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., Defendant.	)	C.A. No. H-84-2949

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO COMPEL

The United States' complaint in this action alleges that defendants Spring Branch Independent School District, et al. ("SBISD") have pursued and continue to pursue a pattern or practice of discrimination against blacks in recruitment and hiring for teaching and clerical positions, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ¶2000(e), et seq. The United States, on January 8, 1986, served its Second Set of Interrogatories and Accompanying Request for Production of Documents, in which it sought information and documents relating to (1) computer-accessible or generated data which the defendants intend to introduce at

trial; (2) non-expert witnesses whom the defendants intend to call at trial; (3) expert witnesses whom the defendants intend to call at trial (copy attached).

On February 7, 1986, SBISD filed its response to the requested discovery, in which it opposes each document request and virtually all of the interrogatories. 1/ For the reasons set forth below, the United States requests, pursuant to Rule 37, F.R.C.P., that defendants be compelled to respond fully to each of plaintiff's interrogatories and requests for production.

1/ See Defendants' Response to Plaintiff's Second Set of Interrogatories and Accompanying Request for Production of Documents (copy attached).

The only interrogatory to which SBISD does not object is Interrogatory No. 1 which seeks the identity and business address of each person whom SBISD expects to call as an expert witness. In its Response, SBISD indicated that it has not determined who it will use as expert witnesses at trial but will supplement its Responses "when a decision on such issue has been finalized."

1. SBISD should be required to identify any data base or output of any computerized recording and indicate each fact that it may seek to prove at trial through the use of such materials.

   a. Information concerning the existence and use of computer data is not attorney work product.

In Interrogatory No. 5, the United States inquires into whether SBISD expects to introduce into evidence the data base or output of any computerized recording, storage, analyzation and retrieval system or any documents pertaining to such data base or output. The United States also requests that SBISD specify each fact that it may seek to prove at trial through the use of such materials.

This information is sought because data bases and computerized output are of critical importance in pattern or practice employment discrimination cases, with both the plaintiff and defendant often relying on computer-accessible employment data base and on computer-generated statistical analyses of employment practices based on such data. An exchange of data bases will avoid potentially prolonged discovery disputes and may facilitate use at trial by the parties of a stipulated common data base. If the parties agree to the accuracy of one data base, both litigation costs and the length of trial will be substantially reduced. Further, in view of the prominent role of statistical analyses in

actions of this type, the information at issue is essential to effective trial preparation and the avoidance of surprise at trial.

In refusing to provide any of the information in Interrogatory No. 5, SBISD states only that the interrogatory "seeks the work product of SBISD's attorney." SBISD does not invoke properly the work product privilege; a general statement that material is "work product" is far short of what must be asserted to raise successfully the privilege. See In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 305 (S.D. N.Y. 1982) (responding party has burden of establishing work product privilege and must specify basis for objection and items of work product involved); 4 Moore's Federal Practice, §26.64[2] (1984). As stated by Professor Moore, "[a] party may not simply claim that materials have been prepared in anticipation of litigation; it must specify the basis for the objection and the items of work product involved." 4 Moore's Federal Practice, supra, §26.64[2] at 26-353-54. Indeed, without knowledge of what SBISD claims is privileged or of the basis for that claim, the United States cannot respond in specific detail in opposition to the asserted privilege. See East Chicago Machine Tool Corp. v. Stone Container Corp., 15 F.R. Serv. 2d 1278 (N.D. Ill. 1972) (Party asserting work

product required to identify documents to permit response to claim of privilege).

Despite SBISD's failure to identify what it believes to be privileged, it is clear that information of the nature sought in Interrogatory No. 5 is not work product protected by Rule 26(b)(3). Rule 26(b)(3) applies by its express terms only to documents and tangible things. In Interrogatory No. 5, the United States seeks not a document or tangible thing but, rather, information on the existence of and possible use of computerized information. Any objection based on Rule 26(b)(3) that such documents or tangible things are shielded from discovery should be saved until production is sought or questions are asked regarding contents. See Innes v. Peerless Insurance Co., 21 F.R. Serv. 2d 1371, 1372 (D. Mass. 1976); East Chicago Machine Tool Corp. v. Stone Container Corp., supra, 15 F.R. Serv. 2d at 1279 (N.D. Ill. 1972); 4 Moore's Federal Practice, supra, §26.64[1] at 26-349.

b. Computer-related documents and tangible things are discoverable.

