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

RYAN McFADYEN, *et al.*,

Plaintiffs,

v.

DUKE UNIVERSITY, *et al.*

Defendants.

1:07 CV 953

PLAINTIFFS' RESPONSE TO DUKE'S MOTION FOR AN ORDER BARRING INQUIRY INTO TOPICS IDENTIFIED IN PLAINTIFFS' CROSS-NOTICE OF THE RULE 30(B)(6) DEPOSITION OF DUKE UNIVERSITY

The matter before the Court is Defendant Duke University's second motion for a protective order in this action (Doc. # 262 and 263) ("Motion" and "Brief") in connection with Plaintiffs' Cross-Notice of certain topics identified in the Notice of Deposition of Duke University issued by the Plaintiffs in *Carrington v. Duke University, et al.* pursuant to Fed. R. Civ. P. Rule 30(b)(6). Duke was served with the Notice and Cross-Notice of Duke's 30(b)(6) Deposition on December 5 and 9, 2001, respectively. Despite more than six weeks' notice of the deposition, Duke filed its motion *minutes* before the deposition was scheduled to begin. At the duly convened deposition, Duke's counsel refused to produce or designate a witness to testify for the University on most of the substantive topics identified in Plaintiffs' Cross-Notice.

Thus, Duke University is not seeking a protective order as much as a court order ratifying Duke's refusal to produce or identify a witness to testify for Duke at a duly noticed deposition. In its Brief, Duke does not assert any privilege, and abandons most of its previous excuses for failing to participate in discovery, including its claim that Plaintiffs seek unidentified "confidential commercial information." Rather, Duke asserts that it had no obligation to produce or designate witnesses at its deposition because, Duke contends, the topics in Plaintiffs' Cross-Notice are not reasonably calculated to lead to the discovery of admissible evidence in connection with Plaintiffs' claims for fraud or breach of contract.

Duke's argument comes to nothing because Duke ignores two other domains of permissible discovery altogether: Plaintiffs are entitled to pursue discovery relating to (1) Plaintiffs claims for punitive damages in connection with the conduct giving rise to its fraud and contract claims, and (2) the myriad, expansive "affirmative defenses" Duke asserts to Plaintiffs' claims. As Plaintiffs document below, Duke's own defenses open the door to discovery on the very subjects Duke contends are "outside the scope of discovery." Because Plaintiffs have a right to conduct discovery into not merely their claims but also their entitlement to punitive damages and the defenses asserted against those claims, Duke's motion fails at the threshold, and must be denied.

RELEVANT FACTS

A. DUKE'S FAILED MOTION TO DISMISS

Plaintiffs initiated this action over four years ago. Since then the Duke Defendants have employed every means and spared no expense to avoid discovery. Initially, Duke asserted that Plaintiffs failed to state a claim against them. Three years and hundreds of pages of briefing later, this Court ruled that Plaintiffs stated no less than a total of 18 claims against 11 Duke Defendants, including Duke University. This Court similarly rejected Duke's co-defendants' motions seeking dismissal of all of Plaintiffs' claims.

B. THE COURT STAYED DISCOVERY TO PROTECT THE CITY DEFENDANTS' ASSERTED IMMUNITIES, NOT TO PROTECT DUKE

In rejecting the Defendants' motions to dismiss, the Court rejected multiple immunity defenses asserted by the City Defendants. The City Defendants appealed to the Fourth Circuit, and moved to stay discovery pending resolution of that appeal. The City Defendants' Appeal deprived the Court of jurisdiction over them during the pendency of their Appeal and thus, the Court stayed discovery as to the City Defendants until the Fourth Circuit ruled on their asserted immunities. Order Granting Mots. to Stay 6 (June 9, 2011) (Doc. # 218).

However, Plaintiffs claims for breach of contract (Count 21) and fraud (Count 24) were asserted only against Duke Defendants, its officers, and employees, and, because Duke Defendants had no interests justifying a stay of discovery as to them, the Court authorized Plaintiffs to proceed to discovery on those claims and Duke's defenses to those claims. *Id.* at

8-9.[1] Moreover, this Court did not foreclose the possibility that Plaintiffs may proceed to discovery in connection with certain City Defendants. To the contrary, the Court provided that:

> If either Plaintiffs or the Duke Defendants believe that they need discovery from a City Defendant specifically limited only to the issues raised in Counts 21 or 24 that cannot wait until the resolution of the interlocutory appeal, they should file a motion with the proposed discovery attached for prior review and consideration by the Court.

