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' MOTION TO STRIKE PORTIONS OF PLAINTIFFS' THIRD AMENDED COMPLAINT AND BRIEF

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

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

Jennifer N. 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, J.D., LEIGH HOLLAND AND AARON CHIMBEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants file this motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. In the event Defendants are required to answer Plaintiffs' Third Amended Complaint ("complaint") [Doc. 44] following a ruling by the Court on the Defendants' motions to dismiss [Docs. 23-36], they respectfully move this Court to strike portions of paragraphs 1 and 2 and all of paragraphs 18 through 62 of the complaint.

I. INTRODUCTION

Jane Doe No. 1, a current TCU student, filed this suit on January 15, 2020. [Doc. 1]. Doe 1 then joined two additional plaintiffs in this action, Does 2 and 3, upon the filing of Doe 1's first amended complaint. [Doc. 19].[1] All of the operative facts allegedly supporting Doe 1's claims begin in January of 2018. [Doc. 44, ¶ 67]. The relevant time period of Doe 2's claims begins approximately one month before Doe 2 graduated from TCU in May 2018 and ends late in August 2018. [Doc. 44, ¶¶ 132-154]. The relevant time period allegedly supporting Doe 3's claims begins in the fall of 2016 and may extend until her graduation in May 2020. [*See id.,* ¶¶ 155 -166].

Does 1, 2 and 3 all attended TCU within the last four years. Nevertheless, they devote no less than 44 lengthy and verbose paragraphs comprising most of the first 29 pages of a 106-page complaint in the section entitled "Statement of Facts"[2] to allegations recounting a litany of racist content in student publications or incidents or campus conflicts concerning race over more than a century, including some allegations about matters that

[1]After Defendants filed motions to dismiss [Docs. 23-36] to Plaintiffs' first amended complaint, in response, Plaintiffs filed their second amended complaint [Doc. 38], adding Jane Doe No. 4 and Jane Doe No. 5 as new plaintiffs. The Court struck Plaintiffs' second amended complaint [Doc. 39]. Doe 1 then sought leave to file her third amended complaint which the Court granted with respect to allowing Doe 1 to add a Title VII claim but denied Doe 1's joinder of Does 4 and 5. [Doc. 43]. On July 2, 2020, Plaintiffs filed their third amended complaint, [Doc. 44] to which this motion to strike is directed.

[2] The Statement of Facts section begins on page 5 of the complaint.

took place before the university was founded.

As an institution of higher education, and in furtherance of its mission, TCU is committed to uncovering, examining, and understanding its history with respect to race in the broader context of the difficult racial history of this region and country. Nevertheless, these allegations have no bearing or relevance in the context of the present controversy before the Court. Plaintiffs recount the history of Texas Christian University's founding in 1873 [Doc. 44, ¶ 18] and the then existing attitudes of race relations in America going back well over 100 years. [¶¶ 19-23]. They then recount early university newspaper publications and other research and historical information to allegedly depict the attitudes of TCU students and faculty during and after that time period. [*Id*., *see e.g.*, ¶¶ 20-26, 29-33].

These allegations only serve to unfairly prejudice all of the Defendants. If these allegations are allowed to remain in the complaint, an undue burden and unnecessary expense of time and cost will be imposed on the Defendants to answer each allegation—all of which are immaterial to any of the elements of Plaintiffs' gender, race, and disability discrimination and state law claims. If not struck, it is anticipated that Plaintiffs will continue to refer to and emphasize these historical and other irrelevant allegations for mere dramatic effect and divert attention away from the real facts and issues that should be examined and considered.[3]

Moreover, because discovery is based on the allegations pled in a complaint, Plaintiffs will likely attempt to broaden the scope of discovery beyond the relevant time

[3] This is not an unreasonable concern. For instance, in Plaintiffs' Response to Defendants' Motion to Dismiss, reference is made to "TCU's insidious past." [Doc. 46, pp. 8, 25,]; that a racially charged environment "has been festering at TCU since its inception" [p. 19]; and TCU cannot have acted without harming Doe 1 because TCU is "aware of both [its] history and the continuation of that legacy on TCU's campus." [p. 25].

period. In the event Defendants are required to answer the complaint[4], the Defendants ask this Court to strike portions of the complaint on the grounds and for the reasons hereinafter set forth.

II. GROUNDS FOR MOTION TO STRIKE

The allegations set forth in the first four sentences of paragraph 1(through the word "victims" on the last line of page 1 of the complaint), the entire first sentence of paragraph 2, the first portion of the second sentence of paragraph 2 (ending after the phrase "[c]onsistent with TCU's historical treatment of minorities and women"), and all allegations in, including the headings (I-X) for, paragraphs 18 through 62 of Plaintiffs' Third Amended Complaint constitute redundant, immaterial, impertinent or scandalous matters that should be stricken from the pleading. FED. R. CIV. P. 12(f).