In Document Request Nos. 3 and 4, the United States does seek production of the items described in Interrogatory No. 5. 2/ These documents and tangible things are sought for the same reasons the United States seeks the information requested in Interrogatory No. 5 -- to facilitate agreement on a common data base, to be able to respond to SBISD's statistical analysis at trial, and to avoid surprise at trial. In its objection, SBISD again asserts only that the requests seek attorney work product.

2/ In Plaintiff's Request for Production of Documents in Connection with its Deposition of Defendant Spring Branch Independent School District, the United States requested computer tapes reflecting information about SBISD's past and present work force and past and present employment hiring procedures. Following in camera inspection of print-outs derived from such tapes, Magistrate Botley ruled that certain tapes were protected from discovery as attorney work product. Although the United States does not know the identity of the tapes that were deemed work product, it is unlikely that the present requests encompass any of the tapes that were protected. The present requests in effect seek production of any data base that SBISD may rely on at trial, and such a request has not been previously made.

To the degree that there may be an overlap between Magistrate Botley's order and these requests, discovery of such information should nevertheless be permitted in view of the substantial need that the United States now has for these materials.

SBISD's conclusory assertion of work product privilege without identification of what it believes is protected again places the United States in the difficult position of being unable to respond directly to the claim. In any case, computer information is not per se non-discoverable work product. See Williams v. Owens-Illinois, Inc., 665 F.2d 918, 933 (9th Cir. 1982); Dunn v. Midwestern Indemnity, 88 F.R.D. 191, 194-96 (S.D. Oh. 1980); Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1138-39 (S.D. Tex. 1976). Rather, discovery requests relating to computer information are treated under the Federal Rules of Civil Procedure in the same manner as discovery requests relating to other types of information. See 2 Wright & Miller, supra, §2218. Thus, to evaluate SBISD's work product claim, the information which SBISD seeks to protect must be identified.

Assuming arguendo that the items sought in Document Request Nos. 3 and 4 are work product, discovery of those materials should nevertheless be permitted pursuant to the exception to the privilege set forth in Rule 26(b)(3). Specifically, as noted previously, data bases and computerized output are of critical importance in pattern or practice employment discrimination cases, as they generally contain employment data and statistical analyses of employment practices based on such data. Indeed, the Supreme Court has

specifically stated that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977) (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974)). See also Hazelwood School District v. United States, 433 U.S. 299, 307 (1977). Thus, discovery of the materials described in Request Nos. 3 and 4 is essential to avoiding surprise at trial and to permitting effective trial preparation. Further, discovery of computer information may facilitate agreement on use of a common data base, thereby reducing costs and the length of trial.

In addition to the presence of "substantial need", as set forth in Rule 26(b)(3), to overcome work product privilege, a party seeking discovery of documents and tangible things must show that "he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Here, even without a specific identification of the materials, it is highly probable that the materials sought in Request Nos. 4 and 5 are in the sole possession of SBISD. The United States is not aware of the existence of a "substantial equivalent" of these items.

Thus, SBISD has failed to demonstrate that the materials sought in Document Request Nos. 4 and 5 are work product. In any case, in view of the United States' substantial need of these items, SBISD should be compelled to answer Interrogatory No. 5 and to produce the materials sought in Request Nos. 3 and 4.

2. The United States is entitled to discover the names of persons whom SBISD expects to call as witnesses at trial

In Interrogatory No. 3, the United States seeks the name of each individual whom SBISD expects to call as a witness at the trial of this action, as well as the subject matter with respect to which each such person is expected to testify. This information is sought to permit the United States to depose those persons before expiration of the period for discovery. Under the current schedule, discovery is to close on June 24, 1986, and the docket call date for trial is August 25, 1986. In view of the short time remaining for discovery, identification of SBISD's trial witnesses is critical to preparation of the United States' case. SBISD refuses to provide any of the information sought in Interrogatory No. 3, stating only that the identification of its trial witnesses and a statement of the subject matter about which such persons may testify constitute attorney work product.

As before, SBISD does not invoke properly the attorney

work product privilege. A party must set forth more than a generalized, conclusory statement to invoke that privilege. The basis for the objection and the items of work product involved must be set forth with specificity. See In re Shopping Carts Antitrust Litigation, supra, 95 F.R.D. at 305; 4 Moore's Federal Practice, supra, §26.64 [2] at 26-353-54. Here, SBISD's conclusory assertion of work product lacks the specificity needed to invoke the privilege.

