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

RYAN McFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

Civil Action Number
1:07-cv-00953

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

Defendant Duke University (hereinafter, Duke), through counsel, submits this reply brief in support of its motion for protective order limiting the Rule 30(b)(6) deposition noticed by Plaintiffs.

INTRODUCTION

Duke filed the motion for protective order that is before the Court to preclude Plaintiffs from seeking discovery through a Rule 30(b)(6) deposition that is inconsistent with the Court's prior orders limiting the scope of discovery at this stage of the case. By this Court's 9 June 2011, Order, discovery is proceeding only as to two of the 41 counts Plaintiffs originally brought in this case. [DE 218, at 9]. The Court has previously fixed the scope of these two counts. First, the Court held that "[Plaintiffs'] breach of contract claim against Duke will proceed only on a

limited basis with regard to the alleged failure to follow promised procedures in the disciplinary process." [DE 186, at 162]. Second, Plaintiffs' fraud claim is limited to the allegations that they each received letters from Matthew Drummond "implicitly representing that [their] Duke Card reports had not been previously disclosed" to the Durham Police. [*Id.* at 173].

Plaintiffs contend that they are entitled to examine Duke on the wide range of topics in their 30(b)(6) cross-notice because: (1) the topics touch on Plaintiffs' punitive damages claim; and (2) Duke raised related issues in its affirmative defenses. *See* Pl.'s Br. at 2. This is not so. Plaintiffs are not entitled to punitive damages on their breach of contract claim and do not link these topics to their fraud claim at all. The affirmative defenses Plaintiffs cite are not defenses to these two claims.

The 30(b)(6) topics make clear that, contrary to the Court's orders and the tenets of Rule 26, Plaintiffs seek broad discovery as to the subject matter involved in the case. Thus, Plaintiffs seek testimony regarding "Duke's decision-making process regarding the Rape Allegations." [DE 263-1, at 10]. Plaintiffs' contention that this and the other challenged topics are permissible areas of discovery on their breach of contract and fraud claims renders meaningless the Court's order that discovery will proceed "only as to these two claims." [DE 218, at 9].

Plaintiffs cross-noticed the 30(b)(6) deposition of Duke on fifteen topics. Duke presented testimony on the subjects that were properly within the scope of discovery as defined by the Court's orders. Duke designated Suzanne Wasiolek, Assistant Vice President for Student Affairs and Dean of Students, to testify as to topics 9, 10, 11, 12, 13, 16, and 17,[1] and designated Tracy Futhey, Vice President for Information Technology and Chief Information Officer to testify as to topics 1, 2, 3, 4, 5, and 7. Each witness testified at length, and each was sufficiently prepared to address those topics as they related to Counts 21 and 24 in this case (and the three counts proceeding in discovery in *Carrington*).

ARGUMENT

I. Plaintiffs Are Not Seeking Discovery Relevant To Their Breach of Contract Claim or Fraud Claim.

Duke showed in its opening brief that Rule 26's limitation of discovery to matters "relevant to any party's claim or defense" means that discovery is limited to "any party's claim or defense" to Plaintiffs' breach of contract claim in Count 21 and DukeCard fraud claim in Count 24. Further, because the relevancy of the

[1] Although the issue is not properly before the Court, Plaintiffs' recitation of "relevant facts" accuses Dean Wasiolek of being insufficiently prepared to testify. *See* Pl.'s Br., at 4-7. This section of their brief has no citations to the record and therefore violates Local Rule 7.2(a)(2). Dean Wasiolek was prepared to testify as to the topics for which she was designated and within the scope of the discovery currently proceeding in the case.

deposition topics that are the subject of Duke's motion is not apparent, Plaintiffs have the burden to show the topics are relevant. *See Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442, 445 (D. Kan. 2000). Plaintiffs have not met their burden.

