IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANE DOE NO. 1, JANE DOE NO. 2, AND JANE DOE NO. 3, PLAINTIFFS, v. TEXAS CHRISTIAN UNIVERSITY, DR. DIANE SNOW, DR. ANDREW SCHOOLMASTER, DR. ROB GARNETT, DR. DARRON TURNER, RUSSELL MACK, J.D., LEIGH HOLLAND and AARON CHIMBEL, DEFENDANTS.	§ § § § § § § § § § § § § § §	CIVIL ACTION NO. 3:20-cv-00106-M

DEFENDANTS' REPLY BRIEF TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFFS' THIRD AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants file their Reply Brief to Plaintiffs' Response to Defendants' Motion to Strike and Brief in Support (Plaintiffs' "Response"). [Doc. 55] The allegations presented by Plaintiffs in their Third Amended Complaint ("complaint") [Doc. 44] that have been challenged by Defendants in their Motion to Strike Portions of Plaintiffs' Third Amended Complaint and Brief ("Motion to Strike") [Doc. 51] have no bearing or relevance in the context of the present controversy before the Court, and will unfairly prejudice all of the Defendants if not stricken pursuant to Federal Rule of Civil Procedure 12(f).

Overview

1. Plaintiffs' Response to Defendants' Motion to Strike is to allege *more* immaterial and impertinent allegations that have no relationship to the claims of the Doe plaintiffs: [Doc. 55, pp. 6-7] (referencing recent news articles concerning TCU's head

football coach and a fall 2020 freshman admitted to TCU who used inappropriate language several years earlier that was recorded in a video and recently circulated on social media). Plaintiffs' Response fails to refute or undermine the validity of Defendants' contentions that the paragraphs at issue in the complaint are irrelevant, immaterial, and otherwise have no relationship to the causes of action they have asserted against Defendants in this lawsuit. Plaintiffs included the historical allegations for dramatic effect and to persuade the trier of fact that the history of TCU gives credence to Plaintiffs' discrimination claims. The allegations clearly lack any materiality to or bearing on the facts and issues relevant to the Doe plaintiffs' specific instances of which they complain. They do not relate to any act or omission of Defendants or any cognizable injury claimed by Plaintiffs. Defendants accordingly renew their request that the Court strike portions of paragraphs 1 and 2 and all of paragraphs 18 through 62 of the complaint.

The challenged allegations emphasize irrelevant and immaterial events that are unrelated to Plaintiffs' claims and do not establish the requisite materiality

2. The offending allegations have no connection to any of the experiences of the Plaintiffs, or any of their causes of actions. Matters that are "redundant, immaterial, impertinent, or scandalous" may be properly stricken from a complaint where they "possess no possible relation to the controversy." *Gilchrist v. Schlumberger Tech. Corp.*, 321 F.R.D. 300, 301–02 (W.D. Tex. 2017). Plaintiffs should not be allowed to broaden this case outside the realm of the causes of action asserted against the Defendants.

3. Federal Rule of Civil Procedure 12 serves two important functions: (1) it is the "clear mechanism for a court to save time and expense by eliminating certain items from the pleadings when those items clearly lack merit or are otherwise unavailing"; and (2) "it conveys clear authority for the court to get rid of irrelevant allegations, particularly

when they appear designed to be inflammatory or to gratuitously embarrass the other party." *Gensler & Mulligan*, Rules and Commentary Rule 12, 1 Federal Rules of Civil Procedure, Westlaw, February 2020 Update. Defendants maintain that the challenged portions of Plaintiffs' complaint—facially—are irrelevant, made against the character of TCU long before the relevant time period, and are clearly designed to be inflammatory.

