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' BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER CONCERNING PLAINTIFFS' SUBPOENAS ADDRESSED TO BURSON-MARSTELLER AND EDELMAN

Defendants Duke University, Robert Dean, Matthew Drummond, Aaron Graves, and Gary N. Smith (the "Duke Defendants") have moved, pursuant to Fed. R. Civ. P. 26(c), that this Court 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. The Duke Defendants are entitled to a protective order because the documents sought by Plaintiffs are outside the scope of discovery permitted by Fed. R. Civ. P. 26(b) and the Court's Orders of 9 June 2011 [DE 218] and 9 September 2011 [DE 244].

NATURE OF THE CASE AND STATEMENT OF FACTS

This action arises out of the investigation of members of the 2005-2006 Duke men's lacrosse team stemming from false allegations of rape made by a stripper hired by one of the team members to perform at a private party held off-campus. None of the Plaintiffs in this case was charged or tried for any offense resulting from those allegations. Nevertheless, Plaintiffs have sued Duke University, certain Duke University employees, the City of Durham, various individuals associated with the City of Durham, and a DNA laboratory for purported violations of their legal rights in connection with the investigation.

Pursuant to this Court's 9 June 2011 Order, all proceedings with respect to Counts 1, 2, 5, 12, 13, 14, 18, 25, 26, 32, 35 and 41, including discovery, are stayed pending resolution of an interlocutory appeal. Order, at 9 (9 June 2011) [DE 218].[1] Discovery may proceed only with respect to Counts 21 and 24. *Id.* Count 21 alleges a claim against the Duke Defendants for breach of contract, limited to the allegation that disciplinary measures were imposed 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

[1] The City of Durham and individual Defendants Patrick Baker, Steven Chalmers, Beverly Council, Ronald Hodge, Jeff Lamb, Lee Russ, Michael Ripberger, David Addison, Mark Gottlieb, and Benjamin Himan (collectively, the "City Defendants"), have sought an interlocutory appeal before the United States Court of Appeals for the Fourth Circuit with respect to claims against one or more Durham-related Defendants.

Plaintiffs' DukeCard information.

On 17 November 2011, Plaintiffs issued subpoenas to third parties Burson-Marsteller and Edelman. *See* Mot. Exs. A & B. Burson-Marsteller and Edelman are public relations firms that Duke University engaged at various times. The subpoenas seek a broad range of documents and exceed the scope of permissible discovery. *See* Mot. Exs. A & B.

QUESTION PRESENTED

Whether the Duke Defendants are entitled to a protective order directing Plaintiffs to withdraw the third-party subpoenas for documents issued on 17 November 2011 to public relations firms Burson-Marsteller and Edelman.

ARGUMENT

A. Relevant Legal Standards

Rule 26(b)(1) of the Federal Rules of Civil Procedure limits the scope of discovery to nonprivileged matters "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b). *See also Quality Aero Tech., Inc. v. Telemetrie Elecktronik*, 212 F.R.D. 313, 315 n.2 (E.D.N.C. 2002) (noting that the "claims or defense" language added in the 2000 amendments to the Federal Rules "implicitly seek[s] to farm out the 'fishing expeditions' previously allowed and serve[s] to reduce the broad discovery which has heretofore been afforded litigants in civil actions").

Where "relevancy is not apparent, it is the burden of the party seeking

discovery to show the relevancy of the discovery request." *See Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442, 445 (D. Kan. 2000). Rule 45, governing subpoenas to third parties, adopts the standard codified in Rule 26. *See Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 452-453 (E.D.N.C. 2005). Thus, the scope of discovery under a Rule 45 subpoena to non-parties is the same as that permitted under Rule 26. *See Liles v. Stuart Weitzman, LLC*, No. 09-61448-CIV, 2010 WL 1839229, at * 2 (S.D. Fla. May 6, 2010).

Rule 26(c)(1) of the Federal Rules of Civil Procedure authorizes a party to "move for a protective order in the court where the action is pending." Fed. R. Civ. P. 26(c)(1). This Court may "for good cause" issue a protective order "forbidding the disclosure or discovery" or "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c)(1)(A), (D). A subpoena for the production of documents may be the subject of a protective order in accordance with the provisions of Rule 26. *See Anker v. G.D. Searle & Co.*, 126 F.R.D. 515, 518 (M.D.N.C. 1989).

A party has standing to move for a protective order concerning a subpoena served on a third party. *See, e.g., Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946, at **1-2 (M.D.N.C. Sept. 6, 1996). Moreover, any party may move for a protective order where a subpoena

violates a case management order. *See, e.g.*, *Integra Lifesciences I, Ltd. v. Merck KGaA*, 190 F.R.D. 556, 562 n.3 (S.D. Cal. 1999). Pursuant to its right to control the general outline of discovery, this Court has the authority to issue a protective order, even with respect to subpoenas issued in other districts. *See Static Control*, 201 F.R.D. at 434.

