IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

DUKE DEFENDANTS' OPPOSITION TO THE PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER RE: DUKE'S SUBPOENAS TO TAKE THE DEPOSITION OF PLAINTIFFS' LITIGATION COUNSEL

Defendants Duke University, Robert Dean, Matthew Drummond, Aaron Graves, and Gary N. Smith (herein "Duke") submit this brief in opposition to Plaintiffs' Motion for a Protective Order Re: Duke's Subpoenas to Take the Deposition of Plaintiffs' Litigation Counsel (DE 294 (herein the "Motion")).

INTRODUCTION

Plaintiffs seek entry of a protective order regarding subpoenas issued to Robert Ekstrand and Stefanie Smith in Carrington et al. v. Duke University et al., No. 08 CV 119 (M.D.N.C.). Mr. Ekstrand and Ms. Smith – who are counsel of record in this case but are not counsel of record in Carrington – have been identified by the parties as fact witnesses in Carrington. Mr. Ekstrand and Ms. Smith filed a separate motion to quash the subpoenas in Carrington (Case No. 08-CV-119; DE 258), to which Duke has responded. Plaintiffs have not demonstrated

the necessity for a protective order in this case.

The McFadyen plaintiffs "ask this Court to Order Duke to cease all other efforts to circumvent the attorney-client and work product privileges in both this action and in Carrington." (Motion at 1-2.) For the reasons stated in Duke's response in opposition to the motion to quash the subpoenas in Carrington (Case No. 08-CV-119; DE 261), Duke has not circumvented any attorney-client privilege or work product protection by seeking to depose Mr. Ekstrand and Ms. Smith in Carrington. Similarly, Duke has not circumvented any attorney-client privilege or work product protection in Carrington or this case. For these reasons, Duke requests that the Motion be denied.

The Motion underscores McFadyen counsel's history of abusing privilege during the course of this litigation and the Carrington case. Given McFadyen counsel's history on these issues, Duke respectfully requests that the Court, pursuant to Rule 26(c)(2) of the Federal Rules of Civil Procedure, enter an order precluding McFadyen counsel from obstructing the discovery process through improper assertions of privilege.

NATURE OF THE CASE

This case arises out of the investigation of false rape allegations made against members of the 2005-2006 Duke men's lacrosse team by a stripper hired by a team member to perform at a party. Pursuant to this Court's Order of 9 June

2011, discovery is proceeding with respect to Counts 21 and 24. (DE 218, at 9.)

STATEMENT OF THE FACTS

The Carrington plaintiffs brought a claim for constructive fraud arising out of a meeting between the captains of the lacrosse team and the president of Duke University. (Case No. 08-CV-119; DE 164, at 76-77.) Mr. Ekstrand attended this meeting (Flannery Dep. 240 (Exhibit 1)), and is, therefore, a fact witness as to what happened at this meeting. Further, the Carrington plaintiffs have brought a claim for fraud against a lawyer in Duke's Office of University Counsel. (Case No. 08-CV-119; DE 164, at 61-62.) That claim hinges upon this lawyer's knowledge of certain facts as of June 2006. (Case No. 08-CV-119; DE 164, at 66-67.) Mr. Ekstrand is a witness to this lawyer's first discovery of those facts in January of 2007. (Exhibit 2.) Additionally, many of the Carrington plaintiffs have referred questions regarding their legal bills (for which they seek compensation) to Mr. Ekstrand. (Tkac Dep. 175 (Exhibit 3); McDevitt Dep. 195 (Exhibit 4).)

For all these reasons, on February 14, 2012, Duke issued subpoenas in Carrington to Mr. Ekstrand and his law firm compelling the production of documents and Mr. Ekstrand's testimony at a deposition. (Exhibits 5-7.) Mr. Ekstrand and his firm served objections to the subpoenas, but also produced over 100 documents in response. (Exhibits 8-9.) After various discussions about scheduling, Mr. Ekstrand agreed that his deposition could proceed on September 4,

2012.

When the Carrington plaintiffs supplemented their initial disclosures on August 14, 2012, they named Stefanie Smith (and Mr. Ekstrand) as a witness with "information related to the facts underlying Counts 8, 11, and 19 and the resulting damages suffered by Plaintiffs." (Exhibit 10.) Duke then issued a deposition subpoena on August 17, 2012 in Carrington to Ms. Smith. (Exhibit 11.) Ms. Smith objected to that subpoena. (Exhibit 12.)