4. Plaintiffs have brought a broad assortment of claims against the Defendants in this lawsuit, including that TCU violated Title VI of the Civil Rights Act of 1964 ("Title VI"), which prohibits discrimination based on "race, color, or national origin . . . under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d. However, Plaintiffs have limited standing to bring a private cause of action under Title VI. In *Alexander v. Sandoval*, the Supreme Court recognized that (1) private individuals may sue to enforce § 601 of Title VI and (2) that § 601 prohibits only instances of intentional discrimination. 532 U.S. 275, 280-81 (2001). As the challenged portions of Plaintiffs' complaint do not relate to Plaintiffs' individualized causes of action, which in regard to Title VI, are limited to proving specific instances of intentional discrimination, they are immaterial and should be stricken. Otherwise, Plaintiffs' complaint is not in compliance with Federal Rule of Civil Procedure 8, which mandates that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief, and that "each allegation must be simple, concise and direct." *M Neustrom*, 6:15:CV-02524, 2018 WL 1310100, at * 2 (W.D. La. 2018) (citing FED. R. CIV. P. 8). In *M v. Neustrom*, the court agreed that the claims alleged in the plaintiff's amended complaint were in violation of Rule 8, which is intended "to prevent unnecessary prolixity in a pleading which places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." *Id*. (internal citations

omitted). The *Neustrom* court accordingly ordered the plaintiff to file a fourth amended complaint that consisted of a total of 35 pages or less, in compliance with Rule 8, and eliminating those lengthy allegations related to historical information. *Id*.

5. If a complaint is so "interwoven with the immaterial, the remote, and the redundant that the disengagement of any relevant or material areas of appropriate allegation is virtually impossible [and] [p]leading to such assertions should not be imposed upon defendants…." a Rule 12(f) motion to strike should be granted. *Int'l Commodities Corp. v. Int'l. Ore & Fertilizer Corp.*, 30 F.R.D. 58, 60 (S.D.N.Y 1961) (granting motion to strike when background of alleged conspiracy was immaterial and would be determined by admissibility of the evidence, which would be considered at trial). When a plaintiff claims the allegations in the complaint provide "background", a motion to strike may still be granted. *Paul M. Harrod Co. v. A.B. Dick Co.*, 194 F Supp. 502, 504 (N.D. Ohio 1961) (district court found allegations claimed to be "background" were not material to the causes of action in the complaint). The lengthy historical recitations in the complaint are completely remote from specific instances of alleged intentional discrimination claimed by Plaintiffs; therefore, they should be stricken from the complaint.

Plaintiffs cite no authority supporting their proposition that historical events are material or relevant to Plaintiffs' claims

6. Plaintiffs state that the Court should look to *Aetna Inc. v. Insys Therapeutics, Inc.*, in determining whether "background" information should be stricken from their complaint. 324 F. Supp. 3d 541, 560 (E.D. Pa. 2018). Notably, in *Aetna*, the challenged portions of the complaint did not involve historical information, but rather referred to the current national opioid epidemic and ongoing parallel litigation and settlements made by the same defendant. *Id*. The *Aetna* case is not comparable to Plaintiffs' complaint which

seeks to link Plaintiffs' race discrimination claims arising out of events in 2018 with the allegation that TCU was founded in 1873 by ex-confederate soldiers. Plaintiffs offer no compelling authority to support the proposition that these historical allegations are relevant—much less material—to the actual causes of action that Plaintiffs assert against the Defendants in this case. Plaintiffs contend that "the allegations in Plaintiffs' Complaint provide the context in which the discriminatory conduct they endured occurred." [Doc. 55, p. 11]. But it is disingenuous to argue that events taking place decades before Plaintiffs attended TCU is material to allegations that they suffered intentional discrimination at the hands of any of the Defendants within the last few years.

7. Courts have found it is proper to strike portions of allegations in complaints where the complaint unnecessarily details unrelated historical events. *See Healing v. Jones*, 174 F. Supp. 211 (D. Ariz. 1959) (finding the counterclaim contained a more extensive reference to events prior to 1882 than is necessary); *M v. Neustrom*, 2018 WL 1310100, at *2 (ordering the plaintiff to eliminate the lengthy allegations related to historical information from its complaint); *Dishner v. Universal Health Services*, Inc., 3:17-CV-3324-D, 2018 WL 1617844, at *1 (N.D. Tex. 2018) (striking the background fact allegations as they were not relevant to any specific element of the premises liability or negligence claim that the Dishner's brought). In *Students for Fair Admissions, Inc., v. President & Fellows of Harvard College*, the court observed in dicta that evidence of Harvard's discrimination against Jewish students in the early 1920's—almost a century before the case was filed—was unlikely to be admitted into evidence. 346 F. Supp. 3d 174, 796 (D. Mass. 2018).

