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

Plaintiffs' subpoenas to non-parties Burson-Marsteller and Edelman seek information that is not relevant to the two narrow claims on which this Court has permitted discovery. For that reason, there is good cause for the entry of the protective order requested.

In their opposition to the Duke Defendants' motion, Plaintiffs never attempt to explain the relevance of their subpoenas to the pending claims as limited by the Court. Instead, they misstate relevant legal standards and describe claims very different than those the Court has allowed to go forward.

Plaintiffs also deflect attention from their inability to justify the subpoenas under applicable standards. They incorrectly characterize the relief the Duke Defendants seek as "extreme" and "extraordinary." They also cast aspersions about the Duke Defendants' own discovery history that are irrelevant to the motion

before the Court and factually incorrect. These arguments are dispatched below.

ARGUMENT

I. DISCOVERY MUST BE RELEVANT TO CLAIMS OR DEFENSES.

Rule 26(b)(1) of the Federal Rules of Civil Procedure is clear. "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1).

Plaintiffs concede that Rule 26(b)(1) controls the scope of discovery. Pls.' Resp. to Mot. Prot. Order 9, n.4, ECF No. 254 ("Opposition" or "Opp."). By twice truncating quotes from that rule, however, Plaintiffs twist the applicable standards.

First, Plaintiffs correctly note that a court *may* order discovery of any matter "relevant to the subject matter involved in the action," Opp. 9, n.4, but omit a key preface to that part of the Rule. That preface makes clear that such discovery is permitted only "[f]or good cause." Fed. R. Civ. P. 26(b)(1). "In order to secure discovery as to the 'subject matter' of an action, a party now must obtain court authorization by showing 'good cause.'" *Volumetrics Med. Imaging, LLC v. Toshiba Am. Med. Sys., Inc.*, No. 1:05CV955, 2011 WL 2470460, at *2, n.2 (M.D.N.C. June 20, 2011). No such authorization has been sought or granted here.

This requirement of obtaining a court order for "good cause" was added to Rule 26(b)(1), effective December 1, 2000. Prior to that time, party-controlled

discovery was allowed into "any matter, not privileged, which is relevant to the subject matter in the pending action." Fed. R. Civ. P. 26(b)(1) (1993). The rule was amended to foreclose "parties [from seeking] to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the 'subject matter' involved in the action." Fed. R. Civ. P. 26 advisory committee's notes to 2000 amendment. This is precisely what Plaintiffs seek to do with the subpoenas to Burson-Marsteller and Edelman.

Second, Plaintiffs claim that the information sought *need not even be relevant*: "[W]hile the topics enumerated in Plaintiffs' subpoena are highly [sic] 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.'" Opp. 12 (quoting Fed. R. Civ. P. 26(b)(1)). Again, Plaintiffs' quotation is incomplete.

The complete sentence from the rule makes clear that, while information need not be *admissible* to be subject to discovery, *relevancy* is required: "*Relevant information* need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1) (emphasis added). Rule 26, in fact, makes relevancy a threshold.

II. THE SUBPOENAS SEEK INFORMATION THAT IS NOT RELEVANT.

The claims on which discovery is allowed are narrow. Those claims concern (1) "the allegation that Duke imposed disciplinary measures against Plaintiffs, specifically suspension, without providing them the process that was promised"; and (2) alleged "fraudulent misrepresentations in letters to Plaintiffs regarding Plaintiffs' Duke Card information." Order 8-9, June 9, 2011, ECF No. 218.

There is no obvious reason why public relations firms hired by Duke would have information relevant to these claims. Plaintiffs offer no such reason in their Opposition.

A. Because Counts 21 and 24 Do Not Have Any "Public" Aspect, the Documents Sought by the Subpoenas Are Not Relevant.

Plaintiffs attempt to justify the subpoenas for public relations documents by recasting their surviving claims as having some "public" aspect. Counts 21 and 24 – as Plaintiffs pleaded them and as this Court has permitted them to proceed – have no such aspect. They concern essentially private transactions between the Duke Defendants and Plaintiffs; namely, disciplinary actions and letters. Although Plaintiffs originally asserted claims that do have "public" aspects (like Count 5 – False Public Statements), only Counts 21 and 24 are proper subjects of discovery.

