudor brought claims alleging that she was subjected to sex discrimination, retaliation, and a hostile work environment that started in June 2007 and continued unabated through her termination by Defendants in May 2011. Neither the United States nor Dr. Tudor seek emotional distress damages in the underlying case.

No party in the underlying case contests in good faith that Dr. Tudor was diagnosed by Ms. Porter with a condition now known as gender dysphoria in April 2007. No party in the underlying case contests in good faith that Dr. Tudor's gender presentation changed to female at work starting in Fall 2007.

In November 2015, Dr. Tudor provided Defendants with discovery responses to Defendants' requests which sought, *inter alia*, all of Tudor's psychotherapist records and information regarding all psychotherapy Dr. Tudor has ever undergone. In her responses to Defendants' requests, Dr. Tudor raised several objections, including objections on the grounds of psychotherapist-patient privilege. (*See generally* Exhibit C.) Without waiving these objections, Dr. Tudor produced documents to Defendants that were sufficient to evidence that Dr. Tudor in fact sought treatment from Dr. Porter for gender dysphoria in mid-2007 and that the purpose of that treatment was limited in scope to diagnosis and referral out to other health providers. Defendants did not challenge Tudor's responses or the objections contained therein at the time.

On June 7, 2016, Defendants filed a copy of the First Porter Subpoena with the Issuing Court (Exhibit D). The First Porter Subpoena sought to both depose Ms. Porter about Porter's treatment of Dr. Tudor and demands production of all of Ms. Porter's records pertaining to Dr. Tudor's treatment.

On June 9, 2016, Dr. Tudor's counsel sent a letter (Exhibit E) via email (Exhibit F) and certified mail (Exhibit G) to Defendants' counsel requesting an opportunity to meet and confer regarding the First Porter Subpoena. The letter from Dr. Tudor's counsel detailed Dr. Tudor's concerns regarding the privileged nature of the information and documents sought by the First Porter Subpoena and requested that Defendants' meet and confer. Defendants' counsel did not respond to this letter.

On June 23, 2016 Defendants filed a Motion to Compel the United States to, *inter alia*, produce all of Dr. Tudor's therapy records including those of Ms. Porter (Exhibit H). In Defendants' Motion to Compel, Defendants claim that Dr. Tudor has waived psychotherapist-patient privilege. (Exhibit H at 14–15).

On June 24, 2016 Dr. Tudor served a letter and deposition notice on Defendants' counsel noticing Dr. Tudor's intent to depose Defendants pursuant to Fed. R. Civ. P. 30(b)(6) on August 11, 2016 (Exhibit I). (Defendants' counsel did not respond to this letter and have not taken steps to seek a protective order from the Western District of Oklahoma.)

On July 6, 2016, the Issuing Court granted a Joint Motion to Extend Time to File Response/Reply for the Motion to Compel (Exhibit J).

On the same day, Dr. Tudor served additional discovery responses to Defendants' requests which also sought, *inter alia*, all of Tudor's psychotherapist records and information regarding all psychotherapy Dr. Tudor had ever undergone (Exhibit K). Once again, in her responses to Defendants' requests, Dr. Tudor raised several objections, including objections on the grounds of psychotherapist-patient privilege (*See generally* Exhibit K). Without waiving these objections, Dr. Tudor pointed to previously produced documents that were sufficient to evidence that Dr. Tudor in fact sought treatment from Dr. Porter for gender dysphoria in mid-2007 and that the purpose of that treatment was limited in scope to diagnosis and referral out to other health providers. (*See generally* Exhibit K).

On July 11, 2016—without ever giving Dr. Tudor's counsel the opportunity to meet and confer—Defendants served Ms. Porter with the First Porter Subpoena, noticing the deposition and demanding production of all psychotherapist records held by Porter pertaining to treatment of Dr. Tudor for July 26, 2016.

On July 18, 2016, Dr. Tudor filed a motion to quash and transfer with the Northern District of Texas (the court of compliance for the First Porter Subpoena) (Exhibit L). Among other things, Dr. Tudor's motion appended a declaration from Dr. Tudor wherein Tudor clarified the scope of her psychotherapy sessions with Dr. Porter as well as the dates of the only two sessions she had with Dr. Tudor, both of which predate Dr. Tudor's allegations of discrimination, retaliation, and hostile work environment (Exhibit B [Tudor Declaration]).

On July 20, 2016, the Northern District of Texas issued a stay on the First Porter Subpoena and set briefing for the transfer question to be completed by August 8, 2016. (Exhibit M) (setting time for response of Defendants for August 1, 2016 and Dr. Tudor's reply for August 8, 2016).