Plaintiffs filed a motion for protective order on September 3, 2012, one day before the scheduled depositions of Mr. Ekstrand and Ms. Smith in Carrington.

QUESTIONS PRESENTED

I. Whether plaintiffs are entitled to a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure where plaintiffs have not provided any specific examples of Duke improperly seeking "to invade the privileges at issue" and where plaintiffs have used these privileges as a shield to bar legitimate discovery.

II. Whether Duke is entitled to an order pursuant to Rule 26(c)(2) of the Federal Rules of Civil Procedure precluding McFadyen counsel from improper assertions of privilege that obstruct the discovery process.

ARGUMENT

Plaintiffs have not demonstrated good cause for the Court to enter a protective order. Furthermore, McFadyen counsel's history in this case demonstrates a flawed understanding of privilege. Duke requests that the Court enter an order precluding McFadyen counsel from obstructing discovery based on

improper assertions of privilege.

I. Plaintiffs Have Not Demonstrated Entitlement to a Protective Order.

As explained above, Duke served subpoenas on Mr. Ekstrand and Ms. Smith in the Carrington litigation; Mr. Ekstrand and Ms. Smith are not litigation counsel in that case. The Carrington plaintiffs identified both Mr. Ekstrand and Ms. Smith as individuals with information regarding the substantive counts and the damages suffered by the Carrington plaintiffs. (Exhibit 10 at 13.) Duke also identified Mr. Ekstrand as having relevant information. (Exhibit 13 at 4, 17.) Mr. Ekstrand and Ms. Smith have moved to quash the subpoenas in the Carrington litigation. (Case No. 08-CV-119; DE 258.) Duke does not seek the deposition of Mr. Ekstrand or Ms. Smith in the McFadyen litigation, where they are counsel of record.

Mr. Ekstrand and Ms. Smith have asked this Court to enter a protective order pursuant to Rule 26(c) and cited Rules 26(b)(3)(A) and 26(b)(3)(B).[1] Rule 26(c) provides that "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending." Fed. R. Civ. P. 26(c).[2] Rule 26(c) does not provide any authority for seeking a protective order

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[1] Plaintiffs repeatedly refer to Rules 26(c)(3)(A) and 26(c)(3)(B). Duke assumes for purposes of this Motion that plaintiffs intended to cite Rules 26(b)(3)(A) and 26(b)(3)(B).

[2] Rule 26(c)(1) requires "a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve

when no discovery is sought in the action, as is the case here. Outside of the subpoenas served in another case, plaintiffs cite no examples of Duke attempting to invade plaintiffs' asserted privileges in this case.

Further, to obtain a protective order, a party must show good cause by demonstrating a particular need for protection. Broad allegations of harm unsubstantiated by specific facts are insufficient. See Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 412 (M.D.N.C. 1991) ("the party [seeking a protective order] must make a particular 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") (citing Gulf Oil v. Bernard, 452 U.S. 89, 102 n.16 (1981)).

Plaintiffs' Motion is duplicative of the relief sought in Carrington, and otherwise unsupported by any specific instances of conduct by Duke in this case. Accordingly, Duke requests that the Motion be denied.

II. McFadyen Counsel Have Asserted Privilege Without a Proper Basis.

As described above, plaintiffs have not demonstrated the necessity for a protective order. Instead, as demonstrated through the Motion itself and the history of this litigation, McFadyen counsel have abused privilege to prevent Duke

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the dispute without court action." Fed. R. Civ. P. 26(c)(1); see also LR 37.1(a). No such certification accompanies the Motion because no conference occurred in connection with the protective order sought in this case.

from obtaining relevant discovery. Duke requests that the Court enter an order precluding McFadyen counsel from improperly asserting privilege.

Plaintiffs seek a protective order relating to "privileged communications [between McFadyen counsel and] any plaintiff in the McFadyen and Carrington litigation, and information protected by the Common Representation Agreement and the common interest protections." (Motion at 1-2.) Accordingly, Duke will address McFadyen counsel's application of privilege in both cases to further demonstrate why Duke requests that the Court deny the Motion and enter an order precluding McFadyen counsel from obstructing discovery based on improper assertions of privilege.

A. Facts are Not Privileged.

Facts are not privileged. See Upjohn v. United States, 449 U.S. 383, 395-96 (1981) (privilege does not "protect disclosure of the underlying facts by those who communicated with the attorney").

