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 STATEMENT OF APPEAL OF MAGISTRATE JUDGE'S FEBRUARY 13 AND FEBRUARY 15 ORDERS

Plaintiff Richard Lowery respectfully submits this statement of appeal pursuant to Local Rule 4(a), Appendix C, and 28 U.S.C. § 636(b)(1)(A). Plaintiff objects to five parts of the United States Magistrate Judge's Order (Dkt. 110): the denial in part of Plaintiff's Motion to Compel production of three documents (Dkt. 60), the granting in part of Defendants' Motion to Compel additional log details and further response to four RFPs (Dkt. 62), the denial of Plaintiff's Motion to Extend Case Deadlines (Dkt. 68), the granting of Defendants' Motion for a Protective Order regarding nepotism allegations (Dkt. 88), and the denial of Plaintiff's Motion for Payment of Expenses caused by Lillian Mills's failure to attend her deposition (Dkt. 89). Plaintiff also objects to the Magistrate Judge's later Order (Dkt. 112) granting Defendants' so-called "Supplemental" Motion to Compel (Dkt. 93).

The University of Texas (UT) has repeatedly delayed, obstructed discovery, and ignored procedural rules, attempting to run out the clock before Plaintiff can obtain evidence proving that UT Present Jay Hartzell was involved in the campaign to

silence Richard Lowery. On February 13, 2024, Magistrate Judge Howell heard oral arguments about nine separate motions connected to UT's obstructionism. While Judge Howell correctly ordered UT to disclose certain relevant evidence in discovery, he erred as to several important motions.

FACTS AND BACKGROUND

The facts of this case are well-known to this Court. *See, e.g.*, Dkt. 51 at 2-7; Dkt. 60 at 4-7; Dkt. 68 at 5-7. Professor Richard Lowery has for some time publicly criticized the ideological direction of the University of Texas and its president, Jay Hartzell. Dkt. 1. Beginning in the summer of 2022, UT officials pressured and threatened Lowery, causing him to self-censor. *Id.* On February 8, 2023, Lowery sued in defense of his First Amendment rights. *Id.* From the start of this suit, Lowery believed that Jay Hartzell was a central figure in the campaign to silence him. *See, e.g.*, Dkt. 8-1, ¶¶ 9, 11, 43; Dkt. 1, ¶¶ 9, 21-24, 36.

This case entered regular discovery on September 25, 2023. Dkt. 57 at 2. Discovery has proved contentious. On February 13, 2023, Magistrate Judge Howell heard arguments on nine different motions, many containing multiple issues within them. *See* Dkt. 92. Judge Howell ruled from the bench and later memorialized his rulings—approximately twelve in all—in an order. Dkt. 110; *see also* Dkt. 114. Plaintiff now submits a statement of appeal, challenging some of those rulings.

First, Judge Howell denied in part Plaintiff's Motion to Compel the production of three documents that UT withheld in their entirety, invoking attorney-client privilege. *Id.* at 1-2. One was an August 5 text chain between UT president Jay Hartzell, defendant Lillian Mills, V.P. for Legal Affairs Amanda Cochran-McCall, and two other UT leaders about Lowery's public speech generating negative media coverage of UT's Civitas Institute. *See* Dkt. 60 at 6-10; Dkt. 63 at 2-5. The other documents were draft "talking points" and an email—sent by UT's Assistant V.P.

for University Communications Mike Rosen—forwarding these talking points as an attachment to various UT officials. *See* Dkt. 60 at 6-10; Dkt. 63 at 3-5. Lowery argued that UT's own descriptions showed that these documents were mixed business and legal communications that should be turned over with any legal advice redacted. Dkt. 60 at 7-10; Dkt. 63 at 3-5. But after reviewing in camera and "considering the log entries, the withheld documents, and the record in support of the privilege assertion (including the declaration of Amanda Cochran-McCall, Dkt. 61-2)," Judge Howell concluded that UT "properly asserted the attorney-client privilege as to the [three] communications." Dkt. 110 at 1-2; *see also* Dkt. 114 at 5:8-18, 92:7-13. Judge Howell, however, ordered UT to provide additional information about the Hartzell text chain: the time, date, and sender of each individual message in the chain. *See* Dkt. 110 at 2; Dkt. 114 at 92:23-93:6.