III. ARGUMENT AND AUTHORITIES

a. Impertinent, immaterial, redundant, and superfluous allegations in the complaint

Pleadings must be "simple, concise, and direct." FED. R. CIV. P. 8(d)(1). Under Federal Rules of Civil Procedure 12(f), a court may strike any "redundant, immaterial, impertinent, or scandalous matter" from a pleading. An impertinent pleading is one that is immaterial. *See generally, Mitchell v. American Tobacco Co.,* 28 F.R.D. 315, 319 (D.C. Pa. 1961). "'Immaterial" matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded.'" 5C, *Wright & Miller, FED. PRAC. & PROC. CIV.* § 1382. "'Impertinent" matter consists of statements that do not pertain, and

[4] The Court has previously determined that Defendants pending motions to dismiss [Docs. 23-36] are applicable to the third amended complaint. [Doc. 43]. To the extent any of Defendants motions to dismiss are denied, and unless the Court orders otherwise, Defendants must answer all of the historical allegations contained in the third amended complaint 14 days after notice of the Court's action. FED. R. CIV. P. 12(a)(4)(A).

are not necessary, to the issues in question.'" *Id*. A "redundant" matter consists of allegations that constitute a needless repetition of other averments or which are foreign to the issue to be denied. *Gilbert v. Eli Lilly & Co. Inc.,* 56 F.R.D. 116, 120, n. 4 (D. P.R.1972). Superfluous historical allegations are a proper subject of a motion to strike. *See, Healing v. Jones*, 174 F. Supp. 211, 220 (D. Ariz. 1959); *M v. Neustrom*, No. 6:15-CV-02524, 2018 WL 1310100, at *2 (W.D. La. Mar. 13, 2018)(ordering plaintiff to replead due to superfluous historical allegations unrelated to incident at issue.)

Examples of impertinent, immaterial, and superfluous allegations in the complaint include:

- In its earliest documented history, TCU promoted racist ideologies to its student body, faculty and staff and purposely branded itself as a bigoted institution through publications and which has perpetuated a racist environment at TCU [¶ 19];

- Over 100 years ago, a TCU yearbook described a KKK event that was well-attended (presumably by TCU students, faculty and others affiliated with the university) [¶ 22];

- Gratuitous and needless references to ancient articles, newspaper clippings and publications sprinkled with racial epithets, slurs, and stereotypes of African-Americans [*See*, *e.g.,* ¶¶ 20, 21, 23, 26 and 28];

- Personal and hearsay opinions of Plaintiffs' attorneys, an example of which is "TCU fully integrated in 1964 (which in itself is reprehensible)" [¶ 24];

- Anecdotal hearsay and personal stories of individuals or former TCU students that have no connection to the Plaintiffs such as:

    - a visiting football player's 1967 on field racial exchange with a TCU football player [¶ 26]

    - the 1969 experience of TCU's first African-American cheerleader [¶ 26]

    - a black female student with living with a white woman in a TCU campus dormitory in 1968 [¶ 28]

- a black athlete's 1971 decision along with other black athletes to stage a walkout over rules and dress code allegedly targeting African-American athletes. [¶ 29]

- Opinions of third parties, such as one commentator opining that African-Americans and women could not participate in general school affairs after integration and were not treated equally by the university [¶ 25], a former TCU professor opining in 1988 about the alleged lack of concern for minorities at TCU [¶ 43], and social media posts of opinions of third parties not made or authorized by TCU [¶ 53];

- Alleged pay disparity between white and black employees at TCU in 1974 [¶ 31];

- TCU's allowing controversial individuals to speak on campus in 1974 [¶ 32];

- The experiences of five foreign athletes that quit TCU's soccer team in 1980 [¶ 37];

- The racial environment on the TCU campus in the 1980s into the early 2000s [¶¶ 34-52];

- The history of the creation and evolution of diversity, cultural, and inclusion programs at TCU and the opinions of Plaintiffs' attorneys that such activities were for improper or unworthy purposes [¶¶ 54-56]; and

- Post-lawsuit happenings and occurrences on campus commenting on the Plaintiffs' claims in the lawsuit and the individual Defendants [¶¶ 57-62].

b. Scandalous allegations in the complaint

A matter is "scandalous" when it tends to convey a party or person in a cruelly derogatory light. *Margetis v. Ferguson*, No. 4:12-CV-753, 2014 WL 174667, *2 (E.D. Tex. Jan. 10, 2014). "Scandalous matters are those casting an excessively adverse light on the character of an individual or party." *OKC Corp. v. Williams*, 461 F. Supp. 540, 550 (N.D. Tex. 1978). Scandalous describes "any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." *Talon Transaction Technologies, Inc. v. StoneEagle Servs.,*

