UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
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CARE ONE MANAGEMENT, LLC et al., 12 Civ. 6371 (SDW) (MCA)

Plaintiffs,

v.

UNITED HEALTHCARE WORKERS EAST, SEIU 1199 et al.,

Defendants.
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BRIEF IN SUPPORT OF
MOTION TO QUASH SUBPOENAS DUCES TECUM

Motion Day: May 19, 2014
ORAL ARGUMENT REQUESTED

Dated: April 25, 2014
New York, New York

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* motion for admission *pro hac vice* pending

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PRELIMINARY STATEMENT

Nonparties Leo Gertner and Luke Herrine ("Movants") move to quash Plaintiffs' subpoenas because they chill core expressive conduct and association protected by the First Amendment, are facially overbroad and impose undue burdens, and are unripe and improper because Plaintiffs likely can obtain from Defendants the information these subpoenas seek.

Plaintiffs are healthcare companies owned by Daniel Straus, a trustee of the New York University School of Law ("NYU Law"). Leo and Luke are first- and second-year NYU Law students. When nearly all of the few events alleged in the Amended Complaint concerning NYU occurred, neither Leo nor Luke had yet enrolled at NYU Law. Yet, days after a petition was submitted to NYU Law's Dean – citing negative findings concerning health care companies Mr. Straus controls and seeking to commence a dialog in the law school community about adopting a code of ethics for trustees – Plaintiffs issued these subpoenas, demanding production of a wide range of private communications that, if ordered disclosed, would severely chill political speech and association.

The subpoenas do more than infringe core First Amendment expressive and associational rights; they also are facially overbroad and otherwise unduly burden Leo and Luke, and were issued before Plaintiffs obtained a single document from, or deposed, any Defendant. Because Plaintiffs cannot overcome Movants' First Amendment privilege, and because there is no basis to impose these undue burdens on nonparties like Leo and Luke, this Court should quash the subpoenas and order Plaintiffs to pay Movants' costs.

BACKGROUND

Luke is in his second year and Leo his first year at NYU Law. Declaration of Luke Herrine, April 24, 2014 ("Herrine Decl.") ¶¶ 1, 14; Declaration of Leo Gertner, April 24, 2014

("Gertner Decl.") ¶¶ 1, 14. Both students are committed to workers' rights and intend to pursue careers in public service after law school. Herrine Decl. ¶ 2; Gertner Decl. ¶ 2. During their brief time at NYU Law, they already have engaged in direct services, awareness-raising, and advocacy efforts surrounding a variety of political issues that they believe to be important, such as debt relief and the rights of detained immigrants. Herrine Decl. ¶ 3; Gertner Decl. ¶ 4.

Recently, Leo, Luke, and some fellow students have sought to raise awareness within the NYU Law community about what they believe to be unjust labor practices by companies controlled by Daniel Straus. Herrine Decl. ¶ 8; Gertner Decl. ¶ 8. Mr. Straus is a member of the Board of Trustees at NYU Law and a benefactor of the law school's Straus Institute of Law and Justice, and he controls the Plaintiff corporations in this lawsuit, including Care One Management, LLC and HealthBridge Management, LLC. Am. Compl. ¶¶ 3, 17 (ECF 37).

In early March 2014, Leo, Luke and other NYU Law students circulated a petition to fellow students in an effort to gather signatures before submitting it to Trevor Morrison, Dean of NYU Law. Herrine Decl. ¶ 8; Gertner Decl. ¶ 8. The petition cites 38 findings by the NLRB that CareOne and HealthBridge Management violated labor laws and a Connecticut federal district court order holding HealthBridge in contempt of court. Herrine Decl., Ex. A. The petition goes on to express the opinion that this conduct by Straus-controlled companies is unfair to workers and inconsistent with the public good. *Id.* The petition then asks Dean Morrison to meet with students or with the union representing workers at those companies (Service Employees International Union Local 1199), to discuss the conduct of the health-care companies vis-a-vis their workers, and to meet with students to discuss the adoption of a code of ethics to govern the conduct of trustees of NYU Law. *Id.*