Second, Defendants challenged the sufficiency of many of the 469 entries on Plaintiff's first objective privilege log, containing documents withheld as both attorney-client privileged and as work product and authored in the months preceding the filing of the lawsuit. Dkt. 62 at 4-6; *see also* Dkt. 64-8. Lowery responded that his first log supplied more detail than UT's own log and that the withheld communications were presumptively made for the purposes of legal advice and litigation preparation. Dkt. 64 at 10-12. Judge Howell ordered Defendants to create a list "identifying the specific communications from the present log for which [] additional information is needed" and ordered Lowery to "produce a supplemental privilege log specifically (1) describing the content sufficiently to assess the assertion of the privilege and (2) identifying the privilege asserted" with 14 days of receiving this list. Dkt. 110 at 2-3. Judge Howell also ordered Lowery to supplement his responses to four RFPs that Lowery objected to as partly irrelevant, overbroad, and unduly burdensome, although Judge Howell narrowed the RFPs somewhat,

without providing implementation guidance. *See* Dkt. 110 at 3; Dkt. 114 at 94:16-95:19.

Third, Plaintiff sought an extension of all case deadlines by at least 60 days, both to give more time to gather evidence about Jay Hartzell's involvement before the March 2 deadline to amend and join additional parties and to prevent UT's delay tactics from keeping Lowery from completing discovery by the May 1 discovery deadline. Dkt. 68; Dkt. 79. After this motion was briefed, Lowery moved for leave to amend his complaint and to add Hartzell as a defendant. *See* Dkt. 94. Because this motion to amend was filed and over two months remained until May 1, Judge Howell denied without prejudice Plaintiff's Motion to Extend Case Deadlines. Dkt. 110 at 3; *see also* Dkt. 114 at 7:13-8:5, 95:20-96:9.

Fourth, Judge Howell granted without prejudice Defendants' Motion for a Protective Order prohibiting deposition questions and requests for production concerning allegations that Jay Hartzell improperly helped his son gain admission to a UT graduate program. *See* Dkt. 110 at 4; *see also* Dkt. 88 at 3. Lowery argued that discovery into the nepotism allegations was relevant and proportional to Lowery's First Amendment chilling claim, both because it plausibly contributed to UT's motive to censor him and because UT has placed the accuracy of Lowery's public criticisms of Hartzell at issue. Dkt. 95. Judge Howell, however, held that "discovery related to this nepotism theory is not relevant in balance with the burdensomeness of that discovery request, at least as the scope of discovery is presently defined by plaintiff's live complaint." Dkt. 114 at 97:14-98:13. Plaintiff remains free to "re-rais[e] these topics as appropriate for discovery" in a later motion, if "the Court grant[s] Plaintiff's motion to amend his complaint." Dkt. 110 at 4. Judge Howell did not explain why it would be burdensome for UT to provide

discovery about whether its president, a public official, had engaged in nepotism at a taxpayer-funded university. *See* Dkt. 114 at 47:9-12, 97:17-21.

Finally, Lowery requested that the Court order UT to pay Lowery's reasonable expenses and attorneys' fees caused by defendant Lillian Mills's failure to appear at her long-scheduled January 29 deposition. Dkt. 89 at 4-5, 7-8; Dkt. 101 at 3-6. Judge Howell denied this motion, holding that Mills's "failure to attend was substantially justified," because "the parties knew there was a dispute and the motion for protection was forthcoming and I think even as plaintiff's counsel stated, expenses potentially could have been avoided." Dkt. 114 at 11:6-14, 98:17-24; *see also* Dkt. 110 at 4.

Two days after the February 13 hearing, Judge Howell granted UT's Motion to Compel additional detail about entries on Lowery's second log—which contained approximately 160 emails withheld as work product. *See* Dkt. 93-1; Dkt. 98 at 3-4. This motion was not argued at the hearing, although Judge Howell asked UT's counsel one question about it. Dkt. 114 at 94:5-10 (noting that the motion "wasn't set for today"); Dkt. 92. In briefing, Plaintiff argued that the log satisfied Rule 26 and that UT never conferred in good faith about dispute prior to filing its motion. *See* Dkt. 98; Dkt. 93-1. Nonetheless, Judge Howell entered "the same ruling" about UT's second motion as its first motion. Dkt. 112.

ARGUMENT

When a party appeals a magistrate judge's order on a non-dispositive motion, the district court judge reviews under the clearly erroneous or contrary to law standard. Local Rules App. C, Rule 4(a); *see also* 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a). De novo review applies to legal conclusions. *See Moore v. Ford Motor Co.*, 755 F.3d 802, 806 (5th Cir. 2014). A finding is "'clearly erroneous' when, although there is evidence to support [the finding], the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Montes-De Oca*, 820 F. App'x 247, 249 (5th Cir. 2020) (citation omitted); *see also St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006) (finding clearly erroneous "if it is implausible in the light of the record *considered as a whole*") (emphasis added).

