IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

Rule 26(f) Report of the Duke Defendants

1. Pursuant to Fed. R. Civ. P. 26(f) and LR16.1(b), a meeting was held by telephone on July 15, 2011. Because of the substantial overlap in the above-captioned case and in Carrington, et al. v. Duke University, et al., No. 1:08-CV-00119, the meeting was attended by attorneys representing the parties in both of the cases and the conference was intended to address the discovery schedule for both cases.[1] Participating in the telephone meeting were Robert Ekstrand and Stefanie Sparks of Ekstrand & Ekstrand for the McFadyen Plaintiffs; David Thompson, Nicole Moss, and Pete Patterson of Cooper & Kirk for the Carrington Plaintiffs; and Richard Ellis and Dixie Wells of Ellis & Winters LLP for Defendants Duke University, Matthew Drummond, Aaron Graves, Robert Dean, and Gary N. Smith

[1] The Duke Defendants are filing simultaneously herewith a Motion to Consolidate Discovery in the McFadyen and Carrington cases. The arguments for consolidation are contained in Paragraph 3(a) below, and in the brief in support of the Motion to Consolidate Discovery.

("Duke Defendants"). Although discovery is only proceeding with respect to the aforementioned parties, attorneys for other parties in the case were also present on the telephone. These attorneys were Dan McLamb of Yates, McLamb & Weyher for Defendants Duke University Health Care System Inc. and Tara Levicy; Reggie Gillespie of Faison & Gillespie for Defendant City of Durham; and Robert King of Brooks Pierce McLendon Humphrey & Leonard LLP for Defendants DNA Security Inc. and Richard Clark.[2]

2. Pre-Discovery Disclosures. The parties have agreed to exchange by August 12, 2011, the information required by Rule 26(a)(1) of the Federal Rules of Civil Procedure. Consistent with the Court's Order of June 9, 2011 [DE 218] in the McFadyen case, such disclosures shall be limited to information relevant to Counts 21 and 24 of the Second Amended Complaint in the McFadyen case. Consistent with the Court's Order of June 9, 2011 [DE 192] in the Carrington case, such disclosures shall be limited to information relevant to Counts 8, 11, and 19 of the First Amended Complaint in the Carrington case.

3. Discovery Plan. The undersigned parties propose to the Court the following discovery plan:

   a. Because there is substantial overlap in the discovery that the parties contemplate in McFadyen and Carrington, the Duke Defendants seek to consolidate discovery in these two cases. Furthermore, the consolidation

[2] DNA Security, Inc. and Richard Clark are defendants only in the McFadyen case.

will greatly enhance judicial efficiency by ensuring that any discovery motions brought before the Court are resolved in both cases simultaneously without any concern for inconsistent rulings. Finally, consolidation would minimize the burden and expense for the parties and third-party witnesses by avoiding multiple depositions and discovery requests. The Duke Defendants are filing a Motion to Consolidate Discovery and brief in support of same (collectively, the "Consolidation Motion") contemporaneously with this Report. The Duke Defendants do not believe, however, that the trials in the two cases should be consolidated.

b. Pursuant to this Court's Order of June 9, 2011 [DE 218], all proceedings in this case with respect to Counts 1, 2, 5, 12, 13, 14, 18, 25, 26, 32, 35 and 41 of the Second Amended Complaint, including discovery, are stayed pending the resolution of the interlocutory appeal in this case. Pursuant to that same Order, discovery is proceeding only with respect to Counts 21 and 24. Consistent with the limitation on discovery ordered by this Court, the Duke Defendants contend that discovery will be needed only on the following subjects at this stage of the litigation:[3]

[3] If discovery is consolidated in McFadyen and Carrington, then the consolidated discovery would proceed on the topics set forth in the Rule 26(f) Report of the Duke Defendants filed in Carrington as well.

i. COUNT TWENTY-ONE: BREACH OF CONTRACT

- The Code of Conduct, Undergraduate Policies and Resolution of Student Conflict, and Alleged Violations of University Policy provisions in the Bulletin of Duke University 2005-2006.

- Duke University's disciplinary proceedings regarding Mr. Breck Archer.

- Duke University's disciplinary proceedings regarding Mr. Matthew Wilson.

- The interim suspension of Mr. Ryan McFadyen.

- Communications regarding the suspensions of Mr. Archer and Mr. Wilson and the interim suspension of Mr. McFadyen.