"Special weight" is given to avoid burdening non-parties with discovery. *See, e.g., Med. Components, Inc. v. Classic Med., Inc.*, 210 F.R.D. 175, 180 n.9 (M.D.N.C. 2002). Discovery of a non-party must be closely regulated where suspicion exists that discovery is being taken for purposes unrelated to the lawsuit at hand. *See Echostar Commc'ns Corp. v. The News Corp.*, 180 F.R.D. 391, 396 (D. Colo. 1998). Protective orders are appropriate means by which to prevent overbroad and irrelevant discovery directed at non-parties. *See, e.g., Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.,* 231 F.R.D. 426, 430 (M.D. Fla. 2005).

B. The Discovery Sought Contravenes Court Order.

Rule 26 opens by specifically deferring to the limits of a "court order." Fed. R. Civ. P. 26(b). Pursuant to the Court's Order of 9 June 2011 [DE 218], discovery has been limited to two claims:

> Specifically, Count 21 alleges a claim against Duke for breach of contract, limited to the allegation that Duke imposed disciplinary measures against Plaintiffs, specifically suspension, without providing them the process that was promised. In addition, Count 24 alleges a claim against [the Duke Defendants] for fraud based on alleged

> fraudulent misrepresentations in letters to Plaintiffs regarding Plaintiffs' Duke Card information. […] **Therefore, discovery will proceed only as to these two claims.**

Order, at 8-9 (9 June 2011) [DE 218] (emphasis added). This holding was reiterated by the September 19, 2011, Initial Pretrial Order [DE 244] stating that "discovery is proceeding only with respect to Counts 21 and 24" but stayed as to all other counts. Order, at 1 (19 September 2011) [DE 244].

This Court has already determined the boundaries of discovery in its Orders of 9 June 2011 [DE 218] and 9 September 2011 [DE 244]. However, neither Burson-Marsteller nor Edelman, nor the courts from which those subpoenas were issued, is aware of this Court's Orders limiting discovery to Counts 21 and 24. In an analogous scenario, protective orders are granted, for instance, to the extent that discovery is sought from non-parties concerning dismissed claims. *See, e.g., White Mule Co. v. ATC Leasing Co. LLC*, No. 3:07CV00057, 2008 WL 2680273, at *6. (N.D. Ohio 2008). Plaintiffs' attempts to circumvent this Court's Orders by pursuing prohibited discovery in other jurisdictions from non-parties warrants entry of a protective order requiring Plaintiffs to withdraw the subpoenas.

C. The Discovery Otherwise Violates Rule 26(b)(1).

1. Almost All of the Requests are Not Properly Limited to Counts 21 or 24.

The subpoenas are not likely to lead to the discovery of relevant, admissible

evidence, and therefore contravene Rule 26(b)(1). The requests for "All Materials" "relating to" these subjects, versions of which appear in both subpoenas (unless otherwise noted), suffer from this problem when directed at the public relations firms[2]:

- Crystal Mangum's allegations that she was assaulted at 610 N. Buchanan Blvd. on or about March 3, 2006;

- Burson-Marsteller being retained to help Duke University manage its public response to the allegations made by Crystal Mangum from March 13, 2006 to the present (including advice given by Burson-Marsteller to University officials, administrators, board members, and employees regarding internal behavior and statements) [Burson-Marsteller subpoena only];

- Burson-Marsteller's public relations advice and communications with Duke University, its administrators, officials, employees, alumni, board members, students, and other consultants regarding both "on" and "off-the record" statements to members of the press (including the schools' newspaper, The Chronicle) as well as the public from March 13, 2006 to the present relating to the allegations and/or the Duke University Men's Lacrosse Team [Burson-Marsteller subpoena only];

- The strategic assistance provided to Duke University by Burson-Marsteller with press inquiries, alumni, crisis management, and public statements from March 13, 2006 to the present [Burson-Marsteller subpoena only];

- "Duke University's public response to Crystal Mangum's allegations, the University's knowledge of their falsity" [Burson-Marsteller subpoena only];

- Any "effort to cover up the conduct or agreements made in connection" with Crystal Mangum's allegations "of any University agent, employee, or official";

[2] The topics in both subpoenas are strung together in a long, run-on block of phrases, without numbering or other easy identification.

