

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO QUASH NON-PARTY CARLOS CARVALHO'S SUBPOENA**

INTRODUCTION

The Court should allow third-party witness Carlos Carvalho's deposition to proceed as scheduled, because he is able and willing to be deposed on January 30. Plaintiff welcomes this opportunity to provide this Court with more of the facts underlying this latest effort by the University of Texas (UT) to obstruct discovery likely to reveal misconduct by its president, Jay Hartzell. UT does not mention it, but Plaintiff offered to reschedule this deposition, of which it had not three but seven days' notice. UT also fails to mention that this dispute does not arise in a vacuum. UT's motion comes on the heels of its unwarranted, unilateral cancelling of Dean Lillian Mills's deposition, which has quite long been scheduled for January 29—and with which Plaintiff fully intends to proceed.

The real problem here is Defendant Burris's deposition, which did not go well for UT. It will be harder for Defendants to "amend" that one, as they did with their deposition on written question answers. Having seen enough, UT is now engaged in a practice of cancelling and obstructing further discovery, hoping to run out the clock and then, having deprived Lowery and this Court of relevant evidence, declare that there's no evidence supporting Lowery's case.

But Carlos Carvalho consents to be deposed on January 30 and has raised no objection to proceeding with the deposition as scheduled. UT's lawyers have a right to notice of that deposition, and Plaintiff has tried to negotiate with them over the timing, but the timing can't be "never," or long after Carvalho's expected testimony would sink UT's other efforts. They do not have a right to quash the subpoena of a third party that they do not represent, and who raises no objections of his own.

Contrary to UT's assertion, its lawyers had seven days' notice of Carvalho's deposition, and Plaintiff's counsel offered to reschedule the deposition to February 1 or explore another day that week, if that would accommodate them.

UT's lawyers are aware that Prof. Carvalho has personal knowledge of the nepotism allegations against Jay Hartzell (*See* Dkt. 77-1), and they wish to prevent Lowery from obtaining timely access to that information in order to gain an advantage at the Feb. 13 motions hearing and resist Lowery's planned motion to amend. Apparently, just like UT's administrators sought to silence Richard Lowery, so they also do not want Carlos Carvalho to testify about Jay Hartzell's alleged wrongdoing. If Hartzell did nothing wrong, then he has nothing to fear from Prof. Carvalho's testimony. And lawyers acting on behalf of a state agency should not be petitioning this Court for assistance in covering up the misuse of public resources.

FACTS AND BACKGROUND

The facts of Richard Lowery's case are well known to the Court. *See, e.g.*, Dkt. 68 at 5-7; Dkt. 60 at 4-7. In August 2022, UT leaders sought to threaten Carlos Carvalho, Executive Director of UT's Salem Center for Policy, into silencing Lowery's public speech about a variety of topics. Dkt. 8-2. At his recent deposition, Defendant Burris freely admitted that he and Mills sought to get Prof. Carvalho to "counsel" Lowery to change the tone of his speech and stop making comments that they disapproved of, which is tantamount to an admission of liability in this case. Ex. C (Burris Dep.) 156:22-157:14. Mills's notes from that meeting also make repeated references to "Jay." Ex. B (meeting notes) at 2.

In addition, Lowery and his counsel have a credible basis to believe that in December 2020, UT president Jay Hartzell and his deputy Nancy Brazzil allegedly tried to use Carvalho to secure special treatment for Hartzell's son in his application for admission to a UT graduate program: an issue relevant both to Hartzell's motive to silence Lowery and to explain Lowery's negative opinion of Hartzell, which Defendants have called "inaccurate" and "disparaging." *See* Dkt. 77-

1; Kolde Dec. ¶ 9. Thus, Lowery seeks evidence about a subject that Defendants have themselves put at issue.

Lowery's knowledge of the Hartzell nepotism allegations is based on what his colleague and friend, Prof. Carvalho told him, of which Carvalho has direct, personal knowledge. UT is afraid of what Carvalho will say, because its representatives know what Hartzell did and wish to prevent Lowery from obtaining that evidence.

As a result, Prof. Carvalho is a material third-party witness in this case, and Lowery's counsel offered to work with opposing counsel to arrange an early deposition. Kolde Dec. ¶¶ 3, 10; *see also* Dkt. 81-3 at 2. UT, however, was and "remains" only "willing to coordinate Carvalho's deposition for a date set after the Court rules on the matters pending at the February 13 hearing and before the pleading amendment deadline." Dkt. 81 at 4. That is because UT seeks to delay confirmation both of Hartzell's role in obtaining special privileges for his son and of his role in silencing Lowery.

Plaintiff intends to move to amend his complaint and add Hartzell as a defendant. *See* Dkt. 68 at 7, 10; Dkt. 79 at 2. Delaying the Carvalho deposition would deprive Lowery of additional evidence to support such a motion. And even if this Court rules on the pending motions at the February 13 hearing, that potentially leaves only eighteen days to depose Carvalho and perform various other planned tasks—such as deposing Hartzell, reviewing any production this Court compels, and preparing the motion to amend—before the March 2 amendment deadline. *See* Dkt. 68 at 3. Due to time constraints, Lowery's attorney reached out to Prof. Carvalho's attorney, Andrei Popovici, to discuss scheduling Plaintiff's deposition of Carvalho in January and keep this case moving forward in an expeditious manner. Kolde Dec. ¶ 11.

