

i.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

**PLAINTIFF'S REPLY IN SUPPORT OF CROSS-MOTION TO COMPEL
KELLY KAMM'S COMPLIANCE WITH THE SUBPOENA**

REPLY ARGUMENT

1. Kelly Kamm still avoids stating if she communicated with others about the campaign to silence Lowery’s speech

Kelly Kamm refuses to say if she communicated about Richard Lowery with Laura Starks, Meeta Kothare, Jay Hartzell, or other key players in this case. Instead of declaring under oath that no such communications occurred, Kamm makes unsworn half-statements related to subsets of her communications, hoping this Court will not notice that she never answers outright. Nor may her lawyers testify on her behalf – their arguments are not testimony.

According to Kamm, for instance, she had no un-privileged “oral conversations” about Lowery and his speech—leaving open the possibility that she communicated in writing or that her lawyers claim that her oral conversations were privileged. *See* Dkt. 76-3 at 5. Defendants employed the exact same language (“Subject to these objections and without disclosing any privileged information”) when responding to two interrogatories that are currently the focus of a motion to compel. *See* Dkt. 60 at 5-7. And, in that instance, UT admits that supposedly privileged oral conversations happened, although UT will not tell us when, about what, or with whom. *See* Dkt. 63 at 5-6; Dkt. 61 at 2, 6.

Kamm also insists that she produced all responsive emails involving her “anonymous email account” and that the Defendants testified that they never conversed with Kamm about Lowery through any means of communication—leaving open the possibility that Kamm emailed using a different account with a non-party. *See* Dkt. 76 at 2, 5. The subpoena at issue sought all “emails or written communications” concerning Lowery and his speech “that are associated with . . . any [] personal email account under the custody and control of Kelly Kamm,” not just ones to or from her anonymous account. Dkt. at 66-1 at 2.

Additionally, multiple other UT employees, including Laura Starks, Meeta Kothare, Justin Dyer, Richard Flores, Nancy Brazzil, and especially Jay Hartzell, are key figures in this case and repeatedly appear in Lowery's filings. *See e.g.*, Dkt. 69 at 5, 11; Dkt. 1. Kamm has no direct power to censor or discipline Lowery, *see* Dkt. 76 at 3, but Hartzell certainly does. And UT employees possessing no supervisory power over Lowery, such as Starks and Kothare, participated in efforts to silence him. Dkt. 69 at 10. Hence, Kamm's communications with these key figures are highly relevant to Lowery's claim that UT has chilled his speech through a campaign of threats and pressure. Dkt. 1, ¶¶ 73-84; *see also Leonard v. Martin*, 38 F.4th 481, 489 (5th Cir. 2022) (in the context of subpoenas, "information is relevant if it bears on, or reasonably could lead to other matters that could bear on, any issue related to the claim or defense of any party") (cleaned up).

2. Kamm's subpoena imposes minimal burden on her

Kamm's subpoena, moreover, is not burdensome but seeks a limited range of material, proportional to the needs of the case. Plaintiff has made clear that—if Kamm in fact possessed no responsive communications—Kamm can satisfy her subpoena by "devot[ing] 20 minutes, maybe an hour to electronic searching through her personal email accounts and then sign[ing] a sworn declaration stating that nothing responsive to the subpoena exists." Dkt. 69 at 4. Although Burris and Mills claim they never responded to Kamm's anonymous complaint, *see* Dkt. 76 at 5, that is immaterial, because Lowery primarily seeks communications that occurred before, not after, Kamm's complaint. Plaintiff wants to know if some other person—named or unnamed—corresponded with Kamm about Lowery during a two-year period and whether this person coordinated or otherwise encouraged Kamm's anonymous complaint to the UT compliance office. Dkt. 69 at 9, 11.

Looking for emails fitting this narrow description should be simple; it would take far less time and consume far fewer public resources than paying lawyers to file multiple briefs before this Court. Yet Kamm suggests that she has not yet even searched. *See* Dkt. 76 at 7. Her unwillingness to do so is telling. It strongly implies that UT knows that something responsive and very harmful for their case is sitting in one of Kelly Kamm’s email accounts.

3. UT’s unreliable productions forces Lowery to seek missing communications from other custodians

Lowery has no choice but to seek discovery from non-parties, because UT’s own productions have been incomplete and inaccurate. Far from easily obtainable elsewhere, *see Precourt v. Fairbank Reconstruction Corp.*, 280 F.R.D. 462, 467 (D.S.D. 2011), the information Lowery seeks—emails from Kamm’s personal accounts—probably never existed on UT-controlled assets. Even if some of Kamm’s correspondents used UT assets, these correspondents may have already deleted these emails, perhaps before this litigation even commenced.

Moreover, twice now, UT has corrected false, material information in answers it previously gave under the penalty of perjury. Defendants Mills and Burris testified in April that they never exchanged texts with Jay Hartzell about Lowery, *see* Dkt. 31-2 at 8, Dkt. 31-3 at 4, before admitting in December that they texted with Hartzell just days before they tried to pressure Carlos Carvalho into censoring Lowery’s speech, *see* Dkt. 60 at 6-7.

Similarly, on January 3, 2024, Defendant Mills verified under the penalty of perjury that she had read UT’s response to Interrogatory No. 9 about the timing of a text-message thread with Meeta Kothare and found it “true and correct to the best of my knowledge.” Kolde Supp. Dec. ¶ 2, Ex. A. But Plaintiff noticed an irregularity in this response at once and contacted UT about it on January 6. *Id.* ¶ 4; Ex. B. And

on January 19, UT acknowledged that Mills inaccurately stated the date of one of her own text threads by almost three months. *Id.* ¶ 6, Exs. C, D. Mills formerly declared that she texted Meeta Kothare about Lowery’s tweets in November, but Mills now states that actually texted on August 23: the day before Lowery’s tweets were reported to UT police. *See* Dkt. 1, ¶¶ 56-59; *compare* Ex. B with Ex D (text dates).

Finally, Plaintiff likely cannot inquire about Kamm’s communications at Mills’ deposition “later this month [January],” “before the hearing on this motion” occurs in February. *Contra* Dkt. 76 at 2, 8. For, just yesterday, UT attempted to unilaterally cancel the Mills’ deposition because counsel had asked a few questions about the Hartzell nepotism allegations. Kolde Supp. Dec. ¶ 9. Thus, even if Mills has personal knowledge about all of Kamm’s private emails (which is highly unlikely), UT’s own actions have attempted to stop Plaintiff from learning this information.

Because of the repeated inaccuracies in Defendants’ discovery responses, Lowery must obtain relevant information from third parties to “better ensure[] the discovery is full and complete.” *Prudential Def. Sols., Inc. v. Graham*, 517 F. Supp. 3d 696, 702 n.2 (E.D. Mich. 2021); *see also Composition Roofers Union Local 30 Welfare Tr. Fund v. Graveley Roofing Enters.*, 160 F.R.D. 70, 72 (E.D. Pa. 1995) (“the information Plaintiffs requested cannot be more easily obtained from Defendant. As noted above, Plaintiffs have tried repeatedly to obtain the information from Defendant, without success.”). Kelly Kamm may indeed “not be the last University employee” who must fulfill her ordinary court duties by obeying a lawful subpoena, *see* Dkt. 76 at 8, but UT’s own inability to respond to Lowery’s discovery requests promptly, accurately, and completely are the cause of that.

CONCLUSION

This Court should compel Kelly Kamm to comply with the subpoena and produce the communications demanded on an expedited basis.

Respectfully submitted,

Dated: January 23, 2024

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