Order Granting Mots. to Stay n. 7 at 9. Thus, even discovery directed to the City Defendants is not foreclosed under the Court's Order staying discovery. To the extent that discovery directed to certain City Defendants becomes necessary to enable Plaintiffs to fully explore their breach of contract claims, their fraud claims, or the array of defenses Duke has asserted to those claims, Plaintiffs are free to seek leave from the Court to do so.

C. THE LONE WITNESS DUKE DESIGNATED TO TESTIFY TO THE FEW TOPICS NOT SUBJECT TO ITS OBJECTIONS WAS NOT PREPARED TO DO SO.

To testify to all of the topics noticed in Part I of the Notice of Duke's 30(b)(6) Deposition, Duke designated one witness: Suzanne Wasiolek. With respect to the topics relating to Plaintiffs' fraud claim, Ms. Wasiolek had no personal knowledge of any of the material facts, reviewed a handful of documents, and spoke with only 4 people. Ms. Wasiolek had no clear recollection of the documents she reviewed, and she did not interview any of the individuals named or identified in connection with Plaintiffs' fraud claim.

[1] The DNASI Defendants and Linwood Wilson, *pro se,* joined the City Defendants' Motion to Stay Discovery pending the Fourth Circuit's ruling on the City Defendants' Appeal. (Doc. # 211 and 212). But the Duke Defendants did not move to stay discovery or join the City Defendants' Motion to do so. Order Granting Mots. to Stay at 8.

Instead, Ms. Wasiolek interviewed Sara-Jane Raines (who appears nowhere in Plaintiffs' Complaint) and an associate university counsel who is not named in Plaintiffs Complaint. Ms. Wasiolek testified that her interviewees had no personal knowledge of the fraud Plaintiffs' allege either. The other two individuals also do not appear anywhere in Plaintiffs' allegations and were equally ignorant of the material facts as Ms. Wasiolek.

Ms. Wasiolek's omissions were even more striking: Ms. Wasiolek did not interview Sgt. Smith, who requested the DukeCard reports from the DukeCard office and delivered them to Sgt. Gottlieb. Ms. Wasiolek also failed to interview the DukeCard employee who produced the DukeCard reports for Smith and Gottlieb.

Ms. Wasiolek appeared oblivious to the correspondence that evinced the fraud and the agreement among Duke and Durham defendants to cover it up through a bogus subpoena, and the ensuing fraud on Plaintiffs and the court. For example, Ms. Wasiolek was ignorant of the communications and transactions culminating in Sgt. Smith's delivery of the DukeCard reports to Sgt. Gottlieb, and was even unaware of Sgt. Smith's April 14, 2006 email directing Sgt. Gottlieb to obtain a subpoena for the DukeCard records that Smith gave Gottlieb two weeks before, on March 31, 2006.

Ms. Wasiolek also conceded that she had not even reviewed the transcript of Sgt. Smith's deposition. As a result, Ms. Wasiolek did not know that Sgt. Smith admitted that he enlisted the aid of a specific programmer in the DukeCard Office (Roland Gettliffe) to produce Plaintiffs' DukeCard records; she did not know that Mr. Gettliffe routinely produced such reports without a subpoena; that the subpoena for Plaintiffs' records was the

only subpoena for DukeCard data that either Mr. Gettliffe or Mr. Drummond received before 2006 or since. Ms. Wasiolek did not know that, after Mr. Gettliffe produced the DukeCard reports on March 31, 2006, Sgt. Smith obtained Gottlieb's agreement to obtain a subpoena for the same records, or that, before the subpoena was issued, Sgt. Smith solicited Mr. Gettliffe's agreement not to disclose that he had already given Plaintiffs' DukeCard records to Durham Police.

Ms. Wasiolek did not even bother to ascertain the identity of the DukeCard Office employee who produced the DukeCard reports to Sgt. Smith, and therefore she did not even know that the DukeCard employee was Mr. Gettliffe. As a result, Ms. Wasiolek also did not know that Mr. Gettliffe told Matthew Drummond that he produced the same records sought by the bogus subpoena that Smith, Gottlieb, Himan and Nifong agreed to issue, and she did not know that Mr. Gettliffe did so before Mr. Drummond advised Plaintiffs that their DukeCard data would be released pursuant to the subpoena unless Plaintiffs' lawyers filed a motion with the Court. Further, because Ms. Wasiolek did not inquire into the policies, customs, or practices of the DukeCard office, she did not know that Mr. Gettliffe always notified Mr. Drummond whenever he produced reports of students' DukeCard data to police, that Mr. Gettliffe did so as matter of course to ensure that Mr. Drummond would know that he need not act on a subsequent request for the same information Mr. Gettliffe had previously produced.