"When examining mixed questions of law and fact," courts "also utilize a *de novo* standard by independently applying the law to the facts found by the [magistrate judge], as long as the [] court's factual determinations are not clearly erroneous." *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005). Parties must appeal a magistrate judge's order to the district court to preserve an issue for appeal to the Fifth Circuit. *Lee v. Plantation of La., L.L.C.*, 454 F. App'x 358, 360 (5th Cir. 2011).

Plaintiff fully incorporates herein all his briefing before Judge Howell on the challenged points without repeating those filings in their entirety.

I. THE THREE WITHHELD UT DOCUMENTS ARE MIXED BUSINESS AND LEGAL COMMUNICATIONS, WHICH SHOULD AT BEST BE PARTLY REDACTED

In-house counsel are often involved with communicating risky decisions within public agencies. But UT cannot hide relevant operational and public-relations communications from discovery just because a lawyer was on a text or email. Attorney-client privilege "is interpreted narrowly so as to apply only where necessary to achieve its purpose," and any "ambiguities as to whether the elements of a privilege claim have been met are construed against the proponent," who bears the burden for all elements of its privilege claim. *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695-96 (5th Cir. 2017) (cleaned up). Because in-house counsel often advise on operational and public relations matters, courts in the Fifth Circuit have "increased the burden that must be borne by the proponent" and demanded "a clear showing that the attorney was acting in his professional legal capacity" when—as

here—communication is with in-house counsel. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 797, 799 (E.D. La. 2007) (citations omitted); *see also* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 111-12 (2016) (describing this "additional scrutiny").

Communications with in-house counsel are privileged only when they are "predominantly legal advice or services," rather than "business or technical advice or management decisions." *Stoffels v. SBC Communs., Inc.*, 263 F.R.D. 406, 411 (W.D. Tex. 2009) (citations omitted). When a corporation "simultaneously sends communications to both lawyers and non-lawyers," as in this case, the corporation "usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes." *Vioxx*, 501 F. Supp. 2d at 805.

UT's own descriptions of the three documents demonstrate that they were mixed communications. Hartzell's text chain was a discussion among top administrators about "media coverage" of the Civitas Institute, which referred to advice concerning Lowery that in-house counsel gave Hartzell days earlier. Dkt. 61-2, ¶¶ 4-6. Later, after multiple texts were exchanged, Defendant Mills (not Hartzell, the originator of the text thread) sought further legal advice. *See* Dkt. 115-2 at 4-5; Dkt. 61-2, ¶ 5; Dkt. 61 at 4. This text chain was created by non-lawyer leaders deciding how to respond to media coverage and likely instructing underlings: unprivileged communications. For "when a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it." *Vioxx*, 501 F. Supp. 2d at 805. And UT's second amended privilege log does not show attorney Amanda Cochran-McCall responding to any of the texts. Dkt. 115-2 at 4-5. If only Mills requested legal advice, then Hartzell's initial texts are not privileged.

Likewise, the Rosen email circulated "draft talking points including input from counsel" about "how faculty should follow [university] policies," prepared to ensure public statements made in response to syllabus inquires "would accurately represent the policies." Dkt. 61-2, ¶¶ 7-8; Dkt. 61-1 at 5. Although in-house counsel gave "input" on the talking points, that does not make the Rosen email and its attachment privileged, for lawyers give input on many things. *Cf. Stoffels*, 263 F.R.D. at 411. Moreover, if a corporation "take[s] a document and attachment that are privileged . . . and then subsequently send the same document and attachment to other corporate personnel for non-legal purposes," the "subsequent conveyance" is unprivileged. *Vioxx*, 501 F. Supp. 2d at 809-10. The talking points may have included some legal input—mixed with educational policies and PR advice—but Rosen and other non-lawyers subsequently circulated the document so that fundraisers and administrators could better respond to inquiries from angry donors. *See* Dkt. 60-7 (email about later conveyance of talking points). Defendant Mills even stated in her deposition that the talking points were unprivileged—information that Plaintiff would have had before the February hearing if UT had not unilaterally cancelled her deposition.[1] Thus, the record demonstrates that these three documents were *not* primarily legal.

Although Judge Howell determined that UT "properly asserted the attorney-client privilege as to the [three] communications," Dkt. 110 at 1-2, he never stated why "the manifest purpose" of these mixed communications was providing confidential legal advice. *BDO*, 876 F.3d at 696. He simply noted that his decision rested on "the log entries, the withheld documents [reviewed in camera], and the record in support of the privilege assertion (including the declaration of Amanda

[1] Transcript not available at time of filing.

