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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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17 Equal Employment Opportunity, )  
Commission )

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Petitioner,

No. CIV 09-0209-PHX-RCB

vs.

O R D E R

Bashas', Inc., )

Respondent. )

23

**Introduction**

24

In this action, petitioner, the Equal Employment Opportunity Commission ("EEOC"), is seeking to enforce an administrative subpoena which it served upon respondent, Bashas', Inc. The EEOC issued that subpoena on May 28, 2008, as part of its investigation into the Commissioner's Charge that Bashas' "has, since at least

28

1 May, 2004, violated Title VII by discriminating against Hispanics  
2 due to their national origin." Mot. (doc. 10), exh. A thereto  
3 (doc. 10-3) at 2. That asserted discrimination took two forms: (1)  
4 "failing to pay Hispanic employees comparable wages to non-Hispanic  
5 employees[;]" and (2) "failing to promote Hispanics into management  
6 positions." Id.

7 Currently pending before the court is Bashas' "Motion for  
8 Leave to Conduct Limited Discovery" on the "issue of whether the  
9 Subpoena constitutes an abuse of process[.]" Id. at 2:2-3.

10 Additionally, Bashas' "seeks discovery to confirm that its  
11 confidentiality concerns are well based." Id. at 2:4-5. As the  
12 discovery issue is a close question, the court will set a hearing  
13 on this discovery motion contemporaneously with the hearing on the  
14 underlying Application for an Order to Show Cause ("OSC") seeking  
15 enforcement of the subpoena.

### 16 **Background**

17 The court assumes familiarity with the parallel action of  
18 Parra v. Bashas', 02-0591 ("Parra"), as well as the prior  
19 proceedings herein, as Parra v. Bashas' Inc., 2009 WL 1024615  
20 (D.Ariz. April 15, 2009), recounts. A few of those facts are worth  
21 repeating and developing though because they take on new  
22 significance in the context of this dispute.

### 23 **I. Parra Litigation**

24 Responding to charges of discrimination against Bashas' by  
25 several Hispanics, the EEOC issued right-to-sue letters. After  
26 receipt of those letters, in April 2002, Messrs. Parra and Estrada,  
27 through their counsel, Davis, Cowell & Bowe ("the Davis firm"),  
28 filed a putative class action alleging national origin

1 discrimination in violation of Title VII of the 1964 Civil Rights  
2 Act as amended ("Title VII"), 42 U.S.C. § 2000e, et seq. The  
3 Parra plaintiffs allege, *inter alia*, that Bashas' discriminated  
4 against them with respect to pay and working conditions. After the  
5 filing of the Parra complaint, the EEOC closed all charges. Mot.  
6 (doc. 10), exh. F thereto (Quincy Decl'n), at 16, ¶ 4:14-15.

7       Shortly after filing the first amended complaint in Parra, in  
8 March 2004, the Impact Fund joined in the representation of the  
9 plaintiffs therein. Discovery ensued during which Bashas' produced  
10 fairly comprehensive wage charts for the years 1994-2003,  
11 inclusive. Id. at 16:18-19. Bashas' also produced "spreadsheets  
12 with more than 25 data fields containing personnel information for  
13 each of the 44,698 employees listed." Id. at 16, ¶ 5:19-20.  
14 Bashas' last produced such pay data in April 2004. Id. at 16,  
15 ¶ 5:20-21. As part of Bashas' disclosure in Parra, this court  
16 issued two confidentiality orders, one of which "pertains directly  
17 to a database which the EEOC is seeking through its enforcement  
18 subpoena." Parra, 2009 WL 1024615, at \*5.

19       After the Ninth Circuit remanded on the issue of class  
20 certification of the pay claim, on February 2, 2009, this court  
21 held a status conference. Because discovery had been closed since  
22 April 2004, plaintiffs sought "updated discovery concerning the  
23 status of [Bashas'] pay policy and its impact on the putative  
24 class." Id. at \*1 (internal quotation marks and citation omitted).  
25 The court denied that request, "[f]inding that the time for the  
26 discovery sought by Plaintiff has long since expired[.]" Id.  
27 (internal quotation marks and citation omitted).

28 . . .

1 **II. EEOC Investigation**

2 Despite closing its files after issuing the right-to-sue  
3 letters in Parra, the EEOC continued with its investigation into  
4 purported discriminatory employment practices at Bashas'. Shortly  
5 after this court denied plaintiff's motion for reconsideration in  
6 Parra on the issue of certifying a class as to the pay claim, on  
7 May 11, 2006, the EEOC served a subpoena upon Bashas'. Mot. (doc.  
8 10), exh. F thereto (Quincy Decl'n) at 17, ¶ 8; and exh. D thereto  
9 at 10-11. Among the subpoenaed documents were "wage charts in  
10 effect between 1998 and the present, and all documents reflecting  
11 the racial or national origin composition of hourly employees[.]"  
12 Id. (internal quotation marks omitted). Bashas' objected to that  
13 subpoena on a variety of grounds, including that the EEOC had  
14 closed the individual charges four years earlier. Id.