On July 21, 2016 the Issuing Court granted a Joint Motion to Extend Time to File Response/Reply for the Motion to Compel (Exhibit N).

On July 26, 2016 the United States filed its response to the Motion to Compel (Exhibit O). In its response, the United States reiterated that Dr. Tudor and Defendants were presently briefing the psychotherapist-patient privilege waiver issue before the Northern District of Texas and that the Western District of Oklahoma should wait to decide the issue until Dr. Tudor was properly before the Western District since she is the holder of the privilege at issue (Exhibit O at 14).

On July 27, 2016, Defendants sent an email to Dr. Tudor's counsel advising that Defendants were withdrawing the First Porter Subpoena and thus the matter had been mooted (Exhibit P). Defendants' email further requested that Dr. Tudor's counsel notify the Northern District of Texas that the matter was mooted as well as notify Ms. Porter. (Since Defendants did not take the necessary steps to appear before the Northern District of Texas or receive ECF notices from that court, Dr. Tudor's counsel took it upon himself to draft a notice for the Northern District of Texas informing the court of the withdrawal as well as to notifying Ms. Porter.)

On July 28, 2016 at approximately 10:54am (eastern time), Dr. Tudor's local counsel filed a Notice of Mootness with the Northern District of Texas. (Exhibit Q [ECF Notice of Filing]; Exhibit R [Notice of Mootness and accompanying exhibits]).

On the same day, at 11:15am (eastern time), Dr. Tudor's local counsel notified Defendants' counsel via email that Dr. Tudor filed a Notice of Mootness with the Northern District of Texas (Exhibit S).

On the same day, at approximately 11:17am (eastern time), Judge Ed Kinkeade of the Northern District of Texas entered an electronic order denying Dr. Tudor's Motion to Quash as moot (Exhibit T).

On the same day, at approximately 11:20am (eastern time), Defendants filed an "amended" notice to depose and compel production of documents of Ms. Feleshia Porter with the Western District of Oklahoma (Exhibit U [ECF Notice of Filing]; Exhibit V [Second Porter Subpoena]). The Second Porter Subpoena seeks the same testimony and same production of documents sought by the First Porter Subpoena. The only substantive difference between the two is that the First Subpoena notices Ms. Porter for deposition on

July 26, 2016 in Dallas, Texas and the Second Subpoena notices Ms. Porter for deposition on August 11, 2016 in Durant, Oklahoma. *See* Figure 1.

Figure 1. *Comparison Chart of First Porter Subpoena (Exhibit D) and Second Porter Subpoena (Exhibit V).*

	First Porter Subpoena	Second Porter Subpoena
Date and Time of Deposition	July 26, 2016, 9:00 a.m.	August 11, 2016, and each day thereafter as necessary 1:00 p.m.
Place of Deposition	Southwest Reporting & Video Services 3010 LBJ Freeway, Ste. 1200 Dallas, TX 75234	Choctaw Casino & Resort 3735 Choctaw Rd. Durant, OK 74701
Production Request	All records, including but not limited to physician notes, office notes, reports, session notes, intake information, diagnostic information, patient charts, prescriptions, correspondence etc., relating to T.R. Tudor a/k/a Robert Tudor a/k/a Rachel Tudor.	All records, including but not limited to physician notes, office notes, reports, session notes, intake information, diagnostic information, patient charts, prescriptions, correspondence etc., relating to T.R. Tudor a/k/a Robert Tudor a/k/a Rachel Tudor.
Distance between Ms. Porter's Office and Site of Deposition	1.1 miles	87.3 miles
Court of Compliance	Northern District of Texas	Eastern District of Oklahoma

On the same day, at approximately 5:10pm (eastern time), Defendants' counsel faxed Ms. Porter a copy of the Second Porter Subpoena and a cover letter indicating that Defendants planned on transmitting the contents to Ms. Porter via FedEx at some later time (Exhibit W). Ms. Porter consents to transfer of the Second Porter Subpoena related motions to the Western District of Oklahoma (Exhibit Z).

Dr. Tudor's counsel has acted with all deliberate speed to file this Motion.

SUMMARY OF ARGUMENT

Dr. Tudor respectfully requests that this Court quash the Second Porter Subpoena on the grounds that it seeks information and documents protected by psychotherapist-patient privilege. In the alternative, Dr. Tudor requests that this Court transfer this Motion to Quash to the Western District of Oklahoma (the Issuing Court and court in the

underlying action). Transfer is proper because Ms. Porter—the non-party witness subject to the subpoena—consents to transfer and there are exceptional circumstances that weigh heavily in favor of transfer.