Cochran-McCall, Dkt. 61-2)." Dkt. 110 at 1-2; *see also* Dkt. 114 at 5:8-18, 92:7-13 (similar). But attorney-client privilege applies on a "document-by-document basis" and "may not be tossed as a blanket over an undifferentiated group of documents." *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 957 F.3d 505, 510 (5th Cir. 2020) (citations omitted). That is, unless every text in the chain was primarily for the purpose of legal advice, Plaintiff ought to receive the non-legal portions of the chain, with the legal advice redacted. Similarly, unless the entirety of both the Rosen email and its attached talking points were legal advice, Plaintiff should receive redacted versions. Judge Howell's ruling did not address this presumption or explain how UT overcame the presumption in favor of disclosure.

A claim of attorney-client privilege is a mixed question of law and fact, so this Court "review[s] factual findings for clear error and the application of the controlling law *de novo*." *Taylor Lohmeyer*, 957 F.3d at 509. Article III courts often examine documents in camera a second time, when reviewing the decision of a magistrate judge who reviewed documents in camera. *See, e.g.*, *United Healthcare Servs. v. Synergen Health LLC*, Civil Action No. 3:20-CV-0301-X, 2023 U.S. Dist. LEXIS 109458, at *22 (N.D. Tex. June 26, 2023). In light of Judge Howell's erroneous conclusion, which lacked any clear findings overcoming the presumption for disclosure, this Court should re-examine the withheld communications in camera to determine if their purpose was primarily legal or if business portions of these communications must be delivered to Plaintiff, after appropriate redactions are made.

II. PLAINTIFF'S LOGS FULLY SATISFY THE REQUIREMENTS OF RULE 26

Lowery's privilege logs—containing more than 700 entries between them—supplies far more information than do UT's original and first amended logs—containing just nine entries, *see* Dkt. 60-6; Dkt. 61-1. Yet UT insists that its logs

satisfied Rule 26, *see* Dkt. 61 at 3, but Lowery's do not. And UT seeks to generate pointless busy work for Lowery and his counsel logging information UT knows is privileged, as retribution for Lowery's temerity to bring a civil rights claim.

The detail required to claim privilege "can only be determined on a case-by-case basis." *Zelaya v. H&F Transp., Inc.*, No. SA-16-CA-450-PM, 2016 U.S. Dist. LEXIS 196119, at *9 (W.D. Tex. Oct. 28, 2016) (cleaned up). Rule 26 "does not attempt to define for each case what information must be provided" but only states that the "description of each document and its contents must provide sufficient information" to assess the privilege claim. *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 697 (5th Cir. 2017) (quotation omitted). Courts in the Fifth Circuit employ "an unstated operating presumption that communications with outside counsel constitute legal advice." *Exxon Mobil Corp. v. Hill*, No. 13-236, 2013 U.S. Dist. LEXIS 91378, at *17 (E.D. La. June 28, 2013); *see also Vioxx*, 501 F. Supp. 2d at 797 n.12.

Plaintiff furnished UT with "objective privilege logs": a recognized system for logging ESI, recommended by experts. *See* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 162-63 (2016). In this system, the producing party records objective ESI metadata and then permits the other party to designate documents that it would like described in greater detail. Sedona Conference, *supra* at 163. Even UT concedes that many entries on Lowery's logs have sufficient information under Rule 26. *See* Dkt. 93 at 1; Dkt. 67 at 2 n.1.

In truth, all the entries supply sufficient information and the timing and context also support that conclusion. Each entry on Lowery's second log, for instance, contains twenty columns of objective metadata, including sender, recipients, subject line, date, size, word count, file name (for attachments), and privileged asserted. *See* Dkt. 93-1. Courts often hold that far less information than this satisfies Rule 26. *See, e.g.*, *Bellamy v. Wal-Mart Stores, Tex., LLC*, Civil Action No. SA-18-CV-60-XR,

2019 U.S. Dist. LEXIS 140720, at *4 (W.D. Tex. Aug. 19, 2019); *Zelaya*, 2016 U.S. Dist. LEXIS 196119, at *9. Indeed, the only column on Defendants' original log that is not on Lowery's second log is a "Privilege Description" column where UT repeatedly copied the phrase: "Email with counsel containing legal advice related to confidential communications." *Compare* Dkt. 93-1 *with* Dkt. 60-6 at 3-4.