UT's lawyers have also sought to delay other material discovery. Over a month ago, the parties scheduled the deposition of Defendant Mills for January 29, at UT's counsel's office in Austin, Texas. *Id.* at ¶ 4, 6. Originally, Plaintiff scheduled the Mills deposition earlier in January, but Lowery agreed to move it to January 29 at Defendants' request. *Id.* at ¶ 4. On January 22, UT's counsel unilaterally cancelled Mills's deposition and stated that they would not consent to rescheduling it until February 15 at the earliest. Kolde Dec. ¶¶ 4-5, 10; *see also* Ex. A (email thread re cancellation). UT partly admits that it cancelled the deposition because it wished to stop Mills from testifying Jay Hartzell's putative nepotism—as Defendant Burris did at his January 17 deposition when he stated that Hartzell's actions were “wrong” and “inappropriate” if they occurred as alleged. Ex. A; *see also* Ex. C, 248:22-250:9. Plaintiff, however, did not agree to the cancellation of Mills's deposition and reached out to counsel for Prof. Carvalho to determine if Carvalho's deposition could also be scheduled for the week beginning January 29, when plaintiff's counsel will be in town. Kolde Dec. ¶¶ 11, 14.

After learning Carvalho's availability, Lowery sent a deposition subpoena to Carvalho and supplied notice to all parties on January 23: seven days before the deposition would occur on January 30. *See* Dkt. 81-2 at 2. The deposition would occur in Austin, Texas, where UT and most of its counsel are located¹ even though that requires Plaintiff's lead counsel to fly in from Seattle, Washington (as he has for every deposition in this case so far). Kolde Dec. ¶ 2; Dkt. 81-2 at 2. Plaintiff made clear to Defendants over email that Defendants were free to conduct their

¹ Three of its outside litigation counsel work out of Jackson Walker's Houston office (Charles L. Babcock, Joel R. Glover, and Javier Gonzalez) and two (Matt Dow and Adan W. Aston) out of its Austin office. Dkt. 81 at 5. Moreover, UT also had two in-house counsel at the most recent deposition (Adam Biggs and Joseph “Jody” Hughes), who both work in Austin. Ex. C, 2:10-17.

own deposition of Carvalho on some other date. Dkt. 81-1 at 2. After UT objected to the third-party subpoena, Lowery’s counsel offered to move the deposition to February 1: nine days after deposition notice was first provided. Kolde Dec. ¶¶ 14-15. UT did not engage with this offer and refused to agree to hold any deposition until after February 13, at the earliest. *See* Dkt. 81 at 4.

ARGUMENT

I. UT LACKS STANDING TO QUASH CARLOS CARVALHO’S DEPOSITION

Defendants do not have standing to quash the deposition of Prof. Carvalho—a third party who retains his own representation and has agreed to the January 30 date. “When a subpoena is directed to a nonparty, *any motion to quash or modify the subpoena generally must be brought by the nonparty*,” for “a party to the action does not have standing to assert any rights of the nonparty as a basis for a motion to quash or modify a subpoena” unless that party possesses “a personal right or privilege regarding the production or testimony sought.” 9 MOORE’S FEDERAL PRACTICE - CIVIL § 45.50 (2023) (emphasis added). Defendants have neither asserted nor established any such a right here.

Courts in the Fifth Circuit refuse to quash non-party subpoenas when the moving party lacks standing. *See, e.g., Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979); *Harris v. Henry*, No. 1:22-cv-00366-DAE, 2023 U.S. Dist. LEXIS 150990, at *7-8 (W.D. Tex. Aug. 28, 2023); *League of United Latin Am. Citizens v. Abbott*, 2022 U.S. Dist. LEXIS 112734, at *10, *13 (W.D. Tex. June 27, 2022). Moreover, “even when a party has standing pursuant to a personal right or privilege, the party cannot challenge a subpoena issued to a non-party on the basis that the subpoena is unduly burdensome or irrelevant” for “the *non-party* served with the subpoena must make objections like undue burden, inconvenience, and the like because the non-party is better positioned to object properly to the subpoena’s burden.” *MC Trilogy*

Tex., LLC v. City of Heath, Civil Action No. 3:22-CV-2154-D, 2023 U.S. Dist. LEXIS 190536, at *6-7 (N.D. Tex. Oct. 24, 2023) (emphasis original); *see also La. Corral Mgmt., LLC v. Axis Surplus Ins. Co.*, 650 F. Supp. 3d 491, 500, 502 (E.D. La. 2023) (holding that “insufficient compliance time” is a basis that only the subpoenaed non-party can invoke). The deponent, Carlos Carvalho, consents to this deposition, and it was scheduled with his permission.

Defendants have not shown—nor even attempted to show—why they possess a personal right or privilege giving them standing to object to this subpoena. Prof. Carvalho received a deposition subpoena, not a document subpoena, so he will not be handing over any documents or tangible things that UT arguably might have a private interest in. *See* Dkt. 81-2 at 2. UT simply wants to prevent Carvalho from answering questions about Jay Hartzell’s alleged nepotism and direct-involvement with silencing Lowery—just as they sought to prevent Defendants Mills answering those questions by unilaterally cancelling her long-scheduled deposition. *See Panzer v. Swiftships, LLC*, 318 F.R.D. 326, 328 (E.D. La. 2016) (“A party cannot unilaterally cancel a properly noticed deposition.”).