Ms. Wasiolek simply did not prepare to testify on the subjects Plaintiffs identified in their Cross-Notice – even when those subjects were unilaterally limited to a handful of

topics by Duke's last second objections. And yet, Ms. Wasiolek swore under oath that no one else was more knowledgeable or better able than she to testify about the noticed topics on behalf of Duke University.

Plaintiffs need not belabor the point any further than to simply note that the transcript of Ms. Wasiolek's testimony as Duke University's corporate representative is rife with variations of "I don't know." Ms. Wasiolek's consistent lack of knowledge across all topics on which examination was actually permitted is tantamount to a failure to appear for the deposition in violation of Rules 30(b)(6) and 37(d)(1)(A), and as a result, caused a significant waste of time and resources, and will continue to do so as Plaintiffs undertake to remedy Duke's failure.

THE STANDARD OF REVIEW

FED. R. CIV. P. RULE 26

Rule 30(b)(6) of the Federal Rules of Civil Procedure creates a means by which a party may compel a public or private corporation to submit to a deposition by oral examination. Fed. R. Civ. P. R. 30(b)(6). A party seeking to depose a corporate party must issue a Notice directed to the corporation that "describes with reasonable particularity the matters for examination." *Id.* The named organization must then "designate one or more officers, directors, or managing agents … or other persons who consent to testify on its behalf, and set out the matters on which each person designated will testify." *Id.* The organization has "a duty to make this designation." *Id.*

Indeed, the law is well-established that a 30(b)(6) deponent has an affirmative obligation to educate himself as to the matters regarding the corporation.

> Rule 30(b)(6) explicitly requires [a company] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires persons to review all matters known or reasonably available to it in preparation for the 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the "sandbagging" of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process…Preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business…[A company] does not fulfill its obligations at the Rule 30(b)(6) deposition by stating that it has no knowledge or position with respect to a set of facts or area of inquiry within its knowledge or reasonably available….

United States v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C., 1996), *aff'd* 166 F.R.D. 367 (M.D.N.C. 1996).[2] While the preparation to testify in a Rule 30(b)(6) deposition can be burdensome,

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[2] *See also Poole ex rel. Elliott v. Textron, Inc.,* 192 F.R.D. 494, 504 (D. Md. 2000) ("Upon notification of a deposition, the corporation has an obligation to investigate and identify and if necessary prepare a designee for each listed subject area and produce that designee as noticed."); *Dravo Corp. v. Liberty Mut. Ins. Co.,* 164 F.R.D. 70, 75 (D. Neb. 1995) (citing *Marker v. Union Fidelity Life Ins. Co.,* 125 F.R.D. 121, 126 (M.D.N.C. 1989) ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.")); *Buycks-Roberson v. Citibank Fed. Savings Bank,* 162 F.R.D. 338, 343 (N.D. Ill. 1995) (stating that the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.); *Securities and Exchange Commission v. Morelli,* 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (citing *Mitsui & Co. v. Puerto Rico Water Resources Authority,* 93 F.R.D. 62, 67 (D.P.R. 1981) ("under Rule 30(b)(6), the deponent 'must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to prepare those

"this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business." *Id.*

FED. R. CIV. P. RULE 26

Fed. R. Civ. P. Rule 26(c) provides that "[a] party or any person from whom discovery is sought may move for a protective order … to protect the party or person from annoyance, embarrassment, oppression or undue burden or expense, …" Fed. R. Civl P. R. 26(c)(1). The burden is on the moving party to show good cause for the protective order. *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001). To carry its burden, the moving party must make:

> a specific request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one.