Yet, McFadyen counsel have repeatedly instructed the deponents not to answer questions relating to the facts of the March 13, 2006 party. These facts are directly relevant to plaintiffs' claims. For instance, in their constructive fraud claim, the Carrington plaintiffs allege that events from March 13, 2006, were relayed to certain administrators from Duke. (Case No. 08-CV-119; DE 164, at 76-77.) The Carrington plaintiffs further allege that in a violation of trust, the

administrators then passed that information on to the Durham Police. (Id.) Accordingly, Duke Counsel sought to inquire as to Carrington plaintiffs' knowledge about the events of March 13, 2006. At the outset of questions about the March 13, 2006 party to Carrington plaintiff Kyle Dowd, McFadyen counsel instructed:

> MS. SPARKS: Can I just make a standing objection in the beginning so I don't interrupt you all the time.
>
> To the extent that any of your answers are based on conversations that you learned from Ekstrand & Ekstrand, I would instruct you not to answer those questions. Now, if you have your own personal knowledge, separate from our conversations with you, then our instruction doesn't apply to that.

(Dowd Dep. 172-173 (Exhibit 14).)

McFadyen counsel instructed Carrington plaintiff Stephen Schoeffel not to answer whether there were non-lacrosse players at the party:

> Q. To your knowledge, before you left the party, were there any non-lacrosse players in attendance?
>
> MS. SMITH: Steve, I'm just going to object to the extent that that information you only know from your representation with Ekstrand & Ekstrand, and I instruct you not to answer.
>
> THE WITNESS: Right. This is something that I learned from counsel later.

(Schoeffel Dep. 130-31 (Exhibit 15); see also Koesterer Dep. 123-24 (Exhibit 16).)

In connection with the criminal investigation, several players reported that the team and the African-American strippers exchanged racial slurs the end of the

strippers' performance. (Exhibit 17 at 5, 9, 19, 21.) One such comment attributed to the players was, "Thank your grandfather for my nice cotton shirt." (Id. at 5, 9.) McFadyen counsel frequently instructed Carrington plaintiffs not to answer questions designed to probe these allegations. (See, e.g., Catalino Dep. 92 (Exhibit 18) (instructing Mr. Catalino not to answer "[t]hat evening, did you hear Nick O'Hara make a comment about a cotton shirt?"); Clute Dep. 117 (Exhibit 19) (instructing Mr. Clute to not answer whether he "heard anything about someone making a comment about a cotton shirt"); Jennison Dep. 164 (Exhibit 20) (instructing Mr. Jennison to not answer whether he "hear[d] that someone had made a comment about a cotton shirt").)

McFadyen counsel also instructed the Carrington plaintiffs not to answer questions about a video made at the party that was intentionally destroyed later:

> Q. Did you talk to any of your teammates about a video being made at the party?
>
> MS. SMITH: Objection to the extent that this conversation was in the presence of counsel or regarding advice from counsel, outside the presence of counsel.
>
> A. I'm not going to answer.
>
> . . .
>
> Q. Did you ever discuss with any of your teammates about destroying a video of the party?
>
> MS. SMITH: Objection. Same instruction applies. Same objection.

(Exhibit 19 at 129-130.)

Each of these questions calls for factual information potentially relevant to the Carrington claims. As the above examples illustrate, McFadyen counsel repeatedly advanced an improper view of privilege to prevent relevant discovery. McFadyen counsel's instructions are based on the belief that if a Carrington plaintiff learned facts about an event from his attorney, he can avoid disclosure. However, "[t]here is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel." See Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267, 278 (D. Neb. 1989). In other words, "it is clearly not the law that a fact is not discoverable because a lawyer communicated that fact to a client." Id. at 280. Likewise, there is no work product protection for the facts that support a particular allegation in a pleading because those facts do not reveal the mental impressions of counsel. Id. at 281.

B. The Factual Basis for Allegations in a Complaint Are Not Privileged.

McFadyen counsel have instructed the McFadyen and the Carrington plaintiffs not to answer questions that go to the heart of the plaintiffs' claims against Duke, including questions that directly relate to information contained in the Carrington and McFadyen complaints.

