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

RYAN McFADYEN, *et al.*,
*Plaintiffs,*

*v.*

DUKE UNIVERSITY, *et al.*

*Defendants.*

1:07 CV 953

**PLAINTIFFS' RESPONSE TO THE DUKE DEFENDANTS' MOTION FOR A PROTECTIVE ORDER REGARDING SUBPOENAS TO TWO MEDIA CONSULTING FIRMS**

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The matter before the Court is the Duke Defendants' Motion and Brief [Doc. Nos. 249-252] for a protective order regarding Plaintiffs' subpoenas to two media consulting firms that Duke retained to design and implement its media strategy in connection with the events alleged in Plaintiffs' Second Amended Complaint [Doc. No. 136]. The Duke Defendants seek the most extraordinary relief available under Rule 26(c) - an order preventing Plaintiffs from discovering the materials sought by Plaintiffs' subpoenas. The Motion should be denied because Defendants fail to meet their "heavy burden" of making "a specific demonstration of facts" sufficient to show that they are entitled to the extraordinary protection they seek. Instead, the Duke Defendants rely solely on bald, conclusory assertions, unadorned by any specific facts,

which this Court does not consider on a motion under Rule 26(c). Indeed, Defendants' Motion is so patently meritless, the Court should summarily deny the motion and permit no further briefing on it.

## RELEVANT FACTS

### A. Duke's Media Strategy

It is already apparent from the limited discovery that the University's strategic intent was to sever Plaintiffs from the University in as visible a manner as possible. Senior members of the media consulting firms themselves wrote extensively about that and media reports from the relevant period also contain admissions to the same effect. Duke's strategy was to alienate, stigmatize, ostracize, and separate the Plaintiffs from the University.

Discovery already shows that Duke employed several means of doing so. Most relevant to this motion with regards to Count 21 is that Duke did so by suspending Plaintiffs through gross violations of the written procedural protections that Duke promises to all of its students. Thus, Duke employed its media strategy to separate Plaintiffs from the University—literally—by suspending them, and then amplified the public perception of their separation by making public statements to a nationwide audience announcing Plaintiffs' suspensions from the University and subjecting Plaintiffs to further public humiliation and obloquy.

Furthermore, with regards to Count 24, discovery has also revealed the University's public relations strategy to make false representations to the public in an attempt to cover up and conceal from Plaintiffs and the public the fact that Plaintiffs' educational records and information sought in the subpoena had already been disclosed illegally by Duke University months before. An example of the University's public relations strategy to emphatically (and falsely) conceal the University's unauthorized and unlawful disclosure of Plaintiffs' educational records, specifically in this case by John Burness, Senior Vice President for Public Affairs and Government Relations, is attached hereto as EXHIBIT 1.

Despite the Duke Defendants' refusal to produce more than 27 documents[1] in all of their initial disclosures and responses to Plaintiffs' First Request for Production of Documents, there is still ample evidence that Duke's media strategy drove its decision-making, including its decisions to deprive Plaintiffs of the procedural protections it promises to all of its students in connection with its disciplinary proceedings. For example:

- Early emails that circled among University administrators regarding Mangum's allegations, attached hereto as EXHIBIT 2, primarily involved public

[1] Among the 27 documents are several duplicates.

relations and communications strategists. For example, one of the first written communications (if not the first) from any Duke administrator regarding Mangum's allegations—Sue Wasiolek's March 17, 2006 e-mail[2]—was circulated to virtually every senior media relations employee of the University, including (1) Duke's Senior Vice President for Public Affairs and Government Relations; (2) Duke's Director of Communications for the Office of Student Affairs and Spokesman for the University; (3) Duke's Senior Communication Strategist; (4) Duke's Associate Vice President for News and Communications; (5) Duke's Assistant Vice President for the Office of Communication Services; (6) Duke's Director of Media Relations; (7) Duke's Senior Public Relations Specialist; and (7) Duke's Sports Information Director.