UT is neither defending nor taking Carvalho’s deposition. Prof. Carvalho is a non-party with his own counsel, and Carvalho is content to have the deposition proceed on its original date: January 30. If all three of the law-firm partners who have appeared for UT in this case are unavailable on January 30, then UT’s law firm in this matter, the largest in Texas, can send one of its many capable associates to monitor this witness deposition. No evidence in the record indicates that no one from UT’s vast legal team is unavailable on January 30. Indeed, this deposition can go forward without Defendants’ counsel even being present. UT has no standing to quash the Carvalho subpoena.

II. LOWERY PROVIDED REASONABLE NOTICE OF THE CARVALHO DEPOSITION

Moreover, Lowery gave UT seven days' notice of the deposition and offered to reschedule it to February 1, if counsel preferred. That is reasonable notice of the deposition, at which UT's counsel's attendance is optional.

The Federal Rules do not impose any minimum time limit for deposition notice, only mandating "reasonable written notice to every other party." FED. R. CIV. P. 30(b)(1). "Reasonableness depends on the facts and circumstances of each case." *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, Civil Action No. 3:03-CV-2711-B (BH), 2010 U.S. Dist. LEXIS 113827, at *21 (N.D. Tex. Oct. 19, 2010). Moreover, Fed. R. Civ. P. 6(a)(1)(B) provides that Saturdays and Sundays be counted when calculating any time period "stated in days or a longer unit of time."

Here, Plaintiff scheduled the Carvalho deposition for January 30 after communicating with UT about an early deposition for Carvalho. Kolde Dec. ¶¶ 3, 10. Because Defendants will not consent to an extension of the discovery deadlines, *see* Dkt. 79, Plaintiff has little choice but to act quickly. Kolde Dec. ¶ 16.

Moreover, Lowery provided seven-days' notice to UT, and he offered to reschedule the deposition for February 1—nine days after the original subpoena—if that was better for Defendants. "Commonly, courts find that notice of at least five days is sufficient for a party's deposition," and even "notice of less than five days . . . [can be] also sufficient under the circumstances of the case." 7 MOORE'S FEDERAL PRACTICE - CIVIL § 30.20[2] (2023). Courts in the Fifth Circuit repeatedly find that seven days constitutes reasonable notice. *See, e.g., Leamon v. KBR, Inc.*, Civil Action No. H-10-253, 2011 U.S. Dist. LEXIS 167527, at *4 (S.D. Tex. Dec. 14, 2011) (seven-days' notice reasonable); *Recursion*, 2010 U.S. Dist. LEXIS 113827, at *21-22 (finding four-days' notice reasonable after collecting cases demonstrating that "notice of a few days" is often reasonable); *Willming Reams Animation v. Regal*

Cinemas, No. SA-00-CA-0843 NN, 2002 U.S. Dist. LEXIS 25899, at *3 (W.D. Tex. Apr. 22, 2002) (six-days' notice reasonable given "the totality of the circumstances").

UT cites no legal authority for its assertion that the notice here was unreasonable, except for two cases featuring fewer days of notice and radically different circumstances. Dkt. 81 at 4; *see also Plaintiffs v. Amazon.Com Servs. LLC*, No. 6:20-CV-01178-ADA-JCM, 2022 U.S. Dist. LEXIS 234371, at *3-4 (W.D. Tex. Jan. 17, 2022) (five-days' notice unreasonable for deposition of *unconsenting and unavailable opposing party*, when three of those days were weekends or federal holidays) (emphasis added); *Sanchez v. England*, No. EP-17-CV-354-KC, 2018 U.S. Dist. LEXIS 224680, at *4 (W.D. Tex. Sep. 27, 2018) (six-days' notice unreasonable for deposition of *unconsenting opposing party*, when opposing party's lawyer resided over 500 miles away from site of deposition) (emphasis added). In contrast to those poor analogues, Lowery will be deposing a non-party on the day that the witness and his attorney agreed to, in the city where Defendants and most of their counsel work.

Nor does UT establish that calendar days are the wrong metric here – that only business days count for notice. The Federal Rules of Civil Procedure require that intervening Saturdays and Sundays are counted when computing time. FED. R. CIV. P. 6(a)(1)(B). UT's chosen metric is contrary to the applicable rule and designed to make the notice appear shorter than it was. And UT does not address the fact that it is not even necessary for its attorneys to be present at this deposition. All of the required participants are available on January 30.

Under these circumstances, seven-days' notice is reasonable.

III. UT IS NOT UNFAIRLY PREJUDICED BECAUSE IT CAN DEPOSE CARVALHO AT A LATER DATE

Allowing Plaintiff's deposition of Carvalho to proceed on January 30 will not deprive UT of its chance to depose Carvalho, for Lowery had already agreed that UT can depose Carvalho further on a later date. Dkt. 82-1.