- Any purported damages that resulted from the allegations included in Count Twenty-One of the Second Amended Complaint.

ii. COUNT TWENTY–FOUR: FRAUD

- The production of the DukeCard data to members of the Durham Police Department on or about March 31, 2006, including the identities of individuals who were aware of this production of data.

- The communications between and among employees of Duke University, members of the Durham Police Department, and members of the Durham County District Attorney's Office regarding the production of DukeCard data.

- The communications between and among employees of Duke University, the members of the 2005-2006 Duke University men's lacrosse team, and agents of those team members regarding the subpoena that was issued on May 31, 2006, that ordered production of "Key card access used by [an] attached list of Duke University Students from 8:00 am March 13, 2006 – 8:00 am March 14, 2006."

- Communications between and among the members of the 2005-2006 Duke University men's lacrosse team and anyone else regarding the DukeCard data that was produced to members of the Durham Police Department on or about March 31, 2006, the need for DukeCard data as it related to the ongoing investigation into the allegations of a sexual assault occurring at 610 N. Buchanan Boulevard in Durham on or about March 13, 2006, and the subpoena that was issued on May 31, 2006, that ordered production of "Key card access used by [an] attached list of Duke University Students from 8:00 am March 13, 2006 – 8:00 am March 14, 2006."

- Any purported damages that resulted from the allegations included in Count Twenty-Four of the Second Amended Complaint.

c. Discovery shall be placed on a case-management track established in LR26.1. The undersigned party proposes that the appropriate plan for this case (with any stipulated modification by the parties as set out below) is that designated in LR26.1(a) as:

_____Standard

_____Complex

__X__Exceptional

d. As will be addressed later in this Report, because of the amount of electronically stored information and because of the number of anticipated depositions, the Duke Defendants contend that twelve months will be needed for completion of discovery on Counts 21 and 24. Accordingly, the Duke Defendants propose that all discovery relating to Counts 21 and 24 be completed by August 31, 2012.

e. Stipulated modifications of the case management track include:

(1) Discovery, including depositions, shall be limited to discovery regarding any nonprivileged matter that is relevant to the Plaintiffs' claims in Counts 21 and 24 of the Second Amended Complaint in the McFadyen case and the Duke Defendants' defenses to those same Counts. If discovery in the McFadyen and Carrington cases is consolidated, then discovery would also proceed regarding any nonprivileged matter that is relevant to the Plaintiffs' claims in Counts 8, 11, and 19 of the First Amended Complaint in the Carrington case and the Duke Defendants' defenses to those same counts. Accordingly, the Duke Defendants contemplate that if and/or when discovery proceeds on the remaining claims that are currently stayed pursuant to this Court's Order of June 9, 2011, additional discovery may be needed from both the Plaintiffs and the Duke Defendants on the remaining counts. Such discovery may include additional (but not duplicative) document requests, additional (but not duplicative) interrogatories, additional (but not duplicative) requests for admissions, and additional (but not duplicative) depositions (including, in some cases, of witnesses who were previously deposed on issues relating to Counts 21 and 24).

(2) If discovery is consolidated, the McFadyen and Carrington Plaintiffs collectively should be able to depose each of the Duke Defendants named in Counts 21 and 24 of the McFadyen Second Amended Complaint and in Counts 8, 11, and 19 of the Carrington First Amended Complaint, such that each Duke Defendant sits for only one deposition regarding McFadyen Counts 21 and 24 and Carrington Counts 8, 11, and 19. In addition, the McFadyen and Carrington Plaintiffs collectively should be able to depose each expert witness identified by any of the Duke Defendants, such that each expert witness sits for only one deposition regarding McFadyen Counts 21 and/or 24 and/or Carrington Counts 8, 11, and/or 19. The Duke Defendants contend that the McFadyen and Carrington Plaintiffs collectively should be allowed a total of thirty depositions in addition to the depositions of the named Duke Defendants and any expert witnesses identified by any of the Duke Defendants. Should discovery be consolidated in the McFadyen and Carrington cases, discovery will proceed on a total of five claims, two of which are virtually identical. Because the factual basis of these claims is limited, thirty depositions beyond the named defendants and expert witnesses should be sufficient for the McFadyen and Carrington Plaintiffs and is consistent with the Court's Order limiting discovery

strictly to the claims that are going forward. If, after they have taken thirty depositions above and beyond the named Duke Defendants, Plaintiffs determine that additional depositions are necessary, then the parties should confer in good faith regarding the need for additional depositions. If the parties are unable to reach an agreement as to additional depositions, then the Plaintiffs may seek leave of Court to conduct additional depositions.