As Lowery's first log itself made clear, all documents on that log were communications between Lowery and his litigation counsel, sent from August 23, 2022 (when Lowery began self-censoring) to February 7, 2023 (when he sued). *See* Dkt. 64 at 12; Dkt. 64-8. All withheld documents on the second log were emails between Lowery's litigation counsel and three outside lawyers consulted by his counsel "for the purposes of gathering information that would be helpful for this litigation and planning litigation strategy." Dkt. 93-2 at 3; *see* Dkt. 93-1 at 6. Consultations to gather information and plan strategy are paradigmatic examples of fact and opinion work product. *See Coleman v. Lee*, No. A-21-CV-00808-RP, 2022 U.S. Dist. LEXIS 234357, at *2 (W.D. Tex. Aug. 30, 2022); *United States v. El Paso Co.*, 682 F.2d 530, 542 & n.15 (5th Cir. 1982). It was an error of fact and law to hold that UT's logs satisfy Rule 26, but Lowery's do not. *See* Dkt. 112; Dkt. 110 at 2-3.

Moreover, Judge Howell's second order never addressed Lowery's argument that this Court should refuse to consider UT's second motion (Dkt. 93), because UT violated the rules by failing to confer in good faith prior to filing. *See* Dkt. 98 at 4-6; *see also* Local Court Rule CV-7(g). Instead, Judge Howell accepted the movant UT's assertion that "ruling on that first motion would dispose of the issues raised in this [second] motion" and ruled for "same reasons announced . . . for the first motion," *see* Dkt. 112 at 1, even though Lowery contested UT's assertion, see Dkt. 98. Judge Howell's failure to consider Lowery's conferral argument is a second error of law,

also mandating reversal. It is yet another example of the rules being deemed optional for UT but binding on Lowery.

III. JUDGE HOWELL ERRED IN GRANTING IN PART UT'S MOTION TO COMPEL FURTHER RESPONSES TO RFPS 6, 7, 13 AND 29

UT moved to compel further responses to its RFPs concerning Lowery's communications with Richard Hanania, all members of the Global Liberty Institute, and all communications regarding Lowery's public speech over a multi-year period. *See* Dkt. 64 at 4-5, 7-10. Lowery objected to parts of these RFPs as irrelevant, disproportional, and unduly burdensome, Dkt. 114 at 23:20-27:22, and even UT's own counsel admitted two of these RFPs were overbroad, see Dkt. 114 at 73:16-74:10. Judge Howell made no findings regarding Plaintiff's disproportionality argument. Instead, he tried to narrow the problematic RFPs and ordered Lowery to produce, within 14 days, "any responsive documents related to his speech regarding the University of Texas or other communications related to his claims in this case." Dkt. 110 at 3. But Judge Howell provided no guidance on how to implement this order, even though parties obviously disagreed about what communications were "responsive" or "related to his claims in this case"—that was exactly the matter under dispute. This ruling was a clear error.

Judge Howell should have provided explicit criteria for Lowery to implement his order, including focused search terms, date restrictions, or other limitations. In practice, he avoided deciding the discovery dispute and sent it back to the parties for further discussion, leaving plaintiff exposed to UT's unreasonable demands for communications about his dissident activities. *Cf.* Dkt. 114 at 94:16-95:19.

IV. UT'S DELAY TACTICS PREVENT LOWERY FROM COMPLETING DISCOVERY BY THE CURRENT DEADLINES AND CONSTITUTE GOOD CAUSE FOR EXTENSION

Judge Howell improperly held that Lowery lacked good cause for an extension because he has already moved for leave to amend his complaint and over two

months remain until the May 1 discovery deadline. Dkt. 110 at 3; *see also* Dkt. 114 at 7:15-20, 95:20-96:2. Strangely, Lowery's diligence in seeking to amend his complaint prior to the deadline counted against him, rather than in his favor. But a party seeking an extension shows "good cause" for an extension if "the deadlines cannot reasonably be met despite the diligence of the party needing the extension." *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 602 (5th Cir. 2021) (internal quotation omitted).

Lowery needs additional time because UT has strategically delayed events, to run out the clock and stop Lowery finishing discovery within the current schedule. *See* Dkt. 68; Dkt. 79. Lowery sought to commence depositions and documents productions in March 2022. Dkt. 16. In contrast, UT refused even to attend a Rule 26(f) conference until late September 2023. See Dkt. 57 at 2; Dkt. 24-1 at 1-2. And, since September, Defendants have missed deadlines, withheld responsive material, unilaterally cancelled a deposition, amended discovery responses weeks or months after providing false information, and pushed to schedule key events later than Lowery asked. *See, e.g.*, Dkt. 102 at 3-4; Dkt. 89 at 3-5; Dkt. 68 at 5-6.