- Duke University's decision to cancel the remainder of the Duke University Men's Lacrosse 2006 season;

- Duke University's actions on April 5, 2006, including but not limited to […] the firing of former Head Coach Mike Pressler, President Brodhead's television interviews, President Brodhead's Letter to the Community, setting up a committee to examine the culture of the lacrosse team, setting up a committee to investigate the Duke administration and/or the decision to create any of the 5 committees announced by President Brodhead on April 5, 2006;

- Any investigation of the allegations by Crystal Mangum;

- Polling of the public regarding Duke University's reputation [Edelman subpoena only];

- Any investigation of […] their teammates' behavior;

- Edelman being retained to assist Duke University with their reputation following the allegations described above from March 13, 2006 to the present [Edelman subpoena only];

- Edelman's assistance to Duke University regarding the University's public response to these allegations from March 13, 2006 to the present (including directions given internally) [Edelman subpoena only];

- Edelman's advice and communications with Duke University, its administrators, officials, employees, alumni, board members, students, parents, and other consultants with on and off-the record statements to the press from March 13, 2006 to the present relating to the University's reputation as a result of the allegations and/or the Duke University Men's Lacrosse Team [Edelman subpoena only];

- Edelman's assistance provided to Duke University with press inquiries, crisis management, and public statements from March 13, 2006 to the present, specifically concerning the University's reputation and Roy Cooper's exoneration of the players [Edelman subpoena only]; and

- Duke University's strategic approach to alumni relations, applicant recruitment, financial campaigning, students, parents, and employees to manage the effect of Crystal Mangum's allegations on the University's reputation, both in the present and future [Edelman subpoena only].

See Mot. Exs. A & B.

Each of these topics and subtopics extends well beyond the appropriate scope of discovery that the Court has permitted. Not one of these topics seeks information relating to the alleged breach of contract with respect to the student suspension process, or to the alleged "fraudulent misrepresentations" Plaintiffs complain the Duke Defendants made when writing letters to Plaintiffs. Nor do these discovery requests appear reasonably calculated to lead to the discovery of admissible evidence given that the only admissible evidence will be with respect to Counts 21 and 24.

These topics, most of which seek public relations advice received concerning Duke University's public "reputation," have nothing to do with either Count 21 or 24. It is not the Duke Defendants' "public response" (a phrase used in many of these requests) to the incidents of 13 March 2006 which is at issue, but rather the Duke Defendants' private interactions with Plaintiffs regarding the procedure employed in their suspensions, and the Duke Defendants' private communications with Plaintiffs regarding the disclosure of their DukeCard information. Counts 21 and 24 are not about what the Duke Defendants generally

communicated to the press, alumni, applicants, the general student body, etc. about the 13 March 2006 events.

Parties clearly have standing to move for a protective order where subpoenas seek irrelevant information. *See Auto-Park*, 231 F.R.D. at 429; *Streck, Inc. v. Research & Diagnostic Sys., Inc.*, No. 8:06CV458, 2009 WL 1562851, at *3 (D. Neb. June 1, 2009). A party's motion for a protective order as to the information sought by a non-party subpoena is properly granted where the subpoena seeks information that does not pertain to a claim within, or defense to, the complaint. *See Mayes v. City of Oak Park*, Civil Action No. 05-CV-74386-DT, 2007 WL 187941, at *2 (E.D. Mich. Jan. 22, 2007). A protective order is appropriate here because most of the requests contained in the subpoenas not only seek irrelevant information, but also are insusceptible to reasonable modification given the narrow scope of Counts 21 and 24 and the nature of the "public relations" materials sought.

2. The Remaining Requests are Overbroad and Unduly Burdensome.

The remaining requests (which appear in both subpoenas) are so overbroad and unduly burdensome as to require extensive and narrow tailoring to Counts 21 and 24 (and defenses thereto), including the requests for "All Materials" the public relations firms hold "relating to" to these subjects:

- Ryan McFadyen;
- Matthew Wilson;
- Breck Archer;
- The Duke University Men's Lacrosse Team; and
- Any investigation of Ryan McFadyen, Matthew Wilson, Breck Archer.

See Mot. Exs. A & B. For example, the topic "Ryan McFadyen" is too overbroad, especially since a permissible request could be fashioned to address the specific process by which Mr. McFadyen was suspended.

Yet even the two narrowest requests advanced by Plaintiffs are overbroad in light of the recipients of the subpoenas (public relations firms) and the use of the omnibus phrases "All Materials" and "relating to," including:

- The suspension of Ryan McFadyen; and
- The suspension of Matthew Wilson.

See Mot. Exs. A & B.

Each and every request in the subpoenas to the public relations firms suffers from facial over breadth because each seeks "All Materials" "relating to" each topic. The Federal Rules require document requests to "describe with reasonable particularity each item or category of items to be inspected." Fed. R. Civ. P.