Additionally, UT has numerous attorneys on this case—at least five outside litigation counsel and multiple in-house lawyers—so it is immaterial if some of its lawyers cannot attend on January 30. UT's lead counsel, Joel Glover, for instance, attended neither of the depositions so far. Kolde Dec. ¶ 13. UT has so far not responded to Plaintiff's offer to reschedule the Carvalho deposition to February 1 or on another day next week, because availability of counsel is not actually the reason for its objections—UT merely does not want Jay Hartzell's actions to be proven through evidence. And, if UT is concerned about the inefficient use of public resources, *see* Dkt. 81 at 4, its lawyers do not even need to show up. Because UT's lawyers are neither the “attorney for a deponent” nor “the attorney seeking discovery,” the local rules do not assign them any specific role at the deposition. *See* W.D. TEX. CIV. R. 30(b). Carlos Carvalho's own counsel—not UT's—is defending the deposition.

CONCLUSION

This Court should deny Defendants' motion to quash the deposition of non-party Carlos Carvalho and their request for protective order preventing Carvalho from testifying.

Respectfully submitted,

Dated: January 25, 2024

s/Endel Kolde

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
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RICHARD LOWERY,

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LILLIAN MILLS, et al.,

Defendants.

Case No. 1:23-cv-129-DAE

DECLARATION OF ENDEL KOLDE
IN SUPPORT OF PLAINTIFF'S RESPONSE TO EMERGENCY MOTION

I, Endel Kolde, declare the following:

1. I am an adult and competent to make this declaration. I am lead counsel for Richard Lowery in this case.
2. I am based in the Seattle area and need to fly to Austin for every in-person event.

3. On Friday, January 19, 2024, the parties' counsel conferred over Zoom about a number of outstanding discovery issues, and also discussed Plaintiff's plan to amend his complaint. At that conferral, the possibility of deposing Carlos Carvalho was discussed, but no specific dates were mentioned.

4. On Monday, Jan. 22, 2024, defense counsel, Joel Glover emailed me that UT was unilaterally cancelling Dean Lillian Mills's deposition, scheduled for January 29. The Mills deposition was scheduled back on December 4, with Defendants insisting it take place on January 29, later than Plaintiff wanted.

5. I responded the next day, Jan. 23, indicating that we did not consent to cancelling the Mills deposition. A true and correct copy of the email thread between counsel is attached as Exhibit A.

6. At this time, I am planning to fly to Austin on Jan. 28, and appear on Jan. 29 for the Mills deposition to either proceed with the deposition as scheduled, or make a record of her non-appearance. If she does not appear, that will likely lead to yet another motion in this case.

7. Plaintiff wishes to obtain evidence from Carlos Carvalho, filling in details about what was said at the Aug. 12, 2022, meeting when Defendants Mills and Burris pressured Carvalho to "counsel" Lowery about his speech. Hartzell's involvement is also reflected in Mills's notes of that meeting, with several references to "Jay."

8. A true and correct copy of those notes with highlights added is attached as Exhibit B.

9. In addition, Plaintiff has credible reasons to believe that Carvalho has first-hand knowledge of Hartzell's actions to benefit his son in UT admissions (Dkt. 77-1), which would be admissible evidence in this case. Such evidence is probative both of Hartzell's motive to silence Lowery and to support Lowery's opinion that Hartzell is a liar or hypocrite. Defendants have claimed in this case that Lowery's opinions of Hartzell are factually inaccurate, disparaging, "crossing the line," and potentially even defamatory, so defendants have opened the door to this area of inquiry. Defendants cannot, on the one hand accuse Lowery making factually inaccurate statements, while on the other hand depriving Lowery of the opportunity to obtain and put forward evidence to support his statements.

10. On Monday, Jan. 22, 2024, I again raised the possibility of an early deposition of Carlos Carvalho, but defense counsel did not engage on that issue and instead cancelled the Mills deposition.

11. Since I was going to be in Austin anyway, I contacted Dr. Carvalho's attorney, Andrei Popovici, to see if Carvalho might be available for a short deposition on Tuesday, Jan. 30, the day after the Mills deposition. His attorney told me that he was willing and able to be deposed then and so I served a deposition subpoena on Jan. 22, 2024, after first sending a copy to UT's counsel. I did not expect UT's counsel to cooperate with scheduling the Carvalho deposition as the pattern has been to delay discovery and especially depositions.

12. Joel Glover emailed me back the next day, demanding that we withdraw the deposition subpoena because he was not available on Jan. 30.

13. Mr. Glover has not attended a single deposition in this case, so I requested that he find coverage from one of the many attorneys on UT's defense team.

14. I also offered to reschedule the deposition to Feb. 1, after determining that Prof. Carvalho would be available then; and further offered to explore other days next week.


15. As of this time, UT's lawyers have not engaged with my offer to reschedule the Carvalho deposition. Instead of responding to my offer, they filed this motion to quash a half-hour later.

16. From Plaintiff's perspective, this emergency motion is one more attempt to conceal Jay Hartzell's role in this case. This might be different if UT's attorneys had displayed a more cooperative attitude about discovery and timing issues. As it is, we are rightly worried about running out of time, or even being accused of having passed on the opportunity to depose Carvalho when we had the chance. We are trying to keep this case moving forward and UT's attorneys are doing the opposite.

17. Attached as Exhibit C are true and correct copies of excerpts from Ethan Burris's deposition dated January 17, 2024.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this date, January 25, 2024.