On March 20 – just days after the petition was circulated – Plaintiffs served Leo and Luke with subpoenas. Herrine Decl. ¶ 9; Gertner Decl. ¶ 9. The subpoenas are not merely targeted at Leo and Luke as individuals; they also purport to be directed at Leo and Luke in their alleged "official capacit[ies]" as board members of Law Students for Economic Justice and to "all persons who have acted or purported to act on [their] behalf[s]." Herrine Decl., Ex. B; Gertner Decl., Ex. A. The subpoenas seek, without any time limitation, numerous categories of documents related to Mr. Straus, the Plaintiff corporations, and the Defendant unions. *Id.*

ARGUMENT

Plaintiffs have invoked this Court's authority to command law students to produce documents concerning their political beliefs, actions, and associations – the core of what the First Amendment protects. The information these subpoenas seek is irrelevant to any material issue in this litigation and in any event should be readily obtainable from Defendants in the ordinary course of discovery. And the subpoenas are facially overbroad and otherwise unduly burdensome. For all these reasons, the Court should quash the subpoenas and order Plaintiffs to pay Movants' costs.

I. Legal Standards

In general, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). A court must, however, limit otherwise permissible discovery when:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C); *see In re Centrix Fin., LLC*, 12 Civ. 6471 (AET), 2012 WL 6625920, at *5 (D.N.J. Dec. 18, 2012) ("Discovery sought via a subpoena issued pursuant to Rule 45 must fall within the scope of discovery permissible under Rule 26(b)."). Rule 45 likewise requires a court to quash or modify a nonparty subpoena that seeks "privileged or other protected matter" or "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iii)-(iv); *cf. Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 529 (D. Del. 2002) (noting that "a nonparty may seek from the court protection from discovery via the overlapping and interrelated provisions of both Rules 26 and 45").

Nonparties are "afforded greater protection from discovery than a normal party." *Centrix*, 2012 WL 6625920, at *6. Accordingly, courts considering nonparty subpoenas "require a stronger showing of relevance than for simple party discovery." *Stamy v. Packer*, 138 F.R.D. 412, 419 (D.N.J. 1990). "[P]ursuant to [then] Rule 45(c)(1), '[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena' and the Court has a responsibility to enforce this duty." *Centrix*, 2012 WL 6625920, at *5.[1]

Where, as here, a subpoena implicates the First Amendment rights of speech and association, courts conduct a two-step analysis. First, the movant must make a prima facie showing that his First Amendment rights would be infringed by compliance with the subpoena. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009); *In re Motor Fuel Temperature*

[1] Rule 45 was amended in December 2013. The provisions of the rule designed to protect nonparties from unreasonable subpoenas are now codified in subdivision (d) of the Rule; prior to the amendment, these provisions were codified in subdivision (c).

Sales Practices Litig., 641 F.3d 470, 488 (10th Cir. 2011). After that prima facie showing is made, the burden shifts to the party seeking the information to "demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1140 (citation omitted); *In re First Nat. Bank, Englewood, Colo.*, 701 F.2d 115, 118 (10th Cir. 1983) ("the burden then [shifts] to the government to make the appropriate showing of need for the material") (citation omitted); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) (requiring a "showing that there is a rational connection between such disclosure and a legitimate governmental end, and that the governmental interest in the disclosure is cogent and compelling"); *In re Lazaridis*, 865 F. Supp. 2d 521, 528 (D.N.J. 2011) (holding, in context of subpoena seeking evidence for use in foreign tribunal, that "a party seeking disclosure of [an anonymous Internet] speaker's identity must show a compelling need for the discovery, such that the need outweighs any First Amendment right"); *see also NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (inquiring whether state "ha[d] demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association").

Nonparty subpoenas are subject to First Amendment limitations even when the government is not a party because "[a] court order, even when issued at the request of a private party in a civil lawsuit, constitutes state action and as such is subject to constitutional limitations." *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091-92 (W.D. Wash. 2001) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)); *see also, e.g.*, *Chevron Corp. v. Donziger*, 13 Misc. 80038 (CRB)(NC), 2013 WL 1402727, at *2-*6 (N.D. Cal. April 5, 2013)

(applying two-step First Amendment analysis and quashing subpoena because it infringed First Amendment rights without sufficient need for the information or careful tailoring); *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp. Regarding IP Address 69.120.35.31*, 08 Misc. 347 (ARR) (MDG), 2010 WL 2219343, at *7 (E.D.N.Y. Feb. 5, 2010) (noting that party's "attempt to utilize the subpoena power is subject to review by this Court for consideration of the First Amendment concerns" and quashing subpoena based on First Amendment value in anonymity).

