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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
RACHEL TUDOR,	)	
	)	
Plaintiff-Intervenor	)	
v.	)	CASE NO. 5:15-cv-00324-C
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

UNITED STATES' REPLY BRIEF IN SUPPORT OF THE JOINT MOTION TO DISMISS THE UNITED STATES' COMPLAINT WITH PREJUDICE

I. **Introduction**

Plaintiff United States and Defendants, having reached a mutually agreeable resolution of the United States' claims in this case, have jointly moved for dismissal of those claims under Fed. R. Civ. P. 41. ECF No. 164. Plaintiff-Intervenor Dr. Rachel Tudor has opposed the Motion, requesting that the Court impose certain conditions on the United States' dismissal or refuse to dismiss the United States' Complaint altogether. ECF No. 181. The United States does not object to some of the conditions requested by Dr. Tudor. However, where Plaintiff-Intervenor would seek to suppress the United States' statements, or to disrupt the settlement by delaying or denying the United States' dismissal from the case, the United States strongly opposes such requests.

II. **Argument**

A. The United States does not object to some of the conditions Dr. Tudor would impose upon the United States' dismissal.

Dr. Tudor has requested some conditions to which the United States has no objection. First, Dr. Tudor has asked that she be permitted, as a condition of dismissal, to use the experts designated by the United States, Dr. George Brown and Dr. Robert Dale Parker. ECF No. 181 at 15. The United States has no opposition to this request.

Dr. Tudor has also asked that, if the United States is dismissed from the case, such dismissal should not have any preclusive effect on her own case. ECF No. 181 at 12. She also asks that the settlement between the United States and Defendants not be viewed as an election of remedies as to her claims. *Id.* at 14. Prior to filing its Motion to

Dismiss, the United States informed Dr. Tudor that it did not oppose these conditions, and the United States maintains that it does not oppose these conditions now.

As an aside, the United States does not believe that Plaintiff-Intervenor's concerns about claim or issue preclusion would come to fruition, primarily because the parties in question (the United States and Plaintiff-Intervenor Dr. Tudor) are not the same parties, nor are they privies. *See MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) (identity of parties required for res judicata to operate); *see also Cty. of Santa Fe, N.M. v. Pub. Serv. Co. of New Mexico*, 311 F.3d 1031, 1048 (10th Cir. 2002) (observing that it was "certainly true" that neither the settlement agreement nor dismissal of the County's lawsuit would have preclusive effect on intervenors' merits claim, because intervenors were not parties to the settlement); 28A C.J.S. Election of Remedies § 13 (election of remedies only applies where inconsistent remedies are asserted against the same party or persons in privity with such a party).

Analogy to the EEOC's relationship to charging parties is instructive on this point, given that the Attorney General enforces Title VII against state and local governments through litigation in the same way that the EEOC does against private employers. 42 U.S.C. § 2000e-5(f). The Supreme Court has recognized that an enforcement action brought by the EEOC vindicates interests beyond the private rights of an individual whose claims form the basis of the action, and that the EEOC neither supplants nor serves as a proxy for that individual. *See Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 326 (1980); *see also Riddle v. Cerro Wire & Cable*

Grp., Inc., 902 F.2d 918, 923 (11th Cir. 1990) (noting that aggrieved individual did not accept terms of a consent decree between the EEOC and defendant and did not sign a release, and finding that the interests between the parties had diverged). The same is true in this case, where the Attorney General initiated this action by filing the United States' complaint, and Dr. Tudor intervened in this action asserting her own claims, as is her right under Title VII. 42 U.S.C. § 2000e-5(f) (person aggrieved has right to intervene in action brought by the Attorney General under this section).

To the degree that Plaintiff-Intervenor is considered a "nonparty" because she is not a party to the complaint that would be dismissed, the general rule is that preclusion does not apply to nonparties, and none of the exceptions to that general rule apply here. *See Pelt v. Utah*, 539 F.3d 1271, 1281-82 (10th Cir. 2008) (listing exceptions). The "law of the case" doctrine is similarly inapplicable here because the parties are not in privity. *State of Kansas ex rel. Beck v. Occidental Life Ins. Co.*, 95 F.2d 935, 936 (10th Cir. 1938). Plaintiff-Intervenor's other cited authorities on these issues do not dictate otherwise.[1] Nevertheless, the United States does not oppose issuance of a dismissal order

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[1] *Wilkerson v. Schirmer Eng'g Corp.*, Civil Action No. 04-cv-00258-WDM-MEH, 2009 WL 2766716, at *4 (D. Colo. Aug. 26, 2009), involved a plaintiff who had filed for bankruptcy, and as a result, a bankruptcy trustee controlled plaintiff's monetary claims while plaintiff herself retained injunctive claims, so the court disallowed the trustee from settling only to the extent it would prejudice plaintiff in obtaining injunctive relief; *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 750 (9th Cir. 2008), involved claims dismissed as to one defendant, where a dismissal would have applied to another defendant as well, which is not the case here; and *ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70-71 (1st Cir. 2006), concerned a plaintiff whose dismissal would have given that plaintiff priority over one of defendant's few assets, to the detriment of the remaining plaintiff.

which makes clear that dismissal of the United States' complaint has no preclusive effect on Plaintiff-Intervenor's claims and does not serve as an election of remedies.