Endel Kolde

Del Kolde

From: Del Kolde
Sent: Tuesday, January 23, 2024 13:08
To: Glover, Joel
Cc: Babcock, Chip; Dow, Matt; Aston, Adam; Vaughn, Cody; Barake, Gabriela; Gonzalez, Javier; Courtney Corbello; Nathan Ristuccia; michael@lovinslaw.com
Subject: RE: UT/Lowery - Draft Complaint/Scope of Discovery/Mills Depo

Dear Joel:

Plaintiff is unwilling to agree to UT's unilateral cancellation of the Mills depo, which has been on the books since Dec. 4. The reason provided for that in your email is legally insufficient, and you must be aware that under Rule 37, filing a motion for protective order may preclude sanctions, but it does not relieve Mills of the duty to show up for her properly noted deposition on Jan. 29. Mills needs to show up or face the consequences.

The parties clearly disagree about the relevance of the nepotism allegations and how they relate to the case and Lowery's opinion about Jay Hartzell's honesty. But, setting aside that disagreement, my questions about the nepotism allegations were a relatively small part of both the Titman and Burris depositions. In the Burris depo, I asked around twenty questions related to this issue during the last ten minutes of what was about a six-hour deposition.

Although we view the threat to cancel the Mills depo as pretext to deprive us of evidence of Hartzell's involvement with the campaign to pressure Lowery, we are offering the following compromise. We proceed with the deposition as scheduled, and I ask questions about all other topics, saving the nepotism questions to the end. You can then object, make your record, and assuming a motion for protective order has been filed, break off the deposition at that point, subject to the court's later ruling. That would allow us to ask 95+% of the questions we plan to ask, without the need to reschedule this depo.

Please be advised that we nevertheless plan to appear on Jan. 29 at 9:00 AM and go on the record. We will be prepared to proceed with the Mills depo at that time, and if she does not appear, you can expect we will be raising that very serious violation of the discovery rules with the court.

Otherwise, we can confer with you on Friday, as you suggested, and we expect to have a final amended complaint redline for you within the next 24 hours.

Thanks.

Del Kolde
Senior Attorney
Institute for Free Speech

From: Glover, Joel <jglover@jw.com>
Sent: Monday, January 22, 2024 18:31
To: Del Kolde <dkolde@ifs.org>
Cc: Babcock, Chip <cbabcock@jw.com>; Dow, Matt <mdow@jw.com>; Aston, Adam <aaston@jw.com>; Vaughn, Cody

<cvaughn@jw.com>; Barake, Gabriela <gbarake@jw.com>; Gonzalez, Javier <jgonzalez@jw.com>; Courtney Corbello <ccorbello@ifs.org>; Nathan Ristuccia <nristuccia@ifs.org>; michael@lovinslaw.com

Subject: UT/Lowery - Draft Complaint/Scope of Discovery/Mills Depo

Del,

Thanks again for your time on the phone last week. Three things:

1. Confirming that we'll be in a position to meet and confer on plaintiff's request to amend the complaint on Friday at 10am CT. We'll send an invite.
2. It doesn't look like we agree on the scope of discovery related to President Hartzell or Robert Hartzell's application to his current UT program. I appreciate the time you took to share plaintiff's theory with us, but in addition to a number of disagreements on Lowery's factual assertions, many of which appear in the draft amended complaint, it doesn't relate to plaintiff's case (or even the proposed amended count two) in a way that brings it within the confines of Rule 26(b). So we intend to seek a protective order from the Court against this type of discovery.
3. Relatedly, it's clear from the past two depositions that you intend to ask all UT witnesses about these topics, regardless of their lack of personal knowledge on the subject. So we are resetting the deposition of Dean Mills until we can get a ruling from the Court on our motion for protective order. She is available on February 15, 16, or 26, all of which are after our discovery hearing with Judge Howell. If the Court does not rule on our motion that day, then we may need to find a later date, but we are of course willing to work with you on that.

We are happy to discuss any of this. Many thanks.

Best,
Joel

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Meeting w Prof Carlos Carvalho (Salem Center), Dean Lil Mills, SrAD Ethan Burris 2022Aug12

Post-meeting notes 2022Aug13 using last names without titles after first instance

Meeting discussion followed these topics:

1) Topics / Speakers

- Dean Mills started by noting that all issues touch business, so any conversation about topics/speakers is not guidance about what could be covered, but an exploration of highest impact for a business school. Mills goal for McCombs centers is to accomplish highest impact by featuring speakers with high academic gravitas (publishing in our core journals) or have significant business or policy achievements. Mills praised the high quality of faculty at the Doctoral Conference the Salem Center sponsored and organized. That event is on hold this year, because Dr. Scott Bauguess is no longer significantly involved.
- Mills provided direction that best practice for when Centers invite academics, they publish (or have published) in top peer-reviewed journals.
- Salem Center Faculty Director Prof Carvalho explaining that the events related to Philosophy / Objectivity resulted from a specific gift (Brigham) to hire a Fellow (Dr. Greg Salmieri). Because of the specific gift this Program will continue, but Carvalho notes that the existence of Civitas Institute will allow/permit Salem Center to steer back toward Economics/Business issues.
- Guiding source for policy content: Mills directed focus to WSJ/FT. Carvalho said he takes leads from WSJ opinion pages. Mills directed topics from front pages of publication more in line with vision for the center and McCombs.