15 Even in the face of those objections and Bashas' failure to  
16 produce the subpoenaed documents, the EEOC did not respond to  
17 Bashas' objections. Id. Nor did it move to enforce the May 11,  
18 2006, subpoena. See id. Instead, four months later, on September  
19 12, 2006, the EEOC advised Bashas' that it was "re-open[ing]" the  
20 charges as to the eight individuals who had filed EEOC charges  
21 against Bashas' in 2002, including plaintiffs Parra and Estrada.  
22 Id.; see also Mot. (doc. 10), exh. E thereto at 13.

23 **III. United Food and Commercial Workers Union ("UFCW")**

24 While the Parra action was ongoing and the EEOC continued its  
25 investigation into the "re-opened" charges, Bashas' claims that the  
26 UFCW "launched a 'corporate campaign' to force [it] to voluntarily  
27 recognize UFCW as the bargaining representative of its employees  
28 without" their vote. Mot. (doc. 10) at 4:3-4; see also exh. F

1 thereto (Quincy Decl'n) at 15, ¶ 2; and at 17, ¶ 9. Bashas'  
2 contends that on a fairly regular basis, the Davis firm and UFCW  
3 "communicate regarding . . . [union] organizing efforts as well as  
4 the *Parra* litigation." *Id.*, exh. F thereto (Quincy Decl'n) at 17,  
5 ¶ 10:16-18 (emphasis added). Further, it "appears" to Bashas'  
6 counsel "that the EEOC is in communication with the *Parra*  
7 plaintiffs' counsel relating to matters extending beyond the *Parra*  
8 litigation. *Id.* at 17, ¶ 11:19-20.

9 **IV. Commissioner's Charge**

10 Eventually, on May 9, 2007, the EEOC filed a Commissioner's  
11 Charge against Bashas'. Mot. (doc. 10), exh. A thereto at 2. As  
12 in *Parra*, the Commissioner asserts that Bashas' has violated Title  
13 VII by discriminating against Hispanics based upon their national  
14 origin with respect to wages. *See id.* The time frame of the  
15 Commissioner's Charge is "since at least May 2004," which is  
16 notable given this court's refusal in *Parra* to allow discovery as  
17 to Bashas' pay polices *after* April 2004. *See id.*

18 In the year following the filing of the Commissioner's Charge,  
19 the EEOC issued another subpoena and three "requests for  
20 information." *Id.*, exh. F thereto (Quincy Decl'n) at 18, ¶ 12:3-5;  
21 *see also* Resp. (doc. 14) at 2:11-14. While acknowledging that  
22 "Bashas' submitted partial responses to the requests," the EEOC  
23 stresses that Bashas' has "failed to fully respond to the EEOC's  
24 Request for Information." Resp. (doc. 14) at 2:14-15.

25 For its part, Bashas' explains that despite "repeat[ed]  
26 request[s][,]" the EEOC has "refused" to provide Bashas' "with even  
27 the most basic information about the charge so that [it] c[an]  
28 defend itself." Mot. (Doc. 10), exh. F thereto (Quincy Decl'n) at

1 18, ¶ 14:12-14. Given what Bashas' perceives to be the broad scope  
2 of the EEOC's investigation, it "argue[s] that fundamental due  
3 process and fairness require[s]" some notice as to "exactly" what  
4 allegations the EEOC believes "warrant a Commissioner's Charge."  
5 Id. at 18, ¶ 14:18-21.

6 In addition to lack of notice concerns, Bashas' has "grave  
7 concerns about the sharing of confidential information between the  
8 EEOC, the Impact Fund, and the UFCW's attorneys," the Davis firm.  
9 Id. at 18, ¶ 15:22-23. To allay those concerns, "Bashas' proposed  
10 that the EEOC enter into a confidentiality agreement - similar to  
11 the one that the parties signed in the Parra action - concerning"  
12 any disclosures to the EEOC. Id. at 18, ¶ 15:24-26. According to  
13 Bashas', "the EEOC did not respond to Bashas' proposed  
14 confidentiality agreement nor provide any assurances that it would  
15 not share the information with the above entities[.]" Id. at 18-19,  
16 ¶ 15.