Defendants will suffer prejudice if the allegations remain in the complaint

8. In addition to the subject allegations being irrelevant, immaterial, impertinent and/or scandalous, Defendants will be prejudiced if forced to answer them and respond to unnecessary and burdensome discovery requests related to those allegations. "The essential function of a Rule 12(f) motion is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Doe v. Roman Catholic Diocese of Galveston-Houston*, Civ.A. H-05-1047, 2006 WL 2413721, at *2 (S.D. Tex. 2006)(internal citations omitted). Courts have determined that Rule 12(f) motions may take into consideration discovery issues, as Rule 26 does not provide a remedy for the initial prejudice caused by requiring a defendant to respond to a complaint that includes multiple immaterial and impertinent paragraphs. *Dishner v. Universal Health Services, Inc.,* 2018 WL 1617844, at *4 (N.D. Tex. Apr. 4, 2018). "Additional prejudices arises [sic] when, as here, the pleadings would require defendants to respond to unnecessary discovery." *Id*., (finding that the expenditures of responding to and litigating the immaterial and impertinent sections, and the corresponding discovery costs, was sufficiently prejudicial to warrant striking the paragraphs at issue.)

9. The *Dishner* court also noted that, "even when a complaint contains a clear statement, length alone can sufficiently render it laborious to comprehend and manage." *Id*. Plaintiffs' complaint here is over one-hundred pages long—length alone should render it proper for consideration of a motion to strike. Within the complaint, Defendants have identified at least twenty-five pages, including paragraphs 18-62, that contain allegations having no relationship or connection to the causes of actions that Plaintiffs assert against Defendants. This can be determined on the face of Plaintiffs' complaint. If allowed to

remain on file, Defendants are vulnerable to discovery requests spanning almost 150 years. Whether these allegations and claims remain in Plaintiffs' complaint will directly impact the scope of discovery, as "the scope of permissible discovery is tethered to the pleaded claims and defenses." *Dishner*, 2018 WL 1617844, at *3. Plaintiffs correctly observe that discovery is not *limited* to those issues raised by the pleadings, and thus cannot deny that the complaint's allegations will set out and inform the scope of discovery, as discovery is "designed to help define and clarify any and all issues" raised by the parties in their pleadings. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). "At a minimum, therefore, the pleadings are the starting point from which relevancy and discoverability are determined." *Nat'l Credit Union Admin. v. First Union Capital Markets Corp*., 189 F.R.D. 158, 161 (D. Md. 1999).

10. Divesting Plaintiffs' complaint of unnecessary allegations will not prejudice or harm Plaintiffs from seeking to admit relevant evidence at trial, or requesting that the court take judicial notice of adjudicative facts under Federal Rule of Evidence 201. However, it will preliminarily function to relieve Defendants from answering irrelevant allegations and avoid burdensome and unnecessary discovery and litigating spurious issues. *See Operating Engineers Local 324 Health Care Plan v. G & W Const. Co*., 783 F.3d 1045, 1050 (6th Cir. 2015) ("The function of the motion is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with them early in the case")(internal citations omitted).

Defendants' Motion to Strike is not made in furtherance of delay or to keep Plaintiffs' claims "in a vacuum"—it is made to expedite the case and avoid prejudice

11. The purpose of Defendants' Motion to Strike is to remove unnecessary clutter from the case and expedite litigation in this matter, rather than cause delay. *See*

Heller Fin., Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294 (7th Cir. 1989)("But where, as here, motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay"); *Tucker v. Am. Intern. Group, Inc.*, 936 F. Supp. 2d 1, 16 (D. Conn. 2013)("Even where matter in a pleading is relevant to the controversy, it nonetheless may be stricken if it is scandalous or set out in needless detail")(internal citations omitted).