- In his deposition on December 2, 2011, Dr. Christopher Kennedy, who was Duke University's Associate Athletic Director in 2006 and is its current Deputy Director of Athletics, testified that he was never consulted about the matter; rather the media strategy designed by the University's media consulting firms drove the University's decision-making throughout the relevant period. *See*, *e.g.*, EXHIBIT 3, Tr. of Kennedy Dep. at 39, 98, 101-102, 151-152, EXHIBIT 4 at 2, Exhibit 5 at 3, and Exhibit 6 at 14. For example, regarding President Brodhead's statement "[i]f [the]

[2] None of the Duke Defendants produced Wasiolek's March 17, 2006 e-mail. It is one of the many documents that the Duke Defendants continue to withhold without justification.

students did what is alleged, it is appalling to the worst degree. If they didn't do it, whatever they did was bad enough," Dr. Kennedy explained that "someone without any knowledge of any of the facts, someone on the outside would again draw the conclusion that some kind of crime had been committed and that Brodhead believed they were guilty. And furthermore, I think it was incredibly indiscreet to say whatever they did was bad enough." Kennedy Dep. 98:2-15 (Dec. 2, 2011). Regarding the public statements made by the University's response to Mangum's false allegations, Dr. Kennedy's advice would have been "to shut up, … every time something happened, it seemed as if (the University) needed to make a statement." Kennedy Dep. 152:2-5.

Richard Edelman himself published his own position, and presumably that of his Firm, to a world-wide audience, including the following statements:

> [T]here are times when the court of public opinion needs heavier weighting than those applied in the legal courtroom. This could be one of those cases. The best type of statement in the days just following the event would have established … a determination to understand the root causes of the problem and a restatement of [Brodhead's] commitment to the rights of the accuser, not just the accused. ***There had to be a separation of the interests of the accused and those of the university*** … .
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> Attached hereto as EXHIBIT 7.

### B. Duke's Media Consultants

The targets of the two subpoenas at issue are the two media consulting firms, Burson-Marsteller and Edelman, Duke employed to provide media strategy services in connection with its public response to the false allegations that give rise to this case.[3]

### C. Plaintiffs' Subpoenas to Duke's Media Consultants

The Duke Defendants mislead the Court when they assert that Plaintiffs' subpoenas seek "'all materials' relating to the media consultants' work with Duke University.'" Defs.' Mot. ¶ 3 at 2. To the contrary, Plaintiffs' subpoenas are narrowly drawn. Plaintiffs' subpoena to Burson-Marstellar to request documents in either the corporation's possession, custody, or control relating to the Plaintiffs, their suspensions, their teammates, the Duke University Men's Lacrosse Team, any investigation of Plaintiffs, their teammates, or Crystal Mangum's false accusations (*e.g.*, that Plaintiffs were principals or accomplices in a brutal, thirty-minute, racially motivated gang rape), the management of the University's public response (specifically advice and strategic assistance provided by Burson-Marsteller to the University regarding the University's response to press inquiries, alumni inquiries, the University's crisis management, and the University's issued public statements), the

[3] Duke Defendants failed to identify either consultant in its Initial Disclosures, but their employment during the relevant time was leaked to the public, often by the consultants themselves. otherwise plaintiffs would not have discovered either relationship.

University's public response on April 5, 2006—the day Plaintiff Ryan McFadyen was unilaterally suspended in violation of every procedural protection the University promises to all students before taking such action. The Complaint itself contains video of President Brodhead publicly declaring that McFadyen was suspended.