(3) If discovery is not consolidated, then the McFadyen Plaintiffs should be allowed to depose each of the Duke Defendants named in Counts 21 and 24, each expert witness identified by the Duke Defendants, and a total of twenty additional witnesses. Similarly, if Plaintiffs determine that additional depositions are necessary, then the parties should confer in good faith regarding the need for additional depositions. If the parties are unable to reach an agreement as to additional depositions, then the Plaintiffs may seek leave of Court to conduct additional depositions.

(4) If discovery is consolidated, the Duke Defendants collectively should be able to depose each of the McFadyen Plaintiffs and each of the Carrington Plaintiffs, such that each McFadyen Plaintiff sits for only one deposition and each Carrington Plaintiff sits for only one deposition. In addition, the Duke Defendants collectively

should be able to depose each expert witness identified by any of the McFadyen or Carrington, such that each expert witness sits for only one deposition regarding McFadyen Counts 21 and/or 24 and/or Carrington Counts 8, 11, and/or 19. In addition, because each Plaintiff's actions, knowledge, and specific damages purportedly suffered are different, discovery is needed on each particular Plaintiff. The Duke Defendants anticipate that as many as 82 additional depositions will be needed. Although this number initially seems large, in fact, it would allow only an average of two additional depositions for each of the McFadyen Plaintiffs bringing Counts 21 and 24 and each of the Carrington Plaintiffs bringing Counts 8, 11, and 19.[4] This number is, therefore, reasonable given the number of Plaintiffs, the scope of the damages allegations and the need for the Duke Defendants to defend against each Plaintiff. If the Duke Defendants determine that additional depositions are necessary, then the parties should confer in good faith regarding the need for these additional depositions. If the parties are unable to reach an agreement as to additional depositions, then the Duke

[4] As an example, these additional depositions may be necessary to probe allegations such as Plaintiffs' claims that they were denied employment opportunities, something that is unique to each Plaintiff.

Defendants may seek leave of Court to conduct additional depositions.

(5) If discovery is not consolidated, then the Duke Defendants should be allowed to depose each McFadyen Plaintiff, each expert witness identified by any one or more of the Plaintiffs, and, for the reasons articulated above, a total of 6 additional witnesses (two additional witnesses for each of the 3 plaintiffs in this case). Similarly, if the Duke Defendants determine that additional depositions are necessary, then the parties should confer in good faith regarding the need for additional depositions. If the parties are unable to reach an agreement as to additional depositions, then the Duke Defendants may seek leave of Court to conduct additional depositions.

(6) Depositions of all witnesses should be limited to seven hours as set forth in Rule 30(d)(2), unless the parties agree otherwise or the Court allows additional time.

(7) For purposes of determining how many depositions have been taken, each Rule 30(b)(6) deposition should be counted as a single deposition. Further, the seven hour limit should apply to any Rule 30(b)(6) deposition, without regard to the number of witnesses who are designated to testify on behalf of the corporation.

(8) If discovery is consolidated, then the Duke Defendants propose the following plan for written discovery. The McFadyen and Carrington Plaintiffs, whether acting individually or collectively, should be allowed to serve a maximum of thirty interrogatories and thirty requests for admissions, including subparts, upon each Duke Defendant, such that no more than thirty interrogatories and thirty requests for admissions are served on any single Duke Defendant. (For example, if plaintiff A submits 25 interrogatories to a particular defendant, neither plaintiff A nor any other individual plaintiff nor any group of plaintiffs may submit more that five additional interrogatories to that particular defendant.) In turn, the Duke Defendants, whether acting individually or collectively, should be allowed to serve a maximum of thirty interrogatories and requests for admissions, including subparts, upon each Plaintiff, such that no more than thirty interrogatories and thirty requests for admissions are served on any single Plaintiff.[5] This number is proposed because

[5] The Duke Defendants proposed several different alternatives during the Rule 26(f) Conference and the subsequent discussions, any one of which would meet the needs of the Duke Defendants. In addition to the approach described in the text, another approach is that the Duke Defendants serve a single set of 20 interrogatories and a single set of 20 requests for admission on all Plaintiffs, and then serve an additional 10 interrogatories and an additional 10 requests for admission on each Plaintiff. A third approach that the Duke Defendants proposed is to develop a Plaintiff Fact Sheet (with a set of standard questions), and then serve 10 interrogatories on each Plaintiff and 30 requests for admission on each Plaintiff.