Inc., No. 3:13-CV-00902-P, 2013 WL 12173219, *4, (N.D. Tex. July 24, 2013). In *Talon*, the court determined that plaintiff's reference to the defendants as "Hacking Defendants" was unnecessary and provocative. In agreeing to strike such references, the court borrowed analysis from another court in which it was determined that a plaintiff can show a defendant's alleged racially discriminatory actions without using the inflammatory term "Ku Klux Klan". *Id.*

Examples of scandalous allegations in the complaint include:

- Describing TCU as a "bigoted and narrow-minded institution" [¶¶ 1, 19];
- Owning slaves and the practice of slavery was accepted at TCU by its founders and their racist ideology was to be instilled in its students through their educational pursuits and this ideology persists to the present day in that TCU treats racial minorities and women as second-class citizens and TCU continues to promote bigotry and hatred [¶ 18];
- TCU's founders were "treasonous" [¶ 18];
- Multiple use of the "N-word" and unnecessary references to stereotypical terms of an earlier era pertaining to African-Americans [*see e.g.*, ¶¶ II., 20, 21, 23, 26, 28, 35, 46, 49];
- TCU has "proudly displayed its bigotry and hate for the African-American members of its own community and also towards its African-American visitors in every facet of the university experience." [¶ 26];
- "TCU's culture facilitates the adultery of an illicit intercourse between injustice and immorality" [IV., p. 11]; and
- Analogizing TCU to a dirty toilet [¶ 40].

Defendants submit that these and other scandalous allegations have no place in the complaint and should be stricken, as should the other immaterial and irrelevant allegations. The historical allegations recount remote events from a period in this country when reprehensible and discredited views and treatment of African-Americans were all too common; but these allegations serve no useful purpose other than to inflame passions

and attempt to scandalize the Defendants. *See, e.g. Alvarado-Morales v. Digital Equip. Corp.,* 843 F.2d 613, 618 (1st Cir. 1988)(offensive allegations used in the complaint to describe work environment such as "concentration camp," "brainwash," "torture" and similes such as "Chinese communists in Korea" had no place in the pleadings and could properly be stricken as scandalous matter in the case.)

c. The immaterial, impertinent, and scandalous allegations are unduly prejudicial to Defendants

While motions to strike are generally disfavored, matters in the pleadings that do not have any relationship to the controversy or may cause the objecting party prejudice are properly stricken. *See OKC Corp. v. Williams*, 461 F. Supp. 540, 550 (N.D. Tex. 1978). If the challenged allegations have no possible relation or logical connection to the subject matter of the controversy, the motion may be granted. 5C, *Wright & Miller, Fed. Prac. & Proc. Civ.* § 1382 (3d Ed.). Courts will strike these kinds of needless assertions if they result in prejudicial harm to the moving party. See *Augustus v. Bd. of Pub. Instruction of Escambia Cnty.*, 306 F.2d 862, 868 (5th Cir. 1962). Prejudice can be shown if the allegations would have "the effect of confusing the issues or [are] so lengthy and complex that [they] place[ ] an undue burden on the responding party." *Dishner v. Universal Health Servs., Inc.*, No. 3:17-CV-03321, 2018 WL 1617844, at *2 (N.D. Tex. April 4, 2018) (quotations and citations omitted).

The historical allegations are merely pled to denigrate the reputation of TCU in an attempt to paint it in a false light as concerns this litigation. These allegations are clearly immaterial to establishing or supporting any of the Plaintiffs' claims. Establishing alleged discrimination must focus only on current events and the Plaintiffs' specific interactions with students, faculty and staff of the university. Therefore, TCU and the other Defendants

would be greatly prejudiced if they were required to litigate over and answer these allegations.

Another purpose of granting a Rule 12(f) motion to strike is to conserve time and resources by avoiding litigation and issues which will not affect the outcome of the case. *Sierra Club v. Tri-State Generation and Transmission Ass'n Inc.*, 173 F.R.D. 275, 285 (D. Colo. 1997); *see also Resolution Trust Corp. v. Schonacher*, 844 F. Supp. 689, 691 (D. Kan. 1994) (stating that rule 12(f)'s purpose "is to minimize delay, prejudice, and confusion by narrowing the issues for discovery and trial.") It is within the court's discretion whether to strike or preserve pleadings. *Jacobs v. Tapscott*, No. 304-CV-1968-D, 2004 WL 2921806, at *2 (N.D. Tex. Dec. 16, 2004). The purpose of such motions is to ensure parties do not waste time and money "litigating spurious issues by dispensing with those issues prior to trial." *Doe v. Roman Catholic Diocese of Galveston-Houston*., No. H-05-1047, 2006 WL 2413721, at *2 (S.D. Tex. Aug. 18, 2006).

