

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, et al.)	
)	
Plaintiffs,)	
)	Civil Action Number
v.)	1:07-cv-00953
)	
DUKE UNIVERSITY, et al.,)	
)	
Defendants.)	
)	

**DUKE UNIVERSITY’S BRIEF IN SUPPORT OF ITS MOTION
FOR A PROTECTIVE ORDER LIMITING THE RULE 30(b)(6)
DEPOSITION NOTICED BY PLAINTIFFS**

Defendant Duke University submits this Brief in Support of its Motion for a Protective Order Limiting the Rule 30(b)(6) Deposition noticed by Plaintiffs.

Pursuant to the Court’s June 9, 2011 Order [DE 218], discovery in this case is currently proceeding only as to two claims. Because the Rule 30(b)(6) notice to Duke University seeks testimony on many topics that are beyond the scope of the discovery allowed by the Court, Duke University is entitled to a protective order. Specifically, Duke is entitled to a protective order foreclosing discovery on Topics 6, 8, 14, and 15, and limiting discovery on Topics 5, 12, and 16 consistent with the Court’s orders.

NATURE OF THE CASE AND STATEMENT OF FACTS

This action arises out of the investigation of members of the 2005-2006 Duke men's lacrosse team stemming from false allegations of rape made by a stripper hired by one of the team members to perform at a private party held off-campus. None of the Plaintiffs in this case was charged or tried for any offense resulting from those allegations. Nevertheless, Plaintiffs have sued Duke University, certain Duke University employees, the City of Durham, various individuals associated with the City of Durham, and a DNA laboratory for purported violations of their legal rights in connection with the investigation.

Duke University and other defendants moved to dismiss the claims against them, and the Court dismissed twenty-seven Counts on March 31, 2011. Order, at 2 (March 31, 2011) [DE 187]. The Court stayed all proceedings with respect to twelve Counts, including discovery, pending resolution of an interlocutory appeal. Order, at 9 (June 9, 2011) [DE 218]. The Court allowed discovery to proceed against Duke University on the two remaining Counts – Counts 21 and 24 – but emphasized that “discovery will proceed only as to these two claims.” *Id.* Count 21 alleges a claim against Duke University “for breach of contract, limited to the allegation that Duke imposed disciplinary measures against Plaintiffs, specifically suspension, without providing them the process that was promised.” *Id.* at 8. Count 24 alleges a claim a claim against Duke for “fraud based on alleged fraudulent misrepresentations in

letters to Plaintiffs regarding Plaintiffs' Duke Card information." *Id.*

On December 5, 2011, the plaintiffs in *Carrington v. Duke University*, Case No. 1:08-cv-119, issued a notice of deposition to Duke University under Rule 30(b)(6). *See* Ex. A. On December 9, 2011, under the procedure authorized by the LR 16(c) Initial Pretrial Order entered on September 19, 2011 [DE 244], Plaintiffs in this case cross-noticed the deposition. *See* Ex. B.

QUESTION PRESENTED

Whether Duke University is entitled to a protective order barring and/or limiting deposition questions as to Topic Numbers 5, 6, 8, 12, 14, 15 and 16 of the Rule 30(b)(6) cross notice served on Duke University, where those topics are not relevant to "any party's claim or defense" to any of the Counts for which discovery is proceeding or are over broad as written.

ARGUMENT

I. Duke is Entitled to a Protective Order Because Plaintiffs Seek to Depose a Rule 30(b)(6) Witness on Topics Not Relevant to Any Claim or Defense Currently in Discovery

Pursuant to Judge Beaty's Order on June 9, 2011 [DE 218], "discovery will proceed only as to" Counts 21 and 24. Order at 9; *see also* Fed. R. Civ. P. 26(b) (specifically deferring to limits of "court order"). Rule 26(b)(1) of the Federal Rules of Civil Procedure further provides that discovery is limited to matters "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). When read in conjunction

with the June 9, 2011 Order the result is that discovery is limited to matters “relevant to any party’s claim or defense” to Counts 21 or 24. *See also Volumetrics Med. Imaging, LLC v. Toshiba Am. Med. Sys., Inc.*, No. 1:05CV955, 2011 WL 2470460, at *2 (M.D.N.C. June 20, 2011) (noting that the “claims and defenses” language was added “in response to concerns that, ‘in some instances, particularly cases involving large quantities of discovery, parties [were] seek[ing] to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the ‘subject matter’ involved in the action””) (quoting Fed. R. Civ. P. 26 advisory committee’s notes, 2000 Amendment, Subdivision (b)(1)).

