IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff v. SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	)	C.A. No. H-84-2949

UNITED STATES' SECOND MOTION
FOR A PROTECTIVE ORDER

Pursuant to Rule 26(c), F.R. Civ. P., Plaintiff United States hereby moves this Court to issue a protective order with respect to defendants' Rule 26 Notice of Deposition to take the depositions of the following employees of the United States Department of Justice on September 15, 1986 through September 18, 1986:

John M. Devaney

Gerald F. George

George E. Henderson

Melissa P. Marshall

Joel W. Nomkin

Jane Robinson

Rita Wilson

The first five (5) persons listed are attorneys of the Department who are or were assigned to this case. As grounds for this Motion, the United States asserts that such depositions would be duplicative of interrogatories previously filed and would be premature and burdensome.

This Motion is in addition to the United States' Motion for a Protective Order to prevent defendants from taking the Rule 26 and 30(b)(6) deposition of the United States on September 17, 1986.

Respectfully submitted,

John M. Devaney

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Washington, D.C. 20530
(202) 633-3875

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff v. SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	)	C.A. No. H-84-2949

MEMORANDUM IN SUPPORT OF UNITED STATES' SECOND MOTION FOR A PROTECTIVE ORDER

The United States brought this action to enforce Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., and alleges that the Spring Branch Independent School District ("SBISD") engaged in a pattern or practice of employment discrimination on the basis of race in the hiring and recruiting of teachers and clerical workers. The instant Motion seeks to prevent SBISD from taking at this time the depositions of seven employees of the United States Department of Justice -- five (5) attorneys and two (2) paralegal specialists -- all of whom are or have been assigned to this case. The basis for this Motion, as set forth below in detail, is that SBISD has previously served on the United States

discovery requests that seek the same information now being sought through depositions of the above-referenced persons. In addition to being duplicative of previous discovery requests, the recently served Notice of Depositions also seeks information that does not exist at this stage of the litigation. The Notice is, therefore, also premature. Finally, in noticing the depositions of attorneys representing the United States in this action, SBISD has not provided any explanation of their need to resort to this unusually intrusive method of discovery. Indeed, the interrogatories previously served by SBISD renders the instant Notice of Depositions unnecessary to any purpose permitted by the Federal Rules of Civil Procedure.

BACKGROUND

On October 15, 1984, SBISD served the United States with its first set of 18 interrogatories. On July 7, 1986, the United States was served with SBISD's Second Set of Interrogatories, consisting of 29 interrogatories, and defendant Henry Wheeler's First Set of Interrogatories, consisting of 17

interrogatories. 1/ SBISD then served on July 23, 1986 a Notice of Deposition of the United States pursuant to Rules 26 and 30(b)(6), F.R. Civ. P., and as an attachment thereto, listed areas of inquiry that are essentially identical to the July 7 interrogatories. 2/ On August 27, SBISD served on the United States the Notice of Deposition that is the subject of this Motion, again indicating the areas of inquiry to be those areas addressed by the July 7 interrogatories.

It is in this context that the subject Motion arises.

1/ This brought the total number of interrogatories served by the Spring Branch defendants to 64 and, of those, 47 had been propounded by defendant SBISD. Upon receiving the most recent sets of interrogatories, on August 14, 1986, the United States filed a Motion to Extend the Number of Interrogatories in order to permit thorough discovery and proper trial preparation in this large and complex action. Pending a ruling on that Motion, the United States has answered 29 of the most recent interrogatories.

2/ The United States has moved for a protective order to prevent the taking of that deposition on the grounds that the deposition would be duplicative of the interrogatories and premature. The Motion for a Protective Order was filed on August 18, 1986. (See Attachments A and B).

ARGUMENT

The Notice of Deposition at issue is duplicative of discovery requests previously served by defendants. Those discovery requests -- the 46 interrogatories served by defendants on July 7, 1986 -- fully address the areas that SBISD now again seeks to inquire into through depositions of attorneys and paralegals for the United States. In addition, the Notice of Deposition of the United States served on July 23, also inquires into these same areas. There is simply no legitimate need for duplicative inquiry, especially in the unusually intrusive form of deposing attorneys who represent a party to this action. All of the information that is available and that is requested in the Notice has been provided in answers to interrogatories or will be provided if the Court grants the United States' motion to extend the number of interrogatories permitted to be filed in this case. (United States' Motion for a Protective Order and Reply in support thereof are attached hereto as Attachments A and B and are incorporated herein by reference).