17 **V. EEOC Subpoena**

18 Instead, on May 28, 2008, the EEOC issued the subpoena which  
19 is the subject of this enforcement action. That subpoena was  
20 served upon Bashas' by certified mail the next day, May 29, 2008.  
21 OSC (doc. 1), Manget Aff. (doc. 2-2) attached thereto at 3-4, ¶¶  
22 14-15; and attachment 8 at 50.<sup>1</sup> That subpoena directed Bashas' to  
23 mail to the EEOC investigator, on June 13, 2008, compact disks  
24 containing a vast range of employee data, such as compensation  
25 details, ethnicity, and union eligibility. See Mot. (doc. 10),  
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27 <sup>1</sup> The EEOC also provided a "domestic return receipt," evidently to  
28 establish service upon Bashas' counsel, but it is impossible to discern the date  
of service from the copy provided to the court. See OSC (doc. 1), Manget Aff.  
thereto (doc. 2-2); and attachment 8 at 50.

1 exh. K thereto at 47-51.

2 On the specified date, June 13, 2008, Bashas' informally  
3 asserted its objections to that subpoena. Mot. (doc. 10), exh. F  
4 thereto (Quincy Decl'n) at 19, ¶ 16:6-7. The EEOC took no action  
5 for approximately seven months. But then, on February 2, 2009, the  
6 day this court denied post-April 2004 pay data discovery in Parra,  
7 the EEOC filed an OSC as to why the May 28, 2008, subpoena should  
8 not be enforced. The EEOC's stated basis for filing that OSC is  
9 twofold. First, the EEOC declares that Bashas' has not "compl[ie]d  
10 with the subpoena." Resp. (doc. 14) at 2. That failure has, from  
11 the EEOC's viewpoint, "delayed and hampered [its] investigation."  
12 OSC (doc. 1) at 2, ¶ 9:19-20. Second, the EEOC declares that  
13 Bashas' has not "serve[d] a petition to revoke" or modify the  
14 subpoena in accordance with 29 C.F.R. § 1601.16(b)(1). Resp. (doc.  
15 14) at 2:26-27. That regulation requires that "[a]ny person served  
16 with a subpoena who intends not to comply shall petition . . . to  
17 seek its revocation or modification[,] . . . within five days . . .  
18 after service of the subpoena." 29 C.F.R. § 1601.16(b)(1)  
19 (emphasis added).

20 Initially, Bashas' had until April 6, 2009, by which to file  
21 its response to the OSC.<sup>2</sup> See Doc. 4. Rather than responding, on  
22 April 3, 2009, Bashas' filed this motion seeking leave to conduct  
23 limited discovery. Such discovery is necessary because, as Bashas'  
24 depicts it, the "EEOC has engineered" the Commissioner's Charge and  
25 the subpoena, "in an effort to funnel information to the plaintiffs  
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27 <sup>2</sup> Since then, Bashas' has been granted two extensions. Most recently,  
28 this court granted Bashas' leave to file its response to the OSC no later than five  
days after the ruling on this motion for leave to conduct limited discovery. See  
Doc. 18.

1 and counsel in the pending *Parra* litigation, and in furtherance of  
2 the UFCW's efforts to apply increased pressure on Bashas' to  
3 unionize. Mot. (doc. 10) at 8:6-9. Put differently, Bashas'  
4 believes that by filing the Commissioner's Charge, and then  
5 issuing the subpoena which is the subject of this enforcement  
6 action, the EEOC engaged in abuse of process.

7 To substantiate its abuse of process theory, Bashas' professes  
8 to be seeking leave to engage in "very limited discovery[.]" Id. at  
9 11:10. First, it wants to "serve written discovery requests" not  
10 just upon the EEOC, but also upon "the named plaintiffs and  
11 plaintiffs' counsel in the *Parra* action, including the Impact Fund  
12 and [the] Davis [firm] . . . individually, and the UFCW[.]" Id. at  
13 11:12-15 (emphasis added). Not only is Bashas' request fairly  
14 broad in terms of those from whom it is seeking discovery, but the  
15 scope of the documents which it is seeking also is quite broad.

16 Bashas' wants "to obtain documents pertaining to any  
17 communications, information or documents provided between the EEOC  
18 and these third parties relating to this Commissioner's Charge or  
19 any other charges currently under investigation by the EEOC." Id.  
20 at 11:15-18 (emphasis added). Lastly, Bashas' wants to "seek any  
21 documents relating to the *Parra* litigation, . . . , provided to the  
22 EEOC by the *Parra* plaintiffs or their counsel." Id. at 11:18-20  
23 (emphasis added). Assuming cooperation by the third parties,  
24 Bashas' anticipates completing this discovery within six weeks.  
25 For now the court will overlook the breadth of these discovery  
26 requests and, instead, focus upon Bashas' claimed entitlement to  
27 conduct discovery in the first place.

28 The EEOC challenges Bashas' entitlement to any discovery.

1 Characterizing this discovery motion as an attempt by Bashas' to  
2 seek "back door access to the EEOC's open investigative file[,]"  
3 the EEOC asserts that such access is "contrary to express  
4 prohibitions in Title VII, . . . and the Freedom of Information Act  
5 ("FOIA")[" Resp. (doc. 14) at 4:4-6. Similarly, depicting  
6 Bashas' discovery request as "a fishing expedition into an open law  
7 enforcement file[,]" the EEOC states that Bashas' must "*first*  
8 demonstrate an abuse of process to support" this discovery request.  
9 Id. at 4:16-20 (emphasis in original).