each Plaintiff's actions, knowledge, and specific damages purportedly suffered are different, and, accordingly, the Duke Defendants need to make inquiries of each Plaintiff. Should more than thirty interrogatories or more than thirty requests for admissions be served upon a party, that party should only be required to answer the first thirty that are served, as evidenced by the time-stamp of the transmission.

f. During the Rule 26(f) Conference, both the McFadyen and Carrington Plaintiffs contended that expert discovery should be delayed until after fact discovery is conducted on all of the claims that survived the Court's Order of March 31, 2011, on the motions to dismiss. The Duke Defendants contend that the Court has ordered discovery to go forward on McFadyen Counts 21 and 24 and Carrington Counts 8, 11, and 19, and expert discovery is an important part of discovery. Accordingly, expert discovery should not be deferred. To this end, the Duke Defendants propose that reports from retained experts under Rule 26(a)(2) should be due during the discovery period set forth in this Rule 26(f) report:

(1) From Plaintiffs by April 1, 2012. At the same time that the reports are produced, Plaintiffs should provide at least three alternative dates on which each retained expert may be deposed. Such dates should be within the period allowed for the depositions of Plaintiffs'

retained experts, as set forth in Paragraph 5(d) herein. The Duke Defendants should in turn notify the Plaintiffs of the dates selected for each deposition within ten days.

(2) From Duke Defendants by June 15, 2012. At the same time that the reports are produced, the Duke Defendants should provide at least three alternative dates on which each retained expert may be deposed. Such dates should be within the period allowed for the depositions of the Duke Defendants' retained experts, as set forth in Paragraph 5(d) herein. The Plaintiffs should notify the Duke Defendants of the dates selected for each deposition within ten days.

g. During the Rule 26(f) Conference, both the McFadyen and Carrington Plaintiffs contended that 45 days before the close of fact discovery, the parties should certify that they have produced all supplementations currently available to them. The Duke Defendants are agreeable to such a requirement, provided that, consistent with Rule 26(e), supplementations are made on an ongoing basis. As a guiding principle, the Duke Defendants contend that supplementations under Rule 26(e) should be due within thirty days after a party discovers new information that must be disclosed, provided, however, that during the final thirty days of discovery, all supplementations will occur as soon as practicable so as not to prejudice the other party.

h. Discovery of Electronic Stored Information ("ESI"). After learning of potential litigation against Duke University arising out of the indictment of three members of the Duke men's lacrosse team, Duke University began its efforts to preserve electronic data on April 20, 2007. The preservation efforts have continued through the present with considerable expense to Duke University. This expense has been exacerbated because the parties have not been able to agree on a data collection end-date. The Duke Defendants believe that the following plan is consistent with Rule 26(b)(2) of the Federal Rules of Civil Procedure and avoids discovery that is "unreasonably cumulative or duplicative." Further, this plan is proposed taking into consideration whether the "burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(c)(3). In order to reasonably mitigate costs while still complying with discovery mandates, the Duke Defendants propose that the following actions be taken:[6]

(1) Relevant information and custodians. The Duke Defendants propose to limit the initial review of data to a specified group of 17

[6] The parties are continuing to discuss the most effective way to manage electronic data discovery.

custodians (23 custodians if discovery in the McFadyen and Carrington cases is consolidated). Seventeen custodians is a significant number of custodians for the two narrow claims going forward as to the Duke Defendants, and the Duke Defendants believe that these custodians will yield the most substantial and complete data in accordance with Plaintiffs' discovery requests, without being "unreasonably cumulative or duplicative."[7] Further, going beyond this list of 17 custodians imposes both a "burden" and "expense" that "outweighs" the "likely benefit" to be gained from