In addition to being duplicative, the Notice is also premature in that it seeks information that is not yet available. Specifically, the United States only recently completed eight months of work copying the SBISD employee and applicant files, and it is in the process of coding this

information into its data base. Until this process is complete, the United States cannot conduct a thorough analysis of applicant flow and hiring information, and such an analysis is necessary to respond to some of SBISD's areas of inquiry. Furthermore, much of the analytical information that SBISD seeks is dependent on information that the United States anticipates acquiring through its Rule 30(b)(6) deposition of SBISD, scheduled to continue on September 30, 1986. Thus, SBISD's varying methods for attempting to obtain information do not alter the fact that much of the information sought is simply not available.

Moreover, allowing attorneys to be deposed would necessarily risk invasion of "the privacy of an attorney's course of preparation." Hickman v. Taylor, 329 U.S. 495, 512 (1947). The Supreme Court has established that persons who seek discovery that invades that privacy bear the burden of justifying in advance their right to discover facts directly from opposing counsel, and that a "naked, general demand" based merely on the general right of discovery under the Federal Rules does not meet this burden. Id. The Court has expressly cautioned against discovery that "would make the attorney much less an officer of the Court and much more an ordinary witness" on the grounds that "[t]he standards of the profession would thereby suffer." Id. at 513.

For the reasons stated herein, we suggest that the Protective Order be granted at this time. At a minimum, the depositions should be postponed until the United States has fully developed the information that defendants seek to discover. If, after the defendants' interrogatories have been fully answered, defendants believe that there remains any particularized need for the taking of the deposition of one or more lawyers or other employees of the Department of Justice, they can, of course, file a notice at that time.

CONCLUSION

For the reasons stated herein this Motion should be granted, and a protective order should be entered preventing the taking of any depositions of Department of Justice employees until thirty (30) days after the United States has answered the presently pending interrogatories from defendants.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	C.A. No. H-84-2949
	)	
v.	)	
	)	
SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before this Court on the motion by plaintiff United States for a protective order under Rule 26(c), F.R.Civ. P., with respect to the taking of the depositions by the Spring Branch defendants of the following employees of the United States Department of Justice: John M. Devaney, Gerald F. George, George Henderson, Melissa P. Marshall, Joel Nomkin, Jane Robinson and Rita Wilson. It is hereby

ORDERED that Defendants' Notice of Deposition of the above-named individuals be stricken without prejudice to serving a new notice after Plaintiff has completed its Rule 30(b) (6), F.R. Civ. P., deposition of the Spring Branch Independent School District and has fully responded to the

interrogatories propounded by Defendants on July 7, 1986.

Signed this _____ day of _____, 1986.

_____
CALVIN BOTLEY
United States Magistrate

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	C.A. No. H-84-2949
	)	
v.	)	
	)	
SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER

Pursuant to Rule 26(c), F.R.Civ.P., Plaintiff United States hereby moves this Court to issue a Protective Order with respect to Defendants' Rule 26 and 30(b)(6) Notice of Deposition upon the United States, scheduled for August 18, 1986. As grounds therefor, Plaintiff states that such deposition is duplicative of interrogatories previously filed and is premature and burdensome.

Respectfully submitted,

Melissa P Marshall

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IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	)	C.A. No. H-84-2949

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER

BACKGROUND

The United States filed this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., alleging that the Spring Branch Independent School District (hereinafter variously referred to as "SBISD," "Spring Branch," or the "Spring Branch defendants") engaged in a pattern and practice of employment discrimination on the basis of race with respect to its teaching faculty and clerical positions. Specifically, the United States alleged in its Complaint that, inter alia, SBISD failed and refused to recruit and hire blacks for teaching and clerical positions on the same basis as whites were recruited and hired.