10 Likewise, according to the EEOC, there is no justification for  
11 discovery here in that Bashas' has not shown a lack of good faith  
12 by the Commissioner in filing the charge. The EEOC goes on to  
13 challenge the sufficiency of the evidence upon which Bashas' is  
14 relying. Turning to Bashas' confidentiality concerns, the EEOC  
15 retorts that it "has and will continue to comply with" Title VII  
16 and FOIA's confidentiality provisions. Id. at 7:26-28. Thus, from  
17 the EEOC's perspective, the confidences of Bashas' and its  
18 employees "are adequately protected." Id. at 8:14.

19 **Discussion**

20 "The EEOC bears the [p]rimary responsibility for enforcing  
21 Title VII." EEOC v. Federal Exp. Corp., 558 F.3d 842, 849 (9<sup>th</sup> Cir.  
22 2009) (internal quotation marks and citation omitted).<sup>3</sup> As part of  
23 Title VII's "integrated, multistep enforcement procedure[,]" id.  
24 (internal quotation marks and citation omitted), individuals, as  
25 well as the EEOC Commissioner, have the authority to file a charge.

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26  
27 <sup>3</sup> Bashas' cites to a prior version of Federal Exp., 543 F.3d 531 (9<sup>th</sup> Cir.  
28 2008), which was "withdrawn and replaced" by the "Amended Opinion" cited above on  
March 3, 2009 -- prior to the filing of Bashas' motion and reply. See Federal  
Exp., 558 F.3d at 844.

1 Id. (citations omitted). The filing of a discrimination charge  
2 triggers the EEOC's mandatory obligation "to investigate the charge  
3 and determine whether there is reasonable cause to believe that it  
4 is true." Id. (internal quotation marks and citations omitted).  
5 "To enable the [EEOC] to make informed decisions at each stage of  
6 the enforcement process, [Title VII] confers a broad right of  
7 access to relevant evidence[.]" Id. (internal quotation marks and  
8 citation omitted). "In acquiring such evidence, the EEOC may  
9 exercise all powers enjoyed by the NLRB [National Labor Relations  
10 Board] under 29 U.S.C. § 161, including the authority to issue  
11 administrative subpoenas and to request judicial enforcement of  
12 those subpoenas." Id. (citing, *inter alia*, 42 U.S.C. § 2000e-9).

13 Section 161 provides in relevant part:

14 In case of . . . refusal to obey a subpoena  
15 issued to any person, any district court of  
16 the United States . . . , within the jurisdiction  
17 of which the inquiry is carried on or within the  
18 jurisdiction of which said person is guilty of  
19 . . . refusal to obey is found or resides or  
transacts business, upon application by the [EEOC]  
*shall have jurisdiction* to issue to such person  
an order requiring such person to appear before the  
[EEOC], . . . , there to produce evidence if so  
ordered[.]

20 29 U.S.C. § 161(2) (West 1998) (emphasis added). Here, because the  
21 EEOC is carrying out its inquiry within the district of Arizona,  
22 and, according to the EEOC, because Bashas' is refusing to fully  
23 comply with the EEOC's subpoena, section 161(2) confers  
24 jurisdiction on this court. See EEOC v. City of Milwaukee, 54  
25 F.Supp.2d 885, 890 n.2 (E.D.Wis. 1999) (where EEOC had filed Title  
26 VII charges against a city, the court found it had jurisdiction  
27 partially based upon 29 U.S.C. § 161(2) "because the City is  
28 located within this dis-strict [sic][]").

1 **III. "Counter-discovery"**

2 For the most part, Bashas' and the EEOC agree on the governing  
3 legal standards. Both rely heavily upon In re EEOC, 709 F.2d 392  
4 (5<sup>th</sup> Cir. 1983). There, the Fifth Circuit "recognized . . . that  
5 facts vary so much from case to case that it is often very  
6 difficult to articulate a single general standard. Id. at 399  
7 (citation omitted). Despite that difficulty, the Fifth Circuit  
8 adopted a "two-step approach" for EEOC subpoena enforcement actions  
9 - an approach which for the most part the Ninth Circuit follows.  
10 See id. at 399 (internal quotation marks and citation omitted).

11 The first step is for the EEOC to file a petition for  
12 enforcement which "fully complie[s] with the informal guidelines  
13 set out" by the Supreme Court in United States v. Powell, 379 U.S.  
14 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). Id. More specifically,  
15 the EEOC:

16 must show [1] that the investigation will be  
17 conducted pursuant to a legitimate purpose,  
18 [2] that the inquiry may be relevant to the purpose,  
19 [3] that the information sought is not already within  
the [agency's] possession, and [4] that the  
administrative steps required by the [agency's  
statutes or rules] have been followed.