Already, Lowery has moved to compel discovery four times, *see* Dkt. 104, and he expects that UT's intransigence will force more motions in the future. Judge Howell himself agreed that Plaintiff's four motions to compel were meritorious, for he granted three of them in part or in whole and found the fourth moot due to events occurring after the motion's filing. *See* Dkt. 110; *see also* Dkt. 100-1 (rescheduling Mills's missed deposition on January 31: the day after Plaintiff filed his motion). And Judge Howell denied Lowery's motion for an extension without prejudice because he understood that the pending motion for leave to amend (if granted) may require new deadlines. Dkt. 110 at 3; Dkt. 114 at 7:20-8:5, 96:3-9. This Court should not wait for a decision on this motion to amend but recognize that UT's delay tactics

already make an extension necessary. The failure to grant Lowery's request for extension will only invite further inappropriate delaying tactics from UT.

V. WHETHER JAY HARTZELL ENGAGED IN HYPOCRITICAL NEPOTISM IS RELEVANT AND PROPORTIONAL TO LOWERY'S FREE SPEECH CHILLING CLAIM

A. Lowery's public speech was constitutionally protected

Discovery into allegations that UT President Jay Hartzell used state resources to advantage his son in UT admissions is relevant to Lowery's original claim in at least two ways, contrary to Judge Howell's thinly reasoned legal conclusion. *Cf. EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209, 211 n.6 (5th Cir. 2001) ("The relevance of documents is a mixed question of law and fact") (cleaned up).

First, the allegations are relevant to whether Lowery's statements about Hartzell are legally protected speech, or the truth (accuracy) of Lowery's public comments. As this Court held, "to establish a chilled speech claim" a plaintiff must demonstrate that "(1) he was engaged in constitutionally protected activity, (2) the defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct." Dkt. 51 at 25 (cleaned up).

Lowery has repeatedly criticized UT leaders as dishonest and hypocritical, and he has urged donors to stop giving to the university. Dkt. 95 at 3-5. Supreme Court precedent holds that "it is essential that [teachers] be able to speak out freely" on "the question whether a school system requires additional funds[,] a matter of legitimate public concern," if the teacher does not make "false statements knowingly or recklessly." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571, 574 (1968). Lowery's public criticisms were protected speech if they were opinions, true statements, or falsehoods caused by mere negligence.

But UT has placed the accuracy of Lowery's public criticisms at issue by aggressively labeling them "factually inaccurate," "false," "disparaging," and "defaming." *See* Dkt. 14 at 18; Dkt. 14-2 at 3; Dkt. 83-3 at 2; Dkt. 83-4 at 156:22–157:22. According to UT, Lowery's statements "cross the line" into unprotected speech. Dkt. 103 at 6 (citing Dkt. 59); *see also* Dkt. 59 at 32:18-33:3, 34:21-35:25 (indicating that falsely calling someone a thief or a grifter may be tortious and outside the First Amendment's protection). Under UT's theory, its administrators were authorized to pressure or "counsel" Lowery because his speech was intentionally or recklessly false and disruptive to university operations.

"Relevant information encompasses any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Allen v. Priority Energy Servs., LLC*, 2017 U.S. Dist. LEXIS 229525, at *15 (W.D. Tex. Jan. 30, 2017) (quotation marks omitted). "It must be clear that the information sought has *no possible bearing* on the claim or defense of a party for the court to deny the request for discovery." *Id.* at *16 (emphasis added). Because UT argues that Lowery's speech is false and constitutionally unprotected, Lowery is entitled to prove the truth of his statements. That is, Lowery is entitled to discovery that is probative of whether Hartzell or other UT administrators dishonestly promote DEI policies within the university. Evidence that Hartzell used his influence to advantage his son while simultaneously advocating policies that disadvantage other white children is relevant to the first element of Lowery's claim.

B. Defendants' motivation to chill Lowery's speech

Discovery about President Hartzell's alleged nepotism is also relevant to UT's motive to silence Lowery—the third element of Lowery's original chilling claim. Lowery has alleged from the outset that UT administrators wanted to stifle his criticisms.