Plaintiffs hypothesize that Duke's "global media strategy" is relevant to Count 21, claiming that "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." Opp. 2. Count 21, however, has nothing to do with "public perception," statements to a "nationwide audience," or "public humiliation or obloquy." Plaintiffs never explain how Duke's alleged "global media strategy" could be relevant to determine the only aspect of Count 21 going forward: whether Duke suspended Plaintiffs without process. Order 8, June 9, 2011, ECF No. 218.

Similarly, Count 24 is not about "false representations to the public" as Plaintiffs imply. Opp 3. Count 24 concerns the contents of what Plaintiffs call the "Subpoena Letter" – a letter allegedly delivered to each of the Plaintiffs concerning their Duke Card information, but not published to the public. *See* Pls.' 2nd Am. Compl. ¶ 1250. ECF No. 136. Count 24 alleges "misrepresentations" to the Plaintiffs, not to the public. *See id.* ¶¶ 1251-1252, 1254-1256. It is only now, in opposing this Motion, that Plaintiffs allege "the public" as an audience to these communications. Opp. 2-3. Plaintiffs have not demonstrated how any alleged "global media strategy" is relevant to evaluating whether correspondence between the Duke Defendants and Plaintiffs contained statements constituting "fraud."

B. Plaintiffs Do Not Address the Overbreadth of the Subpoenas.

Even if Burson-Marsteller or Edelman had information relevant to Counts 21 or 24, the broad swath cut by the subpoenas is not tailored to those claims. The categories of evidence sought would not tend to prove or disprove that the Duke Defendants committed the alleged violations of disciplinary rules or fraud.

Plaintiffs offer no analysis of their actual requests. Their conclusory defense of the subpoenas as "narrowly drawn," however, speaks for itself:

> Plaintiffs' subpoena to Burson-Marstellar [sic] to request [sic] documents in either the corporation's possession, custody, or control relating to the Plaintiffs, their suspensions, their teammates, the Duke University Mens' Lacrosse Team, any investigation of Plaintiffs, their teammates, or Crystal Mangum's false accusations (*e.g.*, that Plaintiffs were principals of 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 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.

Opp. 6-7. This statement paraphrasing the scope of the subpoenas confirms that the bulk of the requests have nothing to do with Counts 21 or 24.

III. THE RELIEF SOUGHT IS NOT "EXTRAORDINARY" OR "EXTREME," SO THE BURDEN ON THE DUKE DEFENDANTS IS NOT "HEAVY."

Plaintiffs describe the relief that the Duke Defendants seek as "extreme" and "extraordinary." Opp. 1, 9, 10, 11, 12. The Duke Defendants, however, do not seek to prohibit *all* discovery from or concerning Burson-Marsteller or Edelman, as Plaintiffs claim. Opp. 1, 9, 10. The Duke Defendants request that two specific subpoenas be ordered withdrawn. If any documents regarding Duke's media relations *are* relevant to Plaintiffs' remaining claims, Plaintiffs can seek them through narrowly tailored requests to the Duke Defendants and/or appropriate third parties. This is neither extreme nor extraordinary in any sense.

The Duke Defendants do not bear a "heavy burden," as Plaintiffs contend. Opp. 1, 10, 18. They need only show "good cause" for the relief they seek. Fed. R. Civ. P. 26(c). To do that, the Duke Defendants must "present[] specific facts in support of the request as opposed to conclusory or speculative statements." *MLC Auto., LLC v. Town of S. Pines*, No. 1:05cv1078, 2007 WL 128945, at 5 (M.D.N.C. Jan. 11, 2007). The Duke Defendants have done that here.

The specific requests in the subpoena *are* the facts that support the Duke Defendants' motion. The subpoenas seek irrelevant information on their face, including documents that concern "Crystal Mangum's accusations," "public relations advice," "the firing of former Head Coach Mike Pressler," "President

Brodhead's television interviews," the establishment of "a committee to examine the culture of the lacrosse team," and the "decision to cancel the remainder of the Duke University Men's Lacrosse 2006 Season." Duke Defs.' Mot. Prot. Order. Ex. A, ECF No. 249. None of these documents would tend to prove or disprove the only issues on which discovery is allowed; to wit, whether the Duke Defendants suspended Plaintiffs without process or defrauded Plaintiffs in the Subpoena Letters. *See* Order 8-9, June 9, 2011, ECF No. 218. As such, the subpoenas violate Rule 26 and two Court Orders. *See id.*; Order, Sept. 9, 2011, ECF No. 244.