20 Id. (quoting Powell, 379 U.S. at 57-58, 85 S.Ct. at 255) (other  
21 citations omitted). An agency such as the EEOC "generally complies  
22 with the Powell requirements . . . through the simple submission of  
23 appropriate affidavits." Id. (citation and footnote omitted).

24 Here, as part of its OSC, the EEOC includes the affidavit of  
25 Paul G. Manget, the "Enforcement Manager of the Phoenix District  
26 Office" of the EEOC, who is "responsible for the investigation of  
27 charges of employment discrimination." OSC (doc. 1), attached  
28 thereto (doc. 2-2) at 2, ¶ 1:1-3. Mr. Manget's affidavit could

1 have benefitted from a little more detail. Nevertheless, given  
2 that Bashas' is not challenging the sufficiency of that affidavit,  
3 and given that the EEOC's burden at this point is not onerous, the  
4 court finds that the first step in the enforcement process is met -  
5 at least for present purposes.

6 At the second step, "an administrative defendant[ ][,]" such as  
7 Bashas', has a "relatively heavy" burden. See In re EEOC, 709 F.2d  
8 at 400. That is so because ordinarily, "a defendant is not  
9 "'entitled to engage in counter-discovery to find grounds for  
10 resisting' a subpoena[.]" Id. (quoting United States v. Litton  
11 Industries, Inc., 462 F.2d 14, 17 (9<sup>th</sup> Cir. 1972)). According to  
12 the Ninth Circuit, "district courts must be cautious in granting  
13 discovery rights, lest they transform subpoena enforcement  
14 proceedings into exhaustive inquisitions into the practices of  
15 regulatory agencies." Reich v. Montana Sulphur & Chemical Co., 32  
16 F.3d 440, 449 (9<sup>th</sup> Cir. 1994) (internal quotation marks and  
17 citations omitted).

18 Consistent with the foregoing, "[a] limited amount of discovery  
19 may be allowed if, for example, the defendant makes a *preliminary*  
20 *and substantial demonstration of abuse*, that is, where the defendant  
21 has presented meaningful evidence that the agency is attempting to  
22 abuse its investigative authority." Reich, 32 F.3d at 449 (internal  
23 quotation marks and citations omitted). "'Anything short of this  
24 showing is not enough.'" Id. (quoting In re EEOC, 709 F.2d at 400).

25 A defendant seeking counter-discovery must meet this fairly  
26 demanding standard partially due to the nature of subpoena  
27 enforcement actions, which are "summary procedure[s][.]" See EEOC v.  
28 St. Regis Paper Co. - Kraft Div., 717 F.2d 1302, 1304 (9<sup>th</sup> Cir.

1 1983) (citations omitted). Hence, in the Title VII context, the  
2 Fifth Circuit has deemed as "absolutely unacceptable[] . . .  
3 dilatory tactics at the subpoena enforcement stage[.]" In re EEOC,  
4 709 F.2d at 400 (footnote omitted). Likewise, the Ninth Circuit in  
5 St. Regis, explained that "[d]ue to the need for speedy  
6 investigation of EEOC charges of employment discrimination,  
7 discovery should be allowed against the EEOC only where *exceptional*  
8 *circumstances* indicate an EEOC abuse of process." St. Regis, 717  
9 F.2d at 1304 (citing cases) (emphasis added). Of course, in this  
10 OSC, it is the EEOC's delay which is evident. It has never sought  
11 the information in its May 11, 2006 subpoena, and it waited over  
12 eight months to seek to enforce its May 8, 2008 subpoena.

13       Given that the standard for allowing counter-discovery is a  
14 showing by the defendant of "a preliminary and substantial  
15 demonstration of abuse," as set forth above, there is no merit to  
16 the EEOC's assertion that Bashas' must "*first* demonstrate an abuse  
17 of process" before the court allows counter-discovery. See Resp.  
18 (doc. 14) at 4:17-18 (emphasis in original). Indeed, requiring a  
19 defendant to first *prove* abuse to support a discovery request to  
20 substantiate an abuse of process claim would place the defendant in  
21 an untenable "Catch-22" situation.