34(b)(1)(A); *see also Pulsecard, Inc. v. Discover Card Serv., Inc.*, No. Civ. A. 94-2304-EEO, 1996 WL 397567, at *10 (D. Kan. July 11, 1996) (applying requirements of Rule 34 to Rule 45 subpoena). Use of all-encompassing language and omnibus phrases in subpoenas violates this requirement. *See Pulsecard*, 1996 WL 397567, at *10. Therefore, the use of the phrase "relating to" to preface Plaintiffs' requests invalidates each subpoena request as overbroad, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. *See id.*

"All Materials" held by the public relations firms "relating to" the mere fact of Plaintiffs' suspensions would not be relevant to Count 21. If the firms specifically advised the Duke Defendants as to the process by which to suspend a Plaintiff – i.e., the gravamen of Plaintiffs' complaint at Count 21 -- that might be relevant. While the subpoenas could have been properly drafted to be aimed at discovering admissible documents addressing Counts 21 and 24, that is not what is before the Court. [3]

[3] Additionally, the subpoenas' attempts to discover confidential commercial information are premature in the absence of a general protective order. Rule 26(c)(1)(G) provides that this Court may bar discovery into matters that would require disclosure of confidential commercial information. (Rule 45(c)(3)(B)(i) contains a similar provision regarding quashing a subpoena seeking confidential commercial information.) Rule 26(d) provides that this Court may regulate the sequence and timing of discovery "in the interests of justice." Fed. R. Civ. P. 26(d). Parties requesting confidential information from a non-party to the case, even when a protective order is in place, must demonstrate a strong need for such documents, particularly when they have marginal relevance. *See Litton Indus. v. Chesapeake & Ohio Ry.*, 129 F.R.D. 528, 531 (E.D. Wis. 1990); *Echostar*, 180 F.R.D. at 396. Here, no general protective order has been entered.

Because Plaintiffs' requests are not limited in scope to admissible materials that have some connection to the only two Counts going forward, the granting of a protective order is appropriate. *See, e.g.*, *Food Lion*, 1996 WL 575946, at *2.

D. Seeking Irrelevant Discovery From Third-Parties Harasses the Duke Defendants.

"Discovery under Fed. R. Civ. P. 26(b) is not without limits; the manner and scope of discovery must be tailored to some extent to avoid harassment or being oppressive." *Ocean Atl. Woodland Corp. v. DRH Cambridge Homes, Inc.*, 262 F. Supp. 2d 923, 926-27 (N.D. Ill. 2003); *see Boykin Anchor Co., Inc. v. Wong*, No. 5:10–CV–591–FL, 2011 WL 5599283, at *2 (E.D.N.C. Nov. 17, 2011) ("discovery is not limitless") (citing *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004)). Rule 26(c) provides that upon a showing of good cause, a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). That rule "was adopted as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b)(1). The provision emphasizes the complete control that the court has over the discovery process." 8A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, *Federal Practice and Procedure* § 2036 (3d ed. 2011) (internal

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Accordingly, the Duke Defendants are not adequately protected from the disclosure of confidential information. Some of the documents requested may also be privileged.

reference omitted).

Plaintiffs' subpoenas are an impermissible attempt to harass the Duke Defendants by seeking irrelevant discovery from third parties in violation of this Court's Orders and Rule 26. Courts foreclose discovery when they perceive an improper motive or purpose behind broad discovery. *See Ocean Atl. Woodland Corp.*, 262 F. Supp. 2d at 927 (N.D. Ill. 2003); *Echostar,* 180 F.R.D. at 395-96. Where, as here, "the subpoenas look like nothing more than a fishing expedition, or, more accurately, an exercise in swamp-dredging and muck-raking," entry of an order precluding discovery from third parties is warranted. *See Perry v. Best Lock Corp.*, No. IP 98–C–0936–H/G, 1999 WL 33494858, at *3 (S.D. Ind. Jan. 21, 1999). As shown above, Plaintiffs' subpoenas do not properly seek information relevant to Counts 21 and 24. Thus, the Duke Defendants respectfully request that the Court enter a protective order to protect the Duke Defendants from disclosure of irrelevant information to which Plaintiffs are not entitled.

CONCLUSION

For the reasons and authorities stated above, the Duke Defendants respectfully request that this Court grant the Motion for Protective Order, ordering that Plaintiffs shall withdraw immediately the subpoenas in issue in the jurisdictions in which they have been served.

This the 8th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, I electronically filed the foregoing DUKE DEFENDANTS' BRIEF IN SUPPORT OF 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.

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