A. Breach of Contract Claim.

None of the topics in the 30(b)(6) notice mention the suspensions of Plaintiffs Breck Archer, Matt Wilson, or Ryan McFadyen, and thus Plaintiffs' contention that the further discovery they seek is relevant to their breach of contract claim is facially unsupported. But Plaintiffs assert that Duke has "mischaracterized" the scope of their breach of contract claim as limited to "whether Duke suspended Plaintiffs without the promised procedural protections it promises to all students." Pl.'s Br. at 10. This is not Duke's characterization; it is the Court's: "Count 21 alleges a claim against Duke for breach of contract, limited to the allegation that Duke imposed disciplinary measures against Plaintiffs, specifically suspensions, without providing them the process that was promised." [DE 218, at 8]. Plaintiffs have not shown that the discovery they seek is relevant to this claim.

1. Punitive Damages Discovery.

Plaintiffs assert, without citation to the Court's order, that one of the "dimensions" of discovery authorized by the Court's 9 June 2011 Order is punitive damages discovery. *See* Pl. Br. at 10-11. However, by statute, Plaintiffs cannot

recover punitive damages for their breach of contract claim. *See* N.C. Gen. Stat. § 1D-15(d); *Carcano v. JBSS, LLC*, 684 S.E.2d 41, 54 (N.C. Ct. App. 2009). Because Plaintiffs cannot recover punitive damages for the claim relating to their suspensions – breach of contract – there is no reason to take discovery regarding Duke's alleged "malice" in suspending Plaintiffs. S*ee* Pl.'s Br. at 17 ("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") (emphasis added).

2. Discovery Regarding Duke's Alleged Public Relations Strategy.

Plaintiffs challenge Duke's request for a protective order regarding Topic 8, "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." [DE 263-1, at 8]; and Topic 14, "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; and (g) considering how Duke's response would affect members of the Lacrosse Team" [DE 263-1, at 11-12]. Plaintiffs contend that their suspensions "were driven by the University's [public relations] 'strategy.'" *See* Pl. Br. at 10. That contention is no basis for discovery at this stage of the case.

Even if the Court had not limited discovery to whether Duke followed allegedly promised procedures in suspending Plaintiffs, evidence of Duke's alleged motive in issuing those suspensions is not relevant to prove their breach of contract claim, where Plaintiffs must show "(1) the existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 530 S.E.2d 838, 843 (N.C. Ct. App. 2000). And evidence of Duke's alleged motive is irrelevant to Plaintiffs' theory that they are seeking discovery to support their punitive damages claim. *See E. Coast Dev. Corp. v. Alderman-250 Corp.*, 228 S.E.2d 72, 79 (N.C. Ct. App. 1976) ("As a general rule, in the absence of statutory authority, exemplary damages are not recoverable in actions for the breach of contracts, *irrespective of the motive on the part of the defendant which prompted the breach."*) (quoting 25 *C.J.S. Damages* § 120, at 1126) (emphasis added).

In addition, as a factual matter, Topics 8 and 14 have nothing to do with the suspensions that are the basis for Plaintiffs' breach of contract claim. Duke suspended Breck Archer for the 2005 fall semester, well before the alleged sexual

assault of Ms. Mangum. [DE 136, at 228]. Duke suspended Matthew Wilson in August 2006 following his arrest for driving under the influence and possession of drug paraphernalia and marijuana, months after Crystal Mangum made her allegations, the lacrosse season was canceled, and Coach Pressler resigned. *See* August 23, 2006 letter from Stephen Bryan to Matthew Wilson (attached as Exhibit 1). Duke suspended Ryan McFadyen following the public disclosure of an email he wrote threatening to kill and skin strippers. *See* Duff Wilson & Viv Bernstein, *Duke Cancels Lacrosse Season and Initiates Critiques*, N.Y. TIMES, April 6, 2006 (attached as Exhibit 2). Plaintiffs seek discovery not about the suspensions, but about the broader "subject matter" of the case, exactly the kind of over broad discovery that the Federal Rules Advisory Committee intended to foreclose by limiting discovery to claims and defenses to those claims. *See* Fed. R. Civ. P. 26(b)(1); *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).

Plaintiffs' breach of contract claim is limited to whether Duke followed its promised procedures in suspending Plaintiffs. Topics 8 and 14 are not relevant to that claim.