22       The court is fully aware, as Bashas' is quick to point out,  
23 that this "preliminary and substantial demonstration" standard "does  
24 not mean actual proof." In re EEOC, 709 F.2d at 400 n. 5 (emphasis  
25 in original). Consequently, to satisfy this burden "[a]ll [Bashas']  
26 needs to do is develop facts from which a court might *infer* a  
27 *possibility* of some wrongful conduct by the [EEOC]." See id.  
28 (internal quotation marks omitted) (emphasis in original). Whether

1 Bashas' has done so is key to the court's discovery determination.

2 Bashas' premises its abuse of process argument on three  
3 factors. The first is the timing of the EEOC's investigation and  
4 this action, which Bashas' asserts "creates a suspicion that the  
5 subpoena was not issued in good faith." Reply (doc. 16) at 3:24-25.  
6 Second, according to Bashas', "the EEOC has *seemingly* shared  
7 information relating to its confidential 'investigations' of  
8 Bashas'" with the Parra attorneys and/or the UFCW. Id. at 4:4-7  
9 (citation omitted) (emphasis added)<sup>4</sup>. Bashas' believes that this  
10 purported sharing of information is not an isolated incident.  
11 Third, Bashas' contends that the EEOC's refusal to provide  
12 information underlying the Charge, its refusal to enter into a  
13 confidentiality agreement, and the EEOC's "extremely broad subpoena"  
14 combine to "impl[y] an improper ulterior motive" for issuing the  
15 Charge and the challenged subpoena. Id. at 4:19-20 and at 5:1  
16 (footnote and citation omitted). Based upon the foregoing, Bashas'  
17 contends that it has made "a substantial demonstration of abuse of  
18 process warranting discovery." Reply (doc. 16) at 2:3-4 (emphasis  
19 omitted). Pending the hearing, at this juncture, the court will only  
20 comment upon some of these factors.

21 **A. Timing**

22 It appears to be more than coincidental that on the same  
23 day this court denied discovery in Parra as to Bashas' post-April  
24 2004 pay policy, the EEOC decided to file an OSC to enforce a  
25 subpoena encompassing such pay data, a subpoena which had been  
26 served over eight months earlier. It is a close question whether,  
27

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28 <sup>4</sup> Newly added emphasis.

1 as Bashas' urges, the timing of the EEOC's filing of the OSC  
2 "creates a suspicion that the subpoena was not issued in good  
3 faith[,] " at least to a degree so as to warrant counter-discovery.  
4 See Reply (doc. 16) at 3:24-25 (citations omitted).

5 To support this argument, Bashas' relies solely upon United  
6 States v. Giant Industries, Inc., 1981 WL 1277 (D. Ariz. June 17,  
7 1981). There, at the same time defendant was the target of a  
8 criminal grand jury investigation, the Department of Energy ("DOE")  
9 issued an administrative subpoena. Purportedly the documents sought  
10 in that subpoena were necessary to a DOE regulatory compliance  
11 investigation. In opposing DOE's enforcement petition, the  
12 defendant asserted that the "subpoena was not issued in good faith  
13 but was intended to obtain information for use as evidence in a  
14 criminal prosecution." Id. at \*1.

15 The court in Giant Industries held that "[t]he timing of the  
16 administrative subpoena create[d] a suspicion sufficient to entitle  
17 Giant to limited discovery . . . to determine whether the subpoena  
18 was issued for a legitimate purpose." Id. at \*2. In reaching that  
19 conclusion, the court reasoned:

20 Giant should not be compelled to produce . . .  
21 information requested by the administrative subpoena  
22 if the purpose of the subpoena is, in reality, . . .  
23 [to] enable the Government to obtain evidence to  
24 support criminal charges against Giant or its officers.

25 Id. The court then separately ruled on each of Giant's discovery  
26 requests, in a manner which appears to have narrowed the scope of  
27 the discovery sought by Giant.

28 There are some obvious factual difference between Giant  
29 Industries and the present action. Perhaps most significant is that  
30 the DOE's issuance of an administrative subpoena in Giant Industries

1 was preceded by a Department of Justice criminal investigation.  
2 Plainly there is no similar parallel criminal investigation here.  
3 Consequently, while the court does find troublesome the timing of  
4 the OSC, at this juncture, without more, the timing is not a  
5 sufficient basis for allowing counter-discovery.

6 B. "Shared Information"

7 Bashas' fares no better with its argument that it is entitled  
8 to counter-discovery because the EEOC "seemingly shared information"  
9 with the Parra attorneys and/or the UFCW. Essentially, it is  
10 Bashas' position that the Parra attorneys and the UFCW have "learned  
11 of information harmful to Bashas' to which they would have no access  
12 except through the EEOC." Mot. (doc. 10) at 8:15-17. Bashas'  
13 claims to have "repeatedly learned of incidents" where it believes  
14 the EEOC improperly provided such information to the Parra  
15 plaintiffs' attorneys and to the UFCW. See Mot. (doc. 10) at 8:14  
16 (emphasis added). Similarly, Bashas' further asserts that "[t]ime  
17 after time" it "has learned that *Parra* plaintiffs' counsel, the  
18 Impact Fund or the UFCW has knowledge of matters of which they  
19 should not be aware." Id. at 9:7-8.