B. *There is no basis for suppressing the United States' statements in or about this case.*

As a condition for the United States' release from a case it has voluntarily settled on satisfactory terms, Plaintiff-Intervenor asks the Court to prevent the United States from "submitting filings in or making public statements regarding [her] case until [her] claims are finally resolved." *See* ECF No. 181 at 23. The prohibition requested by Plaintiff-Intervenor extends to the United States' statements about "its own overlapping merits case." *Id.* at 17. In support of her argument that she will be prejudiced without this condition, Plaintiff-Intervenor exclusively discusses her concern that subsequent United States commentary would be unfavorable to her case. Therefore, the United States limits its response to that scenario.

Imposition of the condition requested by Plaintiff-Intervenor on the United States' dismissal is not legally supported. Limiting the United States' statements in the requested manner would be a prior restraint akin to a gag order, which means *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), applies. *See Pfahler v. Swimm*, No. 07-cv-01885-MJW-KLM, 2008 WL 323244, at *2 (D. Colo. Feb. 4, 2008) (holding that the standard for evaluating gag orders established by the Supreme Court in *Nebraska Press Ass'n* applies in civil cases). Therefore, this Court must evaluate:

> (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. [The court] must then

> consider whether the record supports the entry of a prior restraint on publication [or speech], one of the most extraordinary remedies known to our jurisprudence.

Id. at *2 (quoting *Nebraska Press Ass'n*, 427 U.S. at 562).

Here, assuming hypothetically that the United States were to make public statements of the sort Dr. Tudor fears, other measures would prevent prejudice to Dr. Tudor without unnecessarily curtailing the United States' speech. To the extent Dr. Tudor is concerned that counsel for the United States in this case will, in spite of the Common Interest Agreement,[2] use confidential information they obtained during the pendency of that Agreement, a firewall between those attorneys and any individuals who make subsequent statements on behalf of the United States would prevent any such harm, and in a much less restrictive way. Provided that statements made by the United States subsequent to dismissal are not informed by any information Dr. Tudor shared pursuant to the Common Interest Agreement, any harm to Dr. Tudor that results from the United States' subsequent statements would not be occasioned by the United States' dismissal from this case. Rather, Dr. Tudor would be in the same position, and suffer no greater or less prejudice, than any litigant who agrees or disagrees with the United States' position. And any statements by the United States, favorable to Dr. Tudor's case or not, can be addressed through means such as motions in limine, voir dire, and jury instructions.

Even if content-based prior restraint on the United States' statements in or about this case were the only way to prevent the harm Dr. Tudor has articulated, constitutional

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[2] The Common Interest Agreement obligates the parties to preserve the sanctity of the shared privilege if the parties' interests diverge.

concerns outweigh such an order here. Indeed, a gag order over the United States' speech in this case, or others, would operate as an extraordinary interference with the Executive Branch's constitutional and statutory powers. The Constitution directs the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and pursuant to that responsibility, Congress has empowered the Attorney General to "attend to the interests of the United States" by participating in litigation in state and federal courts across the nation. *See* 28 U.S.C. §§ 516-519. Those powers necessarily include the authority to determine what arguments to present in litigation and whether to participate as amicus curiae. Thus, it is not appropriate for the United States to effectively cede control over the content of its statements to a private party. Suppression of the United States' speech is not an appropriate curative condition here.

C. Having settled its claims, the United States should not be forced to remain in the case for any further period of time.

After extensive litigation in this case, the United States reached a compromise with Defendants that resolved the United States' claims. The United States, joined by Defendants, moved for dismissal of its Complaint as a result of that settlement. Plaintiff-Intervenor, in her brief, asks the Court to upset the settlement by instead forcing the United States to remain in the case, a result which would be not only grossly inequitable but also unworkable.

"Absent legal prejudice to the defendant, the district court normally should grant [a Rule 41(a)(2)] dismissal." *Ohlander v. Larson,* 114 F.3d 1531, 1537 (10th Cir. 1997) (internal citation and quotation marks omitted) (listing factors to be used in weighing

legal prejudice, but as applied to a defendant who opposes dismissal, and reversing district court's denial of Rule 41(a)(2) motion to dismiss *without* prejudice).