[7] This approach, including the selection of the specific custodians whose data should be reviewed, is consistent with the approaches taken by other courts. When dealing with ESI, courts have generally deferred to the producing party to identify the custodians likely to possess responsive documents. See generally Garcia v. Tyson Foods, Inc., No. 06-2198-JWL-DJW, 2010 WL 5392660, at *2-4 (D. Kan. Dec. 21, 2010). Where such a determination is contested, however, it is quite common for courts to limit the number of custodians from which a party must produce documents. See, e.g., Martinez-Hernandez v. Butterball, LLC, No. 5:07-cv-174-H, 2010 WL 2089251, at *4-5 (E.D.N.C. May 21, 2010) (finding plaintiff's request that defendant "run sixty-one numbered queries, most of which include multiple search terms, for thirty-plus custodians, encompassing numerous servers . . . unreasonable and unduly burdensome" and specifically eliminating custodians due to their limited involvement and the unlikelihood that they would possess relevant documents); In re Fannie Mae Sec. Litig., 552 F.3d 814, 820 (D.D.C. 2009). Courts tend to limit the required custodians to those "likely to possess responsive documents." See, e.g., CDW LLC v. NETech Corp., No. 1:10–cv–00530–SEB–DML, 2011 WL 1743749, at *2 (S.D. Ind. May 5, 2011).

searching the electronic records of additional custodians.[8] Once the data of the custodians has been reviewed for relevance and privilege as set forth below, the Duke Defendants will produce the data that is responsive to the requests made by the Plaintiffs. If after that review, Plaintiffs affirmatively show that the data from additional custodians should be produced in order to comply with the discovery that the Court has ordered, the Duke Defendants could review those additional custodians at that time.

[8] Courts have been particularly likely to limit the number of custodians where a party can demonstrate that production of documents without such a restriction would be unjustifiably costly, as it would be in this case. See, e.g., Thermal Design, Inc. v. Guardian Bldg. Prods., Inc., No. 08–C–828, 2011 WL 1527025, at *1 (E.D. Wis. Apr. 20, 2011) (holding that a search of "all archived e-mail accounts and shared network drives, without any restriction as to custodian or individual" that would take "several months" and cost "an additional $1.9 million dollars" not including an additional thirteen weeks and $600,000 to review "is not reasonably accessible"). The court in Thermal Design explained that "even if the information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence, [the requesting party] doesn't explain why the extensive amount of information it seeks is of such importance that it justifies imposing an extreme burden on the [defendants]. Fed. R. Civ. P. 26(b)(2)(C)(iii) (factors include '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'). Courts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply." Id.

The onus should be on the Plaintiffs to put forward evidence that additional custodians were involved in the relevant events and would likely possess responsive documents and that this benefit would outweigh the additional costs. See, e.g., Harris v. Koenig, 271 F.R.D. 356, 367 (D.D.C. 2010). As discussed herein, limiting the initial productions does not prevent the Plaintiffs from making additional requests in the future if a need should arise.

(2) Preservation end date for Duke Defendants. The Duke Defendants propose an end-date of August 31, 2007 for preservation of the Duke Defendants' data. The burden and expense of examining data created after August 31, 2007, in general, likely outweighs any benefit in that there is little likelihood that any relevant information regarding McFadyen Counts 21 and 24 or Carrington Counts 8, 11, and 19 was created after August 2007.[9] That said, the Duke Defendants would intend to question relevant witnesses as to whether any relevant documents were created after August 31, 2007. In the event that relevant documents exist, then the Duke Defendants would undertake to collect and review those documents on a case-by-case basis.

(3) Preservation end date for Plaintiffs. With respect to the Plaintiffs, because the Plaintiffs contend that their damages are ongoing and continue to the present, there should be no such end-date for preservation and review of the Plaintiffs' data. So long as the claims

[9] Count 24 in McFadyen and Count 8 in Carrington focus on specific events, namely the writing of letters, that occurred in May of 2006 and what was known before those letters were written. Count 21 in McFadyen deals with claims that suspensions – all of which occurred during the summer of 2006 or before – were breaches of contract. Count 11 in Carrington focuses on conversations and meetings that took place in March (and possibly April) of 2006. Count 19 in Carrington, for negligent supervision, necessarily encompasses the events alleged in Counts 8 and 11, and the knowledge of Duke University before those events. Accordingly, August 31, 2007 is a reasonable end-date for the review of data for any of the custodians identified by the Duke Defendants.

for damages continue, the need for documents that support or rebut those claims exists.