Dr. Tudor also requests that this Court issue a protective order or stay of the Second Porter Subpoena to allow either this Court or the Issuing Court to decide Dr. Tudor’s Motion to Quash and protect Dr. Tudor’s psychotherapist-patient privilege. Without such a stay, Ms. Porter will be required to produce all records and give a deposition on August 11, 2016, regarding Dr. Tudor’s therapeutic treatment, permanently destroying Dr. Tudor’s unwaived privilege.

Dr. Tudor also respectfully requests that this Court impose sanctions on Defendants and/or Defendants’ counsel pursuant to its inherent powers, Fed. R. Civ. P. 45(c), and/or 28 U.S.C. §1927. Sanctions are appropriate since Defendants’ have engaged in conduct which has needlessly multiplied proceedings in three different United States District Courts, willfully engaged in forum-shopping of the psychotherapist-patient privilege issue, and failed to take reasonable steps to avoid imposing an undue burden upon non-party witness Ms. Porter.

ARGUMENT

I. THE SECOND PORTER SUBPOENA SHOULD BE QUASHED BECAUSE ITS SUBJECT MATTER IS PROTECTED BY PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Dr. Tudor respectfully requests that this Court quash the Porter Subpoena to preserve Dr. Tudor’s unwaived psychotherapist-patient privilege. Dr. Tudor has an interest in ensuring that the privilege she holds in the subject matter of the Porter Subpoena is protected, which is sufficient good cause under Federal Rule of Civil Procedure 26(c)(1) for an order to quash.

Psychotherapist-patient privilege exists. The Second Porter Subpoena notices Ms. Porter for a deposition and also directs Ms. Porter to bring to that deposition “[a]ll records, including but not limited to physician notes, office notes, reports, session notes,

intake information, diagnostic information, patient charts, prescriptions, correspondence, etc. . . .” (Exhibit V at 3.) Based upon the contents of the Second Porter Subpoena, and the previous telephone conversations between Defendants’ counsel and Dr. Tudor’s counsel regarding the substantively similar First Porter Subpoena, it appears that Defendants are seeking to depose Ms. Porter regarding statements and records of statements made by Dr. Tudor to Dr. Porter in the course of psychotherapy sessions conducted in 2007.

The statements exchanged between Ms. Porter and Dr. Tudor during the course of psychotherapy and the records of these statements that Ms. Porter possesses are plainly protected by federal common law psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (recognizing psychotherapist-patient privilege). Dr. Tudor and Ms. Porter made oral and written statements in the course of the psychotherapy in an atmosphere of trust and with the reasonable expectation of confidentiality. The effectiveness of psychotherapy treatment depends upon robust protections of confidentiality. Indeed, this is why the Supreme Court recognized federal common law psychotherapist-patient privilege in *Jaffee*. *Jaffee*, 518 U.S. at 10; *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998) (also recognizing psychotherapist-patient privilege).

Dr. Tudor’s has standing. Dr. Tudor has standing for this Motion because she has a personal privilege and interest in the Porter Subpoena, which seeks to depose and demand production of documents pertaining statements and documents containing privileged statements made during the course of Dr. Tudor’s psychotherapy with Ms. Porter. *Atlantic Inv. Management, LLC v. Millennium Fund I, Ltd.*, 212 F.R.D. 395, 398 (N.D. Ill. 2002) (recognizing that party has standing to object to subpoena issued to non-party where party claims some personal right or privilege with regard to information or documents sought).

No waiver has occurred. Dr. Tudor’s privilege stands unless Dr. Tudor, as holder of the privilege, either expressly waives the privilege or places her mental condition into issue by seeking relief for extraordinary emotional distress. *See, e.g., Huck v. City of Oak Forest*, 185 F.R.D. 526, 529 (N.D.Ill. 1999) (analogizing to waiver of attorney-client

privilege, and reasoning that psychotherapist privilege waived when plaintiff has taken affirmative step in litigation to place her diagnosis or treatment in issue, but recognizing mere assertion that defendant's alleged misconduct caused emotional harm is insufficient to waive privilege); *Ruhlmann v. Ulster County Dep't of Social Servs.*, 194 F.R.D. 445, 450–51 (N.D.N.Y. 2000) (recognizing that request for remedy seeking something beyond garden variety emotional distress would place Title VII plaintiff's mental condition at issue and might trigger waiver of psychotherapist-patient privilege; holding that seeking "garden variety" emotional distress damages does not trigger waiver). Neither situation has occurred.