**D. The Duke Defendants' Own, Expansive Discovery Requests**

Highly relevant to this Motion are the Duke Defendants' own expansive discovery requests. For example, one such request required Plaintiffs to produce *all documents* in their possession custody or control concerning Mangum's allegations. EXHIBIT 8 at 8 (Duke Defendants' First Request for Production of Documents). The Duke Defendants' also compelled Plaintiffs to produce *all videotapes or photographs* regarding *the subject matter of this litigation. Id.* Plaintiffs have complied in good faith with Duke's unfettered requests. In all, Plaintiffs have produced thousands of pages of documents in response to the Duke Defendants' requests, and a virtual a library of audio and video recordings of the Duke Defendants engaging in the conduct alleged in the Second Amended Complaint. For their part, the Duke Defendants have delayed, obstructed, and produced next to nothing: collectively the Duke Defendants have produced 27 documents to date (including several duplicates). Through this Motion, the Duke Defendants now seek to prevent Plaintiffs from obtaining documents from *non-parties* that may some of the materials that the Duke Defendants themselves should have produced to Plaintiffs long ago.

## THE STANDARD OF REVIEW

Rule 45

Subpoenas are governed by Fed. R. Civ. P. Rule 45. Rule 45(c)(3) provides the mechanism "to protect a person subject to or affected by a subpoena" to quash or modify the subpoena. Fed. R. Civ. P. R. 45. The Duke Defendants' Motion is not made pursuant to Rule 45, the time for doing so expired long ago, and the venue for a Motion is in the court from which the subpoenas issued (*i.e.*, the United States District Court for the Southern District of New York and the Northern District of Illinois). Therefore, the Duke Defendants have abandoned any claim for protection under Rule 45, and proceed solely under under Rule 26(c).

Rule 26

Fed. R. Civ. P. Rule 26(c) provides that "[a] party or any person from whom discovery is sought may move for a protective order … to protect the party or person from annoyance, embarrassment, oppression or undue burden or expense, …" Fed. R. Civl P. R. 26(c)(1). The burden is on the moving party to show good cause for the protective order. *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001). To carry its burden, the moving party must make:

> a specific request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one.

*Id.* (quoting *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991) (internal quotations omitted)). Thus, conclusory assertions and speculative claims will not do; the movant must come forward with specific facts to show the movant is entitled to the specific protection requested under Rule 26. *Id.*

Further, where, as here, the movant seeks a protective order "forbidding the disclosure or discovery" under Rule 26(c)(1)(A), the movant must carry "a heavy burden because protective orders which totally prohibit [discovery from a particular source] should be rarely granted absent extraordinary circumstances." *Static Control*, 201 F.R.D. at 434 (quoting *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84 (M.D.N.C. 1987)).[4] Therefore, to obtain the protection they seek, the Duke Defendants must carry their "heavy burden" by making "a specific demonstration of facts" sufficient to justify their request for the most extreme protection available under Rule 26. And they must do so without relying on "conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one." *Static Control*, 431 F.R.D. at 434.

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[4] This is consistent with the philosophy of liberal discovery animating the Federal Rules, which authorize parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense... ." Fed R. Civ. P. R. 26(b)(1). Further, the Rules authorize district courts to order discovery of "any matter" that is "relevant to the subject matter involved in the action," which includes anything that "**appears reasonably calculated to lead to the discovery of admissible** e**vidence**." *Id.* (emphasis supplied).

## ARGUMENT

### I. DEFENDANTS SEEK THE MOST EXTREME PROTECTIVE ORDER AUTHORIZED BY RULE 26(c)

The Duke Defendants seek a protective order totally forbidding the discovery of the information and documents described in the two subpoenas Plaintiffs served on the two consulting firms that Duke retained to the global media strategy that the Duke Defendants employed in connection with the false allegations that Plaintiffs participated in a brutal, racially motivated gang-rape in March of 2006. Defs.' Mot. at ¶ 14. This Court, the most extraordinary relief available under Rule 26(c) and, as this Court has explained, such relief is rarely granted and only where the movant carries the "heavy burden" of proving that the discovery sought is legally protected nature and that there are no means of protecting it less burdensome on a party's liberal right of discovery. *Static Control*, 201 F.R.D. at 431.[5]