Id. (quoting *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991) (internal quotations omitted)). Thus, conclusory assertions and speculative claims will not do; the movant must come forward with specific facts to show the movant is entitled to the specific protection requested under Rule 26. *Id.* Further, where, as here, the movant seeks a protective order "forbidding the disclosure or discovery" under Rule 26(c)(1)(A), the movant must carry "a heavy burden because protective orders which totally prohibit [discovery from

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persons in order that they can answer fully, completely, unevasively, the questions posed...as to the relevant subject matters.'")); ABA Civil Discovery Standards (Aug. 1999), § 19(f) ("Counsel for the [corporation] should prepare the designated witness to be able to provide meaningful information about any designated area(s) of inquiry.").

a particular source] should be rarely granted absent extraordinary circumstances." *Static Control*, 201 F.R.D. at 434 (quoting *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84 (M.D.N.C. 1987)).[3]

ARGUMENT

I. PLAINTIFFS' CROSS-NOTICE IS CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE RELATING TO THEIR CLAIMS *AND DUKE'S DEFENSES.*

Duke University objects to seven topics identified in Plaintiffs' Cross Notice because, Duke contends, "nothing" about the topics "would tend to prove or disprove the only issues on which discovery has been permitted." *See* Brief 7-8. But Duke incorrectly characterizes "the issues on which discovery has been permitted" as (1) whether Duke suspended Plaintiffs without the promised procedural protections it promises to all students and (2) whether Duke defrauded Plaintiffs by advising them that they could prevent their DukeCard records from being disclosed if their lawyers filed a motion with the Court, knowing that Duke had already produced those records to law enforcement. *See id.* at 8. Duke's recitation of the scope of discovery completely ignores two of the three dimensions the discovery authorized by the Court's June 9th Order.

[3] This is consistent with the philosophy of liberal discovery animating the Federal Rules, which authorize parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense... ." Fed R. Civ. P. R. 26(b)(1). Further, the Rules authorize district courts to order discovery of "any matter" that is "relevant to the subject matter involved in the action," which includes anything that "appears reasonably calculated to lead to the discovery of admissible evidence." Id. (emphasis supplied).

First, Duke ignores the fact that Plaintiffs are free to conduct discovery to develop proof of Plaintiffs' punitive damages claims in connection with the conduct alleged in Counts 21 and 24. That necessarily includes, as Plaintiffs have alleged, evidence of fraud, malice, willful and wanton conduct, and deliberate indifference to employees engaging in such aggravated conduct. *See* N.C. Gen. Stat. 1D-1, et seq.

Second, Duke ignores the fact that Plaintiffs are also authorized to conduct discovery related to the myriad of defenses Duke asserts as to those claims. Indeed, Duke's defenses are – by definition – limitless. For example, Duke University's "First Affirmative Defense" asserts nothing less than all defenses that will be "asserted by *or available to* the City of Durham and the Durham Defendants." Duke Defs.' Answ. 455 (Apr. 14, 2011) (Doc. # 195)(emphasis supplied). Duke's "Second Affirmative Defense" asserts "the same privileges and immunities as any other state actor" may assert as a defense to Plaintiffs' claims. *Id.* Duke's "Third Affirmative Defense" asserts that Plaintiffs breached their contract with Duke before Duke did. *Id.* Duke does not leave a clue, however, as to how it was that Ryan, Matt, and Breck all breached the contract between them and the University. *See id.*

Duke dramatically expands the "permissible scope of discovery" by asserting, as its "Sixth Affirmative Defense," that Plaintiffs' damages were

> caused by the intervening and superseding acts of other persons or parties … for whose conduct [the Duke Defendants] are not reasonably responsible, … [and was] not reasonably foreseeable … . By way of example, these intervening and superseding acts include, but are not limited to, **the false rape allegations made by Crystal Mangum** and the actions of former District

> Attorney Michael Nifong in directing the investigation of those allegations.

Id. at 456. Duke's "Sixth Affirmative Defense," dooms its contention that Crystal Mangum's false allegations are beyond the scope of permissible discovery. Duke's "Sixth Affirmative Defense" puts "the false rape allegations made by Crystal Mangum" squarely within the scope of permissible discovery. *Id.*

But that is not all. In its "Ninth Affirmative Defense," Duke geometrically expands their already unbridled defenses by asserting, not without irony, that, because Duke has not engaged in any discovery regarding the circumstances of the Plaintiffs' allegations, they:

> expressly reserve the right to move to amend their answer to add additional responses and defenses as discovery progresses and additional information regarding this action becomes available.

Id. at 458.