2) Best practices re: access to appointments and research funds

- Mills noted her appreciation that funds, fellowships and other engagement opportunities appear publicly announced by Salem. She encouraged Salem continue working w AD-Research to include these in her channels for wider/different distribution.
- Burris raised uncertainty that all titled Director-level persons on Salem website are in the HR system appropriately, because anyone in leadership for Salem Center should be an employee. We agreed, absent other HR info, that persons described as "Visiting Scholars" (and who are reported through 1099-NEC) aren't employees but HR would circle back re status and titles.

3) Opportunities / Challenges regarding Cross-Campus Activities

- Mills stressed that McCombs is part of UT-Austin, and Salem Center is part of McCombs. Specifically, the Salem Center B/S is part of McCombs accounts and any directors serve at the pleasure of the dean.
- We specifically discussed Salem Center engagement with Civitas Institute. Mills requires that McCombs cooperate positively or neutrally with other Centers/Institutes both within McCombs and across UT. The expectation is professionalism and not disrupting operations.
- Carvalho noted that McCombs (and dean) have a \$1.8M fundraising or funding obligation for Salem. Mills noted that she would consult gift agreements to understand better. Mills asked Carvalho to help facilitate her connections with various Salem Center supporters if he wanted any direct assistance.
- Mills/Sr Asso Dean Burris stated that continued critiques of the origins, current operation and chosen director of Civitas Institute are impairing the desired functional relationship, in addition to impeding the operations of the school and the ability to fundraise. At least one leader in the Salem Center has expressed that he/they are "effectively banned from involvement in the 'Liberty Institute', which is now called the 'Civitas Institute', but even if I were not I would have

nothing to do with that" [Professor Lowery quote in thecollegefix.com 8/5/22]. This and public tweets from Salem Senior Scholar Associate Professor Lowery recommending people stop donating to universities, combined with video interviews claiming that taxpayer money is "stolen by grifters" (re Liberty funding by legislature) and the president is "paid to be good at lying to conservative donors and politicians" is inaccurate, misleading, and obstructing the operations of the university. Carvalho characterized those comments by Lowery as opinion, not fact.

- Mills asked Carvalho to counsel Lowery regarding making comments that are factually inaccurate and disruptive to operations. Carvalho thinks he has no effective way to persuade his colleague to stop the public comments that are factually inaccurate and disruptive to operations, such as those above. He revealed that Finance department chair Sheridan Titman said "Jay and Lil want Richard to shut up." Ethan and Mills corrected the position of Lil and Jay that this is not a position of either of them or UT. Instead, we clarified that we expect functional operations between Salem, Civitas, and other centers and institutes in McCombs. Carvalho recommended that any attempt to talk with Lowery would have a higher chance of success coming from Burris, with whom Lowery has no baggage as yet, not Mills or Hartzell. Carvalho is not comfortable providing expectations to Lowery.

4) College communications

Mills relayed her expectations for professionalism and reasonable respect for Chain of Command regarding College communications. Rather than take disagreements regarding work issues/operations public (Twitter), or sending emails to all-faculty, faculty members, especially center leaders, should exercise good judgment and professionalism in resolving issues. For example, appropriate communication would start with internal questions through department chairs, various associate deans, directors.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,)
Plaintiff,)
v.) Case No. 1:23-cv-00129-DAE
LILLIAN MILLS, et al.,)
Defendants.)

ORAL and VIDEOTAPE DEPOSITION OF
ETHAN BURRIS
January 17, 2024
Volume 1

ORAL DEPOSITION OF ETHAN BURRIS, Volume 1,
produced as a witness at the instance of the Plaintiff,
and duly sworn, was taken in the above-styled and
numbered cause on January 17, 2024, from 9:05 a.m. to
4:38 p.m., before Dana Shapiro, CSR, in and for the
State of Illinois, reported by machine shorthand, at
100 Congress Avenue, Suite 1200, Austin, Texas 78701,
pursuant to the Federal Rules of Civil Procedure and
any provisions stated on the record or attached hereto.

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A P P E A R A N C E S

FOR THE PLAINTIFF:

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ALSO PRESENT:

MR. JEFF CHAGRIN, the videographer

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INDEX

PAGE

Appearances.....2
ETHAN BURRIS VOLUME 1
 Examination by MR. KOLDE.....4
Signature and Changes.....252
Reporter's Certificate.....254

EXHIBITS

NO.	DESCRIPTION	PAGE
No. 14	request	41
No. 15	text thread	57
No. 16	privilege log	67
No. 17	The College Fix article	71
No. 18	declaration	76
No. 19	Carvalho declaration	98
No. 20	Notes (Mills)	110
No. 21	Notes (Burris)	183
No. 22	tweet	209
No. 23	email	214
No. 24	email	236

1 are talking about people coming to you for advice. But
2 in this case, Carlos Carvalho was not coming to you for
3 advice. You and Dean Mills were giving Dr. Carvalho
4 unsolicited advice, isn't that true?

13:59:50 5 MR. DOW: Objection, form.

6 BY THE WITNESS:

7 A. No, that's incorrect. He initiated the
8 meeting.

9 BY MR. KOLDE:

13:59:56 10 Q. But he didn't initiate the meeting about
11 Richard Lowery?

12 A. He initiated the meeting about his -- about
13 the center.

14 Q. But you and Dean Mills brought up Richard
14:00:08 15 Lowery's comments, correct?

16 A. Yes.

17 Q. He didn't ask for advice from you or Dean
18 Mills about how to deal with Lowery, did he?

19 A. No.

14:00:22 20 Q. No, he did not?