### II. DUKE DEFENDANTS FAIL TO CARRY THE "HEAVY BURDEN" THIS COURT IMPOSES BEFORE GRANTING THE EXTRAORDINARY RELIEF SOUGHT HERE

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[5] Thus, in *Static Control*, this Court refused to totally prohibit discovery from a defendant's litigation counsel in the case. Instead, the Court ordered that the noticed deposition of defendants' litigation counsel not be conducted, but ordered the defendant's litigation counsel "at a minimum" to personally answer the plaintiff's interrogatories. *Id.* at 437; *see also id.* at 435-436 (explaining that the deposition of defendant's litigation counsel should not be conducted because plaintiff already possessed a complete recording of the conversation at issue.)

### A. The Duke Defendants' Conclusory Assertions Do Not Constitute the "Specific Demonstration of Facts" Required to Support the Extraordinary Protective Order They Seek.

The Duke Defendants' motion fails at the threshold because they fail to support the motion with a "specific demonstration of facts" that this Court requires. Rather, the Duke Defendants rely solely on bald, conclusory assertions devoid of factual detail, which this Court has long refused to consider on a motion under Rule 26(c). *See*, *e.g.*, *Static Control*, 201 F.R.D. at 434 (holding that protection from discovery under Rule 26(c) requires the movant, at step one, to "make a specific demonstration of facts" supporting the relief requested, and explaining that this Court does not consider "conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one....").

And even if this Court were to consider such bald, conclusory assertions on a motion made under Rule 26(c), the Duke Defendants' motion would still fail because the conclusory assertions offered to support their motion are not even their own: they are the conclusory assertions of their lawyers. The Duke Defendants filed no affidavits to support their motion, nor did they even even verify the motion. Thus, the Duke Defendants motion fails at the threshold requirement that they make a showing of specific facts that establish the need for the extraordinary protection they seek. The Motion must be denied based upon that failure alone.

### B. The Duke Defendants Make No "Specific Demonstration of Facts" Showing That the Subpoenas Do Not "Appear Reasonably Calculated to Lead to the Discovery of Admissible Evidence"

Next, the Duke Defendants assert (*ad nauseum)* that Plaintiffs' subpoenas seek information that is "not relevant" to the counts on which discovery is proceeding, and that the topics enumerated in Plaintiffs subpoenas "have nothing to do with Counts 21 and 24." Defs.' Br. at 9. The Duke Defendants offer no specific facts to support that naked assertion, and their contention fails on that basis alone. See discussion, *supra*, at § II(A).

And, while the topics enumerated in Plaintiffs' subpoenas are highly the claims that are presently going forward, they need not be "highly relevant" or even "relevant" to Plaintiffs' claims. Rather, the subpoenas need only "appear reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. Rule 26(b)(1). As to this—the correct—standard, the Duke Defendants offer their lawyers' bald assertions and hyperbole, but nothing at all in the nature of a "specific factual demonstration" sufficient to meet the "heavy burden" this Court imposes to justify the extraordinary protection they seek.[6]

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[6] The Duke Defendants also assert that the media consulting firms are "not aware" of the court's order staying discovery as to claims involving the City Defendants. Br. at 6. That claim is impugned by an email from counsel for Burson-Marstellar, Jesse Schneider, who wrote, "I am also told that the Court has limited the discovery significantly and that this subpoena goes well beyond." Exhibit 9 (E-mail from Jesse Schneider to Plaintiffs' counsel, dated December 7, 2011). Of course,

### C. The Duke Defendants Make No "Specific Demonstration of Facts" Showing the Subpoenas to be Overbroad or Unduly Burdensome

