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 MOTION TO DISSOLVE PROTECTIVE ORDER RE NEPOTISM ALLEGATIONS

REPLY ARGUMENT

1. Hartzell has never denied the nepotism allegations

UT desperately wants to stop its president, Defendant Jay Hartzell, from answering questions about allegations that he misused state resources to benefit his son for admission to a UT graduate program. Despite all the protestations, there is one thing that UT never does: deny the allegations. *See* Dkt. 141.

It would be simple for UT to file documents from its graduate school or a declaration from Hartzell, from his deputy Nancy Brazzil, or from professors in the Philosophy Department, see Dkt. 77-1, ¶¶ 5-10, stating that Lowery's allegations are inaccurate. Simple, that is, unless they knew the evidence would show the allegations to be true.

Tellingly, UT never denies the allegations, and none of the exhibits attached to its response relate to the truth of the nepotism allegations. *See* Dkt. 141; Dkt. 141-1; Dkt. 141-2; Dkt. 141-3. Instead, UT tries to distract from the nepotism problem by name-calling and attempting to change the subject. *See, e.g.*, Dkt. 141 at 1 (calling Lowery "a McCarthyite" and "an inquisitor[]").

As UT admits, see Dkt. 141 at 2, the Hartzell nepotism allegations are part of the complaint, see Dkt. 126, ¶¶ 12, 17-19, 106, 117. At this stage in the proceedings, "[f]actual allegations are entitled to a presumption of truth." *Mazzarino v. Mass. State Lottery Comm'n*, 616 F. Supp. 3d 118, 127 (D. Mass. 2022) (citing *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 10 (1st Cir. 2011)); *see also Tropigas De P.R. v. Certain Underwriters at Lloyd's of London*, 637 F.3d 53, 56 (1st Cir. 2011) ("Facts not denied, qualified, or otherwise properly controverted are deemed admitted.") (citation and internal quotation marks omitted). There is no "bad-faith," Dkt. 141 at 3, in seeking discovery to prove undenied allegations that are included

in the complaint and have been declared under oath, see Dkt. 77-1.[1] There is also no "bad faith," if these allegations really occurred and impacted Hartzell's treatment of Lowery.[2] Lowery is simply asking for an opportunity to conduct discovery and prove his case.

For the sake of evaluating this motion to dissolve and the concurrent pending motions to dismiss and for summary judgment, this Court should treat allegations of President Hartzell's nepotism as presumptively true.

2. UT concedes—contrary to its pending motion—that the *Keenan* standard governs Lowery's chilled-speech claim

In its response, UT once again admits that the three-prong standard set forth in *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002) governs Lowery's chilled-speech claim. *See* Dkt. 141 at 5 (citing *Kennen v. Tejeda* (*sic*)). As this Court held, to establish his chilled-speech claim, Lowery must demonstrate that "(1) [he] engaged in constitutionally protected activity, (2) the defendants' actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff['s] exercise of constitutionally protected conduct." Dkt. 51 at 25 (quoting *Keenan*).

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[1] UT suggests that the plural word "administrators" cannot refer to Hartzell, because Hartzell is only one person. *See* Dkt. 141 at 2, 4-5. But the nepotism allegations concern misbehavior not only by Hartzell but also by his deputy, Nancy Brazzil, and perhaps others—by multiple "administrators." *See* Dkt. 77-1, ¶¶ 5-10. Moreover, it does not matter if a random reader of the *Washington Times* article understood that Lowery referred to Hartzell. *Contra* Dkt. 141 at 4. What matters is whether *Jay Hartzell*, and UT officials around him, understood that Lowery referred to Hartzell—and thus decided to threaten Lowery.

[2] UT is also free to argue about the conclusions to be drawn from evidence that Harztell engaged in nepotism. But arguments as to the weight of the evidence, do not go to either their discoverability or admissibility. The problem is that UT won't even let Lowery ask questions about this topic.

Defendants were the first party to argue that the *Keenan* standard applied, see Dkt. 15 at 17, and they have repeatedly promoted this standard, *see, e.g.*, Dkt. 103 at 3; Dkt. 99 at 3; Dkt. 66 at 3; Dkt. 48 at 8, 13. Their most recent filing again insists that *Keenan* applies. Dkt. 141 at 5.

Defendants' briefing contradicts their argument in their motion to dismiss that *Keenan* does not apply to Lowery's claim because Lowery is a government employee. *See* Dkt. 129 at 7-8. The fact that Defendants have now again returned to embracing the *Keenan* standard shows that they have abandoned that argument in their motion to dismiss. It also shows why judicial estoppel and the law of the case doctrine should keep this Court from considering an argument that Defendants themselves appear to have reversed course on yet again. *See* Dkt. 130 at 9-12.