21 A. No, he did not.

22 Q. Your goal in asking Carvalho to counsel

23 Lowery regarding making comments that are factually

24 inaccurate and disruptive to operations was to get

14:00:48 25 Lowery to stop making comments that are factually

1 inaccurate and disruptive to operations, correct?

2 A. Yes.

3 Q. Stated another way, your goal in asking

4 Carvalho to counsel Lowery regarding making comments

14:01:14 5 that taxpayer money was stolen by grifters or the

6 president is to be paid to be good at lying to

7 conservative donors and politicians was to get Lowery

8 to stop making those kinds of comments, correct?

9 A. Yes.

14:01:40 10 Q. And similarly your goal in asking Carvalho

11 to counsel Lowery regarding making comments that were

12 disruptive to operations was to get him to stop asking

13 people to not donate to UT; is that correct?

14 A. Yes.

14:02:06 15 Q. And as far as you know, that's your

16 understanding of what Dean Mills's goal was as well,

17 correct?

18 A. My impression, but you will have to ask

19 Dean Mills about her goals.

14:02:18 20 Q. You were working together on this issue

21 though, right?

22 A. Yes.

23 Q. Reading the next sentence of the bullet

24 that we have been talking about here, and the last page

14:02:30 25 of Exhibit 20 it reads, "Carvalho thinks he has no

1 Q. Do you think that people in power sometimes
2 use that power to benefit their own family members?

3 MR. DOW: Objection, form.

4 BY THE WITNESS:

16:25:48 5 A. I have no idea how to answer that question.

6 BY MR. KOLDE:

7 Q. I'm just asking for your opinion given --
8 as somebody I assume has some opinions about human
9 nature.

16:25:5610 MR. DOW: Objection, form.

11 BY THE WITNESS:

12 A. At least the research that I have seen,
13 there are absolutely some cases where when people reach
14 a level of power and authority they use that to benefit
16:26:1015 themselves. I have seen lots of other research and
16 cases where people use their power and authority to
17 benefit many others. You are asking a very blanket
18 question. I don't know how to answer it.

19 BY MR. KOLDE:

16:26:2820 Q. Has Jay Hartzell ever asked you to do a
21 personal favor for a family member of his who was
22 applying for admission or employment at UT?

23 A. No.

24 Q. How about Nancy Brazzil, has she ever asked
16:26:4425 you to do a personal favor for Jay Hartzell for one of

1 his family members applying to admission or employment
2 at UT?

3 A. No.

4 Q. Have you ever heard that happening at UT?

16:27:02 5 A. Of Jay Hartzell asking or Nancy Brazzil
6 asking for favors?

7 Q. Yes.

8 A. No.

9 Q. Are you aware that Jay Hartzell's son is in
16:27:1210 the PhD program in the philosophy department at UT?

11 A. I think I had heard that at some point in
12 time. I don't really monitor his son so.

13 Q. If Jay Hartzell had emailed Carlos Carvalho
14 his son's CV on UT email, would you agree -- at the

16:27:3815 time that his son was applying for admission to UT,
16 would you agree that that would be inappropriate use of
17 state resources by Jay Hartzell?

18 MR. DOW: Objection, form.

19 BY MR. KOLDE:

16:27:5020 Q. You may answer.

21 A. I suppose it would depend on the nature of
22 the email and what the request was.

23 Q. You would agree that UT email is a state
24 resource, correct?

16:28:0225 A. Yes.

1 Q. If Nancy Brazzil had followed up with
2 Carlos Carvalho to ensure that Carlos delivered the
3 message that Jay's son was applying to the PhD program
4 in the philosophy department, that would be
16:28:24 5 inappropriate use of state resources, correct?

6 MR. DOW: Objection, form.

7 BY THE WITNESS:

8 A. I have no idea. It depends on the nature
9 of the request.

16:28:36 10 BY MR. KOLDE:

11 Q. Carlos's time. He's a UT employee, right?
12 And Nancy Brazzil is a UT employee? Yes?

13 A. Yes.

14 Q. So if she is talking to him about making
16:28:46 15 sure that the message gets delivered to the philosophy
16 department, that they know that it's Jay's son who is
17 applying, that's a use of state resources, isn't it?

18 MR. DOW: Objection, form.

19 BY THE WITNESS:

16:29:02 20 A. Yes.

21 BY MR. KOLDE:

22 Q. Would you have advised Jay Hartzell to do
23 that if he did that in fact?

24 MR. DOW: Objection, form.

16:29:14 25 BY THE WITNESS:

1 A. I don't know if I would have a strong
2 opinion on it one way or another.

3 BY MR. KOLDE:

4 Q. As in your role as a former leader for the
16:29:22 5 Center for Business Ethics, would you agree that it's
6 not ethical for a head of a large organization like UT
7 to use state resources including underlings to deliver
8 a message that is intended to benefit his son in
9 admission to a graduate program at UT-Austin?

16:29:5010 MR. DOW: Objection, form.

11 BY MR. KOLDE:

12 Q. You may answer.

13 A. From what you described earlier, I believe
14 the communication was or are they aware that his person
16:30:0615 was applying to the program. There is nothing wrong
16 with awareness.

17 Q. Okay. So you don't see a problem with
18 that?

19 A. When you are asking a question in a vacuum
16:30:1820 and I don't really have any context at all from the
21 information you give me right now, no.

