

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

RYAN McFADYEN, ET AL.,

Plaintiffs,

v.

DUKE UNIVERSITY, ET AL.,

Defendants.

CIVIL ACTION NO. 1:07-CV-953

**REPLY TO RESPONSE TO DEFENDANTS' REQUEST TO INCLUDE
PROVISIONS IN SCHEDULING ORDER**

Come now Defendants Richard Clark and DNA Security, Inc. (“the DSI Defendants”), and submit this Reply to the Responses filed by Defendant Duke University and Plaintiffs to the Defendants’ Request to Include Provisions in Scheduling Order.

A. FACTS

June 9, 2011: Judge Beaty issued his ruling on the motion of the Durham Defendants to stay discovery. The Court ruled that discovery is stayed as to all claims except for Causes of Action 21 and 24. The ruling placed the DSI Defendants in the position of having to either attend every deposition so as to object if a witness wandered into topics affecting such Defendants, or not attend depositions and potentially lose their right to object to a witness exceeding the scope of permissible discovery.

August 8, 2011: In an effort to avoid the time and expense of attending a large number of depositions, the DSI Defendants and Dr. Brian Meehan filed their

Request to Include Provisions in Scheduling Order. The sole goal of the Request was to make certain that discovery stayed within the boundaries drawn by Judge Beaty.

August 16, 2011: Duke University filed its Response to the Request and correctly noted that some provisions requested by the DSI Defendants were overbroad.

August 31, 2011: Magistrate Judge Dixon held the Initial Pretrial Conference in this matter as well as in the parallel *Carrington* case. The Court directed counsel to prepare a scheduling order that included up to sixty depositions in this action and over 150 in the *Carrington* case.

September 1, 2011: In an effort to simplify and limit their request, the DSI Defendants sent the attached letter (Tab A) to counsel for Plaintiffs and Duke University. The letter requested only one substantive provision in the scheduling order:

All objections to deposition questions or testimony based on the question or response exceeding the scope of permissible discovery, per Judge Beaty's Order of June 9, 2011, shall be deemed preserved regardless of whether the objection is raised at the deposition.

Such provision would address the DSI Defendants' concerns without impinging on the discovery allowed by Judge Beaty's June 9, 2011 Order.

September 2, 2011: Ignoring the DSI Defendants' September 1, 2011 letter, Plaintiffs filed their hyperbolic Response to the DSI Defendants' Request, stating that the Request (which had been superseded by the September 1 letter) was

“beyond the imaginings of Orwell”¹, “the picture of confusion and inefficiency”, and “the poster child for wasteful litigation”.

B. DISCUSSION

Like the other Defendants in this matter, the DSI Defendants are forced to deal with the consequences of Plaintiffs’ decision to file a 448-page complaint alleging a sprawling conspiracy by “the Consortium”. While Judge Beaty determined that almost none of the allegations asserted against the DSI Defendants stated claims for relief, the DSI Defendants are left facing two causes of action: 18 and 34.

The case now stands in an unusual posture: discovery as to the claims against the DSI Defendants, Dr. Meehan, the Durham Defendants, and Linwood Wilson are stayed, but extensive discovery is allowed to proceed as to two claims involving Duke University. Particularly in light of Plaintiffs’ claims that all Defendants are part of a cabal to persecute the entire Duke lacrosse team, it is possible that either counsel or witnesses will stray outside of the bounds set by Judge Beaty and into areas affecting the DSI Defendants.

Consider the issue: The DSI Defendants are given notice of one of the sixty depositions at this stage of the proceedings; the DSI Defendants choose not to attend as a cost-saving measure; the witness, either with or without prompting, offers testimony relevant to the DSI Defendants. Have the DSI Defendants waived their right to object to such testimony? Have they lost their ability to later pursue that line of questions with that

¹ Given Plaintiffs’ 1384 paragraph Complaint alleging that the 50 defendants are part of a sweeping and shadowy conspiracy, it is difficult to accept Plaintiffs’ criticism that the Request is “beyond the imaginings of Orwell” except with a healthy dose of irony.

witness? Is the testimony admissible against the DSI Defendants? At least as to the last question, Plaintiffs' position is yes: such testimony, while outside the scope permitted by Judge Beaty, would be admissible against the DSI Defendants.²

The DSI Defendants made a simple request in their letter of September 1: that objections that a witness has exceeded the scope of permissible discovery be preserved regardless of whether the objection is raised at the deposition itself. Such provision would not infringe on the legitimate scope of discovery at this stage, and it would relieve the DSI Defendants of the burden of attending dozens of otherwise unnecessary depositions. The DSI Defendants respectfully request that such provision be included in the scheduling order.

² See p. 4 of Plaintiffs' Response, quoting Rule 32(a)(1) to the effect that the testimony would be admissible against any party given notice of the deposition regardless of whether the testimony exceeded the scope of permissible discovery.

Respectfully submitted, this the 7th day of September, 2011.

/s/ Robert J. King III
Robert J. King III
N.C. State Bar No. 15946
rking@brookspierce.com
William P.H. Cary
N.C. State Bar No. 7651
wcary@brookspierce.com
Clinton R. Pinyan
N.C. State Bar No. 22260
cpinyan@brookspierce.com

Charnanda T. Reid
N.C. State Bar No. 38927
creid@brookspierce.com
Brooks, Pierce, McLendon,
Humphrey & Leonard, L.L.P.
Post Office Box 26000
Greensboro, North Carolina 27420
Telephone: 336-373-8850
Facsimile: 336-378-1001

*Counsel for Defendants DNA Security,
Inc. and Richard Clark*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this date, the foregoing REPLY TO RESPONSE TO DEFENDANTS' REQUEST TO INCLUDE PROVISIONS IN SCHEDULING ORDER was filed electronically and served upon each party to this action via the CM/ECF electronic filing system. Notice of this filing will be sent by operation of the Court's Electronic Filing System to counsel for all parties to this action, and to Defendant Linwood Wilson, who is proceeding *pro se* and has been granted access to the CM/ECF system.

This the 7th day of September, 2011.

/s/ Robert J. King III
Robert J. King III