1. Breach of Contract Claim

In Count 21, the McFadyen plaintiffs allege that Duke breached their contracts with the plaintiffs. Duke counsel asked McFadyen plaintiff Breck Archer about the breaches of contract he was asserting, and McFadyen counsel instructed Mr. Archer not to answer:

> Q. Just sitting here today, though, unaided by anything else, can you tell me any other things that you think were breaches of contract?
>
> MS. SMITH: I mean -- objection. To the extent that that is calling for work product and opinion from counsel, things that we have discussed, I'd instruct you not to answer.

(Archer Dep. 234 (Exhibit 21).) Mr. Archer's deposition was Duke's opportunity to understand the claims he is making; McFadyen counsel's instruction on questions that go to the heart of his claims were improper. These instructions are not uncommon; McFadyen counsel have made similar instructions in Carrington.

2. Fraud Claim

In Count 24, the McFadyen plaintiffs claim that Duke and specific individuals committed fraud in connection with the disclosure of plaintiffs' DukeCard information. The Carrington plaintiffs make a similar claim in Count 8 of the Carrington complaint and allege:

> [Duke police] Investigators Smith and Stotsenberg . . . handed over to [Durham police officer] Gottlieb several reports. Among the reports, . . . was one key card report [of DukeCard information] for the Duke team members from March 13 and March 14. . . . On May 31, Nifong

> subpoenaed Duke University to obtain the key card records that he already possessed and had used in his investigation and prosecution of the Duke students.

(Case No. 08-CV-119; DE 145 ¶¶ 324, 434.) Despite these allegations, McFadyen counsel have instructed the Carrington plaintiffs not to answer questions regarding each of the above allegations.

For instance, McFadyen counsel instructed Carrington plaintiff Kyle Dowd not to answer whether he learned that his DukeCard information was turned over, (Exhibit 14 at 242), as he alleged. (Case No. 08-CV-119; DE 145 ¶ 324.) McFadyen counsel also instructed Carrington plaintiff Daniel Oppedisano not to answer whether he learned that his DukeCard information had been subpoenaed, (Oppedisano Dep. 264 (Exhibit 22)), as he alleged. (Case No. 08-CV-119; DE 145 ¶ 434.) McFadyen counsel also instructed Carrington plaintiff Stephen Schoeffel not to answer when he learned his DukeCard information had been subpoenaed. (Exhibit 15 at 187.)

As part of the fraud claim, Carrington plaintiffs allege the following about the July 17 hearing on the Carrington plaintiffs' motion to quash the subpoenas:

> On information and belief, attorneys for Duke attended the July 17 hearing. Throughout the hearing, these Duke representatives knowingly sat silent as Nifong urged the court to order Duke to provide information that Duke already had provided to him. Through this collaboration, Duke and Nifong jointly perpetrated a fraud upon the court.

(Case No. 08-CV-119; DE 145 ¶ 441.) Yet, McFadyen counsel have prevented

Duke from testing this assertion:

> Q. Do you have any reason to believe that attorneys for Duke attended the hearing on the motion to quash the subpoenas?
>
> MS. SMITH: Objection. To the extent that that calls for communications with counsel, I instruct you not to answer.
>
> A. I'm not going to answer the question.

(Exhibit 19 at 179.)

These instructions were improper:

> The complaint is a publicly filed document which is intended to put defendants on notice as to the nature of the claims being made against them. [Defendant] is entitled to obtain testimony from plaintiffs as to their understanding or appreciation of the allegations and any facts of which they are aware that support those allegations.

Schmidt v. Levi Strauss & Co., No. C04-01026 RMW (HRL), 2006 WL 3820984, at *2 (N.D. Cal. Dec. 26, 2006). Duke is entitled to discovery on the factual bases of the allegations in the complaint.

C. The Joint Defense Privilege Does Not Apply.

McFadyen counsel have also repeatedly instructed deponents not to answer questions based on a "privilege that exists with the joint defense agreement." (See Exhibit 18 at 192; see also Exhibit 20 at 45; Exhibit 19 at 255; Exhibit 16 at 186.) McFadyen counsel have maintained a joint defense privilege instruction, even where the deponent has clearly waived any privilege:

> MS. SMITH: . . . I just want the record to show that on behalf of the McFadyen plaintiffs, we do not believe that there's any waiver of the work

product privilege with this untitled attachment.

MR. FALCONE: Despite the fact that he forwarded it to his sister?

