

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

RYAN McFADYEN, <i>et al.</i> ,	)	
<i>Plaintiffs,</i>	)	
	)	
v.	)	1:07-cv-953-JAB-JEP
	)	
DUKE UNIVERSITY, <i>et al.</i> ,	)	
<i>Defendants</i>	)	

**PLAINTIFFS' MOTION TO COMPEL**

PLAINTIFFS, Ryan McFadyen, Matthew Wilson, and Breck Archer, respectfully move for an Order compelling Duke University to produce complete responses to Plaintiffs' Request for Production Nos. 3-59 (Ex. 1) and Plaintiffs for Admission Nos. 4-6 (Ex. 2), under 37.1(a) of the Local Rules and Rule 37 of the Federal Rules of Civil Procedure. Pursuant to Rule 37.1(a), Plaintiffs' counsel is filing a certification of the meetings Plaintiffs' counsel arranged to confer with Duke's counsel to resolve these discovery disputes and of the failure of those diligent efforts. (Ex. 3.)

In addition, pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs respectfully request an Order compelling production of documents and things identified in Plaintiffs' subpoenas the following non-party Duke employees and students: Chris Cramer (Ex. 4), Gerald Wilson (Ex. 5), Jack Bookman, (Ex. 6), John Burness (Ex. 7), Judith Ruderman (Ex. 8), Larry

Moneta (Ex. 9), Prasad Kasibhatla (Ex. 10), Richard Brodhead (Ex. 11), Robert Steel (Ex. 12), Robert Thompson (Ex. 13), Stephen Bryan (Ex. 14), Suzanne Wasiolek (Ex. 15), and Zoila Airall (Ex. 16).

Because those non-parties are all represented by Duke's attorneys of record in this case, Plaintiff's motion to compel their production is combined with Plaintiffs' motion to compel Duke's responses to Plaintiff's written discovery requests.

### **STATEMENT OF THE CASE**

Plaintiffs sued Duke University and others seeking compensatory and punitive damages on their claims for fraud and breach of contract.<sup>1</sup> Prior to discovery, Duke moved to dismiss those claims under Fed. R. Civ. P. Rule 12(b)(6). The Court denied the motion, and allowed Plaintiff to proceed to discovery on those claims.

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<sup>1</sup> Plaintiffs have asserted other claims against Duke and its co-defendants, however, the Court has stayed all proceedings on any claim that involved the City of Durham or its employees pending the Fourth Circuit's ruling on their appeal of the Court's denial of their motions to dismiss based upon various immunities. The City Defendants' appeal remains pending before the Fourth Circuit. The Court allowed Plaintiffs to proceed to discovery on their claims unrelated to the City Defendants: Plaintiffs' breach of contract and fraud claims against Duke. Plaintiffs seek compensatory and punitive damages on those claims.

## STANDARD OF REVIEW

Under the federal rules, the scope of discovery is construed “to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). On a motion to compel discovery under Fed. R. Civ. P. Rule 37, party resisting discovery bears the burden of showing why discovery should not be permitted. *Carefirst of Md. v. Carefirst Pregnancy Ctrs.*, 334 F.3d 390, 402-403 (4th Cir. 2003). To carry its burden the party opposing discovery must “must make a particularized showing” of why discovery should be denied, and conclusory or generalized claims “fail to satisfy this burden as a matter of law.” *Id.*; *Jones v. Circle K Stores*, 185 F.R.D. 223, 224 (M.D.N.C. 1999) (the party opposing discovery must make “a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements”). The parties opposing the discovery requests at issue here cannot carry their burden of making a “particular and specific demonstration of facts” showing that Plaintiffs’ discovery requests do not “encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund.*, 437 U.S. at 351 (1978); *Hickman*, 329 U.S. at 501.

## **ANALYSIS**

Because Plaintiffs are entitled to complete responses to the following discovery requests, and because Plaintiffs' attorneys' efforts to resolve the matter through multiple conferences arranged for the purpose of resolving these matters have failed, Duke must now be compelled to do so.

### **I.**

#### **Duke's Redactions**

##### **(Plaintiffs' Request for Production Nos. 3-59)**

Duke has redacted from documents significant portions without identifying the nature of what has been redacted or why. For example, Duke has redacted every student name that appears in any of the documents or ESI it produced, and Duke has redacted large segments of documents and ESI without identifying the nature of the redacted information, the basis for redacting it, or why the protective order containing all of the protections Duke requested does not sufficiently protect it. In meetings that Plaintiffs' counsel arranged to confer with Duke's counsel to provide unredacted documents, Duke's counsel could not explain why it is not sufficient to mark the document "confidential" (which Duke uniformly does), thereby protecting the entire document from disclosure or even filing except under seal. As it stands, Duke's redaction, particularly of all student names, only serve to conceal from Plaintiffs the identity of witnesses.