II. The Court Should Quash the Subpoenas Because They Are Facially Overbroad

The Court can grant this motion to quash without reaching the First Amendment issues because the subpoenas are overbroad on their face. They seek a wide array of documents without tying the requests to the issues in this case. Moreover, the subpoenas are in no way limited in time. They therefore demand production of documents from long before Leo or Luke even enrolled at NYU Law. The failure to limit the subpoenas temporally makes them unreasonable dragnets that sweep for swaths of documents that have no relation to this case, such as communications between law students about the governance of their school and even bank records showing Leo's paychecks from his three years of unrelated employment at SEIU prior to law school (during which time he had no knowledge of Plaintiffs or Mr. Straus). *See* Gertner Decl. ¶ 3. For this reason alone, the subpoenas impose an undue burden on Movants, *see* Fed. R. Civ. P. 45(d)(3)(A)(iv), and should be quashed. *See, e.g.*, *In re O'Hare*, 11 Misc. 0539 (LHR), 2012 WL 1377891, at *2-*3 (S.D. Tex. Apr. 19, 2012) (denying motion to reconsider decision to quash subpoenas that were "facially overbroad" because, *inter alia*, they sought "all documents concerning the parties to the [underlying] action, regardless of whether those documents relate to that action and regardless of date," they "[we]re not particularized," and "[t]he period covered by the requests is unlimited"); *Wolfe v. Glasgow*, 08 Civ. 813-J-25 (TEM), 2009 WL 1956687, at

*1-2 (M.D. Fla. July 7, 2009) (quashing subpoena where request was "overly broad on its face" because request was so broadly worded as to "encompass[] numerous documents wholly irrelevant to the lawsuit underlying this case").

III. Enforcement of the Subpoenas Would Violate Movants' First Amendment Rights

Even if the Court does not quash the subpoenas as overbroad on their face, it should quash them because they severely infringe First Amendment rights without any countervailing showing of a compelling need for the information they seek.

A. Enforcement of the Subpoenas Would Chill Speech and Association

The subpoenas demand production of documents that concern issues at the heart of the First Amendment: internal communications of political organizations, petitions by students advocating for changes to university policies, and speech to raise awareness about issues of public concern such as labor relations. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (explaining that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" and that "curtail[ment of] the freedom to associate is subject to the closest scrutiny"); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995) (noting particular danger of "suppress[ing] [] free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection.") (internal punctuation and citation omitted); *Thornhill v. State of Alabama*, 310 U.S. 88, 103 (1940) ("The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to

us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.").

As the Supreme Court recognized in *NAACP v. Alabama*, compelling groups to disclose their members, particularly when they espouse dissident beliefs, impinges on the freedom of association. 357 U.S. at 462. Likewise, courts have held that compelled disclosure of private communications is likely to chill speech and association. *See, e.g.*, *House v. Napolitano*, 11 Civ. 10852 (DJC), 2012 WL 1038816, at *12 (D. Mass. Mar. 28, 2012) (holding that plaintiff stated a claim for violation of freedom of association because "[c]ompulsory disclosure of [his organization's] members, supporters and internal communications of the organization . . . can seriously infringe on privacy of association and belief guaranteed by the First Amendment and can have a profound chilling effect") (internal punctuation and citations omitted); *see also Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (stating that "the fear of public disclosure of private conversations might well have a chilling effect on private speech").

The context in which the subpoenas were served compounds the risk that ordering compliance would further chill Leo, Luke, and other law students from engaging in political speech and association, whether about workers' rights or even the governance of their own law school. Movants decided to raise awareness regarding what they believe are important issues by circulating a petition to their classmates that ultimately was delivered to Dean Morrison. A few days later, Plaintiffs served these subpoenas, which demand that Leo and Luke reveal (among other things) all of their communications and other documents related to the subjects discussed in the petition.

Being slapped with these subpoenas has sent a clear message to Leo, Luke, and other students: if you speak out on matters of public concern, you risk subjecting yourself to intrusive

and burdensome nonparty discovery. Indeed, upon being served with the subpoenas, Movants believed they were issued in retaliation for their criticism of Mr. Straus and the companies he controls. *See* Herrine Decl. ¶ 10; Gertner Decl. ¶ 10.