Where, as in this case, a Rule 30(b)(6) deposition notice seeks discovery on topics not relevant to any party’s claim or defense to a Count proceeding in the action, entry of a protective order to limit the scope of the deposition is appropriate. *See, e.g., Shenoy v. Charlotte-Mecklenburg Hosp. Auth.*, No. 3:08-cv-125, 2011 WL 3564424 (W.D.N.C. Aug. 12, 2011); *Young v. United Parcel Serv. of Am., Inc.*, No. 08-cv-2586, 2010 WL 1346423, at *9 (D. Md. Mar. 30, 2010) (prohibiting questioning on “matters that are not related to claims in [plaintiff’s] amended complaint”); *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 238 (D. Md. 2010) (limiting topics of 30(b)(6) deposition for relevance to claims and defenses involved in case).

Further, where a court has already determined the boundaries of discovery – as this Court did in limiting discovery in its 9 June 2011 Order [DE 218] – a protective order should be granted to prevent parties from going beyond those boundaries. *See Shenoy*, 2011 WL 3564424, at *2 (granting protective order where plaintiff’s 30(b)(6) notice failed to “heed the guidance” of court’s order that discovery be limited to remaining claims in action); *U.S. ex rel. Barko v. Halliburton Co.*, 270 F.R.D. 26, 29 (D.D.C. 2010); *Abudiad v. City and County of San Francisco*, No. 09-cv-1778, 2011 WL 5520943, at *3 (N.D. Cal. Nov. 14, 2011) (quashing plaintiff’s 30(b)(6) deposition notice where “the topics squarely fall” into portion of discovery that had been bifurcated).

Seven of the topics in the deposition notice are not relevant to the parties’ claims or defenses on which discovery is proceeding. Where “relevancy is not apparent, it is the burden of the party seeking discovery to show the relevancy of the discovery request.” *See Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442, 445 (D. Kan. 2000). Accordingly, Plaintiffs have the burden of showing the relevancy of these seven topics.

A. Topic Number 5

Topic Number 5 in Plaintiffs’ Rule 30(b)(6) deposition cross-notice seeks testimony on:

Defendant's policies and practices for preserving data – both electronic and hard-copy – that may relate to the Rape Allegations,¹ including:

- a. When Defendant first anticipated that litigation may arise from the Rape Allegations;
- b. Defendant's establishment of a litigation hold for data that may relate to the Rape Allegations, including when such a hold was instituted, communications related to the hold, and efforts to monitor compliance.
- c. Defendant's efforts to locate and preserve data that may relate to the Rape Allegations from:
 - i. Personal email accounts;
 - ii. Other non-Duke email accounts, such as employer email accounts;
 - iii. Duke email accounts;
 - iv. Postings to social media websites and blogs;
 - v. Text messages;
 - vi. Voice mails;
 - vii. Alumni correspondence;
 - viii. Board meetings and other meetings of Duke officials;
 - ix. Individual notes or files;
 - x. Presentations;
 - xi. Press releases;
 - xii. Communications with Durham; and
 - xiii. Any other sources of data;

¹ Plaintiffs' Cross Notice of Deposition defines "Rape Allegations" as follows: "Rape Allegations' means information relating to the allegations made by Crystal Mangum relating to the events that occurred at 610 North Buchanan Blvd. in Durham, NC on March 13-14, 2006, including but not limited to, the medical examination of Crystal Mangum, any investigation of the allegations, any reaction to the allegations, and any disposition of the allegations, including the ultimate exoneration of the three members of the 2005-2006 Duke University Men's Lacrosse team who had been indicted in connection with Ms. Mangum's allegations."