At no point during the course of the underlying case has Dr. Tudor expressly waived psychotherapist-patient privilege. Indeed, throughout the litigation Dr. Tudor has repeatedly, clearly, and consistently invoked psychotherapist-patient privilege to shield statements and records of statements related to her psychotherapy treatment with Ms. Porter. For example, Dr. Tudor has gone to great lengths to exactly clarify in her discovery responses that she believes, *inter alia*, statements made to and records of such statements made to Ms. Porter are protected. (*See* Exhibit C [Discovery Responses dated Oct. 28, 2015], at Response Nos. 63 ("Plaintiff/Intervenor objects to this Request for Production on the ground that it seeks records protected by psychotherapist-patient privilege."); Exhibit K [Discovery Responses dated July 6, 2016], at Response Nos. 64 ("Plaintiff/Intervenor also objects to this Request because it seeks information protected by the psychotherapist-patient and/or physician-patient privilege and interferes with the Plaintiff/Intervenor's recognized privacy interest in one's medical care and medical records."), 65 (similar), 66 (similar).) Dr. Tudor's counsel has also repeatedly clarified Dr. Tudor's position to Defendants' counsel. (*See, e.g.*, Exhibit E [Ltr. from Ezra Young to Dixie Coffey dated June 9, 2016]). The United States has repeatedly advised the Western District of Oklahoma of Dr. Tudor's dogged attempts to protect the privilege. (*See, e.g.*, Exhibit O at 14 [United States' response to Defendants' Motion to Compel]). Indeed, Dr. Tudor has expended significant time and resources fending off the First Porter Subpoena in motion practice before the Northern District of Texas just days ago arguing, *inter alia*,

that she did not waive psychotherapist-patient privilege (*See generally* Exhibit L [Motion to Quash and Transfer with accompanying exhibits]).

Moreover, at no point has Dr. Tudor or the United States done anything that put Dr. Tudor's mental condition into issue such that waiver of the privilege was triggered. For example, neither Dr. Tudor nor the United States are seeking emotional distress damages in the underlying action. (*See* Exhibit X [United States' Complaint], at 19–20 (emotional distress damages not sought); Exhibit Y [Dr. Tudor's Complaint in Intervention], at 33–35 (same).) (Even if remedies like emotional distress damages were sought in the underlying action, many federal courts are clear that a request for *garden variety* emotional distress damages does not trigger waiver of psychotherapist-privilege.¹) Contrary to the baseless assertions Defendants have made in filings before the Issuing Court (*see, e.g.*, Exhibit H at 14 (“Plaintiff and Intervenor have placed the medical and psychological condition of Dr. Tudor at issue in both the claims asserted in this action as well as the request for damages”)), the mere fact that Dr. Tudor and the United States have filed Title VII claims and sought remedies does not itself trigger waiver of Dr. Tudor's psychotherapist-patient privilege.²

An order to quash the Second Porter Subpoena is an appropriate means of protecting Dr. Tudor's privilege. The relief Dr. Tudor seeks is appropriate because Dr. Tudor can demonstrate that she has good cause for the relief requested and specific need for the protection sought. Fed. R. Civ. P. 26(c)(1) (authorizing protective orders where good cause is shown); *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 435 (5th Cir. 1990).

¹ *Ortiz-Carballo v. Ellspermann*, 2009 WL 961131, at *2 (M.D.Fla. 2009) (“The majority of federal courts that have addressed the issue have held that a party does not place his mental condition in controversy merely by requesting damages for mental anguish or ‘garden variety’ emotional distress.”); *Ruhlmann v. Ulster County Dep’t of Social Servs.*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000) (“a party does not put his or her emotional condition in issue by merely seeking incidental, ‘garden-variety’, emotional distress damages”); *Stevenson v. Stanley Bostitch, Inc.*,

² *Cf. Shirazi v. Childtime Learning Center, Inc.*, 2008 WL 4792694 (W.D. Okla. Oct. 31, 2008) (Cauthron, J.) (recognizing that aggrieved employee in Title VII suit does not waive right to privacy by simply filing lawsuit); *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 606 (D.Nev. 2016) (declining to find “legitimate interest” in employer obtaining privileged medical records of aggrieved transgender employee to, *inter alia*, establish the timeline of the employee's medical transition and/or establish timeline of physiological changes).

In addition, Dr. Tudor respectfully requests an order to stay or protective order relieving Ms. Porter from compliance with the Second Porter Subpoena until this Court or the Issuing Court can rule on the underlying issue of Dr. Tudor's psychotherapist-patient privilege.