Faced with the choice of either revealing their communications to parties they had criticized – including intimate conversations with friends, deliberations on strategy, and unpublished drafts – or not engaging with an issue in the first place, many students would surely choose the latter. Likewise, many would avoid associating with other students about political issues if they knew that the fact and substance of their communications would be disclosed simply because of the association. This chilling effect is particularly pernicious when it falls on idealistic law students, who are being taught to develop advocacy skills and use them to promote what they believe to be just causes.

The subpoenas already have caused Leo and Luke to hesitate in communicating about political issues, including the labor practices of Mr. Straus's companies. They have caused them to refrain from fully expressing their opinions on these topics and to avoid engaging with others who express strong opinions about the topics out of fear that those views may be attributed to them through mere association. The subpoenas have caused Luke and Leo at times to avoid written communications about these topics entirely, out of fear that they may be forced to produce such communications. *See* Herrine Decl. ¶ 11; Gertner Decl. ¶ 11. Though the subpoenas thus have chilled their expression (and almost certainly chilled political speech by other NYU Law students), Leo and Luke have continued speaking publicly (albeit more guardedly) about Mr. Straus, Plaintiffs, and these subpoenas, because they do not want to give others the impression that students in their positions will be totally silenced by the issuance of subpoenas like these. Herrine Decl. ¶ 12; Gertner Decl. ¶ 12.

Thus, Movants' First Amendment rights would be infringed unless the subpoenas are quashed. *See, e.g.*, *Perry v. Schwarzenegger*, 591 F.3d 1126, 1143 (9th Cir. 2009) (holding that movants made a prima facie showing that subpoena arguably infringed First Amendment rights because their "declaration[s] create[d] a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression"); *ETSI Pipeline Project v. Burlington N., Inc.*, 674 F. Supp. 1489, 1490 (D.D.C. 1987) (holding that nonparty advocacy organization demonstrated First Amendment burden from subpoena based on affidavit stating that disclosure of the information sought would lead to harassment and reprisals against organization, its officers, and its contributors).

B. Plaintiffs Cannot Make the Heightened Showing of Need Required to Justify the Burden on First Amendment Rights

Because the subpoenas substantially infringe First Amendment rights, the burden shifts to Plaintiffs to demonstrate a compelling need for the information that outweighs the First Amendment burden. *See Perry*, 591 F.3d at 1140; *NAACP v. Alabama*, 357 U.S. at 463. Plaintiffs cannot demonstrate that Movants possess information that is relevant to any material issue in this case, let alone a compelling need for the array of documents they have requested.

The 333-paragraph Amended Complaint never mentions Leo or Luke, and mentions NYU in just 12 paragraphs. Most of the allegations regarding NYU concern conduct by Defendants or by student groups (such as Student Labor Action Movement and NYU for Occupy Wall Street) of which Movants are not and have never been members. Herrine Decl. ¶¶ 6-7; Gertner Decl. ¶ 7. And nearly all of the NYU-related allegations concern conduct that occurred before Leo or Luke enrolled at NYU Law. Am. Compl. ¶¶ 17, 216-18, 220-24. That includes nearly all of the allegations concerning Law Students for Economic Justice ("LSEJ"), a student

organization that had formally disbanded until Luke and other students re-launched it in the summer and fall of 2013. Herrine Decl. ¶¶ 4-5. Prior to assisting in circulating the petition, Movants had no communications with anyone who was involved in LSEJ before 2013 about Plaintiffs, Defendants, or Straus. Herrine Decl. ¶ 5; Gertner Decl. ¶ 6.

Indeed, the only specific allegation in the Amended Complaint that could be read to refer to Movants is:

> Upon information and belief, an NYU student group has since petitioned the law school to oust Daniel Straus from its board. The Defendants' attempt to remove Mr. Straus as a trustee of NYU Law School is another example of their willingness to use any means to compel Straus and Plaintiffs to cede to unionization and negotiation [sic] extortionate demands.

Am. Compl. ¶ 225. Aside from the numerous factual inaccuracies in that statement,[2] it is not clear how Movants' effort to draw the university community's attention to what they perceive as wrongdoing by Mr. Straus's companies is relevant to this RICO action. Even were it somehow relevant, the fact that Movants circulated a petition regarding Mr. Straus and his companies and the manner in which a trustee of NYU Law should conduct himself is at most tangentially related to the claims asserted by Plaintiffs.