Duke's motion for a protective order collapses under the weight of its own expansive affirmative defenses, all of which Duke completely ignores. The Court need look no further to deny Duke's motion for a protective order. Plaintiffs have a right to conduct discovery designed not only to prove their claims and entitlement to punitive damages; but also to develop evidence tending to disprove the expansive affirmative defenses Duke asserts to defeat Plaintiffs' claims. Duke's rather expansive approach to pleading those defenses has opened the door to discovery relating to subjects as broad as "intervening and superseding acts" that "include, *but are not limited to*, the false rape allegations made by Crystal Mangum

and the actions of former District Attorney Michael Nifong in directing the investigation of those allegations." *Id*. at 456 (emphasis supplied).

II. INQUIRY INTO DUKE'S PUBLIC RELATIONS STRATEGY IS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF EVIDENCE ADMISSIBLE TO PROVE PLAINTIFFS' CLAIMS AND DISPROVE DUKE'S DEFENSES TO THOSE CLAIMS

Duke refused to designate or produce a witness to testify for the University on topics, (specifically, Topics 8 and 14), that related in any way to Duke's Press Strategy because, Duke contends, the topics "have nothing to do" with Plaintiffs' fraud or contract claims. Here again, Duke ignores the fact that Plaintiffs suspensions had everything to do with the Public Relations "strategy" and "scripts" designed by Duke's consulting firms and implemented at the highest levels of the University, as evinced by correspondence involving the University's President, Provost, and Chairman of the Board. Plaintiffs alleged in their complaint and explained in prior briefings the obvious fact that "the firing of former Head Coach Mike Pressler," "President Brodhead's television interviews," the establishment of "a committee to examine the culture of the lacrosse team," the "decision to cancel the remainder of the Duke University Men's Lacrosse 2006 Season" and the University's public suspensions of Plaintiffs in violations of the University's promised procedures, which give rise to Plaintiffs' breach of contract claims, are all manifestations of the University's public relations strategy to "create separation" between the University and members of the lacrosse team.[4]

[4] Many of the events described in this paragraph are near identical and/or encompassed in the categories within Topic 14.

All of Duke's contentions to the contrary are belied by the fact that that all of the foregoing decisions, including the suspension of Ryan McFadyen without notice or a hearing, occurred on one day: April 5, 2006, within hours of each other. In fact, all of those events – including the suspension of Ryan McFadyen – were announced together in an official University Statement issued through President Brodhead to representatives of the national and international media on April 5, 2006, and repeated in a Letter to the Community that Duke University posted on its website on April 5, 2006. The Statement and Letter to the Community are attached hereto as **Exhibit 1**. Similarly, President Brodhead announced these decisions and expounded on them in televised interviews Brodhead gave to representatives of the local, state, national and international media on April 5, 2006. Plaintiffs identified and alleged the relationship between the University's public relations strategy and scripts and its suspension of Plaintiffs in violation of virtually every protection Duke promises to all students accused of violating policies codified in the Student Bulletin. *See*, *e.g.*, Pls.' Second Amended Compl. (Doc. # 136) ("SAC"), ATTACHMENT 17 at 221 and ATTACHMENT 26 at 262 (video recordings of President Brodhead's interviews with CNN and WRAL, respectively).

Duke's argument is impugned by the correspondence among its most senior administrators (*e.g.*, the University's President, its Provost, its Vice President for Public Relations, and its Vice President for Student Affairs). The correspondence plainly shows that the decisions announced on April 5th, including the suspension of Ryan McFadyen, were driven by the Duke Defendants' media and public relations "strategy" and "script."

For example, in an email to Vice President for Student Affairs Larry Moneta, President Brodhead wrote:

> "Friends: a difficult question is, how can we support our lacrosse players at a devastatingly hard time w**ithout seeming to lend aid and comfort to their version of the story? We can't do anything to side with them, or even, if they are exonerated, to imply that they behaved with honor. The central admin can[']t, nor can Athletics**."

Exhibit 2 (President Brodhead's email to VP Larry Moneta) (emphasis supplied). In response to President Brodhead's email, Vice President Moneta wrote: "The dilemma, of course, is with public acknowledgement of our support without feeding the 'coverup' [sic] allegations…" *(Id.)* (e-mail from V.P. Moneta to President Brodhead, dated April 10, 2006).