Good cause exists because, if this Court does not quash the Second Porter Subpoena in advance of August 11, 2016, or issue a stay pending a decision on this Motion to Quash, it is clear that Defendants will orally question Ms. Porter about privileged statements Dr. Tudor made during psychotherapy sessions and seek production of records from Ms. Porter which contain privileged statements at the noticed August 11, 2016 deposition.

Dr. Tudor's concern that the Porter Subpoena will result in revelation of privileged information and records is substantiated by specific facts that show that protection is necessary to preserve her psychotherapist-patient privilege. *See In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998). For example, Dr. Tudor points to the Second Porter Subpoena itself, which expressly states that Defendants intend to use it to seek production of documents from Ms. Porter that contain privileged statements. (Exhibit V at 3 (directing Ms. Porter to produce "All records, including but not limited to **physician notes**, office notes, reports, **session notes**, intake information, diagnostic information, **patient charts**, prescriptions, **correspondence** etc., relating to T.R. Tudor a/k/a Robert Tudor a/k/a Rachel Tudor.") (emphasis added).)

Defendants' absolute disregard for Dr. Tudor's claims of privilege is further evidenced by Defendants' past filings in the Issuing Court, wherein Defendants have stated that they seek to uncover all details about Dr. Tudor's psychotherapy treatment from Ms. Porter and others because the defendants believe no privilege exists. (*See, e.g.*, Exhibit H at 15 ("Plaintiff should be compelled to disclose any medical or medical health records")) Accordingly, intervention from this Court is necessary to maintain the *status quo* and preserve Dr. Tudor's psychotherapist-patient privilege pending fuller consideration of the merits of her claim of privilege, and an order to quash from either this Court or the Issuing Court is ultimately required to preserve that privilege.

II. TRANSFER OF THIS MOTION TO THE WESTERN DISTRICT OF OKLAHOMA IS APPROPRIATE

Transfer of this Motion to the Issuing Court is appropriate for at least two reasons. The court of compliance may transfer subpoena-related motions back to the court of issuance where the non-party subject to the subpoena consents to transfer or there are other “exceptional circumstances.” Fed. R. Civ. P. 45(f) (“[w]hen the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances.”). The Advisory Committee Notes on the most recent change to Rule 45 note further emphasize that when considering a request for transfer, the court of compliance’s “prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not assumed that the issuing court is in a superior position to resolve subpoena-related motions.” Both potential conditions of transfer under the rule (and both policy considerations outlined in the Advisory Committee Notes) weigh in favor of transferring the Second Porter Subpoena motions to the Western District of Oklahoma.

Non-party witness consents to transfer. Ms. Porter—the non-party subject to the Porter Subpoena—has consented to transfer to the Court of Issuance (Exhibit Z). Pursuant to the plain text of Rule 45(f), Ms. Porter’s consent to transfer alone is sufficient for transfer of the Second Porter Subpoena related motions to the Court of Issuance. Ms. Porter would not be burdened by transfer, thus satisfying the “prime concern” of this Court.

Exceptional circumstances exist. There are also at least two exceptional circumstances that support transferring the Second Porter Subpoena related motions to the Western District of Oklahoma.

First, the Issuing Court is intimately familiar with the parties’ practices up to present, and is thus best situated to resolve the privilege issue. The parties in the

underlying case have heavily litigated this case in the Issuing Court, through a resolved Motion to Dismiss. *See United States et al. v. Southeastern Oklahoma State University et al.*, 2015 WL 4606079 (W.D. Okla. July 10, 2015). There are also currently several interconnected discovery disputes pending, including a Motion to Compel that is still in the process of being briefed which directly concerns the psychotherapist privilege issue at the heart of the Second Porter Subpoena and this Motion to Quash (Exhibit H at 15 [Defendants' argument for waiver in Motion to Compel in the Issuing Court]). Thus, the Issuing Court already has familiarity with the specific dispute and claim of privilege at issue, which strongly weighs in favor of permitting transfer back to the Court of Issuance. *See, e.g., In re Subpoena to Paul G. Cassell*, 2016 WL 3645166, at *2 (D. Utah June 30, 2016) (noting that court of issuance judge's familiarity with specific privilege being asserted is one exceptional ground for transferring matter to court of issuance); *Parker Compound Bows, Inc. v. Hunter's Manufacturing Company, Inc.*, 2015 WL 7308655, at *2 (N.D. Ohio Nov. 19, 2015) (fact that underlying case has been pending with Issuing Court for over one year, that there are "an array of discovery issues in this case already," and that the Issuing Court has "developed an understanding of the factual predicates implicated in this motion to quash" "exemplifies exceptional circumstances that warrant transfer"). Given that the Issuing Court will rule on discovery requests made to the United States covering the precise documents requested in the Porter Subpoena, the Issuing Court is in a better position to rule on Dr. Tudor's Motion to Quash with a full understanding of the discovery requests made to Dr. Tudor and the United States, their compliance with those requests, and the appropriateness of those requests in the context of the overall underlying litigation.