Despite Leo and Luke's remote-at-best connection to the case, the subpoenas demand a startlingly broad swath of sensitive documents. For example, the subpoena's Document Demand

[2] For example, Movants are unaware of any petition that asked NYU Law to "oust Daniel Straus from its board." The petition Leo and Luke helped to circulate and that was submitted to Dean Morrison merely sought (i) to have the Dean meet with students, or the union, to discuss the apparent misconduct of the health-care companies owned by Mr. Straus, and (ii) to foster a dialog with the administration about adopting a code of ethics to govern NYU Law trustees. *See* Herrine Decl., Ex. A. In addition, the petition submitted to Dean Morrison was not organized by or submitted on behalf of any organized student group, but simply by the students who signed it. *See* Herrine Decl. ¶ 8; Gertner Decl. ¶ 8. And to the extent that the opinion expressed in the second sentence of paragraph 225 of the Amended Complaint means to suggest that the petition was orchestrated by the Defendant unions rather than Leo, Luke, and other NYU students, it is baseless.

No. 5 seeks "[a]ny and all documents, including internal memoranda and strategy documents or communications, relating to LSEJ's petition to remove Daniel E. Straus as a trustee for the NYU School of Law." Herrine Decl., Ex. B; Gertner Decl., Ex. A. Document Demand No. 3 seeks "[a]ny and all documents relating to any and all communications between you and/or LSEJ and NYU relating to Plaintiffs and/or Daniel E. Straus." *Id.* And Document Demand No. 9 calls for production of, among other things, Leo's bank records, paychecks, pay stubs, and other documents concerning his pre-law school employment at SEIU, despite the fact that his work there had nothing to do with Mr. Straus or Plaintiffs. *Id.*; *see* Gertner Decl. ¶¶ 3, 13. Absent a much clearer articulation of what relevant information Plaintiffs believe Movants possess, Plaintiffs come nowhere near showing the compelling interest needed to justify such chilling, burdensome discovery demands.

The recent decision by a California district court to quash nonparty subpoenas in *Chevron Corp. v. Donziger*, 13 Misc. 80038 (CRB)(NC), 2013 WL 1402727 (N.D. Calif. April 5, 2013), is directly on point. In the underlying case, Chevron alleged that the defendants violated RICO by "attempt[ing] to defraud and extort Chevron by bringing suit in Ecuador, bribing Ecuadorian judges and ghostwriting opinions and expert reports, and exerting a pressure campaign on Chevron in the United States." Chevron issued document and deposition subpoenas to nonparty Amazon Watch, an organization that seeks to bring attention to what it believes are environmental and human rights abuses by companies operating in the Amazon, including by posting information on its website, organizing awareness-raising campaigns, and using media campaigns to educate and lobby. Chevron alleged that "the RICO defendants used Amazon Watch as a mouthpiece for pressure and smear campaigns in the United States against Chevron, in furtherance of their conspiracy to defraud Chevron of billions of dollars." *Id.* at *1.

In evaluating Amazon Watch's motion to quash, the court found that the organization had demonstrated that disclosing documents about their campaign against Chevron would chill its staff and constituents from expressing their views and from associating with the organization. *Id.* at *2-3. The court rejected Chevron's argument that the RICO claims rendered Amazon Watch's advocacy unprotected by the First Amendment, explaining that "[e]ven if this Court assumes that Amazon Watch was the mouthpiece for the RICO defendants, there is nothing to suggest that Amazon Watch's campaigns and speech were more than mere advocacy and were likely to incite or produce imminent lawless action." Absent a finding of "probable cause to believe that Amazon Watch's conduct falls outside the scope of the First Amendment because it is inciting unlawful activity or is fraudulent speech," the court held, Amazon Watch had made a prima facie showing that the First Amendment privilege applied. *Id.* at *4. The court then held that Chevron had not made the required showings that the information sought was highly relevant, that the requests were narrowly tailored, and that the information was not available elsewhere. *Id.* at *5-*6. Rather, the requests were "overbroad, unrelated to the central issues in this litigation, and very likely available from defendants and other sources." *Id.* at *7. The court concluded that Chevron could issue new subpoenas to Amazon Watch only if, on pain of sanctions, they were "significantly narrower in scope to seek only highly relevant information and more carefully tailored to avoid infringing upon the organization's First Amendment rights." *Id.*

