UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. KAPLAN HIGHER EDUCATION CORPORATION, Defendant.	)	Case No. 1:10-CV-2882-PAG Judge Patricia A. Gaughan

EEOC'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL

On March 24, 2011, Defendant issued the following discovery to EEOC: (1) forty-nine (49) Requests for Production; (2) nineteen (19) Interrogatories; (3) a Notice of Deposition scheduling Charging Party Nichols for deposition on May 3, 2011; and (4) a Notice of Rule 30(b)(6) Deposition scheduling EEOC for deposition on May 19, 2011. See Comp. Ex 1. Shortly after EEOC expressed an objection to Defendant's Rule 30(b)(6) Notice, Defendant moved to compel EEOC to produce the testimony described in the Notice. Defendant's Rule 30(b)(6) Notice improperly seeks the testimony of EEOC counsel and seeks information protected from disclosure by the attorney work-product doctrine, the attorney/client and common interest privileges, EEOC's law enforcement privilege, and the Government's deliberative process privilege. Moreover, the Notice is unduly burdensome and seeks, in part, information that EEOC will produce in response to Defendant's other pending discovery requests. Finally, while Defendant claims that it merely seeks testimony about the scope and sufficiency of EEOC's "underlying administrative investigation," the Sixth Circuit held long ago that such matters are not subject to review. EEOC v. Keco Industries, 748 F.2d 1097, 1100 (6th Cir. 1984) ("[i]t was error for the district court to inquire about the sufficiency of the Commission's investigation").

ARGUMENT

I. NO CIRCUMSTANCES JUSTIFY DEPOSING EEOC'S COUNSEL

Paragraphs 1-4, 6 & 9 require EEOC's counsel to testify and divulge attorney work product.[1] Paragraphs 1-3 require EEOC to testify, without limitation, about *all factual information and documents* which support or rebut EEOC's Complaint filed in this litigation. Further, EEOC must describe its analysis of each fact and document in deposition and explain to Defendant why EEOC believes each piece of information obtained either supports or rebuts EEOC's claim. Such information is attorney work-product and can only be provided by EEOC's counsel of record. Similarly, Paragraph 4 seeks testimony about criteria used not only to determine the scope of the investigation, but also used to determine or "[a]ffect" EEOC's Complaint and EEOC's criteria for identifying class members. Paragraph 6 seeks testimony about any statistical analyses EEOC has conducted relative to its Complaint. Paragraph 9 does not merely seek information about what investigation was conducted, but seeks testimony about any and all steps in EEOC's investigation *of the claims asserted in the Complaint.* That is, all steps taken by EEOC counsel to direct the investigation, to research and analyze claims in anticipation of litigation, and to conduct the subsequent litigation of such claims. The only witness competent to testify about such matters is EEOC's counsel of record. To prepare for such a deposition would require weeks of preparation, either to marshal and analyze every fact or document or to teach a non-lawyer how to parrot counsel's analysis during the deposition. The Federal Rules prohibit such an unduly burdensome inquiry. As one court properly observed: "even under the present-day liberal discovery rules, [a party] is not required to have counsel 'marshal all of its factual proof' and prepare a witness to be able to testify on a given defense or counterclaim." In re Indep. Serv. Org. Antitrust Litig., 168 F.R.D. 651, 654 (D. Kan. 1996); See also CSX Transp., Inc. v. Vela, 2007 U.S. Dist. 3334966 at *4

[1] While Paragraph 5 is vague, to the extent that it requires EEOC to testify about other pending investigations, anticipated litigation, or pending litigation it also compels disclosure of attorney work product. Title VII also prohibits EEOC from disclosing information about other pending charges. EEOC does not waive its objections on such grounds.

(S.D. Ind. Nov. 8, 2007) (same); Smithkline Beecham Corp. v. Apotex Corp., 2000 U.S. Dist. WL 116082, at *9 (N.D. Ill. Jan. 24, 2000) (same); U.S. v. District Council of New York City, 1992 U.S. Dist. WL 208284 at **15-16 (S.D.N.Y. Aug. 18, 1992) (same).