(4) Search Methodology. The Duke Defendants propose that they work together with the Plaintiffs to develop a reasonable set of "keyword" search terms to be run against the preserved data for the 17 custodians (23 custodians if the cases are consolidated for discovery).[10] This subset of documents will then be reviewed by the Duke Defendants for responsiveness and privilege, and responsive, non-privileged documents shall be produced. Because of the type of damages sought by the Plaintiffs and the multitude of information that would be relevant to those damages claims, a keyword search cannot be used to limit the volume of the Plaintiffs' data that is reviewed. Accordingly, the Plaintiffs should review their entire set of data for responsiveness, relevance, and privilege, and only responsive, relevant, non-privileged documents should be produced.

[10] "The use of key words has been endorsed as a search method for reducing the need for human review of large volumes of ESI to be followed by a cooperative and informed process [that includes] sampling and other quality assurance techniques." Romero v. Allstate Ins. Co., 271 F.R.D. 96, 109 (E.D. Pa. 2010). Because of the significant volume of ESI associated with these 17 custodians, if a keyword search were not used, and the ESI was to be manually searched, the time required to conduct such a search would likely result in the "burden of the proposed discovery outweigh[ing] its likely benefit." Ulyanenko v. Metro. Life Ins. Co., No. 09 Civ. 3513, 2011 WL 2183172, at *5 (S.D.N.Y. June 3, 2011).

(5) Production of ESI and Documents. The Duke Defendants propose rolling productions from both parties. The Duke Defendants also propose that both sides produce electronic files and documents as outlined below:

(a) Electronic Files should be produced in Native/near-Native format. This is the least expensive way to produce ESI, and it can be then be loaded into almost any litigation support database.

- E-mail files should be produced in a near native format (HTML or MSG).
- Attachments and loose files should be produced in native format.
- Each native /near-native file name should bear a document identifier similar to a Bates number. When a protective order is entered in this case, then any document that is marked as confidential pursuant to that order should also have some indication of that confidentiality designation in the file name.
- If redaction is required, then the document should be produced as a .tiff file.
- Load file(s) for native/near-native, images, extracted text, and other files should be produced in Concordance format.

(b) Paper Documents should be produced in image format.

- All paper documents should be scanned to image format (group IV single page tiff).
- Load file(s) for image files should be produced in Concordance format.

(c) Electronic data should be produced using hard drives which will be shipped to the party requesting the data.

(6) Cost allocation. When requests for production of ESI that are not reasonably accessible without undue burden or cost are served, the party asked to produce the ESI should be allowed to move the Court for an order that requires the requesting party to pay the reasonable expenses of producing the ESI.

(7) Privileged and protected ESI. The parties reserve the right to withhold any relevant ESI subject to a common law or statutory privilege.

4. Mediation. Mediation should be conducted midway to late during this discovery period, with the exact date to be set by the mediator after consultation with the parties. The parties have discussed possible mediators but have not agreed on a mediator. The parties are continuing to confer about a possible mediator and hope to reach agreement before the pretrial conference scheduled in this case.

5. Preliminary Deposition Schedule. Preliminarily, the Duke Defendants propose the following schedule for depositions:

a. Fact discovery shall be completed by March 31, 2012. The Duke Defendants contend that fact discovery should be completed before beginning expert discovery.

b. Because of the number of depositions that will be needed in this matter, regardless of whether discovery is consolidated in McFadyen and Carrington, and the challenges associated with scheduling those depositions

within the discovery period, the Duke Defendants have proposed to the Plaintiffs that depositions of all of the parties take place in the Middle District of North Carolina, except for expert depositions. The McFadyen Plaintiffs indicated that they would agree with this provision. The Carrington Plaintiffs indicated that they would not agree with this provision. The Duke Defendants contend that for these reasons, the Court should order that depositions of parties shall occur in the Middle District of North Carolina.[11]

c. Because of the number of anticipated depositions, the Duke Defendants propose that a plan be established in advance to allow for the orderly progression of discovery. To this end, the Duke Defendants propose that two weeks of each month be set aside for depositions in this case. Plaintiffs should notice depositions for the first full week of the month; the Duke