20 Bashas' identifies only two specific instances where this  
21 alleged improper sharing of information occurred. Moreover, Bashas'  
22 did not elaborate at all as to the substance of the purportedly  
23 "harmful information."

24 Bashas' submits an affidavit from its counsel and an excerpt  
25 from a deposition taken in the related Parra action to show the  
26 first instance of alleged information sharing. In that affidavit,  
27 Bashas' counsel avers that "Bashas' learned that Jocelyn Larkin,  
28 attorney for the Parra class, was aware of a charge of

1 discrimination against Bashas' then being investigated by the EEOC."  
2 Mot. (doc. 10), exh. F thereto (Quincy Decl'n) at 17, ¶ 11:21-23.  
3 Because at that time "the EEOC had not yet filed suit against  
4 Bashas' on th[at] charge," and because "Larkin was not involved in  
5 th[at] charge[,] nor did she represent the charging party[,]"  
6 Bashas' surmises that the EEOC was "in communication with the *Parra*  
7 plaintiffs' counsel relating to matters extending beyond the Parra  
8 litigation." Id. at 17, ¶ 11.

9 Of course, this argument is based upon conjecture. There is a  
10 serious question whether the page and a half of deposition testimony  
11 to which Bashas' cites supports its view of events. In that  
12 portion, the witness is being questioned as to Bashas' hiring  
13 practices on the Navajo reservation. See id., Tab 1 thereto  
14 (Sanford Dep'n) at 23-24. At least on the face of it, the scant  
15 proffered deposition testimony does not advance Bashas' argument of  
16 shared information between the Parra attorneys and/or the UFCW.

17 The second scenario which Bashas' maintains shows abuse of  
18 process is the manner in which Bashas' first learned of this  
19 enforcement action. As Kristy L. Nied, Bashas' "Director of  
20 Communications[,]" describes it, Bashas' first learned of the filing  
21 of the OSC when she received a call from a business reporter on  
22 February 4, 2009 - two days after the filing of the OSC. Mot. (doc.  
23 10), exh. L thereto (Nied Decl'n), at 2, ¶ 5. Ms. Nied declares  
24 that during that call the reporter informed her that "he had  
25 received information from the UFCW" that the EEOC had filed this  
26 enforcement action, and he requested a comment from Bashas' on that  
27 filing. Id. Ms. Nied further declares that she received a similar  
28 request from a different reporter the next day, and he likewise

1 informed her that the UFCW was the source of his information as to  
2 the filing of this EEOC enforcement action. See id.

3 Bashas' is unaware of any EEOC "announcement or press release"  
4 pertaining to this action. Mot. (doc. 10) at 6:21-22. Furthermore,  
5 Bashas' believes that "the filing of subpoena enforcement actions do  
6 not appear on commercial docketing services generally available."  
7 Id. at 6:22-23. Therefore, Bashas' claims to be "at a loss as to  
8 how the union would have learned of this . . . action within days"  
9 of its filing "any other way than from the EEOC." Id. at 6:24-7:1-  
10 2.

11 Assuming, *arguendo*, that events unfolded as Ms. Nied declares,  
12 *i.e.*, that the EEOC informed the UFCW, who in turn informed the  
13 reporters, of the filing of this action, the question is whether  
14 this is sufficient to establish a "preliminary and substantial  
15 demonstration of abuse" of process. See In re EEOC, 709 F.2d at  
16 402. Ms. Nied's declaration may well show that this is "a truly  
17 exceptional case, that is, [one] where the defendant has made a  
18 preliminary and substantial demonstration of abuse." See id.  
19 Similarly, Ms. Nied's declaration, although partially based upon  
20 hearsay, may constitute "meaningful evidence" that the EEOC "is  
21 attempting to abuse its investigative authority[.]" Id. at 400  
22 (internal quotation marks, citation and footnote omitted). It is  
23 possible, however, that these purported concerns could be remedied  
24 by entry of a confidentiality order. Accordingly, the question is  
25 whether the events as Ms. Nied describes them warrant counter-  
26 discovery or simply a confidentiality order.

27 Finally, the court is loathe to consider counter-discovery  
28 based upon the wholly unsubstantiated averment in Bashas' counsel's

1 declaration that "upon information and belief, the UFCW and Parra  
2 counsel," the Davis firm, "which also represents the UFCW regularly,  
3 communicate regarding the organizing efforts, as well as the Parra  
4 litigation." Mot. (Doc. 10), exh. F thereto (Quincy Decl'n) at 17,  
5 ¶ 10:16-18 (emphasis added). Plainly, this one qualified averment  
6 is not meaningful evidence of abuse of process by the EEOC. Without  
7 more, there is no link between these supposed communications and the  
8 EEOC's alleged abuse of process.