While Defendant's Notice appears to call for the deposition of a party, it is actually a notice to depose EEOC's counsel. As a law enforcement agency, EEOC has no independent knowledge of the transactions giving rise to the litigation and the responsive information sought can only be obtained through disclosure of its counsel's work product. SEC v. SBM Certificates, Inc., 2007 U.S. Dist. WL 609888 at **22-26 (D. Md. Feb. 23, 2007) (issuing protective order where 30(b)(6) notice required SEC counsel to testify about work product concerning investigation and prosecution of the case). In EEOC v. McCormick & Schmick's Seafood Restaurants, 2010 U.S. Dist. WL 2572809 (D. Md. Jun. 22, 2010), the employer (represented by Defendant's counsel of record) issued a nearly identical Rule 30(b)(6) Notice as that issued here. The Rule 30(b)(6) notice issued in McCormick required EEOC to testify regarding "[f]actual information and documents that support or rebut" various allegations in EEOC's Complaint. Id. Further, the notice in McCormick sought information about how EEOC identified potential claimants, what statistical analyses were conducted regarding EEOC's allegations, and the process/criteria EEOC used to conclude that discrimination occurred. Id. Defendant seeks the same testimony here. As in SEC v. SBM Certificates, the court in McCormick properly concluded that issuing such a Rule 30(b)(6) notice to a law enforcement agency is tantamount to compelling the agency's counsel to testify and divulge attorney work product. McCormick at **4, 8-10. See also SEC v. Jasper, 2009 WL 1457755 at **2-4 (N.D. Cal. 2009) (Rule 30(b)(6) deposition improper where it constituted equivalent of deposition of SEC counsel, sought work product, and information was available by other means); FTC v. U.S. Grant Resources, LLC, 2004 U.S. Dist. WL 1444951 at *8 (E.D. La. June 24, 2004) (holding Rule 30(b)(6) deposition of FTC improper because it effectively required

FTC's counsel to testify and sought protected opinion work product); SEC v. Buntrock, 217 F.R.D. 441, 444-46 (N.D. Ill. 2003) (granting SEC's motion for protective order where defendant's Rule 30(b)(6) notice was practical equivalent of notice to depose SEC's counsel, would intrude upon work product, and alternative means of obtaining information were available); SEC v. Rosenfeld, 1997 U.S. Dist. WL 576021 at *2 (S.D.N.Y. Sept. 16, 1997) (Rule 30(b)(6) notice improper given that SEC attorneys and persons working under their direction conducted investigation and, therefore, notice sought deposition of counsel about theories, impressions, and opinion work product); EEOC v. HBE Corp., 157 F.R.D. 465, 466 (E.D. Mo. 1994) (holding same regarding EEOC litigation allegations); District Council, at **5-6, 10 (holding same regarding Justice Department allegations in RICO litigation).

To obtain testimony from opposing counsel, the party seeking discovery must show that: (1) no other means exists to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. Nationwide Mutual Insurance Co. v. The Home Insurance Co., 278 F.3d 621, 628 (6th Cir. 2002). Defendant's motion does not even acknowledge its burden to justify deposing counsel, let alone satisfy the Nationwide factors.

Further, Defendant cannot compel EEOC to "create" a witness to testify as counsel's proxy pursuant to Rule 30(b)(6). Such designation would inevitably invade attorney work product in this case. McCormick at *6; SEC v. SBM Certificates at *24. Additionally, the need to prepare a proxy would result in an undue burden to EEOC; it would require EEOC counsel to manufacture a witness by selecting an EEOC employee without knowledge and training the employee to memorize counsel's knowledge of the case and analysis of facts and documents relating to specific aspects of the Complaint. McCormick at *10 ("The need to prepare a proxy [for EEOC counsel] would result in an undue burden to EEOC, particularly where the underlying factual information allegedly sought is obtainable through other discovery means."). Moreover, such testimony would amount to a deposition of EEOC counsel,

which is not required under Rule 30(b)(6). See also FTC v. U.S. Grant Resources, LLC, 2004 WL 1444951 at *8 (E.D. La., June 25, 2004); Buntrock, 217 F.R.D. at 444; Rosenfeld, 1997 WL 576021 at *2; RTC v. Kazimour, 1993 WL 13009325 at *3 (N.D. Iowa, November 16, 1993).