- d. The manner in which Defendant maintains data that may relate to the Rape Allegations, including the location of such data and any software used for that purpose;
- e. Any indexing, processing, or reviewing Duke has done of data that may relate to the Rape Allegations;
- f. The identity and activities of any outside vendors or other third parties Duke has used to assist in its preservation efforts;
- g. The manner in which Defendant identifies custodians whose data is being preserved and the identity of such custodians, including the 252 custodians of electronically stored information identified in Defendant's letter of June 30, 2008.

Topic 5 seeks discovery on “Defendant’s policies and practices for preserving data – both electronic and hard-copy – that may relate to the Rape Allegations.” As previously noted, Plaintiffs have defined “Rape Allegations” broadly, to include, among other things, “information relating to the allegations made by Crystal Mangum relating to the events that occurred at 610 North Buchanan Blvd. in Durham, NC on March 13-14, 2006,” “the medical examination of Crystal Mangum,” and “ultimate exoneration of the three members of the 2005-2006 Duke University Men’s Lacrosse team who had been indicted” (none of whom are plaintiffs in this case). None of these topics is relevant to the scope of any claim or defense currently proceeding in discovery. Nothing about Ms. Mangum’s

allegations, Ms. Mangum's medical exam, or the exoneration of the three indicted members of the lacrosse team would tend to prove or disprove the only issues on which discovery has been permitted: whether Duke imposed disciplinary measures against Plaintiffs without providing them due process, or whether any of the Duke Defendants defrauded Plaintiffs in this case in connection with statements about their Duke Card information.

Even if some discoverable information may fall within this broad topic, such as the preservation of data relating to Counts 21 or 24,² the topic is broader than the Court's June 9, 2011 Order allows and is therefore outside the scope of a permissible Rule 30(b)(6) deposition. *See, e.g., Young*, 2010 WL 1346423, at *9 (30(b)(6) deposition topics "must not be overbroad").

Moreover, this topic is over broad because it is not limited to this case. Specifically, the subparts to this topic seek to discover "[w]hen Defendant first anticipated that litigation may arise from the Rape Allegations," and "Defendant's establishment of a litigation hold for data that may relate to the Rape Allegations, including when such a hold was instituted," but "litigation" is not limited to this

² As there is no evidence that Duke University has not honored its discovery obligations, inquiry into this topic may be premature. *See Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 684 (N.D. Ga. 2010) (finding no error in magistrate judge's order denying discovery on such topic until Plaintiff developed evidence to show Defendants had not honored their discovery obligations).

case. There is no reason Duke's actions with respect to any other litigation would be relevant to Counts 21 or 24 of the present lawsuit.

Accordingly, this topic as drafted is overbroad.

B. Topic Number 6

Topic Number 6 in Plaintiffs' cross-notice of deposition pursuant to Rule 30(b)(6) seeks testimony on "[c]ommunications with insurance carriers regarding the Rape Allegations, including the dates of such communications."

Communications with an insurer regarding litigation are protected work product.

Therefore, a protective order is appropriate. *See Medical Assur. Co., Inc. v.*

Weinberger, No. 4:06-cv-117, 2011 WL 2471898, at *10 (N.D. Ind. June 20, 2011);

Metro. Life Ins. Co. v. Muldoon, No. 06-cv-2026, 2007 WL 4561142, at *2 (D. Kan.

Dec. 20, 2007).

Further, communications with insurance carriers regarding Crystal Mangum's allegations are outside the scope of any claim or defense currently proceeding in discovery. Such communications are not relevant to the disclosure of Duke Card data to the Durham Police, nor are they relevant to the response to the subpoena seeking production of Duke Card data from Duke University (Count 24). Likewise, communications with insurance companies are not related to Duke's alleged imposition of disciplinary measures against Plaintiffs without providing them sufficient due process (Count 21).

C. Topic Number 8

Topic Number 8 in Plaintiffs' cross-notice of deposition pursuant to Rule 30(b)(6) seeks testimony on "Duke's public relations strategy with respect to the Rape Allegations, including the process for developing that strategy, its implementation, and any consideration of its impact on Plaintiffs' reputations."