The exception to *Ohlander*'s pronouncement identified in *Cty. of Santa Fe, N.M. v. Pub. Serv. Co. of New Mexico*, 311 F.3d 1031 (10th Cir. 2002) does not apply here. In *Santa Fe*, the Tenth Circuit endorsed the denial of a voluntary motion to dismiss where some parties had settled but a remaining party would be prejudiced by dismissal. *Id.* at 1048-49. The case was brought by a county alleging that a public utility was building power lines in violation of local code; county citizens intervened, and as part of their complaint, they requested injunctive relief that included a writ of mandamus requiring the plaintiff county to enforce the code provision against the utility. *Id.* at 1034. Because the county was a necessary party with respect to the intervenors' desired relief, the Tenth Circuit found that the county should remain in the case so that relief could be effectuated if the intervenor citizens prevailed. *Id.* at 1048. There is simply no comparable need for the United States to remain in this litigation; the United States' presence as a party is not necessary to assure that any of Dr. Tudor's requested relief can be effectuated. ECF No. 24 at 33-35.

Nevertheless, *Santa Fe* is notable in a different respect: the *Santa Fe* court acknowledged the "awkward situation" that would often arise if a plaintiff were forced to remain in a case even after it had agreed, as part of a settlement, not to pursue its claims against the defendant. *Id.* at 1049. The Tenth Circuit explained that the equities of requiring a settled plaintiff to continue in the litigation must be evaluated, and that these

equities "are important factors for a court to consider in deciding whether to grant the motion to dismiss with prejudice." *Id.* But the Tenth Circuit also recognized that the "awkward situation" it described could not develop in the case before it. *Id.*

Plaintiff-Intervenor's cited case regarding delay of dismissal, *Baca v. Berry*, 806 F.3d 1262 (10th Cir. 2015), also proves inapt. In *Baca*, the defendant, a mayor, objected to plaintiff voters' motion to dismiss without prejudice where the voters indicated they might renew the litigation after the upcoming election. *Id.* at 1270-71. As a result, the district court deferred ruling on the voters' motion to dismiss until after the election. *Id.* at 1269. The Tenth Circuit found that because the district court was unsure of the legal prejudice that dismissal might have on the mayor, it was appropriate to delay dismissal. *Id.* at 1271. But *Baca* concerned a dismissal without prejudice, which carries with it an inherent possibility that the dismissed party can refile the litigation, which was the harm the district court sought to avoid when it stayed the dismissal; here, no threat of a future refiling exists. *Id.* (quoting district court's reasoning).

If the Court denied the Motion to Dismiss or delayed dismissal, the United States would suffer serious prejudice. As any litigant who enters into a settlement agreement, the United States agreed to settle its claims, in part, to avoid the continued expense of litigation. If the Court denied the Motion to Dismiss or delayed dismissal, the United States would be in the "awkward position" described in *Santa Fe*; but it would have to expend resources in order to comply with Court orders, for example, to appear at hearings or trial. The United States would also have to expend resources to continue to monitor

and review activity in the case. In light of this prejudice to the United States, and the fact that any prejudice to Dr. Tudor from dismissal can be alleviated by other means, the equities articulated by the Tenth Circuit in *Santa Fe* weigh in favor of granting the United States' request for dismissal.

Furthermore, delaying the dismissal of the United States as a party to this case would not actually achieve Plaintiff-Intervenor's apparent aim of preventing the United States from articulating any views contrary to her litigating position. The United States is not aware of any authority that prevents it from changing its views, or articulating those changed views, because it remains a party to this case. Further, as discussed in more depth *supra* at Section II.B, the United States should not be placed under a gag order irrespective of whether it remains a party to this litigation.

Plaintiff-Intervenor also advances some concerns about the use of information shared under the Common Interest Agreement between counsel for the United States and Defendants, but it is unclear how those concerns are alleviated by requiring the United States to remain in the case. Moreover, again, any such concerns can be addressed through less restrictive means, such as imposition of a firewall between the Department of Justice attorneys assigned to case and any representatives of the United States who subsequently make statements or participate in filings that differ from Plaintiff-Intervenor's legal theories.

Upon evaluation of the equities to Plaintiff United States, coupled with the reality that a delay will not achieve the goal Plaintiff-Intervenor has articulated, the Court should neither deny nor delay dismissal of the United States' case.

III. Conclusion

While some of Plaintiff-Intervenor's proposed curative conditions are targeted to prevent prejudice to Plaintiff-Intervenor that may result from the United States' immediate dismissal from this litigation, others are neither appropriate nor legally justifiable. The United States opposes any delay in dismissal from this case, and any effort to limit its statements in this case or elsewhere. The United States respectfully requests that the Court enter the United States' dismissal from this litigation without further delay and without conditioning that dismissal on restraint of the United States' speech.

Date: October 12, 2017

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CERTIFICATE OF SERVICE

I certify that I served this document on all counsel of record through the Court's electronic filing system on the date below.

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