Defendant relies on decisions in EEOC v. American International Group, Inc., EEOC v. Burlington N. & Santa Fe Ry. Co., EEOC v. Cal. Psychiatric Transitions, and other decisions issued by district courts outside the Sixth Circuit (e.g., Sterling Jewelers, Jillian's and CRST), for the proposition that employers may conduct Rule 30(b)(6) depositions of EEOC concerning the scope and sufficiency of EEOC's investigation. Defendant contends that EEOC cannot object, as a general matter, to such a deposition but must, instead, object to specific questions posed and resolve each objection with the Court. As the court recognized in McCormick, none of the cases Defendant cites support its effort to obtain work product information through a 30(b)(6) deposition of EEOC. McCormick at *11. More importantly, though, the cases Defendant cites are inconsistent with Sixth Circuit precedent. In the Sixth Circuit the scope and sufficiency of EEOC's investigation is beyond review. EEOC v. Keco Industries, 748 F.2d 1097, 1100 (6th Cir. 1984). This Court is bound by Keco in which the court held that "[i]t was error for the district court to inquire into the sufficiency of the Commission's investigation." Id. at 1100. The scope and sufficiency of EEOC's investigation is beyond review and, therefore, not a relevant subject of discovery. While EEOC will produce to Defendant the parties' communication regarding conciliation (which Defendant already has), Defendant has not shown that the scope and/or sufficiency of EEOC's investigation bears a relationship here to conciliation.

II. DEFENDANT SEEKS DISCLOSURE OF ATTORNEY WORK PRODUCT

Paragraphs 1-4, 6 & 9 (and perhaps Paragraph 5) require EEOC to divulge attorney work product. Although Defendant claims that it seeks "facts," it seeks much more. The "facts" in this case consist of the testimony, interrogatory answers, and documents (including Defendant's own business

records) that are the subject of on-going discovery. To the extent Defendant requests them in discovery, EEOC will produce the non-privileged portions of its investigative file, information regarding claimants and other, non-privileged, material. Further, EEOC will produce its expert report pursuant to the Court's order and make its expert available for deposition. The parties have yet to take any depositions, but that discovery vehicle, as well Defendant's ability to interview third party witnesses, interview Defendant's own personnel, and analyze Defendant's own data, are readily available to Defendant.

Defendant's Notice seeks more than facts – it compels EEOC to conduct research to identify, collect, and analyze all "factual information and documents" that support or rebut EEOC's allegations and, subsequently, to testify as to how each fact or document either supports or rebuts certain aspects of the claim. Using Rule 30(b)(6) to delve into EEOC counsel's impressions of the case, interpretation of evidence, and assessment of legal theories is an improper attempt to expose attorney work product: "[I]t is the selection and compilation of the relevant facts that is at the heart of the work product doctrine." HBE Corp., 157 F.R.D. at 466. In Hickman v. Taylor, the Supreme Court identified an attorney's culling relevant facts and documents as one of the key attorney functions deserving the work product protection. Hickman v. Taylor, 329 U.S. 495, 511 (1947). Courts have flatly rejected attempts to take Rule 30(b)(6) testimony regarding analogous subject matter finding that such examination was a proper intrusion into attorney work product. See Buntrock, 217 F.R.D. at 444-46 (holding Rule 30(b)(6) deposition notice seeking examination as to facts supporting complaint allegations improperly sought work product and granting protective order); SmithKline Beecham Corp. at **9-10 (holding Rule 30(b)(6) deposition notices seeking examination as to facts supporting complaint allegations improperly sought attorney work product and denying motion to compel deposition). An attorney's selection and compilation of relevant evidence from the record for possible use on behalf of the client is attorney work product and is not discoverable. In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th

Cir. 1980); Shelton v. Am. Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1986); See also In re Allen, 106 F.3d 582, 608 (4th Cir. 1997) ("We believe that the selection and compilation of documents by counsel in this case for preparation for pretrial discovery falls within the highly protected category of opinion work product."); Berkley Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (same).