3. Hartzell's nepotism is relevant to two of the three *Keenan* prongs

This case stands in a different position than it did in February 2024, when Magistrate Judge Howell granted UT's motion for a protective order "without prejudice to Plaintiff's re-raising these topics as appropriate for discovery should the Court grant Plaintiff's motion to amend his complaint." Dkt. 110 at 4. Unlike in February, Jay Hartzell is now a defendant. Unlike in February, there is now a second count concerning selective enforcement of a speech code. Similarly, the nepotism allegations are now part of both counts in the complaint, see Dkt. 126, ¶¶ 12, 17-19, 106, 117, as Defendants admit, see Dkt. 141 at 2.

Lowery has a right to obtain discovery into "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1). "Relevancy is broadly construed, and a request for discovery should be considered relevant if there is *any possibility* that the information sought may be relevant to the claim or defense of any party." *Camoco, LLC v. Leyva*, 333

F.R.D. 603, 606 (W.D. Tex. 2019) (emphasis added) (citation and internal quotation marks omitted).

Allegations of nepotism by Jay Hartzell are relevant both the injury and the motivation prongs of the *Keenan* analysis of the chilled-speech claim (as well as to the speech code claim). Defendants Mills and Burris have both declared that they never threatened Lowery with discipline or made any statement that could be construed as a threat to either Lowery or Carlos Carvalho. *See, e.g.*, Dkt 14-1, ¶¶ 3, 8-9; Dkt. 14-2, ¶¶ 4-10, 13-14; Dkt. 141-3 at 109:19-110:14. Information showing that Hartzell—Mills' and Burris' boss, at the top of the UT "chain of command"—has reason to silence Lowery is evidence showing that Defendant Mills and Burris had motive to threaten Lowery in a way that would chill a person of ordinary firmness from speaking. This is especially true when evidence shows Hartzell had communicated with Mills and Burris about Lowery's speech shortly before these threats. *See* Dkt. 119-1 at 4-5.

Likewise, the allegations are relevant to whether Defendants' actions were substantially motivated by Lowery's protected speech (the third prong of the *Keenan* test). Both defendant Burris and former Defendant Titman testified that Hartell's conduct as described in the nepotism allegations, if true, were "wrong" and "inappropriate." Dkt. 89-4 at 91:7-11("Q: Would you agree that if Jay Hartzell used state resources to obtain favorable treatment for a family member in admission to a UT-Austin program that would be inappropriate? A: Yes."); Dkt. 83-4 at 248:22-249:8, 250:5-9 ("Q: Do you agree it would be wrong for Jay Hartzell to ask for special treatment for his son in admission to the graduate program in the Department of Philosophy at UT while he's the president of UT? A: Sure."). Indeed, although Titman lacked specific knowledge about Hartzell's son, he was "sure" that "it's happened" that "white university administrators at the University of Texas

sometimes pull strings to get favorable treatment for a family member in admissions." Dkt. 89-4 at 90:14-20. Due to the issuance of the protective order, Lowery was never able to ask similar questions of Dean Mills or Carlos Carvalho.

It is not disruptive to university operations for Lowery to engage in constitutionally protected whistleblowing against unethical behavior. *See Lane v. Franks*, 573 U.S. 228, 240-41 (2014) (protecting the right of a government employee to give truthful testimony about corruption). There is no legitimate government interest in covering up unethical actions that violate university rules. *See id.* at 241. Defendant Hartzell, however, had abundant personal interest in stopping true information about his misbehavior coming to light.

4. Seeking discovery that has so far been prohibited is not cumulative

Discovery into Hartzell's alleged nepotism is not cumulative. So far, Plaintiff has only asked questions on nepotism at two depositions—Burris' and Titman's. The current protective order prevented Plaintiff from requesting documents about these allegations or asking questions about nepotism at the deposition of Lillian Mills and Carlos Carvalho. *See* Dkt. 110 at 4. Lowery's own knowledge about these allegations comes from conversations with Carlos Carvalho and would likely be inadmissible hearsay at trial, at least as to the truth of the underlying nepotism conduct. *See generally* Dkt. 77-1.

CONCLUSION

This Court should dissolve the protective order concerning allegations of Jay Hartzell's nepotism. This Court should also order Lillian Mills and Carlos Carvalho to be deposed a second time about these nepotism allegations within 30 days of its decision.

Respectfully submitted,

Dated: September 21, 2024

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