**II.**  
**All Documents, ESI, and Tangible Things Outside of**  
**the “17 Custodians” to which Duke Has Unilaterally**  
**Limited its Review in Responding to Plaintiffs’**  
**Discovery Requests**

Plaintiff timely made 59 Requests for Production of Documents and ESI (Ex. 1). In responding to Plaintiffs’ production requests, Duke did not review any documents in its possession, custody, or control that were not connected somehow to one of 17 individuals Duke refers to as “custodians.”

The Court has already rejected Duke’s attempt to limit discovery to any number of custodians. Prior to the beginning of discovery, Duke sought to impose this limitation upon Plaintiffs’ discovery requests, and failed. First, Duke proposed and Plaintiffs refused to accept the limitation in the conferences on the parties’ Rule 26(f) conference. Duke then urged the Court to limit its obligation to produce documents or ESI to 17 custodians at the hearing on the competing reports of the parties’ Rule 26(f) conference, the Court rejected Duke’s proposal to so limit Plaintiffs’ right of discovery, and no such limitation can be found in either the Court’s initial discovery order or protective order.

Plaintiffs are entitled to all documents and ESI that are responsive to their discovery requests, not just those that are within the ambit of the 17 custodians Duke unilaterally hand-picked prior to the onset of discovery.

During a meeting Plaintiffs' counsel arranged to confer about Duke's anemic production documents, Duke's counsel revealed that Duke has, all along, limited its search for responsive electronically stored information to only those 17 custodians. Because Duke failed to conduct the diligent review of all ESI, documents, and tangible things in its possession, custody, or control, which Rules 26, 33, and 34 require, Duke must now be compelled to do so under Fed. R. Civ. P. 37 and LR 37.1.

### III.

#### **Subpoenas Duces Tecum to Non-Parties**

Plaintiffs issued document subpoenas to several non-party Duke employees and former students. Specifically, Plaintiffs issued subpoenas to Chris Cramer (Ex. 4), Gerald Wilson (Ex. 5), Jack Bookman, (Ex. 6), John Burness (Ex. 7), Judith Ruderman (Ex. 8), Larry Moneta (Ex. 9), Prasad Kasibhatla (Ex. 10), Richard Brodhead (Ex. 11), Robert Steel (Ex. 12), Robert Thompson (Ex. 13), Stephen Bryan (Ex. 14), Suzanne Wasiolek (Ex. 15), and Zoila Airall (Ex. 16).

All of these individuals produced nothing responsive to Plaintiffs' subpoenas, and all of them have declared that they will not produce anything responsive to the subpoenas in objections prepared for them by Duke's attorneys of record in this case. (*Id.*) The same day that Plaintiffs' counsel

learned of this, Plaintiffs' counsel arranged a meeting with counsel for the subpoenaed individuals to resolve their objections and obtain the materials Plaintiffs seek. During the conference, Duke's attorneys (on behalf of their non-party clients) advised Plaintiffs' counsel that the individuals did not have sufficient time to produce anything responsive to the subpoenas at all. Plaintiffs' counsel offered to draft and join in a motion to extend the discovery period limited only to the subpoenas, but Duke's counsel refused the offer and asserted that Duke would object to any effort to extend the time allowed for these individuals to produce the materials sought in the subpoenas.

Because these individuals refused to produce the materials sought by the subpoenas directed to them, Plaintiffs respectfully request an order compelling them to do so pursuant to Fed. R. Civ. P. Rule 45.

#### **IV.**

##### **Plaintiffs' Request for Admission Nos. 4-6**

(Duke Police Delivered Plaintiffs' DukeCard Data to the  
Durham Police on March 31, 2006)

Plaintiffs' Requests for Admission Nos. 4 - 6 (Ex. 2) seek Duke's admission that its police officers Smith and Stotsenberg gave Plaintiffs' DukeCard data to Durham Police Sergeant Mark Gottlieb on March 31, 2006:

##### **Request for Admission No. 4.**

Admit that on March 31, 2006, Defendant Gary Smith and Duke Police Lt. Greg Stotsenberg provided a key card report for 3/13/06 to 3/14/06 of Plaintiff Ryan McFadyen to Defendant M.D. Gottlieb.