EEOC counsel's review of facts and documents probative of unlawful discrimination, and the results of sifting through such evidence, necessarily reflects counsel's theories of the case and intended lines of proof. Such information is attorney work product and is not discoverable. Spork v. Peil, 795 F.2d 312, 316-17 (3d Cir. 1985); Sawgrass Sys., Inc. v. BASF Aktiengesellschaft, 1999 U.S. Dist. WL 358681 at *4 (E.D. Mich. 1999) (same). Federal courts have also repeatedly refused to allow Rule 30(b)(6) examinations of parties or their counsel that calls for testimony identifying the documents produced during the litigation that those parties or their counsel deem probative of claims or defenses. FTC v. U.S. Grant Resources, LLC at *10 (denying, on work product grounds, examination of FTC regarding knowledge of ads and which ads reflected deceptive or unfair trade practices); Am. Nat'l Red Cross, 896 F. Supp. 8, (D.D.C. 1995) (holding corporate designee properly invoked work product doctrine when refusing to answer questions regarding documents contended to be supportive of affirmative defenses).

Consistent with the Court's bifurcation order, Defendants are free to conduct discovery concerning witnesses, to conduct expert discovery, and to analyze all non-privileged facts and documents produced and/or in their own possession. Indeed, competing analyses of the facts and documents is the function of each party's advocate. However, Defendant may not use Rule 30(b)(6) to force EEOC's advocate to divulge *EEOC's internal analysis* of documents and facts. District Council,

1992 U.S. Dist. WL 208284, at *4. Defendant cannot depose EEOC and force it to lay out its theories, lines of proof, and interpretation of evidence. Such an inquiry is inappropriate in the adversary system.

Paragraphs 4 and 9 (seeking to discover "factors" taken into account when identifying class members and "[a]ny and all steps" in EEOC's investigation of its claims) are so broad as to compel EEOC to identify: (1) the identities of persons EEOC counsel has contacted or communicated with regarding this case; (2) the contents of communications between EEOC and its potential class members; (3) EEOC counsel's communications with EEOC Headquarters regarding this litigation; and (4) the manner in which EEOC counsel has analyzed Defendant's hiring decisions. All of these categories of information are plainly attorney work product. The course and scope of EEOC counsel's factual and legal investigation of the claims is work product. As Paragraph 4 states, Defendant intends to interrogate EEOC counsel about what "criteria" counsel applied concerning counsel's investigation of the claims and what "factors" have been taken into account to identify class members. Similarly, Paragraph 9 requires EEOC to divulge "all steps" in counsel's investigation of EEOC's claims, which would include identification of any potential witnesses and a description of counsel's contact with witnesses, collection and assessment of facts, and legal analysis. This information is clearly attorney work product. District Council, 1992 U.S. Dist. WL 208284, at *10. Moreover, counsel's mental impressions have no probative value. The only import of this information is as a tool to gain unfair advantage. See Laxalt v. McClatchy, 116 F.R.D. 438, 443 (D. Nev. 1987) (identity of persons with relevant knowledge discoverable, identity of those interviewed reflects attorney trial preparation and is not discoverable); Mass. v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 153-54 (D. Mass. 1986) (same); Bd. of Educ. v. Admiral Heating & Ventilating, Inc., 104 F.R.D. 23, 32 (N.D. Ill. 1984) (same); Hickman, 329 U.S. at 512 (referencing witness statements and memoranda as work product); Upjohn Co. v. U.S., 449 U.S. at 383, 399 (1981)("[f]orcing an attorney to disclose notes and memoranda of

witness's oral statements is particularly disfavored because it tends to reveal the attorney's mental processes"); EEOC v. Carrols Corp., 215 F.R.D. 46, 51-52 (N.D.N.Y. 2003) ("Carrols' argument that claimants, not the EEOC, filled out the questionnaires is unavailing. In Hickman and Upjohn, the Supreme Court afforded such protection to witness statements and such statements are incorporated in questionnaires."); U.S. v. Chatham City Corp., 72 F.R.D. 640, 643 (S.D. Ga. 1976) (holding witness statements taken by FBI agents were work product protected from disclosure).