[11] "[C]ourts ordinarily presume that a plaintiff may be deposed in the judicial district where the action was brought, inasmuch as the plaintiff, in selecting the forum, has effectively consented to participation in legal proceedings there." In re Outsidewall Tire Litig., 267 F.R.D. 466, 471 (E.D. Va. 2010); see also Scooter Store, Inc. v. Spinlife.com, LLC, No. 2:10–cv–18, 2011 WL 2118765, at *2 (S.D. Ohio May 25, 2011) (the general rule is "that the proper location of a plaintiff's deposition, including that of a corporate officer if the plaintiff is a corporation, is in the forum where the litigation is pending"). Generally, a plaintiff must "bear any reasonable burdens of inconvenience that the action represents." Morin v. Nationwide Fed. Credit Union, 229 F.R.D. 362, 363 (D. Conn. 2005) (quoting Fed. Deposit Ins. Co. v. La Antillana, S.A., No. 88–CV–2670, 1990 WL 155727, at *4 (S.D.N.Y. Oct.5, 1990)). While it may be more convenient for a plaintiff to be deposed in his state of residence, that does not mean it is unduly burdensome for him to travel to his selected forum state to be deposed. See Scooter Store, 2011 WL 2118765, at *4.

Defendants should notice depositions for the third full week of the month. Such a procedure would minimize the need to consult with counsel about their schedules, and counsel could then simply focus on the schedules of the deponents.

d. Because of the number of anticipated depositions, as many as three depositions should be allowed to proceed simultaneously. Unless the parties agree otherwise, no more than three depositions should be taken at the same time.

e. The Duke Defendants should depose the experts retained by the Plaintiffs by June 30, 2012. The Plaintiffs should depose the experts retained by the Duke Defendants on or before the close of discovery on August 31, 2012.

6. Other items.

a. Plaintiff(s) should be allowed until October 31, 2011, to request leave to join additional parties or amend pleadings. The Duke Defendant(s), likewise, should be allowed until October 31, 2011, to request leave to join additional parties or amend pleadings. After these dates, the Court should consider, inter alia, whether the granting of leave would delay trial, as well as the dictates of Rule 16. During the Rule 26(f) Conference, the McFadyen and Carrington Plaintiffs both contended that this date should be 60-90 days before the end of the discovery period. Because the original complaint in the McFadyen case was filed over three years ago, has already

been amended twice, and has been the subject of extensive motions to dismiss, the Duke Defendants could not agree to a presumptive deadline for amending the complaint and adding parties that is so late in the discovery period. Under Rule 16(b), if good cause is shown, a court could allow the amendment and/or the addition of parties at any point. The Duke Defendants cannot agree that amendments should be permitted and parties should be added after 6-9 months of discovery without this showing of good cause.[12]

b. By the written consent of counsel for the Plaintiffs and the Duke Defendants, the parties should be able to agree to modify this Rule 26(f) Report without the consent of the Court, except that the close of discovery should not be changed by consent of the parties without the consent of the Court.

[12] The Duke Defendants seek to avoid a situation such as that once faced by the defendants in Raleigh Flex Owner I, LLC v. Marketsmart Interactive, Inc., No. 1:09-CV-00699, 2010 WL 3211064 (M.D.N.C. Aug. 11, 2010). In Raleigh Flex, the plaintiffs sought to amend the pleadings late in the discovery period, and the defendants opposed the motion. The court said, "Defendants' argument in this regard ignores the fact that the Scheduling Order to which they agreed permitted requests for such amendments up to the day before the planned close of general discovery. At the time of the establishment of the Scheduling Order, Defendants could have sought an earlier deadline for such proposed amendments, after which Plaintiff would have had to meet the more demanding 'good cause' standard in Federal Rule of Civil Procedure 16(b), rather than only the more 'liberal' test of Rule 15(a). . . . In fact, most proposed scheduling orders the undersigned Magistrate Judge reviews set the deadline for amendment of pleadings and addition of parties well before the date for the close of discovery." Id. at *3 (emphasis added).

c. The Duke Defendants anticipate that a protective order will be required to protect the privacy of personal information of individuals and confidential business or financial information that may be subject to disclosure or discovery.

d. The parties have discussed special procedures for managing this case, including reference of the case to a Magistrate Judge on consent of the parties under 28 U.S.C. §§636(c), or appointment of a master: The parties do not consent to either procedure.

e. The Duke Defendants anticipate that trial of all of the counts in McFadyen that survive this Court's Order of March 31, 2011, is expected to take at least 20 days. A jury trial has been demanded. For efficiency, the Duke Defendants contend that trial should not be set in McFadyen until the Stay entered by this Court on June 9, 2011, is lifted such that all counts at issue in McFadyen can be tried in a single trial.

This the 1st day of August.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically filed the foregoing **Rule 26(f) Report of the Duke Defendants** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and to Mr. Linwood Wilson, who is also registered to use the CM/ECF system.

This 1st day of August, 2011.

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