22 Q. I'm just in the process of investigating
23 these facts and allegations so I'm just trying to
24 understand. If as I have described them, and I
16:30:3825 understand that there is only some facts that are

1 before you in terms of the question, is there anything
2 in there that worries you like he's doing that to make
3 sure that the philosophy department gives his kid's
4 application special treatment?

16:30:58 5 MR. DOW: Objection, form.

6 BY THE WITNESS:

7 A. If he asked that specific question, I think
8 yes, that would be inappropriate.

9 BY MR. KOLDE:

16:31:06 10 Q. If he sent his kid's CV to Carlos, and then
11 had his underling, Nancy Brazzil, go to Carlos and say
12 essentially, "Carlos, make sure that the philosophy
13 people know that Jay's son is applying," would you
14 agree that that would create a perception that Jay
16:31:28 15 Hartzell was seeking special treatment for his son to
16 admission to the graduate program at UT-Austin?

17 MR. DOW: Objection, form.

18 BY THE WITNESS:

19 A. I would agree some people might interpret
16:31:44 20 it that way. I can also see sharing a person's --
21 son's -- your -- one of your children's CVs to get
22 feedback on it and help determine how appropriate for
23 applying for a particular PhD program is also quite
24 appropriate. So again, the way you are phrasing many
16:32:10 25 different contingencies along the way, sure that

1 doesn't seem all that ethical. But there is lots of
2 contingencies wrapped up in there that could easily be
3 interpreted some other way.

4 BY MR. KOLDE:

16:32:24 5 Q. Do you agree it would be wrong for Jay
6 Hartzell to ask for special treatment for his son in
7 admission to the graduate program in the Department of
8 Philosophy at UT while he's the president of UT?

9 A. Sure.

16:32:46 10 Q. Just to wrap this up. Today is the first
11 time you are hearing about any of this?

12 A. Yes.

13 MR. KOLDE: It's 4:30. If we take a two-minute
14 break I think I'm done. I need to review my notes,
16:33:04 15 consult my co-counsel.

16 THE VIDEOGRAPHER: 4:31. Off the record.

17 (WHEREUPON, a recess was had.)

18 THE VIDEOGRAPHER: 4:37. Back on the record.

19 BY MR. KOLDE:

16:39:10 20 Q. Okay. Thank you, Associate Dean Burris. I
21 don't have any more questions.

22 A. Thank you.

23 MR. DOW: We will reserve our questions until the
24 time of trial. Del, as I mentioned at the Friday
16:39:18 25 meeting, confirm, I think it's clear, but certainly all

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,)
Plaintiff,)
v.)Case No. 1:23-cv-00129-DAE
LILLIAN MILLS, et al.,)
Defendants.)

REPORTER'S CERTIFICATION
ORAL DEPOSITION OF
ETHAN BURRIS
January 17, 2024

I, Dana Shapiro, a Certified Shorthand Reporter,
hereby certify to the following:

That the witness, ETHAN BURRIS, was duly sworn by
the officer and that the transcript of the oral
deposition is a true record of the testimony given by
the witness;

I further certify that pursuant to FRCP Rule
30(e)(1) that the signature of the deponent:
was requested by the deponent or a party before the
completion of the deposition and that the signature is
to be before any notary public and returned within 30
days from date of receipt of the transcript. If
returned, the attached Changes and Signature Pages
contain any changes and reasons therefore;

I further certify that I am neither counsel for,
related to, nor employed by any of the parties or
attorneys in the action in which this proceeding was
taken, and further that I am not financially or

1 otherwise interested in the outcome of the action.

2 Certified to by me this January 22, 2024.

3 *Dana Shapiro*

4
5 DANA SHAPIRO, Illinois CSR 84-3597
6 CSR Expiration: 5/31/25
7 Illinois Certified Shorthand Reporter
8 Registered Agent Solutions, Inc.,
9 A Lexitas Company, Firm No. 17
10 5301 Southwest Parkway
11 Corporate Center One, Suite 400
12 Austin, Texas 78735
13 888-893-3767
14 Expires: 1/31/2025
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1 COUNTY OF TRAVIS)

2 STATE OF TEXAS)

3 I hereby certify that the witness was notified on
4 January 22, 2024 that the witness has 30 days
5 after being notified by the officer that the transcript
6 is available for review by the witness and if there are
7 changes in the form or substance to be made, then the
8 witness shall sign a statement reciting such changes
9 and the reasons given by the witness for making them;

10 That the witness' signature was/was not returned
11 as of _____.

12 Subscribed and sworn to on this _____ day of
13 _____, 20____.

14 *Dana Shapiro*

15 _____
16 DANA SHAPIRO, Illinois CSR 84-3597
17 CSR Expiration: 5/31/25
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Expires: 1/31/2025

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

ORDER

BEFORE THE COURT is Defendants' Motion to Quash the deposition subpoena of non-party Carlos Carvalho and Motion for a Protective Order. The Court, having considered the briefs on file, hereby finds that Defendants' Motion is DENIED.

IT IS THEREFORE ORDERED that Plaintiff's deposition of Carlos Carvalho shall occur on January 30, as scheduled. This Court grants leave to Defendants to hold their own deposition of Prof. Carvalho at a later date.

SIGNED this _____ day of _____, 2024.

Dustin M. Howell
United States Magistrate Judge