Finally, in Paragraph 6, Defendant's seeks disclosure of EEOC's own statistical analyses, including those conducted during EEOC's investigation. Such analyses reveal the Government's deliberative process privilege, EEOC's law enforcement privilege, constitute attorney work product, and are irrelevant. Further, pursuant to Keco, "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency[]" and it is error for the Court to inquire into its sufficiency. Keco at 1100. All data analyses conducted in this case, both before and after EEOC filed its lawsuit, have been performed by EEOC counsel and their agents. Accordingly, it is clearly attorney work product and otherwise non-discoverable. When EEOC designates expert witnesses under Rule 26(a)(2) pursuant to this Court's scheduling order, Defendant will have the relevant and non-privileged analyses and may depose EEOC's expert witness/es. Paragraph 6 serves only to reveal EEOC's internal *analyses*, which are privileged and irrelevant.

III. DEFENDANT SEEKS INFORMATION PROTECTED BY ATTORNEY-CLIENT AND COMMON INTEREST PRIVILEGES

Defendant's Notice requires EEOC's counsel to testify about counsel's communications with prospective and actual class members (e.g., Paragraphs 1-4, 6) and counsel's communications with among EEOC personnel in the Field and Headquarters (e.g., Paragraphs 5-9), in plain violation of the attorney-client privilege and the common interest privilege. Given that the EEOC will shortly produce its non-privileged investigative file to Defendant, it is clear that Defendant seeks more than the non-

privileged administrative phase communications between EEOC investigative staff and the public. Instead, the Notice is intended to secure testimony from counsel all internal communication regarding this case, including which witnesses counsel spoke to, when such information was collected, and what information counsel has conveyed internally about facts that support and rebut EEOC's Complaint.

Courts recognize an attorney-client relationship between the EEOC and all persons who seek legal advice or representation in connection with suits brought on their behalf. In EEOC v. Georgia Pacific Corp, Defendant moved to compel EEOC to produce "writings concerning, reflecting, or stating" communications between EEOC and the charging party. In denying defendant's motion, the court stated that "an essential element in pursuit of a private litigant's right [under Title VII] is the representation of that litigant by the EEOC's staff." EEOC v. Georgia Pacific Corp., 1975 U.S. Dist. WL 267 (D. Ore., Nov. 10, 1975). An essential precondition to the EEOC's filing cases on behalf of harmed persons is that those persons can communicate with the EEOC attorneys in confidence. EEOC v. Int'l Profit Assoc., Inc., 206 F.R.D. 215, 218 (N.D. Ill. 2002) ("Communications between prospective class members and EEOC counsel and their agents are protected from disclosure by the attorney-client privilege."); EEOC v. Nebco Evans Dist., Inc., 1997 U.S. Dist. WL 416423 at *4 (D. Neb. June 9, 1997) (acknowledging the attorney client privilege between claimants and the EEOC because EEOC is acting as the claimants' representatives); EEOC v. HBE Corp., 1994 U.S. Dist. 376273 at *2 (E.D. Mo. May 19, 1994) ("A number of courts have held that when the EEOC brings suit on behalf of individuals, the communications between the attorneys for the EEOC and the charging party are protected by the attorney-client privilege.") Moreover, when EEOC acts in the public interest through lawsuits its communications with prospective or actual claimants necessarily relate to rendering legal services. In EEOC v. Tony's Lounge, Inc., the court found that the communications between the EEOC and the claimants related to seeking or rendering legal advice based on the fact that the deponents were within

the class of aggrieved persons for whom the EEOC filed suit. EEOC v. Tony's Lounge, Inc., 2010 U.S. Dist. WL 1444874 at **1-2 (S.D. Ill. April 9, 2010). Similarly, in EEOC v. Bill Heard Chevrolet the court found that a potential claimants' attempt to obtain more information about the EEOC's lawsuit was cognizable as a request for legal representation, one which was protected by the attorney-client privilege. EEOC v. Bill Heard Chevrolet Corp., 2009 U.S. Dist. WL 2489282 at **4-5 (Aug. 12, 2009).