In his original complaint, Lowery alleged that UT censored him for criticizing Jay Hartzell and other senior UT officials for being dishonest and promoting harmful DEI policies, among other things. Dkt. 1, ¶¶ 9-10, 24. Lowery's complaint cited an op-ed that he published on June 28, 2022 in the *Washington Times* as a key example of these criticisms. *Id.* ¶¶ 7, 12. In this article, Lowery faulted "self-interested administrators" for promoting affirmative action policies that "disadvantage in the admissions process people with the same identity profile as their own children — though, of course, this disadvantage seldom reaches to their children themselves." Dkt. 8-7 at 4. Lowery has stated under oath that he "had President Jay Hartzell in mind as an example" of such a self-interested administrator when he wrote the article. Dkt. 77-1, ¶ 14. That Hartzell may have sought special, unearned privileges for his son while denying those benefits to other people's children is the exact hypocrisy that Lowery's *Washington Times* article condemned. *See id.*, ¶ 17.

If Hartzell himself engaged in this dishonest practice, that fact supports Lowery's theory that UT administrators wanted to stop Lowery from speaking out about this issue. Hartzell or someone close to him may well have read the *Washington Times* article and recognized themselves in Lowery's description. UT leaders unquestionably read many other articles publishing Lowery's criticisms. *See, e.g.*, Dkt. 88-3; Dkt. 31-2 at 5-7. And Hartzell knows that Lowery is Carvalho's friend, whom Hartzell allegedly used to contact the UT Philosophy Department on behalf of his son. *See* Dkt. 77-1, ¶ ¶ 15-16. At least, Lowery is entitled to use the discovery process to obtain more information about his theory, which is plausible on its face.

When evaluated on the entire record, Judge Howell's ruling that nepotism is irrelevant to Lowery's original claim, *see* Dkt. 114 at 97:14-25, is both clearly

erroneous and a mistake of law. Judge Howell conflated the weight of the—currently undiscovered—evidence for its discoverability. *See United States v. Harrist*, 258 F. App'x 668, 671 (5th Cir. 2007) (distinguishing weight from relevance). The weight of evidence is a question for the fact-finder, once both sides have had a chance to conduct full discovery. Evidence concerning Hartzell's alleged nepotism directly relates to UT's motive to suppress Lowery's speech.

C. Defendants supplied no evidence of undue burden

Judge Howell also held that Lowery's requests for production and deposition questions on nepotism were unduly "burdensome" "in balance" to their relevance. Dkt. 114 at 97:17-21; *see also* Dkt. 100 at 4. This was an error of law, because all of UT's objections to Lowery's discovery in its briefing concerned relevance, not proportionality. *See* Dkt. 88 at 3-5 (never mentioning proportionality); *see also* Dkt. 103 at 2-6 (same). UT supplied no evidence of burden. Moreover, there is no presumed privacy interest in allowing a public official to use the judicial process to cover-up his misdeeds or allowing Texas university officials to conduct their public duties in secret. If Hartzell did what he is alleged to have done, then it is obviously relevant. If not, then discovery will bear that out and he has nothing to worry about. His son's admission to a selective graduate program at the institution Hartzell leads should by itself raise eyebrows about conflicts of interest.

Courts determine proportionality on a balancing test that considers "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. 26(b)(1). "Once the party seeking discovery establishes that the materials requested are within the scope of permissible discovery, the burden shifts to the party

resisting discovery to show why the discovery is irrelevant, overly broad, unduly burdensome or oppressive, and thus should not be permitted." *Medina v. Schnatter*, 1:22-cv-498, 2022 U.S. Dist. LEXIS 106547, at *3 (W.D. Tex. June 15, 2022) (quoting *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011)). As "the party seeking the protective order," UT must show "the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Leblanc*, 559 F. App'x 389, 392 (5th Cir. 2014) (cleaned up).

UT supplied no evidence of burden whatsoever. Its exhibits for its motion were emails between counsel and the discovery requests themselves. *See, e.g.*, Dkt. 88-1; Dkt. 103-1. UT never submitted, for instance, numerical information calculating the expense that Lowery's request for a few emails would cause, or witness declarations about the supposed oppression UT officials would experience by answering fifteen minutes of deposition questions. *See* Dkt. 89 at 4. Carvalho never suggested that he would find such questioning at his deposition burdensome.

Judge Howell inverted the legal test by presuming burden without any evidentiary basis—or even any briefing on the issue. *See* Dkt. 114 at 97:17-21. He never applied the proportionality balancing test or examined "particular and specific demonstration[s] of fact." *Leblanc*, 559 F. App'x at 392. His error of law necessitates reversal.