9 Bashas' makes much of the fact that the EEOC did not outright  
10 deny that it shared information. Subject to the positions of the  
11 parties at the OSC hearing, the court is not inclined to give much  
12 credence to this assertion because at this second-step the burden is  
13 on Bashas' to "make[] a preliminary and substantial demonstration of  
14 abuse[;]" the burden is not upon the EEOC. See Reich, 32 F.3d at 449  
15 (internal quotation marks and citations omitted).

16 **C. "Ulterior Motive"**

17 Lastly, Bashas' is relying upon three factors which it believes  
18 in combination "impl[y] an improper ulterior motive" for issuing the  
19 challenged subpoena, and thus, by extension, a basis for engaging in  
20 counter-discovery. See Reply (doc. 16) at 5:1 (footnote and citation  
21 omitted). Bashas' first points to the EEOC's refusal to provide it  
22 "with even the most basic information underlying the charge[.]" Id.  
23 at 4:16-17. Next, Bashas' notes the "extremely broad" scope of the  
24 subpoena, seeking "computer files for over 40,000 former and current  
25 employees[.]" Id. at 4:19-20. Third, Bashas' heavily relies upon  
26 the EEOC's "continued dismissal of any possible consideration of a  
27 confidentiality agreement[.]" Id. at 7:23. The EEOC's  
28 unwillingness to enter into a confidentiality agreement as to the

1 subpoenaed information, from Bashas' perspective, "substantiate[s]  
2 its evidence of abuse of process." Id. at 5:9 (emphasis omitted).

3       The question is whether these factors, either alone or  
4 together, support a finding that this is "a truly exceptional case"  
5 so as to justify counter-discovery however. See In re EEOC, 709  
6 F.2d at 402. To be sure, simply raising the specter of "due process  
7 and fairness" concerns based upon lack of notice is "too remote and  
8 too vague to warrant . . . [such] discovery." See Litton  
9 Industries, 462 F.2d at 17. Further, eventually it may be that the  
10 EEOC's asserted refusal to adequately notify Bashas' of the nature  
11 of the Commissioner's Charge could be the basis for a constitutional  
12 challenge to enforcing the subpoena, but the question now is whether  
13 it provides an adequate basis for allowing counter-discovery.

14       On the face of it, the challenged subpoena does appear to be  
15 fairly broad. Bashas' has not shown, and it does not necessarily  
16 follow, however, that an arguably broad subpoena means there has  
17 been an abuse of process. In an effort to equate a broad subpoena  
18 with an improper ulterior motive, Bashas' cites to EEOC v. First  
19 Alabama Bank of Birmingham, 440 F.Supp. 1381 (N.D. Ala. 1977),  
20 aff'd, 611 F.2d 132 (5<sup>th</sup> Cir. 1980). The facts before this court do  
21 not begin to approach the egregious facts of First Alabama, however.

22       Moreover, First Alabama was in a different procedural posture  
23 than the present case. There, the EEOC was seeking to enforce a  
24 subpoena against the bank; the bank was *not* seeking counter-  
25 discovery as is Bashas'. Not only that, First Alabama was issued  
26 following a trial, so that court had the benefit of a fully  
27 developed record. Accordingly, at this point in the litigation,  
28 First Alabama does not provide a sufficient basis upon for allowing

1 Bashas' to engage in counter-discovery.

2 As discussed above, the court has serious reservations as to  
3 the propriety of allowing counter-discovery in this subpoena  
4 enforcement action. At the same time, however, the court cannot  
5 ignore the broader context in which this particular dispute has  
6 arisen, and the timing of this OSC.

7 **Conclusion**

8 Thus, for the reasons set forth herein, IT IS ORDERED that the  
9 "Motion for Leave to Conduct Limited Discovery" by respondent  
10 Bashas', Inc. (doc. 10) is set for hearing contemporaneously with  
11 the hearing on EEOC's Application for an OSC.

12 IT IS FURTHER ORDERED that, consistent with this court's May 6,  
13 2009, order, Bashas' "shall file its Response" to the EEOC's Order  
14 to Show Cause Why an Administrative Subpoena Should Not be Enforced  
15 (doc. 1) "no later than five (5) days after" the filing of this  
16 order. See Doc. 18 at 1:18-19.

17 IT IS FINALLY ORDERED that Bashas', Inc. appear on the 30<sup>th</sup> day  
18 of June, 2009, at 1:30 p.m., in Courtroom 626, Sandra Day O'Connor  
19 Courthouse, 401 W. Washington Street, Phoenix, Arizona 85003, and  
20 show cause why it should not be compelled to comply with the  
21 subpoena issued to it. At the hearing, the parties each shall be  
22 prepared to submit a proposed confidentiality order.

23 DATED this 18th day of June, 2009.

24

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26

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28 Copies to counsel of record

  
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Robert C. Broomfield  
Senior United States District Judge