Following a motion to compel filed by the United States, on November 1, 1985, Magistrate Botley ordered the Spring Branch defendants to produce and make available for copying all documents relating to SBISD teaching and clerical employees, from 1965 forward, and all documents relating to applicants for teaching and clerical positions during that period. For approximately eight (8) months, from November 13, 1985, to July 1986, two employees of a contractor of the United States worked every day that SBISD permitted microfilming these documents. Information from these microfilm copies is in the process of being coded to form a computerized data base.

On October 15, 1984, the Spring Branch defendants served the United States with defendant SBISD's first set of 18 interrogatories.

On July 7, 1986, the United States was served with defendants SBISD's Second Set of Interrogatories, consisting of 29 interrogatories and with defendants Henry Wheeler's First Set of Interrogatories, consisting of 17 interrogatories (See, Attachment A). This brought the total number of interrogatories served by the Spring Branch defendants to 64; of those, 47 had been propounded by defendant SBISD.

Rather than condone a breach of Local Rule 10(E)(4), Plaintiff informed the Spring Branch defendants that it would only respond to 12 of defendant SBISD's second set of

interrogatories (Attachment B). Plaintiff also noted that in suits such as this, extended numbers of interrogatories were appropriate and therefore no objection would be made to a motion by the Spring Branch defendants for relief from Rule 10(E)(4). Plaintiff then responded to the first 12 of SBISD's second set of interrogatories and to all of the interrogatories propounded by defendant Wheeler (Attachment A); however, because Plaintiff is still in the process of coding information from the microfilm into the data base, much of the information requested could not be provided.

On July 23, 1986, Defendants served the United States with a Notice of Deposition pursuant to Rules 26 and 30(b)(6), F.R.Civ.P., and as an attachment thereto listed areas of inquiry which are essentially identical to the July 7 interrogatories (See, Attachment C). The Spring Branch defendants have not moved for waiver of Rule 10(E)(4). In an effort to comply with the local rules and to facilitate discovery, the Plaintiffs served such a motion on August 13, 1986.

ARGUMENT

The Spring Branch defendants' Rule 26 and 30(b)(6), F.R.Civ.P., deposition of the United States is duplicative of information sought through interrogatories. The areas of inquiry listed as an attachment to the Notice of Deposition are

essentially an identical listing of the two sets of interrogatories propounded to the United States on July 7.

The 1983 Amendments to Rule 26(b)(1), F.R.Civ.P., provide that a court may limit discovery if it determines that the discovery is unreasonably duplicative or if it may be obtained from some other source that is more convenient, less burdensome or less expensive. 1/ The anticipated objective was to guard against redundant or disproportionate discovery. Fed.R.Civ.P. 26(b)(1) Notes of Advisory Committee on Rules, 1983 Amendment;

1/ Rule 26, F.R.Civ.P., states in pertinent part:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery....
>
> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive....

(Language of the 1983 Amendment is underscored.)

Heat and Control, Inc. v. Hester Industries, Inc., 785 F.2d 1017, 1023-24 (Fed. Cir. 1986). Here, the Spring Branch defendants are seeking by deposition exactly the same information as they have already sought through interrogatories.

The information sought by Defendants is not only duplicative, it is also premature. As Attachment A reflects, much of the information sought is simply not yet available: the United States only recently completed eight months of diligent work copying the SBISD employee and applicant files, and it is still in the process of coding the massive amount of information from these documents into its data base. Furthermore, as Attachment A also reflects, much of the analytical information sought is dependent upon information that Plaintiff anticipates acquiring through its Rule 30(b)(6) deposition of SBISD, which is scheduled to continue beginning September 30, 1986. Therefore, the method of demanding discovery does not alter the fact that the information sought is simply not yet available. 2/

Plaintiff brought to the Spring Branch Defendants' attention on July 16, 1986, that the number of interrogatories had

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2/ Plaintiff, prior to responding to the interrogatories and at the time the Notice of Deposition was received, repeatedly explained to Defendants that the information was not yet available.

exceeded the limitation imposed by Local Rule 14(E)(4) [3] and that as there was a continuing lack of cooperation on defendant's part with respect to any discovery not backed by a court order, Plaintiff would not condone a breach of the local rule. [4] However, defendants were assured that should they move for waiver of the rule, plaintiff would not object as such an extension is appropriate in actions like this that involve complex factual and legal questions. Attachment B.

