EXHIBIT 2

Dixie Wells

From: Dick Ellis
Sent: Wednesday, July 27, 2011 10:03 PM
To: David Thompson; 'Pete Patterson'
Cc: Robert Ekstrand (rce@ninthstreetlaw.com); 'Stefanie Sparks'; 'Dan McLamb'; Dixie Wells
Subject: FW: Carrington (26)

David and Peter:

In your email of July 19, 2011, you raised a number of issues arising from the Rule 26(f) conference. We address those issues in the attached document. For ease of understanding, we have copied your email, and we have set forth our response in red following each paragraph. Best regards - Dick Ellis

MCFADYEN et al v. DUKE UNIVERSITY et al Doc. 240 Att. 2

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Initial Disclosures

Carrington Plaintiffs' Position: We discussed extending the time for initial disclosures. You suggested an extension of about five weeks to September 1, but you were also not opposed to keeping the default deadline. We now propose an extension of two weeks, which would put the initial disclosure deadline at August 12. Also we would like to clarify our understanding that initial disclosures will be with respect to the three claims for which discovery is going forward at this time.

Duke's Response: We agree to exchange initial disclosures on the three claims for which discovery is going forward on August 12.

Depositions

Carrington Plaintiffs' Position: We proposed forty depositions per side in the Carrington case. We are willing to increase the number of depositions per side to 60, and we continue to insist on symmetry between the sides.

We will agree to consolidate depositions that are common to both the Carrington and McFadyen cases. To facilitate this process, we propose a cross-noticing system that would give the Carrington and McFadyen plaintiffs seven days after the other notices a deposition to serve their own notice for that deponent. When such a cross-notice is filed, the depositions will be consolidated and counsel for the Carrington and McFadyen cases will split the time permitted for the deposition. As a general matter, consolidated depositions will be limited to the duration provided by the Federal Rules, but we reserve the right to seek additional time for any particular deposition.

Duke's Response: We cannot agree that there should be symmetry – by which we understand you to mean the exact same number of depositions – between the sides. While the claims of the thirty-eight plaintiffs are based on the same set of operative facts, their damages are individual issues. For that reason, we anticipate needing as many as 120 depositions. While this number may seem high, as we discussed during our telephone conference, even 120 depositions would give us only about two depositions for each plaintiff, in addition to the depositions of the plaintiffs themselves. Given the many different types – and the significant amounts – of the damages that have been claimed, such a suggestion is, if anything, conservative. Your suggestion of 60 would mean that we would only be able to take the depositions of the plaintiffs themselves, and 22 other witnesses – not even one additional witness for each plaintiff.

As for consolidation, in contrast to consolidating some depositions, we propose that all discovery be consolidated. As for depositions, that would mean that anytime a deposition is noticed, it is noticed for both cases. If we are to use a system like the one that you suggest whereby depositions would be cross-noticed, we would want it agreed that if the deposition is not cross-noticed, then that deponent will not be deposed in the other case. In short, each deponent sits for only one deposition in both Carrington and McFadyen. By way of example, if we depose a witness, then we would only be able to depose him or

her once – at which time we would need to cover any issues relating to the claims going forward in both Carrington and McFadyen.

We agree that depositions would be limited to the time limits provided within the Federal Rules of Civil Procedure, unless the parties agree otherwise or a court orders otherwise.

Based on the claims going forward, we believe that a reasonable number of depositions for the plaintiffs would be 25 if the Carrington and McFadyen cases are not consolidated for discovery. That said, in an effort to reach a compromise, if the two cases are consolidated for discovery, then we would agree that the Carrington and McFadyen plaintiffs could take as many as 60 depositions, if you would agree that the Duke Defendants could take 120 depositions of the Carrington and McFadyen plaintiffs.

Interrogatories and Requests for Admission

Carrington Plaintiffs' Position: The local rules provide that in cases classified as complex "interrogatories (including subparts) and requests for admission are limited to 25 in number by each party." L.R. 26.1(a)(2). The rule for exceptional cases is identical, except that the number of interrogatories and requests for admission is increased to 30. We are willing to cut down on the number of interrogatories and requests the local rules would provide us under either of these case management tracks. And we are also committed to symmetry here as well as with respect to depositions. We thus propose limiting interrogatories and requests for admission to 100 per side.

Duke's Response: As with depositions, we cannot agree that there should be symmetry – by which we understand you to mean the exact same number of interrogatories and requests for admission – between the sides. Your proposal would mean that we would be allowed less than 4 interrogatories and requests for admission to each plaintiff. Again, given the multiple types of damages and the significant amounts of the damages that the plaintiffs are claiming, we simply cannot agree with this proposal. As we discussed during the telephone conference, there are a number of ways to approach written discovery that we would ask that you consider. One approach is that we be allowed 30 interrogatories and requests for admission to serve on each plaintiff. Another approach is that we be allowed to serve a single set of 20 interrogatories and a single set of requests for admission on all plaintiffs, and then be allowed to serve an additional 10 interrogatories and an additional 10 requests for admission on each plaintiff. Finally, another approach is that we have a plaintiff fact sheet, and then be allowed to serve 10 interrogatories on each plaintiff and 30 requests for admission to serve on each plaintiff.