**Request for Admission No. 5.**

Admit that on March 31, 2006, Defendant Gary Smith and Duke Police Lt. Greg Stotsenberg provided a key card report for 3/13/06 to 3/14/06 of Plaintiff Matthew Wilson to Defendant M.D. Gottlieb.

**Request for Admission No. 6.**

Admit that on March 31, 2006, Defendant Gary Smith and Duke Police Lt. Greg Stotsenberg provided a key card report for 3/13/06 to 3/14/06 of Plaintiff Matthew Wilson to Defendant M.D. Gottlieb.

(Ex. 2.) In response to each request, Duke failed to admit or deny those facts.

Rather, Duke claimed it lacked sufficient information to admit or deny them,

asserting:

Duke University has made a reasonable inquiry and the information that it knows or can readily obtain is insufficient to enable it to admit or deny that on March 31, 2006, Defendant Gary Smith provided a key card report for 3/13/06 to 3/14/06 of Plaintiff Matthew Wilson to Defendant M.D. Gottlieb. Except to the extent that it is expressly stated otherwise, this Request for Admission is denied.

(*Id.*) However, Sgt. Smith himself admitted in sworn testimony that he provided a report containing each Plaintiffs' DukeCard data for the period of March 13 – 14, 2006.

Q: And you also gave them the key card information. Is that right?

A: At a later date.

Q: Yeah. March 31st?

A: Yes.



Q: Okay. And all of this information you provided, you did so because it was your understanding that Duke had a policy of cooperating with Durham. Is that correct?

A: Yes.

(Ex. 17, Smith Dep. 29:22-30:6, Dec. 30, 2011.) Moreover, Sgt. Gottlieb reported that Smith and Stotsenberg delivered Plaintiffs' DukeCard data to him personally. (Exhibit 18, Gottlieb's "supplemental" report of his activities in the investigation of Mangum's allegations.) And Sgt. Smith confirmed that Gottlieb's report was correct in its report that Duke police officers Smith and Stotsenberg personally delivered Plaintiffs' DukeCard data to Gottlieb on March 31, 2006 at 3:00 p.m.:

Q: [Reading from Gottlieb's report, page 8] "Investigator Smith and Stotsenberg from Duke police drove up to the District 2 Substation as I was leaving. And they had three reports they delivered, reports to me requested by us. Two were for staff at Duke who were being harassed due to this case (Duke reports 2006-1548 and 2006-1515), and one is a key card report for the team members on March 13, 2006, to March 14, 2006."

Is this an accurate statement of what happened at 3 p.m. on March 31st?

A: I recall giving a key card report. I honestly don't remember giving them anything else.

(Ex. 17, Smith Dep. 47:19-48:5) Finally, Sgt. Smith admitted that he gave Gottlieb Plaintiffs' DukeCard data to Gottlieb in his capacity as the Duke

Police Department's "lead investigator" in the investigation of Mangum's false allegations. (*Id.* 30:23-25.)

Against these admissions in sworn testimony, Duke claims that it conducted a diligent inquiry but could not develop sufficient information to admit or deny that Smith gave Gottlieb Plaintiffs' DukeCard data. All Duke had to do was ask Smith, and he would have admitted it; after all, that's all Plaintiffs had to do.

Plaintiffs' counsel requested a meeting to confer about Plaintiffs' Request for Admission Nos. 4-6, and, at the meeting requested that Duke supplement its response by admitting those facts. Plaintiffs directed Duke's counsel to Sgt. Smith's deposition testimony and the exhibits annexed thereto. While Duke's counsel took no position on the matter but promised to review it. Plaintiffs are filing this motion to compel in connection with these Requests for Admission to preserve it, and will file an amended motion in the event Duke's counsel provides a supplemental response appropriately revising Duke's responses.

### **CONCLUSION**

For all of the foregoing reasons, Plaintiff's motion to compel should be granted.

September 21, 2012

Respectfully submitted by:

EKSTRAND & EKSTRAND LLP

*Counsel for Plaintiffs*

/s/ Robert Ekstrand

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**CERTIFICATE SERVICE**

The foregoing Motion to Compel and the exhibits annexed thereto were filed with the Clerk of Court via the Court's CM/ECF system, which will automatically serve the filing upon all parties to this action by delivering a notice of and link to the filing to counsel of record, all of whom are registrants with the Court's CM/ECF system for service, and directly to Linwood Wilson, a party who is appearing in this case *pro se* and is also registered with the Court's CM/ECF system.

Respectfully submitted by:

/s/ Robert Ekstrand  
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