Moreover, the attorney-client privilege covers Government attorneys' communications with their Government client. EEOC v. Texas Hydraulics, Inc., 246 F.R.D. 548, 554 (E.D. Tenn. 2007) ("A government agency, such as the [EEOC], can invoke the attorney client privilege in the context of regulatory and civil litigation. The privilege belongs to the client agency.") (citations omitted); Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005) (government entity can assert attorney-client privilege in the civil context). Any communications between EEOC counsel and its client, the Government, with regard to its recommendation of this litigation, the documents it relied upon in making these recommendations, or the facts it communicated to EEOC Headquarters in connection with this litigation clearly fall within the privilege. Defendant's motion to compel EEOC counsel to testify about which "facts or documents" it discussed with EEOC Headquarters is a direct attempt to break the privilege, one for which Defendant has offered no justification or rationale that is recognized by the courts.

IV. DEFENDANT SEEKS INFORMATION PROTECTED BY THE LAW ENFORCEMENT PRIVILEGE

Paragraphs 4-6 and 9 seek information protected by EEOC's law enforcement privilege. The purpose of the law enforcement privilege is to protect against the production of documents which would reveal sources and methods about ongoing law enforcement activities. Ohio Bureau of Worker's Comp. v. MDL Active Duration Fund, Ltd., 2006 U.S. Dist. WL 3311514 at *3 (S.D. Ohio, Nov. 13, 2006). The D.C. Court of Appeals succinctly described the interests served by this privilege, stating "[the

privilege protects] the need to minimize disclosure of documents whose revelation might impair the necessary functioning of a department of the executive branch. The argument here that law enforcement operations cannot be effective if conducted in full public view is analogous to that made on behalf of intra-agency deliberations." Black v. Sheraton Corp., 564 F.2d 531, 541 (D.C. Cir. 1977). The law enforcement privilege is so central to the effective operation of government that it was first recognized as common law; it has been subsequently recognized in federal courts. Id.; U.S. v. Lang, 766 F. Supp. 389, 403-04 (D. Md. 1991).

Paragraphs 4-6 and 9 demand that EEOC counsel discuss how the agency sorts and analyzes data to identify employers that may be violating the laws EEOC enforces. As Lang correctly states, an official's selection of certain critical facts out of a sea of relevant information would reveal law enforcement sources and methods. Lang, 766 F. Supp. at 404 ("production would reveal […] what portions of that activity [the SEC] believes are important"). The internal disparate impact statistical analyses in this case have been performed by EEOC counsel. Therefore, such analyses obviously will not be evidence in this litigation and Defendant cannot make any showing of particularized need to obtain them. To the extent EEOC's litigation expert witnesses perform such analyses (using data that will be lawfully disclosed), the analyses will be disclosed when due in accordance with the Court's scheduling order. Defendant will have the right to depose the EEOC's experts, as the Court has provided. Further, because EEOC will disclose the factual data used to conduct statistical analyses, Defendant is also free to generate its own statistical analyses to counter the EEOC's statistical expert.

V. DEFENDANT SEEKS INFORMATION PROTECTED BY THE GOVERNMENT'S DELIBERATIVE PROCESS PRIVILEGE

Paragraphs 1-9 also seek information concerning the EEOC staff's conclusions and recommendations to their superiors and EEOC Headquarters about the facts of this case. This type of request is prohibited by the deliberative process privilege, which protects communications made by

government agents which are the basis of the government decision making process. The purpose of the privilege is to provide a space for government employees to air their opinions and provide frank advice about policy matters without the chilling effect of their conversations being scrutinized in subsequent litigation. Dep't of the Interior v. Klamath, 532 U.S. 1060, 1065-66 (2001) ("deliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,'"). In Schell v. U.S. Dept. of Health & Human Services, 843 F.2d 933, 940 (6th Cir. 1988), the Sixth Circuit described the documents encompassed by the privilege as "recommendations, draft documents, proposals, suggestions, and other substantive documents which reflect the personal opinions of the writer rather than the policy of the agency." Id.