B. Fraud Claim.

Plaintiffs do not attempt to link the challenged topics to their fraud claim. None of the challenged topics mentions Plaintiffs' DukeCard data or the letters

they received regarding the subpoena issued to Duke to obtain that data. Aside from their uncited assertions regarding Dean Wasiolek's preparation and a description of documents Duke produced to Plaintiffs, Plaintiffs' response brief does not address their fraud claim at all. Nor does it explain how the challenged topics are relevant to punitive damages on that claim.

II. Duke's Affirmative Defenses to Counts Other than 21 and 24 Are Not the Proper Subject of Discovery at this Stage of the Case.

Defenses to Plaintiffs' breach of contract and fraud claims are relevant areas of discovery at this stage, but only defenses to those two claims. Plaintiffs want to broaden discovery to include Duke's defenses to the rest of their remaining claims. The five defenses Plaintiffs cite in their brief as "dramatically expand[ing] the permissible scope of discovery" (Pl.'s Br. at 11), do not relate to Counts 21 or 24.

Duke's first affirmative defense indicates that Duke will assert any defenses asserted by or available to the City of Durham. This defense is unrelated to Plaintiffs' suspensions or the DukeCard subpoena, and is not a proper subject for discovery at this time. Likewise, Duke's second affirmative defense asserts privileges and immunities available to state actors. This defense, again, is unrelated to Plaintiffs' claims in Counts 21 and 24.

Duke's third affirmative defense could be the proper subject of discovery at this point – the defense that Plaintiffs breached their alleged contract with Duke

prior to Duke's alleged breach. However, Plaintiffs have not tied this defense to any of the challenged 30(b)(6) topics. Duke's sixth affirmative defense calls into question the superseding acts of third parties, including Crystal Mangum, but the superseding acts of third parties are not a defense to breach of contract or fraud – the superseding acts of third parties is a defense to counts that are currently stayed, and therefore is not the proper subject of discovery at this stage of the case. Duke's ninth affirmative defense merely reserves the right to assert additional defenses as may be revealed in discovery and does not expand the scope of discovery at this stage.

III. Duke's Communications with Its Insurers Are Protected as Attorney Work Product.

Duke also seeks a protective order regarding Topic 6, "communications with insurance carriers regarding the Rape Allegations, including the dates of such communications." [DE 263-1, at 8] Plaintiffs claim that Duke is "wrong on the law" that its communications with insurance companies are protected from discovery, but cite no authority for that proposition. Pl. Br. at 18. Communications with insurance companies are protected from discovery. *See Medical Assur. Co. 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). Even if Plaintiffs could overcome the

work product protection for these communications, Plaintiffs have not even tried to argue that this topic is relevant to Plaintiffs' suspension or the subpoena for their DukeCard data.

Instead, even though it is not before the Court on this motion, Plaintiffs argue that Duke was obligated to produce any insurance policies that might satisfy a possible judgment in this action pursuant to Fed. R. Civ. P. 26(a)(1)(A)(iv). *See* Pl. Br. at 19. Duke informed Plaintiffs that it would produce these insurance policies upon the entry of an appropriate protective order and provided a draft protective order to Plaintiffs' counsel on 7 October 2011.[2] *See* 10/07/2011 email from Ms. Wells to Mr. Ekstrand and Ms. Sparks (attached as Exhibit 3). Although the parties have continued to negotiate the terms of such a protective order, they have yet to reach an agreement on those terms. Upon entry of a protective order, Duke will produce any insurance policies responsive to Rule 26(a)(1)(A)(iv).

CONCLUSION

For the foregoing reasons, and the reasons argued in its opening brief, Duke University respectfully requests that the Court grant the motion for a protective order and limit the Rule 30(b)(6) deposition of Duke.

[2] Duke also sent the draft order to counsel for the plaintiffs in *Carrington* that same day. The *Carrington* plaintiffs and Duke were able to agree on the format of a stipulated consent protective order, which this Court entered on 19 January 2012. [DE 236].

This the 1st day of March, 2012.

/s/ Paul K. Sun, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2012, I electronically filed the foregoing Duke Defendants' Reply Brief in Further Support of Motion for Protective Order Limiting the Rule 30(b)(6) Deposition 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 1st day of March, 2012.

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