In *Dishner*, the court held that the pleadings providing background information regarding the defendants' financial structure and revenue sources as a corporation were unrelated to the elements of the plaintiffs' premises liability and negligence claims, and the court accordingly struck those pleadings. *Id.* at *3. The court explained that the background information and pleadings were properly stricken because they related to incidents and lawsuits that occurred years before the accident at issue and therefore the pleadings were "'[s]uperfluous historical allegations [and] are properly subject to a motion to strike.'" *Id*.

The "Statement of Facts" allegations through paragraph 62 in the complaint have no bearing on or relevance to the specific elements of Plaintiffs' race or gender

discrimination claims.[5] They constitute surplusage and go well beyond Rule 8's mandate that allegations be simple, concise, and direct.

TCU and the other Defendants will suffer prejudice if they are forced to answer all of the extraneous "Statement of Facts" allegations. Rule 8 requires that a response to each allegation/averment—an admission, a denial, or a statement of insufficient knowledge—be made. FED. R. CIV. P. 8(b). It will be a time-consuming and expensive task to comply with this requirement. Many of the allegations are based on ancient publications. Defendants' attorneys will have to invest a great deal of time to read each publication and investigate the matters described to properly make a considered response to each historical allegation to comply with the rule. Superfluous allegations may survive a motion strike but only if they "perform some other useful purpose in promoting the just and efficient disposition of the litigation." 5C, *Wright & Miller, Fed. Prac. & Proc. Civ.* § 1382 (3d Ed.).

Requiring Defendants to respond to these allegations can hardly be said to be just and efficient in terms of disposing of the case, and certainly it would not be a prudent use of attorney resources. The cost to Defendants in the form of attorney's fees will not be insignificant. Prejudice thus includes the cost and expense a defendant is put through to respond to the voluminous historical pleadings or background allegations that are wholly unnecessary and immaterial to the plead claims. *See e.g., Verfuerth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 652 (E.D. Wis. 2014) (court found defendant would be prejudiced if it had to answer voluminous and immaterial background facts section of 96-

[5] Under Titles VI and IX, they must establish that the actions about which they complain were motivated by intentional discrimination. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 407–08 (5th Cir. 2015). Further, they must show an appropriate person—an official authorized to institute corrective measures—had actual knowledge of the discrimination and responded with deliberate indifference. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). The historical allegations have no relevance to either element.

page complaint and struck the same so defendant only had to respond to allegations relating to surviving claims.)

Further, prejudice will be sustained by the Defendants if the allegations are not struck, as it will open the door to overly broad, voluminous, and complex discovery. As was noted in *Dishner*, "the scope of permissible discovery is tethered to the pleaded claims and defenses." 2018 WL 1617844, at *4. There the court struck as prejudicial numerous impertinent and immaterial allegations, concluding "that the expenditures of responding to and litigating [thirty-one paragraphs], and the corresponding discovery costs, are sufficiently prejudicial to warrant striking these paragraphs." *Id.* In essence, properly responding to and addressing the complained of allegations would constitute litigating a multitude of mini-trials.

This case presents three plaintiffs in one case asserting individualized and separate claims based on alleged factual scenarios involving multiple witnesses and departments within the university over the relevant four-year time period. Discovery on each of their claims will require complex, tedious and time-consuming efforts on the litigants. Injecting the likelihood of discovery on subject matters, incidents, and occurrences of 100, 50, 25 or even 10 years ago as alleged in the "Statement of Facts" would be very prejudicial to Defendants and overly complicate and lengthen an already complicated case. And, most importantly, such discovery would not shed light on the veracity of Plaintiffs' allegations, which must rise or fall on the specifics of their respective experiences at TCU.

IV. CONCLUSION

FOR THESE REASONS, and to avoid prejudice to the Defendants, Defendants respectfully move the Court to grant this motion to strike. Further, they respectfully request the Court rule on the merits of the motion before Defendants may be required to answer the complaint following the Court's rulings on the Defendants' Rule 12(b)(6) motions.

DATED: July 22, 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

CERTIFICATE OF CONFERENCE

I hereby certify that on July 21, 2020, the undersigned conferred with opposing counsel regarding Defendant's Motion to Strike Portions of Plaintiffs' Third Amended Complaint and Brief and counsel for Plaintiffs' advised he is opposed.

/s/ George C. Haratsis
George C. Haratsis

CERTIFICATE OF SERVICE

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

/s/ George C. Haratsis
George C. Haratsis

I:\09300\0102\14O4667.DOCX