12. By striking those certain paragraphs of Plaintiffs' complaint, the case will proceed without requiring Defendants to answer the unnecessary historical allegations, without opening the door to discovery for information maintained over a 150 year period, and substantially limit the prejudice TCU will encounter if forced to litigate spurious issues raised by the historical allegations. *See Holley v. N. Carolina Dep't of Admin., N.C.,* 846 F. Supp. 2d 416, 433–35 (E.D.N.C. 2012) (finding that sworn statements concerning past instances of racial discrimination, occurring between 1976 and 1987, were not sufficiently related to plaintiff's 2006 race discrimination claim and, even if the past allegations were relevant, they would be inadmissible at trial under Federal Rule of Evidence 403 in that they would be highly prejudicial and likely to confuse or mislead the jurors as to the only race discrimination claim at issue in the case).

13. Plaintiffs argue that the historical and background information "add light, texture, color, and provide the fact finder with a full look at the environment permitted to fester at TCU." [Doc. 55, p. 11] But they are incorrect to suggest that the environment at TCU decades ago infers that Plaintiffs have been subjected to unlawful discrimination. In discrimination cases, courts generally require the aggrieved party to focus on the specific alleged discriminatory conduct giving rise to the claim or else a defendant would be unfairly prejudiced if discrimination could be proved through past instances of alleged discrimination. See e.g., *Diloreto v. Towers Perrin Forster & Crosby, Inc.*, No. 3:09-CV-

1280-B, 2010 WL 11619087, at *2 (N.D. Tex. Aug. 20, 2010)("The Fifth Circuit has held discovery should be limited to the "employing unit" or "work unit" in discrimination cases."); see also *Rubinstein v. Admin. of Tulane Educ. Fund*, 218 F.3d 392, 397-98 (5th Cir. 2000)(discovery in plaintiff-professor's discrimination and retaliation suit limited to the mechanical engineering department—the relevant decision-making unit with respect to plaintiff—rather than university-wide); *McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53, 63 (E.D.Penn. 1979)(in employment discrimination case filed by black former employee, discovery was limited to facts about racial discrimination; "Whether Mack discriminates against employees on the basis of religion, creed, gender or national origin is wholly irrelevant to his present claim."); *Clemons v. Dollar Gen. Corp.*, CIV.A. 2:09-CV-64, 2010 WL 1994809, at *3 (N.D. Miss. May 18, 2010)("information regarding other claims and lawsuits brought against defendants are irrelevant to a new plaintiff's action in Title VII litigation … Allowing discovery of this information could only serve to provide plaintiff with means to draw conclusory inferences which do not necessarily have any basis in fact and are therefore irrelevant.")

Conclusion

14. "The past is a foreign country; they do things differently there." *Leslie Poles Hartley*, The Go-Between (1953). What was said or done on the campus of TCU decades ago—in a different era—has no connection to the present controversy.

For the reasons set forth in the Motion to Strike and this Reply, Defendants request that their Motion to Strike be granted in its entirety.

DATED: August 26, 2020.

Respectfully submitted,

/s/ George C. Haratsis

George C. Haratsis
State Bar No. 08941000
gch@mcdonaldlaw.com

Rory Divin
State Bar No. 05902800
rd@mcdonaldlaw.com

Jennifer Littman
State Bar No. 00786142
jnl@mcdonaldlaw.com

McDONALD SANDERS,
A Professional Corporation
777 Main Street, Suite 2700
Fort Worth, Texas 76102
(817) 336-8651
(817) 334-0271 Fax

ATTORNEYS FOR DEFENDANTS TEXAS CHRISTIAN UNIVERSITY, DR. DIANE SNOW, DR. ANDREW SCHOOLMASTER, DR. ROB GARNETT, DR. DARRON TURNER, RUSSELL MACK, LEIGH HOLLAND, AND AARON CHIMBEL

CERTIFICATE OF SERVICE

The undersigned counsel certifies that the above and foregoing Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Strike Portions of Plaintiff's Third Amended Complaint was served on all counsel of record receiving electronic notice from the court's ECF notification system.

/s/ George C. Haratsis
George C. Haratsis