Two weeks later, the same senior officials are still perseverating over the University's public relations strategy and scripts. For example, President Brodhead reported in an email to the University Provost and the Chairman of the Board of Trustees, Robert Steel, that he has been faithful to the public relations "scripts" saying:

> "**I have been careful not to say that I am confident the players are innocent though certainly a large number of them are** of the criminal charge. I continue to her [sic] this message and so does Bob Steel, who will beat up on me about it again later today."

Exhibit 3 at 2 (Emails from President Brodhead to Provost Lange dated April 24, 2006) (emphasis supplied). President Brodhead goes on to remind the University Provost, Peter Lange, that they all "need to be on script" regarding Plaintiffs and their teammates. *See id.* at 1.

But that is not all. Further proof that Duke's media strategy drove the Duke Defendants' wrongful conduct was developed in the sworn testimony of Duke's former Athletic Director, Joe Alleva. (Dep. of Joeseph Alleva, Baton Rouge, Louisiana, January 20, 2012). Mr. Alleva testified that, during the University's press conference on March 28, 2006, he made positive and truthful statements about Plaintiffs and their teammates' character. Mr. Alleva testified that he was "crucified" for making those statements immediately after the press conference by President Brodhead himself and that Brodhead did so in the presence of the members of the Crisis Management Team, all of whom knew how "off-message" Mr. Alleva's truthful, positive statements about Plaintiffs were. Mr. Alleva agreed that there could be no doubt after that meeting that any University official would be similarly "crucified" should they make similarly truthful, positive statements about Plaintiffs or their teammates to representatives of the press. Doing so contradicted the public relations strategy and script that had already been adopted by the University's most senior officials.

Because Plaintiffs' suspensions were driven by the University's "strategy," and in light of the exhibits attached, Plaintiffs' Topics 8 and 14 seeking testimony relating to "Duke's public relations strategy with respect to the Rape Allegations, including the process for developing that strategy, its implementations, and any consideration of its impact on Plaintiffs' reputations," "responding to and participating in Durham's investigation of the Rape Allegations," "determining the truth of the Rape Allegations," "formulating public statements relating to the Rape Allegations," and "considering how Duke's response would affect members of the lacrosse team" are all well within the scope of discovery and this Court's two Orders.

From the beginning of this litigation, Plaintiffs alleged that Plaintiffs' suspensions were driven entirely by Duke's decision to protect its corporate brand at the expense of the Plaintiffs' good names and their reputations. *See, e.g.*, SAC ¶¶ 451-55, at 139-40 and ¶¶ 693-702 at 220-28; *see also id.* ¶ 91 at 34-35; ¶¶ 1223-28 at 384-86; ¶¶ 85-92 at 32-35; and ¶¶ 713-18 at 226-27. Plaintiffs even embedded footage of Duke's President executing Duke's media strategy on nationally broadcast interviews in which he announces that Ryan McFadyen was suspended without notice or hearing, thereby subjecting him to national and international public obloquy on the eve of indictments. SAC, ATTACHMENT 17 at 221-22 (video of President Brodhead's nationally televised announcement of the University's immediate and indefinite suspension of Ryan McFadyen). The testimony of Dr. Kennedy and Mr. Alleva has already established precisely what Plaintiffs alleged in their Complaint.

Finally, Duke is plainly aware that Plaintiffs' inquiry into subjects identified in Plaintiffs' Cross-Notice will produce further proof that Plaintiffs' suspensions were accompanied by willful and wanton conduct, fraud, malice, and a deliberate indifference to Plaintiffs' rights, and Duke officials, directors, and managing employees' participation in and ratification of that wrongful conduct.[5] Because that wrongful conduct accompanied the conduct giving rise to Plaintiffs' right to compensatory damages for fraud, breach of contract, and breach of the covenant of good faith and fair dealing, inquiry into this topic is

[5] For example, Topic 16 seeks testimony regarding the supervision of President Richard Brodhead who spearheaded the public response of the University on April 5th and Dean Sue Wasiolek who Duke University admits in its own played a key role in the events surrounding Plaintiff McFadyen's suspension. *See* Duke Defs.' Answ. 242. Furthermore, Topics 12 and 15 seek testimony as to what Duke knew at the time it suspended Plaintiffs in violation of Duke's promised procedures.

"reasonably calculated to lead to the discovery of admissible evidence relating to Plaintiffs' entitlement to punitive damages. *See* N.C. Gen. Stat. § 1D-1, et seq.