We propose that the Carrington and McFadyen plaintiffs be allowed a combined 30 interrogatories and 30 requests for production for each named defendant.

Time for Discovery

Carrington Plaintiffs' Position: Given the increase in the number of depositions that we are proposing, we also propose to lengthen the fact discovery period from six to nine months.

Duke's Response: Given the number of depositions that are under consideration and the large amount of electronically stored information ("ESI"), we anticipate that 12 months will be needed. As we discussed during the telephone conference, we contend that expert discovery should proceed on these claims. Judge Beaty has ordered that discovery should go forward on these claims and certainly expert discovery is an important component. With the addition of expert discovery, we believe that a period of 12 months is appropriate.

Identity of Mediator

Carrington Plaintiffs' Position: We would agree to Judge Bullock as the mediator. Of course, we are happy to consider other names as well.

Duke's Response: Because of what we have learned about Judge Bullock's connection with your firm, we cannot agree to Judge Bullock. We would propose Jonathan Harkavy.

Rule 26(e) Supplementation Deadline

Carrington Plaintiffs' Position: We now propose establishing a deadline of 45 days before the close of discovery for final supplementation and certification that everything has been turned over.

Duke's Response: Rule 26(e) requires supplementation in a "timely manner." So long as the parties are providing supplementations in such a timely manner, that is, within at least 30 days of receipt of the information, and so long as any information discovered at any point, including less than 45 days before the close of discovery is provided to the opposing side as soon as possible, then the Duke Defendants are agreeable to such a certification 45 days before the close of discovery.

Presumptive Deadline for Plaintiffs and Defendants to Amend Pleadings

Carrington Plaintiffs' Position: We proposed a deadline for both sides of 45 days before the close of discovery, while you proposed a deadline earlier in the discovery period. We are willing to move the deadline for both parties up to 90 days before the close of discovery.

Duke's Response: Because this complaint was filed over three years ago, has already been amended once, and has been the subject of extensive motions to dismiss, the Duke Defendants cannot agree to a presumptive deadline that is this late in the discovery period. If there is good cause shown, the court can allow an 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. We would propose that the deadline for amending pleadings and/or adding parties should be three months after the start of discovery.

ESI Production

You emailed questions and observations to us about production of electronic data. This is our response in a Q (your questions)/A (our responses) format. We intend for this information to apply to the McFadyen case, as well as to Carrington.

Carrington Plaintiffs' Position: First, with respect to the custodians whose ESI will be searched we of course need to know who you are contending is a "key" custodian. On our call you suggested there were only 18 such custodians, which seems to be far too few. In a letter dated June 30, 2008, Duke University defendants indicated they had been collecting e-mails and other electronic documents for 252 custodians. While we recognize that certain custodians among those 252, e.g. Brodhead, Steel, should have a much larger amount of relevant ESI than many of the other 252 custodians, before we can consider narrowing the scope of whose ESI needs to be searched we need more information on how you have attempted to narrow that field and identify custodians. To that end if you could provide us with the following information that would be very helpful:

- Who are the 18 "key" custodians whose ESI you propose searching;
- How did you determine those 18 should be the "key" custodians (e.g. did you perform key word searching, did you review their entire collection of ESI, etc.);

Duke's Response: We will identify the 18 once we reach agreement. They were identified by us primarily through interviews. We also created some sample key words to confirm that the 18 are appropriate to this task of collecting and providing data. Their entire sources of electronic data that might have been used for any purpose relating to the issues open for discovery are collected and preserved. The 252 custodians that you reference were identified in an abundance of caution, based on the claims that were alleged prior to Judge Beaty's March 31 Order allowing only a few of the claims to go forward. The 18 custodians are people with information relevant to the three claims going forward in Carrington at this stage.

- How is the ESI for these 252 custodians being stored (e.g. has the ESI all been collected into a searchable database)

Duke's Response: The ESI we have collected is stored on CDs, DVDs, servers and hard drives. So far, considering the high expense involved, we have loaded some, but not all, of the collected data into a searchable database. The issues subjected to discovery are now limited, but no "end date" has been identified, so the collection and preservation is ongoing.

Carrington Plaintiffs' Position: Second, in addition to knowing who the custodians are whose ESI will be searched, we need to better understand what sources of ESI for each

custodian will be searched. Thus we would request that for each custodian whose ESI will be searched you provide us with a list indicating each source of ESI that was collected and searched (e.g. Duke e-mail account, Duke computer hard drive, personal computer hard drive, personal e-mail account, network server, shared drive, etc.).