Second, the Issuing Court is also well-situated to resolve this dispute because it will likely have to resolve a yet to be filed, but interconnected, motion to compel Defendants' attendance at a deposition for which the Issuing Court is also the Court of Compliance. On June 9, 2016 Dr. Tudor noticed Defendants with a deposition pursuant to Fed. R. Civ. P. 30(b)(6) to be conducted in Oklahoma City, Oklahoma on August 11, 2016 (Exhibit I [Ltr. to Defendants Counsel and 30(b)(6) notice]). Defendants never

responded to the 30(b)(6) notice despite Dr. Tudor's repeated requests that Defendants confer if they objected to the 30(b)(6) notice. Given that Defendants have noticed the Second Porter Subpoena deposition for August 11, 2016 in Durant, Oklahoma—which is over 150 miles away from Oklahoma City—it is highly likely that Defendants are planning to refuse to comply with Dr. Tudor's 30(b)(6) subpoena. Indeed, it is impracticable and unduly burdensome for Dr. Tudor's counsel, the United States' counsel, and Defendants' counsel to conduct two different depositions on the same day over 150 miles apart. (It strains credulity that Defendants could not choose any other date falling within the just over 12-month period of discovery already allocated in the underlying matter). Moreover, the course of events leading up to the issuance of the Second Porter Subpoena strongly suggest that Defendants are not only willfully engaging in unscrupulous attempts to forum-shop the psychotherapist privilege issue (see *infra* Part III), but are also intentionally creating a deposition scheduling conflict to avoid compliance with a duly noticed 30(b)(6) subpoena rather than bringing a good faith motion seeking protective order to the Western District of Oklahoma directly. Since the Western District of Oklahoma has subject matter jurisdiction over Dr. Tudor's 30(b)(6) subpoena, and since it is highly likely that the Western District of Oklahoma will need to weigh whether the Second Porter Subpoena's notice date unfairly burdens counsel in the underlying matter and/or independently warrants sanctions, the Western District is uniquely well-situated to resolve the Second Porter Subpoena related motions. *See Parker Compound*, 2015 WL 7308655 at *2 (holding that Issuing Court is better situated to resolve motion to quash where party seeking relief alleges issuing counsel has engaged in "vexatious" and "desperate" discovery practices and sanctions are sought).

III. SANCTION OF DEFENDANTS AND/OR DEFENDANTS' COUNSEL IS APPROPRIATE.

Dr. Tudor also respectfully requests that this Court issue sanctions against Defendants and/or Defendants' counsel pursuant to its inherent powers, Federal Rule of Civil Procedure 45, and/or 28 U.S.C. §1927. Sanctions are appropriate since Defendants

have inexcusably engaged in conduct which has taxed the limited resources of three different United States District Courts, willfully engaged in forum-shopping of the psychotherapist privilege issue at the heart of the Second Porter Subpoena, and have run afoul of Rule 45(c)'s good faith requirement to take reasonable steps to avoid imposing an undue burden upon non-party witness Ms. Porter.

Taxing resources of three U.S. District Courts for same dispute. Between June 23, 2016 and present, Defendants have attempted to attack Dr. Tudor's hitherto unwaived psychotherapist privilege in proceedings under the jurisdiction of three different United States District Courts in two different states.

Rather than waiting for the Western District of Oklahoma to render a decision on the merits of Defendants' Motion to Compel (Exhibit H [Defendants' motion to compel; filed on June 23, 2016]; Exhibit N [Order extending time for filing of responsive briefing; entered July 21, 2016]), Defendants noticed the First Porter Subpoena on July 11th, waited for Dr. Tudor's counsel to move to quash it (Exhibit L [Dr. Tudor's motion to quash and transfer; filed on July 18, 2016]) and for the Northern District to enter an order with a briefing schedule on the transfer issue (Exhibit M [Order from Northern District of Texas setting briefing to close on transfer issue for August 8, 2016; entered on July 19, 2016]), withdrew the First Porter Subpoena (Exhibit P), and then re-issued the substantively similar Second Porter Subpoena and demanded that this deposition be held in a city that made a third court the court of compliance under Rule 45. As a result of Defendants' machinations, three different district courts have now been presented with the psychotherapist-patient privilege issue at the heart of the Second Porter Subpoena. Defendants' unreasonable and vexatious multiplication of proceedings on the psychotherapist-patient privilege issue justifies the imposition of sanctions. *See* 28 U.S.C. §1927 (“[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct.”).