III. DUKE'S INSURANCE AGREEMENTS AND INFORMATION REQUIRED BY THE TERMS OF THOSE AGREEMENTS

Duke seeks a protective order foreclosing discovery as to Topic 6, "[c]ommunications with insurance carriers regarding the Rape Allegations, including the dates of such communications." To the extent Duke claims its reports and notices Duke made to its carriers are "work product" or are otherwise privileged, Duke is wrong on the law and wrong on the facts. Work product does not extend to notices made to insurance carriers, and, even if it did, Duke waived it by openly pleading in its complaint that Duke made multiple notices to its carrier regarding the wrongful conduct giving rise to Plaintiffs' claims. For example, in *Duke University v. National Union Fire Ins. Co.,* No. 08-CV-854 (M.D.N.C. 2008), Duke alleges that two policies apply to Plaintiffs' claims and that Duke repeatedly notified the carrier of Plaintiffs' potential claims, that Duke continually provided notice of "developments" with respect to the basis of Plaintiffs' claims to its carriers, and that Duke also provided its carrier with "numerous" reports regarding the allegations and "Duke's subsequent investigation into the allegations." Compl. ¶¶ 35-36 (Nov. 24, 2008) (Doc. # 1).

Further, Duke alleged that it provided this information to National Union pursuant to the terms of two policies issued by National Union (*id.* ¶ 20), and that each policy:

> defines 'Wrongful Act' to include, among other torts, 'any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the Organization,' or any libel, slander or defamation.

Id. ¶ 20.

Duke was obliged to produce these two policies no later than October 4, 2011 pursuant to the mandatory initial disclosure provisions of Federal Rule 26(a)(1)(A)(iv) ("a party must, without awaiting a discovery request, provide to the other parties … for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action... ."). Despite the unambiguous command of Rule 26 and despite Plaintiffs' repeated demands that Duke produce applicable insurance agreements for inspection and copying, Duke refuses to do so because, Duke contends, they all contain unspecified "confidential commercial information."

Plaintiffs naturally cross-noticed the deposition topic relating to Duke's communication with its carriers. Here, too, Duke University refused to produce or even designate any person to testify on the topic. But this time, Duke traded its prior rationale for two new ones. Duke abandoned its claim that the insurance agreements contained "confidential commercial information" in favor of equally conclusory claims that the topic called for the disclosure of work product and was beyond the scope of the claims going forward at this time.

IV. THE DUKE DEFENDANTS' OWN OBJECTIONS ARE IMPUGNED BY DUKE'S EXPANSIVE DISCOVERY REQUESTS

Highly relevant to this Motion is the Duke Defendants' own expansive interpretation of the Court's June 9th Order with respect to its own discovery requests. For example, one

such request required Plaintiffs to produce *all documents* in their possession custody or control concerning Mangum's allegations. **Exhibit 4** at 8 (Duke Defendants' First Request for Production of Documents). The Duke Defendants' also compelled Plaintiffs to produce *all videotapes or photographs* regarding *the subject matter of this litigation. Id.* Plaintiffs have and continue to comply in good faith with Duke's unfettered requests. In all, Plaintiffs have produced thousands of pages of documents in response to the Duke Defendants' requests, and a library of audio and video recordings of the Duke Defendants engaging in the conduct alleged in the Second Amended Complaint. For their part, the Duke Defendants have delayed, obstructed, and produced next to nothing: collectively the Duke Defendants have produced 99 documents to date (including several duplicates, 28 identical letters addressed to Plaintiffs' teammates – including teammates who are not plaintiffs in any ongoing litigation – regarding the subpoenas for their DukeCard information, and one document consisting of a gigantic black square and yet no note as to the basis for the redaction). Through this Motion, the Duke Defendants now seek to prevent not only document discovery, but testimonial discovery relating to Plaintiffs' claims and Duke's defenses.

CONCLUSION

The Motion should be denied.

Dated: February 14, 2012

Respectfully submitted by:

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

RYAN McFADYEN, *et al.*, *Plaintiffs,* *v.* DUKE UNIVERSITY, *et al.* *Defendants.*	1:07 CV 953

CERTIFICATE OF SERVICE

The foregoing document was filed with the Clerk of Court via the Court's CM/ECF system on February 14, 2012, which automatically serves the filing upon all parties to this action by delivering notice of and a link to the filing to the e-mail address that counsel of record have registered in the CM/ECF system for service.

Dated: February 14, 2012

Respectfully submitted by:
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