Defendant's request cannot be construed to seek merely the facts collected during EEOC's investigation (although, pursuant to Keco, the scope of the investigation is irrelevant). Instead, Defendant wants to know what the investigator made of Defendant's records and testimony—what subjective conclusions the investigator reached. Not only is this type of inquiry wholly irrelevant to the facts of this litigation (as the trial is a *de novo* review of the facts), but it would be prevent investigators from candidly expressing their opinions. The Schell court neatly summarizes this issue as "whether disclosure of materials would expose an agency's decision-making process in such a way as to discourage discussion with the agency and thereby undermine the agency's ability to perform its function." Id. Here, the inevitable result of requiring an EEOC investigator to testify about what opinions they expressed to their supervisor would be to obtain testimony about who the investigator found credible, and what recommendations they made to their supervisor. This type of inquiry is flatly prohibited.

VI. DEFENDANT SEEKS IRRELEVANT INFORMATION

In Paragraphs 7 and 8, Defendant seeks discovery "relating to the performance of background checks or credit checks" on any employees or applicants for employment with EEOC and about EEOC's "use or consideration of background or credit history information in employment or hiring decisions." Setting aside the privileged nature of such information, the selection criteria EEOC uses are wholly irrelevant to this disparate impact case. Defendant seeks information that has no remote evidentiary value. Piacenti v. Gen. Motors Corp., 137 F.R.D. 221, 223 (N.D. Ill. 1997) ("The object of inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue"). The proof scheme for this Title VII case, as interpreted by Griggs v. Duke and its progeny, focuses solely on the relationship between Defendant's use of credit history as a selection criteria test, whether it had a disparate impact on a protected class, and whether Defendant can prove its business necessity affirmative defense. Griggs v. Duke, 401 U.S. 424, 431-32 (1971); Graoch Associates #33, L.P. v. Louisville Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 374-75 (6th Cir. 2007). Proof that any other employer (including EEOC) applies similar criteria has no bearing on whether Defendant can prove that its use of such criteria was justified, in relation to the jobs at issue.

In defense of Paragraphs 7 and 8, Defendant argues that such evidence supports its "estoppel" defense. Citing a district court case concerning an asylum petition, Defendant incorrectly states that the Government may be estopped from prosecuting claims where the Government "is simultaneously engaging in nearly identical conduct." Doc 20-1 at 12. That is not true. The Supreme Court has refused to hold that estoppel could ever be successfully asserted against the Government. Michigan Express, Inc. v. United States of America, 374 F.2d 424, 427 (6th Cir. 2004). However, even if estoppel were an available affirmative defense in this case, the Government "may not be estopped on the same terms as any other litigant." Michigan Express at 427, quoting Heckler v. Community Health Services of

Crawford City, Inc., 467 U.S. 51, 60 (1984). A party attempting to estop the Government bears a "very heavy burden" to demonstrate that the Government engaged in malfeasance by intentionally misleading the party to engage in specific conduct. Michigan Express at 427-428. Evidence of EEOC's hiring criteria (regarding, of course, completely different jobs that those at issue here) cannot possibly constitute the kind of malfeasance that would permit Defendant to estop EEOC from prosecuting Title VII violations.

Finally, Paragraphs 5, 6 and 9 demand that an EEOC agent testify about how the EEOC investigated this case, how the investigator analyzed the evidence, and what policies the investigator consulted with regard to the EEOC's determination. In Keco, and subsequently in EEOC v. Ford Motor Co., the Sixth Circuit held that EEOC's investigation is not relevant to EEOC's subsequent litigation. EEOC v. Ford Motor Co., 98 F.3d 1341 at *9 (6th Cir. 1996); Keco at 1100. Therefore, the investigator's assessment of the evidence (which is otherwise privileged) is not relevant.

CONCLUSION

For the foregoing reasons, and based on the above cited authority, EEOC respectfully requests that the Court deny Defendant's Motion to Compel EEOC to comply with its Rule 30(b)(6) Notice issued on March 24, 2011.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that I filed EEOC's Opposition to Defendant's Motion to Compel on May 9, 2011, using the electronic filing system which will provide a copy to counsel of record.

/s/
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