As other courts have observed, as officers of the court, Defendants' counsel are obligated to abide by their special administrative responsibility in the judicial process,

which entails taking care to ensure that judicial resources are preserved and proceedings are not multiplied purely for strategic gain. *Cf. Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (holding §1927 sanctions appropriate “for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court”); *Donaldson v. Clark*, 819 F.2d 1551, 1558–59 (11th Cir. 1987) (*en banc*) (quotations omitted) (noting that members of the bar have a “special administrative responsibility in the judicial process” and that monetary sanctions may be imposed for “an unjustified failure to carry out” this special responsibility). By bringing the psychotherapist privilege issue before three different district courts in quick succession, Defendants’ counsel have flagrantly run afoul of their obligations as officers of the court to conserve judicial resources, and thus sanctions are warranted. *Cf. Resolution Trust Corp. v. Dabney*, 73 F.3d 262 (10th Cir. 1995) (upholding Judge Cauthron’s imposition of §1927 sanctions upon counsel where counsel failed to follow established procedures for moving the appropriate court for relief sought rather than multiplying proceedings after-the-fact).

Forum shopping. Defendants’ gamesmanship in forum shopping motions related to psychotherapist privilege issue also merits imposition of sanctions. As discussed above, between June 23 and present Defendants have taken steps to bring Dr. Tudor’s psychotherapist privilege issue before three different courts in quick succession. Rather than filing a single good faith motion requesting the relief Defendants claim they seek—Defendants have moved from the Western District of Oklahoma, to the Northern District of Oklahoma, and now to the Eastern District of Oklahoma all in an apparent effort to find a favorable decision on the psychotherapist privilege issue.

While in isolation any one of Defendants’ attacks on the privilege issue would be unproblematic, the multiplied proceedings in three different courts and the suspect timing and apparent gamesmanship strongly suggests that Defendants’ counsel are operating outside the contours of mere zealous advocacy on their clients’ behalf. *See, e.g., Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) (“The purpose of [§1927 sanctions] is to deter dilatory litigation practices and punish aggressive

tactics that far exceed zealous advocacy.”). *Cf. Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008) (holding that finding of bad faith not necessary to impose sanctions; “any conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court[] is sanctionable”).

Moreover, the circumstances and manner in which Defendants have filed their motion to compel and the issuance of the First and Second Porter Subpoenas strongly suggest that Defendants are engaging in calculated efforts to hinder if not totally circumvent Dr. Tudor’s ability to meaningfully protect her hitherto unwaived privilege. *See, e.g., Allender v. Raytheon Aircraft Co.*, 220 F.R.D. 661, 665 (D.Kans. 2004) (awarding sanctions in part because the “circumstances” and “manner in which subpoenas were issued suggests a calculated effort to hinder if not circumvent plaintiff’s ability to oppose the collection/production of irrelevant medical records”). (Indeed, Dr. Tudor’s attorney Ezra Young has expended in excess of 37 hours making preparations and drafting filings related to the First Porter Subpoena and in excess of 16 hours [and climbing] making preparations and drafting filings related to the Second Porter Subpoena.) Taken together, these circumstances also merit the imposition of sanctions.

Dereliction of Rule 45(c)(1)’s “good faith” requirement. Defendants’ counsels’ conduct also evidences that they have failed to take reasonable steps to avoid imposing an undue burden upon an unrepresented non-party witness, further meriting the imposition of sanctions.

Federal Rule of Civil Procedure 45(c)(1) mandates that attorneys issuing a subpoena upon a non-party witness take reasonable steps to avoid imposing an undue burden or expense on the non-party witness. Up to present, Defendants’ gamesmanship has inexcusably imposed upon Ms. Porter’s time and has repeatedly threatened to interfere with her personal commitments (*See, e.g., Exhibit Z* [Email between Ezra Young and Feleshia Porter; Porter notes that she is unavailable for proceedings falling between August 3 and August 14]).

Since receiving a copy of the First Porter Subpoena on July 11th, Ms. Porter has had the unenviable experience of receiving two subpoenas compelling her attendance at

depositions and production of documents related to her treatment of Dr. Tudor. As a result of Defendants' stratagem, Ms. Porter has also been dragged under the jurisdiction of two different district courts in two different states, unrepresented by personal counsel in both forums, and has been forced to scramble to ascertain what steps she must take to comply with the subpoenas.