It is not Duke University's "public relations" with respect to the incidents of March 13, 2006 that is at issue, but rather Duke University's private communications with Plaintiffs regarding the disclosure of their Duke Card information and Duke University's private interactions with Plaintiffs regarding the procedure employed in their suspensions. Counts 21 and 24 are not about what the Duke Defendants generally communicated to the press, alumni, applicants, or the general student body about the March 13, 2006 events. On its face, therefore, inquiry into Duke's public relations strategy with respect to Crystal Mangum's allegations is not relevant to the claims alleged in Counts 21 and 24.

Accordingly, because Deposition Topic 8 is not relevant to any of the parties' claims or defenses to Counts 21 or 24, Duke University should not have to produce a witness to testify regarding this topic. *See Young*, 2010 WL 1346423, at *9 (prohibiting questioning on matters not related to plaintiff's claims); *Abudiad*, 2011 WL 5520943, at *3 (quashing plaintiff's 30(b)(6) deposition notice where topics were not relevant to claims proceeding in discovery).

D. Topic Number 12

Topic Number 12 in Plaintiffs' cross-notice of deposition pursuant to Rule 30(b)(6) seeks testimony on "Duke's communications with Durham regarding the Rape Allegations, including communications relating to meeting with members of the Lacrosse Team and information disclosed by members of the Lacrosse Team."

Communications between Duke University and Durham regarding the disclosure of Duke Card data to the Durham Police and the subsequent subpoena seeking production of Duke Card data from Duke University would be relevant to Count 24 and defenses to the claim alleged therein. Communications regarding the procedure employed by Duke University in imposing disciplinary measures against Plaintiffs would be relevant to the parties' claims or defenses to Count 21 and defenses to that claim.

But Topic Number 12 is not so limited; it is much broader. For example, because Plaintiffs define "Rape Allegations" to include the medical examination of Crystal Mangum, Topic Number 12 would require Duke to produce a witness to testify about Duke's communications with Durham regarding this medical examination. Whatever the communications between Duke and Durham regarding Crystal Mangum's medical examination, evidence of those communications is not relevant to Plaintiffs' proof of Duke-Card-related fraud, to Plaintiffs' proof regarding their suspensions, or to Duke's defenses to those claims. Topic Number

12 is, therefore, impermissibly broader than the scope of any claim or defense currently proceeding in discovery as it goes beyond communications relevant to the two counts on which discovery is proceeding.

Accordingly, Duke is entitled to a protective order limiting inquiry on this topic to communications between Duke University and Durham regarding the disclosure of Duke Card data to the Durham Police and the subsequent subpoena seeking production of Duke Card data from Duke University, or regarding the procedure employed by Duke University in imposing disciplinary measures against Plaintiffs. *See Young*, 2010 WL 1346423, at *9 (30(b)(6) deposition topics “must not be overbroad”).

E. Topic Number 14

Topic Number 14 in Plaintiffs’ Rule 30(b)(6) deposition cross-notice seeks testimony on:

Duke’s decision-making process for responding to the Rape Allegations, including: (a) communicating with and/or advising members of the Lacrosse Team, their coaching staff, their parents, and their attorneys on matters relating to the Rape Allegations; (b) responding to and participating in Durham’s investigation of the Rape Allegations; (c) determining the truth of the Rape Allegations; (d) cancelling the 2005-2006 men’s lacrosse season; (e) forcing Mike Pressler to resign as lacrosse coach; (f) formulating public statements relating to the Rape Allegations; (g) considering how Duke’s response would affect members of the Lacrosse Team.

Inquiry into Duke's decision-making process for the seven issues set forth in Topic 14 has no bearing on the issues in Counts 21 or 24. For example, Plaintiffs brought several claims regarding the cancellation of the season, including the portion of Count 21 which alleged breach of contract on the basis that Duke failed to enforce its anti-harassment policy. This aspect of Count 21 was dismissed on March 31, 2011. Order, at 2. (March 31, 2011) [DE 187]. Accordingly, the cancellation of the season is not relevant to any party's claims or defenses to Count 21. Similarly, the other issues are likewise not relevant to any party's claims or defenses. Because these topics are not relevant to Counts 21 or 24, discovery into these topics is prohibited by the Court's Order of June 9, 2011.