MS. SMITH: Yes, because Mr. Clute's choice to waive it by forwarding it to his sister does not waive it on behalf of our clients, according to the joint defense agreement, and also the work product privilege that we do still assert.

(Exhibit 19 at 254-255.) As the proponent of the joint defense privilege, McFadyen counsel bear the burden of establishing it. See, e.g. Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398, 416 (D. Md. 2005).

In the Motion, McFadyen do not say who (other than McFadyen plaintiffs) have signed the joint defense agreement. (Motion at 2-3 (stating only that "the McFadyen Plaintiffs are all signatories to the Common Representation Agreement").) Even as to the McFadyen plaintiffs, no executed copy of an agreement has been provided. During a deposition in Carrington, after instructing on joint defense, Duke counsel asked McFadyen counsel for a list of the participants to the common interest or joint defense:

MS. SMITH: Right. Because I'm not asserting the privilege right now on behalf of Mike Catalino. There's other individuals who are our clients, including our civil clients right now, who have a privilege that exists with the joint defense agreement.

MR. FALCONE: Who is a participant to the joint defense agreement?

MS. SMITH: Do you want me to name – all the individuals we represented.

MR. FALCONE: If you don't mind naming them or giving some way of putting some identity to them, that would be great.

MS. SMITH: Yes. Do you want me to go through all -- it includes every single person that -- every single member of the 2005-2006 team.

MR. FALCONE: Anyone else?

MS. SMITH: Including Devon Sherwood,[3] who sought legal advice from us.

MR. FALCONE: In addition to the 2005-2006 team, does the joint defense privilege you are asserting apply to anyone else?

MS. SMITH: Beyond the members of that team?

MR. FALCONE: Correct.

MS. SMITH: In terms of who -- in terms of other counsel, yes. I mean, if you're talking about the holder of the privilege, the holder of the privilege is the clients. But if you're talking about if you want me to go through individuals --

MR. FALCONE: I'm talking the holder of the privilege. Is there anyone beyond the 2005-2006 team?

MS. SMITH: Mike Pressler.

MR. FALCONE: Did you represent Mike Pressler?

MS. SMITH: He at points came in and sought legal advice from Ekstrand & Ekstrand. And in that capacity, the holder of the privilege extends to the parents, who played the role of not just the payer, but also played the role of being part in assisting in the legal representation. I think we asserted that privilege with one of the parents yesterday.

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[3] Devon Sherwood testified that he was not accused of any crime and therefore did not retain his own counsel in the spring of 2006. See Sherwood Dep. 126 (Exhibit 23).

MR. FALCONE: Coach Pressler, all the members of the 2005-2006 team, and all the parents of the members of the 2005-2006 team?

MS. SMITH: I mean, we would have to go through the individuals, with the parents and knowing who it applies to.

MR. FALCONE: So some of the parents it applies to and some it does not?

MS. SMITH: My position is that it applies to all of them. But if there was one that was not directly assisting in the legal representation, under the law, and was just a payer or something, then we wouldn't claim it. My belief is, looking back now, every single -- our position is that every single parent that was one of our parents of one of the clients was a direct assistance in it. So we would say that the privilege does -- they're a holder of the privilege as well.

MR. FALCONE: When did that privilege begin?

MS. SMITH: March -- it depends per person.

MR. FALCONE: How much variance are we talking about?

MS. SMITH: I mean, you're talking about a couple of days when people that sought prior to the non-testimonial order, which was March 23rd. And then we had individuals who sought more legal assistance March 23rd. So what the joint defense agreement does is it retroactively dates back from not just the date that they signed that, but from when they sought legal assistance from us.

MR. FALCONE: So we've got Coach Pressler, every member of the '05-'06 team, every parent of the '05-'06 team. Anyone else?

MS. SMITH: No. I mean, not that I'm – my position is to say that I do not believe that there is anyone else.

MR. FALCONE: [Duke employee and assistant coach] John Lantzy?

MS. SMITH: To the extent, yes, at points he sought legal advice from us associated with the case.

(Exhibit 18 at 192-96.) McFadyen counsel later made clear that this list was non-

exhaustive: "[T]here certainly could be someone that I'm leaving out." (Exhibit 18 at 197.)