The same analysis applies here. As demonstrated by Movants' declarations, issuance of these subpoenas has chilled them and other students from expressing their views about political issues, either privately or publicly, and from associating with people or organizations involved in discussing or debating matters of public concern. Failing to quash such subpoenas will only

deepen the chill. Despite Plaintiffs' allegations that the Defendant unions have encouraged third parties to criticize Mr. Straus and cause his ouster as a trustee of NYU Law, any information that Leo or Luke may possess is unrelated to the material issues in the litigation. In any event, any relevant documents would be in the possession, custody, or control of Defendants.

The subpoenas are particularly improper because they were issued so early in the case. The docket shows that the Court has permitted limited discovery to proceed pending resolution of Defendants' motion to dismiss the Amended Complaint, but that no depositions have occurred and no documents have been exchanged.[3] Any arguably relevant communications that Leo or Luke might possess would almost certainly be possessed by Defendants, yet Plaintiffs have not pressed to obtain them from Defendants prior to serving these temporally unlimited, wide-ranging subpoenas on Movants. *See* Fed. R. Civ. P. 26(b)(2)(C)(i) (requiring court to limit discovery sought if it "can be obtained from some other source that is more convenient, less burdensome, or less expensive"). Courts routinely quash nonparty subpoenas where the issuing party has not first sought to obtain the documents from the opposing parties. *See, e.g.*, *In re Centrix Fin., LLC,* 12 Civ. 6471 (AET), 2012 WL 6625920, at *6-7 (D.N.J. Dec. 18, 2012) (granting motion to quash because, although some information sought "might be of some limited relevance," it was duplicative of information that defendants already possessed or that they could obtain from plaintiffs); *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 529 (D. Del. 2002) (granting nonparty's motion to quash because, *inter alia*, information would be available through party discovery and disclosure would create burden for nonparty); *Taggart v. Wells Fargo Home Mortgage, Inc.*, 10 Civ. 00843 (LFS), 2012 WL 4462633, at *3 (E.D. Pa.

[3] Despite that party discovery has barely begun, court filings show that Plaintiffs have served ten deposition subpoenas on nonparties, including several elected officials. (*See* ECF 84, 85.)

Sept. 27, 2012) (granting motion for protective order preventing nonparty deposition, in part because plaintiff did not demonstrate that information could be obtained only from the nonparty); *ETSI Pipeline Project*, 674 F. Supp. at 1490 (granting nonparty's motion to quash where disclosure would infringe First Amendment rights and plaintiff "ha[d] not sufficiently exhausted all alternative sources for the information sought here or made reasonable efforts to obtain the information elsewhere").

It would be inefficient, and contrary to Rules 26 and 45, to require Movants to comply with these subpoenas when limited initial discovery has only just begun and none of the parties has produced any documents or been deposed. In addition to the unlikelihood that Movants possess any relevant documents not also possessed by Defendants, permitting the case to progress further could clarify that there is no need for these subpoenas. For example, party discovery might make clear that Movants do not possess any documents related to Plaintiffs' claims, or the Court might grant Defendants' motion to dismiss the Amended Complaint. At the very least, the Court should bar discovery demands directed at Leo and Luke until a later stage of the case when they might become ripe.[4]

Accordingly, Defendants cannot demonstrate a compelling need for the information sought, much less at this stage of the case. Because the subpoenas infringe on First Amendment rights without sufficient justification, they should be quashed.

[4] Plaintiffs have suggested in court filings that they are concerned that evidence in the possession of nonparties may not be preserved because it does not fall within Defendants' litigation hold. (*See* ECF 52 at 19-20). This is not a relevant concern with respect to Movants, as they are preserving all potentially responsive documents pending resolution of the underlying action. Herrine Decl. ¶ 15; Gertner Decl. ¶ 15.

IV. The Court Should Quash the Subpoenas Because They Are Unduly Burdensome

Even if the Court does not conclude that the First Amendment requires quashing the subpoenas, they should be quashed for the independent reason that they unduly burden Movants in violation of Federal Rules of Civil Procedure 26(b)(2)(C) and 45(d)(3)(A)(iv). *See Centrix*, 2012 WL 6625920, at *6 (noting "heightened protections for discovery" enjoyed by nonparties).