Next, Duke asserts that the subpoenas are overbroad and unduly burdensome. Here, again, the Duke Defendants offer nothing more than their lawyers' bald, conclusory assertions that the subpoenas are "overbroad" and "unduly burdensome," Defs.' Br. at 10-12, but they offer nothing in the nature of a "specific factual demonstration" that this Court requires on a motion under Rule 26(c). Their contention fails on that basis alone. See discussion, *supra*, at Argument §II(A). But that is not all that is wrong with Defendant's argument. The Duke Defendants also have no standing to assert a claim of burden or overbreadth because Plaintiffs' subpoenas are not directed to them. Further, both claims are belied by correspondence from Burson-Marstellar's attorney, from which it is clear that Burson-Marstellar did not preserve materials in their possession relating to Plaintiffs or the matters identified in Plaintiffs' subpoena, and, as a result, Burson-Marstellar may not have any of the materials it once possessed to produce in response to Plaintiffs' subpoena. *See* Exhibit 9 (E-mail from Jesse Schneider, attorney for Burson-Marstellar, to Robert Ekstrand, Plaintiffs' counsel, dated December 7, 2011.) ("We still do not know whether we have any documents [responsive to Plaintiffs' subpoena]. … It

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neither Plaintiffs nor their counsel expressed the opinion that Plaintiffs' subpoenas exceed the scope of discovery.

requires going back and searching the files of certain employees no longer with the company and others who may not have any relevant documents."). Therefore, given that the Duke Defendants apparently took no steps to ensure their consultants' retention of evidence that is relevant to this case, and given that the subpoenas are not directed to the Duke Defendants, their claim of "overbreadth" and "burden" has no merit.

### D. The Duke Defendants Make No "Specific Demonstration of Facts" Showing that the Subpoenas Seek "Confidential Commercial Information"

Next, in a footnote, Duke drops the suggestion that the subpoenas seek materials that are or contain "confidential commercial information." Defs.' Br. at 12, n.3. Here, again, the Duke Defendants do not even attempt to make "a specific factual demonstration" showing that materials possessed by Duke's media consulting firms constitutes "confidential commercial information." The Duke Defendants' failures do not end there in connection with their purported "confidential commercial information." The Duke Defendants do not submit any form of log or listing of the specific documents they claim to constitute or contain "confidential commercial information." Fed. R. Civ. P. Rule 26(b)(5), added in 1993, provides the procedure for asserting claims of protection for communications or materials that would otherwise be discoverable. *See id.* The Rule requires the party asserting the privilege or protection to make the claim expressly, and to describe the nature of the information

not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. *Id.* The Duke Defendants have provided nothing of the sort, either to Plaintiffs or to the Court.

The Duke Defendants also fail to identify any authority supporting the proposition that communications and materials prepared by a media consulting firm are subject to legal protection. Even if such authority existed, any legal protections afforded to such materials were waived long ago by the Duke Defendants' own (and their consultants') public commentary about the media strategy Duke devised in collaboration with these two consulting firms.

In addition, any valid legal protections that may have existed in connection with the subpoenaed documents have been waived by the Duke Defendants failure to provide any of the information required by Fed. R. Civ. P. Rule 26(b)(5). The Duke Defendants' have not produced any log or listing of documents that contain any "confidential commercial information" whatsoever. That, alone, is enough to waive whatever protection they claim. But that is not all. In addition, they have not produced in connection with each document they purport to contain confidential commercial information (1) a brief description or summary of the content of the document or communication; (2) the date the document was prepared, (3) the name

of the person(s) who prepared the document; (4) the person(s) to whom the document was directed, or for whom it was prepared; (5) the purpose for preparing the document; (6) the specific privilege or protection they claim in connection with each document; or (7) an explanation of how the document satisfies the asserted legal requirements of the claimed protection. *See* Fed. R. Civ. P. R. 26(b)(5). Courts not only decline to issue protective orders in the face of such failures, but also deem the failures to be a waiver of the protection sought. *See*, *e.g.*, *Aurora Loan Services*, *Inc. v. Posner & Assocs.*, *P.C.*, 499 F. Supp. 2d 475, 479 (S.D.N.Y. 2007) (party waived privilege for documents identified in privilege log because log failed to identify which privilege was being asserted for particular documents and often failed to identify parties to each communication). Here, the Duke Defendants do not simply fail to identify parties to each communication or identify which privilege is being asserted as to each document—they have failed to produce a log itemizing the purportedly confidential documents at step one, much less the detail required to protect the purported "confidential commercial information" they contain. In short, the Duke Defendants have failed to do what the Rules require in order avoid waiver of any legal protections that may be afforded to the subpoenaed documents at step one. *See generally* Fed. R. Civ. P. Rule 26(b)(5).