Plaintiff United States, in an effort to provide timely discovery, has itself moved this Court to extend the number of interrogatories permitted under Rule 14. If as we expect that motion is granted, plaintiff will fully respond to the interrogatories, thereby obviating the need for any deposition of the kind noticed.

Defendants further demand that the deposition be taken in Houston, and that the requested documents be produced there,

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3/ Local Rule 14(E)(4) provides:

> (4) Interrogatories. No party shall serve more than thirty (30) interrogatories, including subparts, without leave of the Judge first obtained.

The defendants did not obtain leave prior to propounding the excessive number of interrogatories.

4/ Defendants' effort to avoid Local Rule 14(E)(4) is also evinced by the fact that although two sets of interrogatories were served, the information sought is not particular to the individual defendant; rather both sets of interrogatories form a continuous line of questioning, broken into two sections.

unless the United States will pay the expense of bringing counsel for the defendants to Washington, D.C. for the deposition. As the deposition is both duplicative and premature, it is clearly unreasonable to force the United States to send a witness, lawyer, and extensive files to Houston, or to pay all expenses for its deposition to be taken in Washington.

Plaintiff United States also seeks this protective order with respect to the date on which Defendants have noticed the deposition to be taken. In that Notice of Deposition, Defendants request the production of all documents and other materials relating to "the scope of Defendants' examination" (Attachment C, Notice of Deposition, p. 2). However, Defendants' Notice was served on July 23, 1986, for a deposition to be taken on August 18; such notice does not comply with Rule 34, F.R.Civ.P., which affords a party 30 days in which to respond to a request for production of documents and things. Further, counsel for Plaintiff has explained that a scheduling conflict precludes conducting the deposition on that date has proposed several alternative dates.

Plaintiff conferred by telephone on August 14, 1986, with counsel for the SBISD defendants, but was unable to reach an agreement with respect to the matters raised by this Motion.

CONCLUSION

Plaintiff United States' Motion for a Protective Order should be granted.

Respectfully submitted,

GERALD F. GEORGE
MELISSA P. MARSHALL
JOHN M. DEVANEY
Attorneys
Civil Rights Division
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Washington, D.C. 20530
(202) 633-3861

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	C.A. No. H-84-2949
	)	
v.	)	
	)	
SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before this Court on the motion by plaintiff United States for a protective order under Rule 26(c), F.R.Civ.P., with respect to the taking its deposition by the Spring Branch defendants. It is hereby,

ORDERED that Defendants' Notice of Deposition of Plaintiff United States be stricken without prejudice to serving a new notice after Plaintiff has completed its Rule 30(b)(6), F.R.Civ.P., deposition of the Spring Branch Independent School District and has fully responded to the interrogatories propounded by Defendants on July 7, 1986.

Signed this _____day of _____, 1986.

_____
CALVIN BOTLEY
United States Magistrate

CERTIFICATE OF SERVICE

I, David L. Rose, hereby certify that a copy of Plaintiff's Motion For Protective Order, a Memorandum in Support thereof, and a proposed Order were served, by DHL Express, on August 15, 1986, on the following counsel:

Jeffrey A. Davis, Esquire
Reynolds, Allen & Cook
3300 Allied Bank Plaza
Houston, Texas 77002

David L Rose

DAVID L. ROSE
Attorney
Civil Rights Division
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Washington, DC 20530

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SPRING BRANCH INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	)	C.A. No. H-84-2949

UNITED STATES' REPLY TO DEFENDANTS' RESPONSE TO MOTION FOR A PROTECTIVE ORDER

On August 18, 1986, the United States moved this Court for a protective order with respect to Defendants' ("SBISD") Rule 26 and 30(b)(6), F.R.Civ.P., Notice of Deposition, served on the United States on July 23, 1986. In its Response to the United States' Motion, SBISD asserts that the Motion was filed in an untimely manner and that the proposed deposition will be neither burdensome nor premature.

