

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

**DUKE DEFENDANTS' MOTION
FOR PROTECTIVE ORDER
CONCERNING PLAINTIFFS'
SUBPOENAS ADDRESSED TO
BURSON-MARSTELLER AND
EDELMAN**

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, Defendants Duke University, Robert Dean, Matthew Drummond, Aaron Graves, and Gary N. Smith (the "Duke Defendants") respectfully move this Court to enter a protective order concerning the third-party subpoenas issued by the Plaintiffs on 17 November 2011, to public relations firms Burson-Marsteller in the Southern District of New York, and Edelman in the Northern District of Illinois. The Duke Defendants seek an order directing Plaintiffs to withdraw immediately the subpoenas in issue in the jurisdictions in which they have been served. These subpoenas are attached hereto as Exhibits A and B, respectively. In support of this Motion, the Duke Defendants state as follows:

1. On 17 November 2011, Plaintiffs issued a subpoena to Burson-

Marsteller in the Southern District of New York that required the firm to produce documents on 19 December 2011, at 12 pm. Burson-Marsteller was served with the subpoena on 18 November 2011.

2. On 17 November 2011, Plaintiffs issued a subpoena to Edelman in the Northern District of Illinois that required the firm to produce documents on 20 December 2011, at 5 pm. Edelman was served with the subpoena on 21 November 2011.

3. Burson-Marsteller and Edelman are public relations firms that Duke University engaged at various times. The subpoenas request Burson-Marsteller and Edelman to produce “All Materials” in their possession “relating to” their work for Duke University.

4. Pursuant to two Court Orders [DE 218] [DE 244], discovery may proceed only with respect to two claims: Counts 21 and 24. Count 21 alleges a claim against Duke for breach of contract, limited to the allegation that Duke imposed disciplinary measures against Plaintiffs without providing them process. Count 24 alleges a claim against the Duke Defendants for fraud based on representations in letters to Plaintiffs regarding Plaintiffs’ DukeCard information.

5. The scope of each of the subpoenas overreaches the two narrow claims presently before this Court. The subpoenas seek “All Materials” “relating to” to a litany of topics. Most of those topics are not relevant to any party’s claim

or defense.

6. To the extent that the remaining general topics are conceivably relevant, the requests are overbroad as drafted.

7. The subpoenas are not reasonably calculated to lead to the discovery of admissible evidence.

8. Thus, the documents sought by Plaintiffs are outside the scope of discovery permitted by Fed. R. Civ. P. 26(b).

9. Furthermore, Plaintiffs should be ordered to withdraw their subpoenas immediately because the subpoenas are harassing to the Duke Defendants and are premature in the absence of a general protective order.

10. In accordance with Fed. R. Civ. P. 26(c), the undersigned counsel for the Duke Defendants certifies that they conferred in good faith with Plaintiffs' counsel in an effort to resolve this discovery dispute prior to filing this Motion. Counsel for the Duke Defendants presented their specific objections to each item of the subpoenas to Plaintiffs' counsel and suggested to Plaintiffs' counsel that Plaintiffs limit the scope of their subpoenas. Plaintiffs' counsel rejected this suggestion.

11. Specifically, on 1 December 2011, Dick Ellis, counsel for the Duke Defendants, consulted in-person with Stefanie Sparks, counsel for Plaintiffs, regarding the scope of these subpoenas. In response to Ms. Sparks's request for

more detailed information, Dixie Wells, another counsel for the Duke Defendants, sent a detailed email on that same day to Plaintiffs' counsel, Ms. Sparks and Mr. Ekstrand, setting forth the primary objection to each request contained in each subpoena. Ms. Sparks, Mr. Ekstrand, and Ms. Wells then spoke by telephone later that day in an attempt to reach an agreement on the scope of these subpoenas. The parties were not able to reach an agreement.

12. On 1 December 2011, in an abundance of caution given the time limits contained in Fed. R. Civ. P. 45(c)(2)(B) with respect to objecting to a subpoena, the Duke Defendants filed a consent motion to extend the time to file a motion for a Rule 26(c) protective order to 8 December 2011.

13. On 6 December 2011, Ms. Wells emailed Ms. Sparks and Mr. Ekstrand to state that after careful consideration of each of the points that Mr. Ekstrand and Ms. Sparks had set forth during the 1 December 2011 telephone conversation, the Duke Defendants remained of the position that the subpoenas did not comply with the Court's Orders. Ms. Sparks responded to that email on 7 December 2011 by stating that the position of Plaintiffs was likewise unchanged. Accordingly, the parties have not been able to reach an agreement on this issue.

14. For the foregoing reasons, as more fully explained in the Duke Defendants' brief contemporaneously filed with this Motion, the Duke Defendants respectfully request that the Court order Plaintiffs to withdraw immediately the

subpoenas that were issued on 17 November 2011 and addressed to public relations firms Burson-Marsteller and Edelman.

This the 8th day of December, 2011.

Richard W. Ellis

Richard W. Ellis

N.C. State Bar No. 1335

Email: dick.ellis@elliswinters.com

Paul K. Sun, Jr.

N.C. State Bar No. 16847

Email: paul.sun@elliswinters.com

Jeremy M. Falcone

N.C. State Bar No. 36182

Email: jeremy.falcone@elliswinters.com

Ellis & Winters LLP

1100 Crescent Green, Suite 200

Cary, North Carolina 27518

Telephone: (919) 865-7000

Facsimile: (919) 865-7010

Dixie T. Wells

N.C. State Bar No. 26816

Email: dixie.wells@elliswinters.com

Ellis & Winters LLP

333 N. Greene St., Suite 200

Greensboro, NC 27401

Telephone: (336) 217-4197

Facsimile: (336) 217-4198

Counsel for Duke Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, I electronically filed the foregoing **MOTION FOR PROTECTIVE ORDER CONCERNING PLAINTIFFS' SUBPOENAS ADDRESSED TO BURSON-MARSTELLER AND EDELMAN** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and to Mr. Linwood Wilson, who is also registered to use the CM/ECF system.

This 8th day of December, 2011.

/s/ Richard W. Ellis
Richard W. Ellis
N.C. State Bar No. 1335
Email: dick.ellis@elliswinters.com
Ellis & Winters LLP
1100 Crescent Green, Suite 200
Cary, North Carolina 27518
Telephone: (919) 865-7000
Facsimile: (919) 865-7010

Counsel for Duke Defendants