Assuming arguendo that SBISD properly pleaded the attorney work product privilege, to the extent the claim of privilege is based on Rule 26(b)(3), it must fail. By its terms, that Rule applies only to the production of documents and tangible things. Indeed, the Notes of the Advisory Committee on Rule 26(b)(3) (1970 Amendment) specifically address this limitation on the reach of the Rule. The Notes provide in relevant part:

> Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use. (emphasis added).

Thus, there is a clear distinction between application of Rule 26(b)(3) to requests for production of documents and tangible

things and application of the Rule to interrogatories. See generally 4 Moore's Federal Practice, supra, §26.64[1]. Here, Interrogatory No. 3 seeks only names and statements of the subject matter of potential witnesses, and, therefore, SBISD's assertion of work product privilege based on Rule 26(b)(3) must fail.

Further, Rule 26(b)(3) allows discovery of work product upon a showing that the seeking party "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." In this case, the identity of persons whom SBISD expects to call as witnesses is critical at this stage of the litigation. In view of the scheduled close of discovery, it is likely that the United States will be unable to depose potential witnesses in the absence of prompt identification of such persons by SBISD. As one commentator has stated, "[s]ince one prime purpose of the Rule is to eliminate surprise and take the sporting element out of litigation, it can be argued with some force that adequate preparation for cross-examination demands that the party know who the witnesses will be in advance." 4 Moore's Federal Practice, supra, §26.57[4] at 26-172. Thus, courts have required that a party disclose during the discovery stage the witnesses whom it intends to call at trial. See, e.g., United

States v. Northside Realty Associate, 324 F. Supp. 287, 297 (N.D. Ga. 1971); United States v. 216 Bottles, 36 F.R.D. 695, 701 (E.D. N.Y. 1965). Here, the concern is paramount in view of the short time remaining for discovery in this action.

Thus, the United States has substantial need of the information sought in Interrogatory No. 3, and that information cannot be obtained elsewhere. Discovery should therefore be permitted even upon a finding that the information sought might constitute work product.

In connection with Interrogatory No. 3, the United States also seeks in Document Request No. 2, documents which pertain to the subject matter with respect to which persons whom SBISD expects to call as witnesses will testify. The United States also has a substantial need of such materials and is unable to obtain them from another source. Discovery of these materials is thus not foreclosed on work product grounds.

Accordingly, SBISD should be ordered to provide a list of persons whom it expects to call as witnesses at the trial of this action, a statement of the subject matter of the testimony of such persons, and documents pertaining to that testimony.

3. The information sought pertaining to expert witnesses is discoverable under Rule 26.

In Interrogatory No. 2, the United States requests information about experts whom SBISD expects to call as witnesses at

the trial of this action. Specifically, for any such person, the United States seeks to learn of his or her education and employment history; the identity and subject matter of any writings that the expert has published; the nature and identity of other judicial or administrative proceedings in which the expert has been retained or otherwise served as a consultant or witness; the identity of all documents upon which the expert bases or expects to base any opinions, findings, or conclusions; and the identity of all documents prepared by or under the supervision of the expert. This information is sought to enable the United States to anticipate and prepare for the examination of any expert to be called at trial by SBISD. Although SBISD has indicated that it has retained no such persons at this time, it is clear that objection will be made to providing the information at such point as experts are retained. Accordingly, it is appropriate to rule now on the SBISD objections to avoid the necessity of another motion to compel and further ruling.

In refusing to provide any of the requested background information, SBISD states only that the information sought goes beyond the scope of discovery permitted by Rule 26(b)(4) of the Federal Rules of Civil Procedure.

a. Background information about an expert is discoverable.

As a threshold matter, insofar as the United States' Interrogatory No. 2 seeks background information on SBISD's experts, the request is not governed by Rule 26(b)(4). On its face, that Rule only applies to "facts known and opinions held by experts" in connection with litigation or for trial. Information about an expert's education and work experience is not a "fact known or opinion held" in connection with litigation. Accordingly, a discovery request seeking such information is governed by the discovery provisions of Rule 26(b)(1) relating to ordinary witnesses. See 4 Moore's Federal Practice, supra, §26.66[2] at 26-408. Under the liberal discovery standards of Rule 26(b)(1), which permit discovery regarding any non-privileged matter that is relevant to the subject matter of the action, the information sought in Interrogatory No. 2 is clearly discoverable. To be within the scope of relevancy set forth in Rule 26(b)(1), the discovery sought need only be "reasonably calculated to lead to the discovery of admissible evidence." Information concerning the background of an expert who is expected to testify at trial is admissible evidence at trial and, therefore, requests related to an expert's background certainly satisfy the relevancy standard for discovery set forth in Rule 26(b)(1).