1. The Motion For a Protective Order was Filed In a Timely Manner

Prior to the filing of the United States' Motion for a Protective Order, counsel for the parties agreed to postpone the taking of the deposition until September 17, 1986. The

United States' Motion was filed on August 18, 1986 and was therefore clearly filed in a timely manner.

In asserting in the first section of its Response that the United States "has waived any right to object to the deposition because the motion was filed too late", SBISD fails to acknowledge that the parties had agreed to postpone the deposition until September 17. (SBISD acknowledges this agreement later in its Response, p. 7). That agreement was reached in a telephone conversation that occurred shortly after the United States received the Notice of Deposition. In that conversation, counsel for the United States indicated that scheduling conflicts would prevent production of a witness on the date originally noticed and that the United States was considering filing a motion for a protective order to prevent SBISD from taking the deposition. Thus, the date for the deposition was September 17, 1986, and the United States' Motion for a Protective order, filed on August 18, was timely.

2. The Discovery Sought By SBISD Is Unreasonably Duplicative and Is Premature

As described in the United States' Motion, the areas of inquiry listed in SBISD's Notice of Deposition are essentially an identical listing of the two sets of interrogatories propounded to the United States on July 7, 1986. To the extent

permitted by the local rules, [1/] the United States has answered those interrogatories by providing all information that is available. Some of the information sought in the interrogatories and again in the Notice of Deposition, however, simply does not exist at this time. The United States will of course supplement its answers to those interrogatories when further information is available. At present, therefore, further inquiry into these areas by deposition would be both premature and duplicative.

In its Response, SBISD recounts some of the work performed by the United States in this litigation, apparently in an effort to establish that the information it seeks must be available and that its deposition request is not premature. SBISD's speculation about the information that the United States possesses, however, does not alter the fact that much of the information it seeks through deposition has simply not been

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1/ Local Rule 10(E)(4) imposes a 30-interrogatory limit. Defendants recently served on the United States 46 interrogatories, bringing the total number of interrogatories propounded by defendants to 64. Defendants have not sought a waiver of Local Rule 10(e)(4). Upon receiving the most recent sets of interrogatories, the United States filed on August 14, 1986 a Motion to Extend the number of interrogatories in order to permit thorough discovery and proper trial preparation in this large and complex action. Pending a ruling on that Motion, the United States answered 29 of the additional interrogatories.

developed at this stage of the litigation. For example, some of the areas of inquiry require thorough and complex analysis of applicant flow and hiring information, but such an analysis must await completion by the United States of its data-base. As explained in the Motion for a Protective Order, the United States only recently completed copying SBISD employee and applicant files, and it is in the process of coding this information into its data-base. All of the information that is available and that is requested in the Notice has been provided in answers to interrogatories or will be provided if the Court grants the United States' motion to extend the number of interrogatories permitted to be filed in this case. When additional information becomes available, as required by the Federal Rules of Civil Procedure, the United States will provide it in supplemental answers to interrogatories.

SBISD argues that in moving for a protective order, the United States is in effect asserting that it should not be required to submit to a deposition until it has completed the discovery process. The United States makes no such assertion; it merely submits that a deposition that seeks non-existent information and information that has been previously requested is not sanctioned by the discovery provisions of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated in this Reply and in the United States' Motion for a Protective Order, the Motion for a Protective Order should be granted.

Respectfully submitted,

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(202) 633-3875

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Reply of United States to Defendants' Response to Motion for a Protective Order has been served upon counsel for the Defendants by United States mail on this 5th day of September, 1986, at the following address:

Jeffrey A. Davis
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JOHN M. DEVANEY
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U.S. Department of Justice
Washington, DC 20530
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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing United States' Second Motion for a Protective Order and Memorandum in Support of United States' Second Motion for a Protective Order has been served upon counsel for the Defendants by courier mail, on this 8th day of September, 1986, at the following address:

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