Beyond the burden on their First Amendment rights discussed above, complying with the subpoenas would subject Leo and Luke to significant practical burdens. Because the subpoenas have no time limitation, they require reviewing *all* of the communications and other documents in Movants' possession, whether they are in electronic, paper, or other format, to determine if they are responsive to the subpoena. This requires them to review, for example, tens of thousands of email messages, as well as any handwritten notes, phone records, text messages, and social media postings in their possession. *See* Herrine Decl. ¶ 13; Gertner Decl. ¶ 13. Neither Leo nor Luke is a corporation with a records or IT department; they are law students with numerous curricular and extra-curricular commitments and with final exams approaching in May. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii) (instructing courts to consider "parties' resources" in undue burden analysis). Accordingly, complying with these subpoenas would create a substantial burden. *See* Herrine Decl. ¶ 13-14; Gertner Decl. ¶ 13-14.

These burdens are unjustified given Movants' tenuous-at-best connection to this lawsuit, the minimal likelihood that they possess relevant information, the early stage of this litigation, and the likely availability of any discoverable information from Defendants. *See, e.g.*, *Adkins v. Sogliuzzo*, 09 Civ. 1123 (SDW), 2011 WL 4345439, at *3 (D.N.J. Sept. 15, 2011) (Wigenton, J.) (affirming grant of protective order preventing disclosure of bank records sought through nonparty subpoenas where information sought was not relevant and burden imposed was

"great"); *Nonio v. Rochford*, 09 Civ. 6295 (PGS), 2011 WL 735271, at *3 (D.N.J. Feb. 22, 2011) (granting motion to quash nonparty subpoena because plaintiff had not "adequately demonstrated the relevance of the requested documents"); *Schmulovich v. 1161 Rt. 9 LLC*, 07 Civ. 597 (FLW), 2008 WL 4572537, at *5 (D.N.J. Oct. 14, 2008) (granting motion to quash nonparty subpoena because, "[w]hile the Court could certainly hypothecate about how the subpoenaed information is relevant to this case, it is not appropriate for the Court to use conjuncture to develop a theory of relevance," but rather "Plaintiffs' responsibility to set forth how the subpoenaed information is relevant to this litigation"). Therefore, the Court should quash these subpoenas.

V. The Court Should Award Costs and Fees to Movants

In addition to quashing the subpoenas, the Court should order Plaintiffs to pay Movants' costs and attorney's fees. Rule 45 requires a party or attorney issuing a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and states that "[t]he court for the district where compliance is required *must* enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply." Fed. R. Civ. P. 45(d)(1) (emphasis added). "[W]hen a subpoena should not have been issued, literally everything done in response to it constitutes 'undue burden or expense' within the meaning of [the rule]." *Hallamore Corp. v. Capco Steel Corp.*, 259 F.R.D. 76, 81 (D. Del. 2009) (citation omitted).

Rule 45(d)(1) mandates sanctions in this case because Plaintiffs have not taken reasonable steps to avoid imposing undue burden and expense on Leo and Luke. For all of the reasons discussed in this brief, the subpoenas do not further any legitimate purpose of discovery. To the contrary, these subpoenas suppress or at a minimum chill a wide range of core expressive conduct protected by the First Amendment and impose additional practical burdens on Movants.

Accordingly, the costs of litigating this motion should be borne by Plaintiffs, not Leo and Luke. *See, e.g.*, *Ebert v. C.R. Bard, Inc.*, 13 Misc. 277, 2014 WL 1365889, at *4 (M.D. Pa. Apr. 7, 2014) (granting motion to quash subpoena as overbroad and awarding nonparty attorney's fees he incurred as a result); *Smith v. BIC Corp.*, 121 F.R.D. 235, 245-46 (E.D. Pa. 1988) *aff'd*, 869 F.2d 194 (3d Cir. 1989) (affirming grant of motion to quash nonparty deposition subpoenas and award of attorney's fees and costs to nonparties where information sought was not relevant); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 814 (9th Cir. 2003) (affirming award of attorney's fees under Rule 45 where subpoena was "overly burdensome and served for an improper purpose").

CONCLUSION

For all of the reasons discussed in this brief, the Court should grant the motion to quash and order Plaintiffs to pay Movants' costs.

Respectfully submitted,

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* motion for admission *pro hac vice* pending