Accordingly, because Topic 14 is not relevant to Counts 21 or 24, Duke University should not have to produce a witness to testify regarding this topic. *See, e.g., Young*, 2010 WL 1346423, at *9 (prohibiting questioning on matters not related to plaintiff's claims); *Abudiad*, 2011 WL 5520943, at *3 (quashing plaintiff's 30(b)(6) deposition notice where topics were not relevant to claims proceeding in discovery).

F. Topic Number 15

Topic Number 15 in Plaintiffs' Rule 30(b)(6) deposition cross-notice seeks testimony on "Duke's knowledge of any results of DNA testing related to the Rape Allegations, including the date when Duke first learned of those results."

The results of DNA testing have no relationship to Count 21 involving the Duke Card data or to Count 24 involving the procedures employed by Duke University in imposing disciplinary measures against Plaintiffs. Plaintiffs' Second Amended Complaint does not allege any connection between results of DNA testing and either of these Counts, and Duke University is not aware of any such relationship. Duke's knowledge of any results of DNA testing related to Crystal Mangum's allegations is not relevant to Counts 21 or 24.

Moreover, Topic 15 – “Duke's knowledge of any results of DNA testing related to the Rape Allegations, including the date when Duke first learned of those results” – is related to claims against the City Defendants, on which discovery specifically has been stayed. Order, at 6 (June 9, 2011) [DE 218]. The June 9, 2011 Order also explicitly stayed discovery as to all defendants on claims involving the City Defendants, because “[i]t is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position,” thereby undermining the protection of the defense of qualified immunity. Order, at 6 (June 9, 2011) [DE 218]. Questions around DNA testing are central to several of the claims Plaintiffs have raised against the City Defendants, so this same concern would arise if Plaintiffs were permitted to depose a Duke representative on Topic 15. *Id.* at 6 (noting that claims against

Defendant DNA Security, Inc., among others, “are all claims that are also asserted against at least some of the City Defendants and are so intertwined with the claims against the City Defendants that it would be almost impossible to proceed to discovery on those claims without overstepping into the claims against the City Defendants presently on appeal.”).

G. Topic Number 16

Topic Number 16 in Plaintiffs’ cross-notice of deposition pursuant to Rule 30(b)(6) seeks testimony on

Duke’s supervision of the actions of Richard Brodhead, Tallman Trask, and Suzanne Wasiolek relating to the Rape Allegations, including the identity of the persons involved in such supervision, the selection of those persons, the supervisory actions taken by those persons, and the manner and substance of those persons’ communications with each other and with President Brodhead, Dr. Trask, and Dean Wasiolek.

Inquiry into Duke’s supervision of the actions of Richard Brodhead, Tallman Trask, and Suzanne Wasiolek relating to Crystal Mangum’s allegations is in no way relevant to (i) the disclosure of Duke Card Data to the Durham Police Department, the subsequent subpoena that was issued to Matthew Drummond on 31 May 2006, seeking production of Duke Card Data from Duke University, and the response to that subpoena; or (ii) the allegation that Duke imposed disciplinary measures against Plaintiffs without providing them sufficient due process. None of these three

administrators is alleged to have been involved with the Duke Card data or the disciplinary measures, and none of the three is a defendant in Counts 21 or 24. , Therefore, this topic is outside the scope of discovery permitted in this Court's June 9, 2011 Order.

CONCLUSION

For the reasons and authorities stated above, Duke University respectfully requests that this Court grant the Motion for Protective Order, foreclose Plaintiffs' requested discovery into Topics 6, 8, 14, 15, and 16 of their Rule 30(b)(6) deposition cross-notice, and limit the scope of Topics 5, 12, and 16 of their cross-notice to the issues relevant to Counts 21 or 24 of the First Amended Complaint.

This the 18th day of January, 2012.

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CERTIFICATE OF SERVICE

It is hereby certified that on January 18, 2012, I electronically filed the foregoing **Duke University's Brief in Support of its Motion for a Protective Order Limiting the Rule 30(b)(6) Deposition Cross Noticed by Plaintiffs** 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 the 18th day of January, 2012.

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