VI. MILLS'S NON-ATTENDANCE WAS NOT SUBSTANTIALLY JUSTIFIED

Finally, binding precedent holds that Mills's non-attendance at her properly noticed deposition was not substantially justified. *See, e.g., Barnes v. Madison*, 79 F. App'x 691, 706-07 (5th Cir. 2003); *King v. Fid. Nat'l Bank*, 712 F.2d 188, 191-92 (5th Cir. 1983); *Hepperle v. Johnston*, 590 F.2d 609, 613-14 (5th Cir. 1979).

There were no factual disputes about the events leading up to Mills's non-appearance. *See* Dkt. 114 at 11:7-9, 98:21 (finding the facts "as plaintiff's counsel stated"). All parties agree that UT emailed Plaintiff about cancelling the January 29 deposition one week before (on Monday, January 22); that Lowery's counsel responded the next day refusing to cancel and offering a compromise solution; that no response was made to this compromise offer until the parties conferred about the issue on Friday, January 26; that UT moved for a protective order after business hours that evening; and that defendant Mills did not appear for her deposition on the morning of January 29 even though her motion for a protective order had not yet been granted. *See* Dkt. 100 at 2; Dkt. 89 at 4-5; Dkt. 83-2. Judge Howell's ruling that defendant Mills had a substantial justification for her non-appearance was a mistake of law. *See* Dkt. 114 at 11:6-14, 98:17-24. Moreover, it is another example of UT and its counsel not being held to the standards of the federal rules of procedure, while those same standards are applied to a civil-rights plaintiff.

"A party cannot unilaterally cancel a properly noticed deposition." *Panzer v. Swiftships, LLC*, 318 F.R.D. 326, 328 (E.D. La. 2016). When a party fails to appear, "the court *must* require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." FED. R. CIV. P. 37(d)(3) (emphasis added). Once a deposition is properly noticed, "the party is obliged to appear until some order of the court excuses attendance," because "the mere act of filing a motion for a protective order does not relieve a party of the duty to appear." *Barnes*, 79 F. App'x at 707. Such a motion "must be not only made but *granted* before the scheduled deposition to excuse compliance." *King*, 712 F.2d at 191 (emphasis original).

The Fifth Circuit has twice ruled that a pending motion for a protective order filed one business day before the deposition does not constitute substantial justification. *See Barnes*, 79 F. App'x at 707; *King*, 712 F.2d at 189, 191-92. Until UT rejected Lowery's compromise offer at the January 26 conferral and filed its motion that evening, Plaintiff did not know if Mills would appear and could not have acted to avoid expenses. Conferring in good faith requires "a genuine attempt to resolve the dispute" through the "two-way communication[.]" *Wareka v. Square*, No. 1:21-CV-00382-LY-SH, 2022 U.S. Dist. LEXIS 15598, at *8 (W.D. Tex. Jan. 28, 2022) (citations omitted). Under these circumstances, Lillian Mills by law had no substantial justification for failing to attend her deposition.

CONCLUSION

This Court should reverse five parts of Magistrate Judge Howell's February 13 order. After reviewing in camera, this Court should compel UT to produce the three withheld documents to Lowery, with redaction of any legal advice, as indicated by the Court. Additionally, this Court should issue a new scheduling order, extending discovery deadlines by at least sixty days; should deny UT's motion for a protective order prohibiting discovery into the Hartzell nepotism allegations; should deny UT's motion to compel further RFP responses, and should require that UT pay Plaintiff's reasonable expenses and attorneys' fees caused by Mills's non-appearance at her deposition. Additionally, the Court should hold that Plaintiff's privilege logs satisfy the requirements of Rule 26 and demonstrate that the withheld communications are attorney-client privileged or protected work product.

Respectfully submitted,

Dated: February 27, 2024

s/Endel Kolde
Endel Kolde
Washington Bar No. 25155
Courtney Corbello
Texas Bar No. 24097533
Nathan J. Ristuccia
Virginia Bar No. 98372
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, D.C. 20036
Tel: (202) 301-1664
Fax: (202) 301-3399
dkolde@ifs.org
ccorbello@ifs.org
nristuccia@ifs.org

Counsel for Richard Lowery

s/Michael E. Lovins
Michael E. Lovins
Texas Bar No. 24032555
LOVINS | TROSLCAIR, PLLC
1301 S. Cap. Of Texas
Building A Suite 136
Austin, Texas 78746
Tel: (512) 535-1649
Fax: (214) 972-1047
michael@lovinslaw.com

[Pursuant to Fed. R. Civ. P. 5(d)(1)(B) and Section 14(c) of the current Administrative Policies and Procedures for Electronic Filing, no certificate of service is required for this filing because all parties' counsel are registered for ECF service. Magistrate Judge Howell and all parties were served via ECF.]