Where, as here, a court can determine irrelevance from the face of the requests, the burden shifts to the party seeking information to show relevance. *See, e.g.*, *Dean v. Anderson*, No. 01–2599–JAR, 2002 WL 1377729, at *2 (D. Kan. June 6, 2002) ("The Court determines that the subpoenas duces tecum *on their face* do not appear relevant. As such, . . . the party seeking the information [has] the burden to show the relevancy of these subpoenas.") (emphasis added). As discussed above, it is Plaintiffs who have not carried their burden.

IV. THE DUKE DEFENDANTS' DISCOVERY HISTORY IS MISSTATED IN THE OPPOSITION AND IRRELEVANT TO THIS MOTION.

Plaintiffs also remark on the size of the Duke Defendants' production, *see* Opp. 3, 7, and complain that the Duke Defendants should have produced the materials requested from Burson-Masteller and Edelman "long ago." Opp. at 7.

With these remarks, Plaintiffs create the impression that they requested the so-called "global media strategy" documents from the Duke Defendants. They have not. *See* Pls.' 1st & 2nd Reqs. for Produc. of Docs. (attached as Exhibits A and B).

Had Plaintiffs done so, the Duke Defendants would have raised the same relevance concerns they raise here and had them considered by this Court. Instead, Plaintiffs elected to first seek discovery from non-parties in other jurisdictions. *Cf. Med. Components, Inc. v. Classic Med., Inc.*, 210 F.R.D. 175, 180 n.9 (M.D.N.C. 2002) (explaining special considerations given to discovery aimed at non-parties).

In any event, each party's discovery obligations are independent. *See, e.g.*, *Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 242, n.23 (M.D.N.C. 2010). Accordingly, Plaintiffs' remarks on the Duke Defendants' production and discovery requests, *see* Opp. 3, 7, have no bearing on the motion before the Court.

V. THE OVERBROAD SUBPOENAS LIKELY SEEK CONFIDENTIAL AND/OR PRIVILEGED INFORMATION.

Plaintiffs devote four pages, Opp. 14-18, to contesting that the subpoenas may seek confidential or privileged materials. *See* Duke Defs.' Br. Supp. Mot. Prot. Order 12, n.3, ECF No. 250. Plaintiffs' arguments are inapposite.

Plaintiffs are critical of the Duke Defendants for not knowing exactly what documents Burson-Marsteller and/or Edelman each has in its possession. Opp.

18.[1] They contend that the Duke Defendants should have made the showings set forth in Rule 26(b)(5) – a rule that addresses the scenario in which a party withholds otherwise discoverable information claiming privilege.

That scenario, however, is not in play here, and the Rule 26(b)(5) requirements are inapposite. Moreover, it would be nonsensical to put the onus on the Duke Defendants to create a "log or listing," Opp. 15, of a third-party's documents – especially before those documents are even identified or known.

Plaintiffs also dispute the need for a "general protective order" to enable discovery of confidential information going forward, referring to the Duke Defendants' efforts to reach agreement on such measures. Opp. 17-18. While the Duke Defendants do hope to establish such measures soon, Plaintiffs' arguments are misplaced. This motion seeks the withdrawal of particular subpoenas.

The Duke Defendants raised the prospect that documents subject to the subpoenas might be confidential or privileged as a point of consideration for the Court. It bears on the potential risks and harm to the Duke Defendants of the

[1] Plaintiffs' conclusory statements insinuate, but do not demonstrate, that the Duke Defendants possessed either the legal authority or the practical ability to ensure the preservation of documents prepared by the public relations firms. Opp. 14. The law imposes no such requirement. *See Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 515-16 (D. Md. 2009) (defendant had no obligation to preserve any documents prepared by two third-party consultants).

unfettered disclosure of irrelevant information that Plaintiffs seek through subpoenas. It is not, however, the thrust of the Duke Defendants' argument.

CONCLUSION

The Duke Defendants respectfully request that the Court grant the Motion for Protective Order and order that Plaintiffs withdraw immediately the subpoenas in issue in the jurisdictions in which they have been served.

This the 17th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012, I electronically filed the foregoing DUKE DEFENDANTS' REPLY BRIEF IN FURTHER 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 17th day of January, 2012.

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