It is plain on its face that Defendants' counsel are operating in dereliction of Federal Rule of Civil Procedure 45(c)(1)'s requirement that counsel issuing subpoenas to non-parties take reasonable steps to avoid imposing an undue burden on the witness. *See, e.g., Builders Ass'n of Greater Chicago v. City of Chicago*, 2002 WL 1008455 at *3 (N.D.Ill. May 13, 2002) ("good faith in issuing a subpoena is not sufficient to avoid sanctions under Rule 45(c)(1) if a party has issued the subpoena in violation of the duty imposed by that Rule").

For example, Defendants have failed to take steps to ensure that Ms. Porter is available to attend the deposition noticed by the Second Porter Subpoena. (Ms. Porter is not available. *See* Exhibit Z [Porter noting unavailability from August 3–14, 2016].) Defendants do not have any rationale supporting moving proceedings from court to court which, for Ms. Porter, creates an unneeded burden for her to scramble to figure out how she might personally redress issues with the subpoenas and/or adjust her schedule to allow for compliance if the latest protective order is not granted. Defendants also do not have any legitimate rationale that justifies re-noticing a subpoena to Ms. Porter that is substantively the same as the First Porter Subpoena, which the Northern District of Texas stayed earlier this month (Exhibit M), creating yet another undue burden for Ms. Porter as she must wait for this Court to act on this Motion rather than waiting on the Northern District of Texas to rule in accordance with its previously scheduled briefing. Additionally, Defendants have no legitimate rationale which justifies demanding that Ms. Porter attend a deposition in Durant, Oklahoma (which is over 80 miles away from Ms. Porter's office in Dallas, Texas) when the First Porter Subpoena demanded that Ms. Porter travel just over *1 mile* from her office to attend that deposition (see *supra* Figure 1). Though Defendants are entitled to issue a subpoena within the parameters of Rule 45, it is

unjustifiable to re-notice the substantially same subpoena for a deposition location that is very far from Ms. Porter simply to forum shop the psychotherapist-patient privilege issue. Given the burdens the Second Porter Subpoena places upon Ms. Porter and Defendants' failure to take steps to avoid burdening Ms. Porter, imposition of sanctions is warranted.

CONCLUSION

For the foregoing reasons, Dr. Tudor respectfully requests that this Court quash the Porter Subpoena, or, in the alternative, transfer this Motion to Quash to the Western District of Oklahoma. Dr. Tudor additionally requests that Ms. Porter's noticed deposition for August 11, 2016, be stayed pending the resolution of this motion, and that Ms. Porter be instructed that she need not comply with provisions of the Second Porter Subpoena which demand that she produce her psychotherapist records pertaining to Dr. Tudor's care. Lastly, Dr. Tudor requests that this Court award appropriate sanctions against Defendants and/or Defendants' counsel.

Respectfully submitted,

Dated: August 1, 2016

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Application for *Pro Hac Vice* Pending
Law Office of Jillian T. Weiss, P.C.
P.O. Box 642
Tuxedo Park, NY 10987
949-291-3185
Fax: 917-398-1849
eyoung@jtweisslaw.com

/s/ Ryan Eitzmann
Ryan Eitzmann (OK Bar No. 22556)
National Litigation Law Group, PLLC
42 Shepherd Center
2401 Northwest 23rd Street

Oklahoma City, OK 73107
(405) 429-7629
Fax: (405) 604-0679
reitzmann@nationlit.com

ATTORNEYS FOR DR. RACHEL TUDOR

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record. I also certify that a copy of the foregoing was served on all counsel of record in the underlying action and Ms. Feleshia Porter via email and U.S. Mail as follows:

Kindanne C. Jones
Dixie L. Coffey
Jeb Joseph
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Section
313 N. E. 21st Street
Oklahoma City, Oklahoma 73105
Kindanne.Jones@oag.ok.gov
Dixie.Coffey@oag.ok.gov
Jeb.Joseph@oag.ok.gov
*Attorneys for Defendant State of Oklahoma
Ex rel. Regional University System of
Oklahoma & Southeastern Oklahoma State
University*

Allan Townsend
Delora Kennebrew
Meredith Burrell
Shayna Bloom
Valerie Meyer
U.S. Dep't of Justice, Civil Rights Division-DC
950 Pennsylvania Avenue NW
Room 49258 PHB
Washington, DC 20530
Allan.Townsend@usdoj.gov
Delora.Kennebrew@usdoj.gov
Meredith.Burrell@usdoj.gov
Shayna.Bloom@usdoj.gov
Valerie.Meyer@usdoj.gov
Attorneys for the United States of America

Ms. Feleshia Porter, MS, LPC
3530 Forest Lane, #55
Dallas, Texas 75234
feleshia@aol.com
Pro Se

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)