Duke's Response: We have inquired about, searched and collected all relevant sources of ESI for the 18. If (for example) there was some home email address that we were told was used only for internet shopping, and never for Duke-related purposes, we did not search that address. We will provide a chart that will show the collection of data for these custodians (for example, sources and volumes), all of which is being preserved.

Carrington Plaintiffs' Position: Third, assuming we can reach agreement on custodians and ESI to be searched, we would need to reach agreement on how that search should proceed. You had suggested using search terms. We are not opposed across the board to using search terms, but don't believe they are necessarily appropriate for identifying all relevant ESI, especially e-mail, in the months immediately following the rape accusation and ensuing investigation. We are willing to consider using search terms to identify potentially relevant-ESI for later time periods, if you are willing to search the e-mail accounts and other sources of ESI for identified custodians in their entirety for a specified time period.

Duke's Response: We see no reason why key words will not work for all times related to the custodians. However, we are willing to consider a limited date range to search for the 18 for the issues that remain for discovery. Of course, we will need an unrestricted search of your clients' sources of electronic data (viz, emails, blogs and social site materials), since due to the nature of their claims and (we presume) their broad contentions of continuing harm, we have been unable to conceive of key words that would reliably identify relevant documents.

Carrington Plaintiffs' Position: Also, you would have to be willing to agree that our search of ESI could be limited to search terms.

Duke's Response: We cannot agree to that. Key words work for the defendants' electronic data, but, as noted generally above, they are not realistic and would not work for plaintiffs, whom we assume are contending continuing damage.

Carrington Plaintiffs' Position: We can discuss in more detail what that appropriate time period should be. With respect to using search terms against ESI gathered for later time periods to identify potentially relevant materials, we would need to know the following in order to consider this proposal:

- How is the ESI stored (e.g. is all of the custodians' ESI stored in a searchable database against which search terms can be ran);

Duke's Response: For the 18, once search terms are identified, we can load all of their relevant data into a searchable database.

- Carrington Plaintiffs' Position: What sorts of searches are possible (e.g. simple key word searches, more complex Boolean searches, etc.)

Duke's Response: Both

- Have the proposed search terms been tested, and if not, what ability do we have to test them to determine if they capture all (or a substantial majority of) relevant documents;

Duke's Response: As noted above, initially we selected some words to use as a test. It worked. We have received no key words from you to test. However, once we receive something, we can work with you to develop a testing protocol. We do not anticipate any problem.

- Are you proposing limits on the number of search terms?

Duke's Response: No, subject to reasonableness.

Carrington Plaintiffs' Position: Fourth, while the issues detailed above really need to be resolved before we can discuss details related to actual production of ESI, some issues to keep in mind are the following:

- Can we agree on any file types that can automatically be excluded from any search and production (e.g. system files, exe files, temp files, etc.).

Duke's Response: Yes, consistent with industry standards.

- Will the production be duplicated across custodians;

Duke's Response: De-duplication would be a part of the process of dealing with the data.

- Does your proposal to produce e-mail in html or msg files ensure that information on blind carbon copies is also produced?

Duke's Response: Yes.

- Can we reach agreement regarding the production of metadata (e.g. agree that metadata does not need to be produced in the first instance but reserving the right for specific documents identified following review of the produced materials to request associated metadata);

Duke's Response: Perhaps. Of course, most of the questions you raise, including this one, apply to your clients, too, and there are technical issues with which you and we must deal related to this metadata question.

- Once we have worked out the details of search and production, we have no objection to your producing the information on a hard drive and we will do the same

Duke's Response: OK. Hard drive.

Carrington Plaintiffs' Position: A final issue we wanted to raise was the issue of our clients' e-mails stored on the Duke e-mail system. It was our understanding that Duke had preserved those e-mail accounts. We of course will need to review those accounts to, among other things, respond to your discovery requests. Can you provide us with a copy of those e-mail accounts so we can begin our review? Since we will be reviewing for any materials responsive to your discovery requests, you should have no need to access those accounts. Given our continued concern that privileged information likely resides in those accounts, we continue our request that if you do intend to access any of our clients' accounts that you provide us with 14 days prior notice so we can take all appropriate steps necessary to protect those privileged materials. If you need to discuss details on how to produce copies of those e-mail accounts to us, please contact Nicole Moss at 910-270-8768.

Duke's Response: We will provide you with the emails for your clients that are within Duke's possession; we have not read and will not read these materials before we send them to you and get something back from you. Of course, after review by you, we assume everything that complies with the rules regarding electronic data production (or discovery) will be sent back to us.

We assume everyone understands that the rules about production of electronic data apply to the plaintiffs' electronic data accounts of whatever kind - personal computer hard drive, personal e-mail accounts, network server, shared drive, social media, blogs, etc. We assume this is understood and not subject to contention as a general matter (excluding any discussion of technical details). Please let us know if you disagree.