Even assuming, as SBISD asserts, that the discoverability of an expert's work history and education is governed by Rule 26(b)(4), such information is also discoverable under that provision. Rule 26(b)(4)(A) sets forth standards and methods for discovery of information from experts who are expected to be called as witnesses:

> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

This Rule was enacted in 1970 in response to decisions by federal courts that sought to liberalize the procedures governing discovery of experts. See, e.g., United States v. Meyer, 398 F.2d 66, 70-77 (9th Cir. 1968); Knighton v. Villian & Fassio, 39 F.R.D. 11, 13 (D. Md 1965); United States v. 364.82 Acres of Land, 38 F.R.D. 411, 415-16 (N.D. Cal. 1965). As stated in the Notes of the Advisory Committee on Rule 26(b)(4) (1970 Amendment), "a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent." Specifically, according to the Advisory Committee, effective

cross-examination and rebuttal require that a party have advance knowledge of the line of testimony of its adversary's expert. Accordingly, courts have held that Rule 26(b)(4)(A)(i) authorizes discovery of background information of an expert through the use of interrogatories. See, e.g., Fyodorova v. National Enquirer, Inc., 89 F.R.D. 68, 69 (S.D. N.Y. 1981) (party required to answer interrogatories seeking expert's business address, present and prior business and professional affiliations, educational background, and identification of publications); Keith v. Van Dorn Plastic Machinery Co., 86 F.R.D. 458, 460 (E.D. Pa. 1980) (information concerning expert's background, experience, and education can be obtained through interrogatories). Thus, SBISD's attempt to preclude discovery of background information regarding its experts is without merit.

Insofar as Interrogatory No. 2 seeks the identity of documents upon which SBISD's experts may base or expect to base their findings or opinions, such an inquiry is plainly sanctioned by Rule 26(b)(4)(A)(i). This request is essentially an inquiry into possible conclusions of the experts and grounds in support of such conclusions. Rule 26(b)(4)(A)(i) expressly authorizes such an interrogatory. 3/

3/ The United States does not seek at present to compel production of documents relating to any expert retained by SBISD. The United States does not, however, waive future challenge to any objection that SBISD might raise in response to a request for such materials.

b. Discovery obtained pursuant to Rule 26(b)(4)(A)(i) does not require payment of fees and expenses of an expert.

SBISD asserts further that if the information requested in Interrogatory No. 2 is discoverable, the United States "should be required to pay the fees and expenses incurred by any expert that may be employed in gathering this information." Discovery conducted pursuant to Rule 26(b)(4)(A)(i), however, does not require the discovering party to pay fees and expenses of the expert. See, e.g., Keith v. Van Dorn Plastics Machinery Co., supra, 86 F.R.D. at 460 (discovery of expert through interrogatories rather than by deposition does not require discovering party to pay fees). As one commentator has stated, answering interrogatories propounded under 26(b)(4)(i) only requires providing information that a party would necessarily have to obtain from its expert in any case, and "it requires no extra time of the expert and does not increase the cost to the party who retained the expert." 8 C. Wright & A. Miller, Federal Practice and Procedure §2030 at 252 (1970).

Thus, the scope of the inquiry in Interrogatory No. 2 is expressly authorized by the rules governing discovery of experts, and this type of discovery does not require the United States to pay fees or expenses incurred by SBISD's expert in compiling the requested information.

CONCLUSION

The discovery that the United States seeks is authorized by Rule 26 of the Federal Rules of Civl Procedure. SBISD's conclusory assertions of work product are insufficient to invoke the protection of that privilege. Moreover, to the extent that any of the discovery sought is work product, any privilege that could attach is overcome by plaintiff's substantial need for the information and materials at issue.

Accordingly, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, SBISD should be ordered to produce all of the requested discovery.

Respectfully submitted,

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ORDER

This matter comes before this Court on the motion by plaintiff United States to compel answers and production in response to its Second Set of Interrogatories and Accompanying Request for Production of Documents. Having heard oral argument and read all of the briefs submitted by the parties on this matter, it is hereby,

ORDERED that defendant Spring Branch Independent School District respond fully to each of plaintiff's interrogatories and requests for production by _____, 1986.

Signed this ___ day of _____, 1986.

_____

UNITED STATES DISTRICT JUDGE