The Duke Defendants' failure to take *any* of the actions necessary to preserve whatever legal protections might have applied to the subpoenaed materials and their

conspicuous failure to make the required "specific demonstration of facts" to justify the extraordinary protection they seek suggests the absence of a proper purpose in interposing this Motion. The only plausible purpose of such a motion is its most obvious effect: to obstruct and delay Plaintiffs' discovery of evidence of the Duke Defendants' conduct that, as the Duke Defendants themselves contend, will humiliate them. But the Rules are not so trivial as to authorize protective orders prohibiting discovery on grounds that a party, in the absence of protection, will be humiliated by the revelation of their own prior conduct. *See* Fed. R. Civ. P. R. 26(c) (enumerating grounds for protective orders).

### E. The Duke Defendants Make No "Specific Demonstration of Facts" Showing the Need for a "General Protective Order"

Next, having failed to identify any specific content in the subpoenaed material that justifies a protective order, the Duke Defendants assert that Plaintiffs' discovery of the materials sought by their subpoenas is "premature in the absence of a general protective order."[7] Mot. at para 9. To support this claim, the Duke Defendants rely on generalities that belie their own claims. For example, instead of producing an itemization of protected or privileged material, the Duke Defendants merely assert

[7] This is the same meritless claim the Duke Defendants have invoked to justify their refusal to make the initial disclosures required by Rule 26 or produce more than 27 pages of documents in response to Plaintiffs First Request for Production of Documents. Plaintiffs address this problem separately in Plaintiffs' Motion to Compel.

that "***Some of the documents*** requested ***may*** also be privileged." Br. at 13, n.3 (emphasis supplied). Here, the Duke Defendants reveal that they apparently have no idea what they are asking this Court to protect. Certainly, Rule 26(c) does not authorize a baseless prior restraint on every document possessed by a corporate entity's media consulting firm, and the Duke Defendants offer no authority to the contrary. In any event, the Rules provide ample remedies for disclosures of truly confidential material in response to subpoenas. *See*, *e.g.,* Fed. R. Civ. P. Rule 45(d)(2)(B) (providing protections where "information produced in response to a subpoena is subject to a claim of privilege or of protection...."). Thus, the Duke Defendants' request for a "general protective order" should be denied.

### F. The Duke Defendants Do Not Cure Their Total Failure to Make the "Specific Demonstration of Facts" this Court Requires by Casting Aspersions at Plaintiffs

Finally, the last refuge of the Duke Defendants is to cast aspersions at Plaintiffs. *See generally* Defs.' Br. at 13-14. They wind up their briefing by asserting that Plaintiffs' subpoenas are animated by improper purposes, including "fishing," "muck-raking," and "swamp dredging." Defs.' Br. at 14. Again, they offer nothing in the way of facts to back up their histrionics. It goes without saying that the Duke Defendants do not cure their total failure to carry their "heavy burden" through such tactics.

## CONCLUSION

The Duke Defendants have not carried their "heavy burden" of making a "specific demonstration of facts in support of the request." Rather, they rely on the "conclusory" and "speculative statements" of their lawyers to support their claim of "need for a protective order and the harm which would be suffered without one." Because this Court rejects such speculative and conclusory assertions as a basis for imposition of a protective order (even when made by the parties themselves), the Motion fails at the threshold, and must be denied.

Dated: December 29, 2011

Respectfully submitted by:
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