Duke has unsuccessfully requested complete participant information from both McFadyen and Carrington counsel. McFadyen counsel produced an unexecuted sample "Common Representation Agreement." (Exhibit 24 at 3-4.) The sample agreement cannot be the basis of the joint defense of the group listed by McFadyen counsel above. The agreement requires a signatory to state that he is "a subject of accusations made by the Durham Police Department with respect to matters relating to events that transpired in the residence located at 610 N. Buchanan on or about March 13, 2006." (Id. at 3.) The parents, coaches, and Duke employees were never suspects in the criminal investigation.

Duke still has not obtained a list of participants in this supposedly privileged joint defense group. McFadyen counsel invited Duke to seek this information through an interrogatory. (Exhibit 24 at 2; see also Exhibit 18 at 197.) The Federal Rules of Civil Procedure do not allow for interrogatories on third parties like McFadyen counsel. Moreover, McFadyen counsel moved to quash Duke's efforts to discover this information through the only available procedure (depositions of McFadyen counsel). (Case No. 08-CV-119; DE 258.) In any case, as the proponent of the privilege, McFadyen counsel is under an affirmative obligation to provide this information so that Duke may assess the privilege

assertion. See Fed. R. Civ. P. 26(b)(5).

McFadyen counsel have not provided even a basic foundation for an assertion of joint privilege. Any joint privilege instruction is improper.

D. McFadyen Counsel Have Confused the Deponents Through the Privilege-Based Instructions.

As the proponent of privilege, McFadyen counsel bears the burden of demonstrating its applicability. See Fed. R. Civ. P. 26(b)(5)(A); see also In re Application of Chevron Corp., 736 F. Supp. 2d 773, 783-84 (S.D.N.Y. 2010) ("the party seeking disclosure nevertheless is entitled to discover the dates and places of and the identities of the participants in the communications, the identities of others who were present and to whom the communications were disclosed, and the general subject matter (but not the content) of the communications").

Accordingly, when McFadyen counsel have instructed a deponent not to answer a question, Duke has sought to examine the nature of the privilege. In so doing, Duke finds confused deponents who do not understand the privileges asserted. (See Exhibit 15 at 203-04 (initially failing to answer whether he thinks his relationship with Dr. Trask is any different than any other student at Duke due to confusion about privilege assertions earlier in the deposition).) In a recent deposition in this case, McFadyen counsel instructed the deponent Ryan McFadyen not to answer a question. McFadyen counsel then further explained how the

assertion of privilege confused Mr. McFadyen and other deponents:

> MS. SMITH: Objection. I think it's confusing. I mean, these boys are not --
>
> MR. EKSTRAND: I think he's answering "no," so...
>
> MR. SEGARS: I'm just --
>
> MS. SMITH: I just mean --
>
> MR SEGARS: You're the one who's instructing him.
>
> MS. SMITH: -- they don't understand privilege as well as we might, and so they have to follow our instruction. And I think every time you follow up with these questions it's confusing to them. And they not trying to withhold anything --
>
> MR SEGARS: Well -- right.
>
> MS. SMITH: -- but they're also trying to follow their counsel's instruction and the follow-up question. It's like -- they're not lawyers. They can't determine what's reasoning that's separate from privilege; what's facts and separate from our work product. They just can't. And it happens at every single deposition. And we're not trying to have them withhold anything, but at the same time they should be able to follow their own counsel's instruction.

McFadyen Dep. 127-128 (Exhibit 25).[4] In so doing, McFadyen counsel fail to appreciate that "[i]t is incumbent upon the proponent [of the privilege] to specifically and factually support his claim of privilege, . . . and an improperly asserted privilege is the equivalent of no privilege at all." U.S. v. Duke Energy

[4] The deposition transcript of Mr. McFadyen is being produced with Mr. McFadyen's testimony redacted to allow his counsel time to designate portions of his testimony as confidential pursuant to the Protective Order. (DE 284.) The discussions by counsel would not be protected by the Protective Order.

Corp., No. 00 CV 1262, 2012 WL 1565228, at *12 (M.D.N.C. Apr. 30, 2012) (citations omitted).

CONCLUSION

Duke requests that the Motion be denied. Duke also requests that the Court enter an order pursuant to Rule 26(c)(2) precluding McFadyen counsel from improperly asserting privilege and noting that (1) facts are not privileged; (2) the factual bases of the allegations of the Complaint are not privileged; and (3) McFadyen counsel have not provided an adequate basis for instructing on the joint defense privilege or common interest doctrine.

This 27th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically filed the foregoing 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 27th day of September, 2012.

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