MCFADYEN et al v. DUKE UNIVERSITY et al Doc. 312 Att. 1

EXHIBIT 1

Reply Brief

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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-JAB-JEP

REPLY SUPPORTING PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER BARRING DEPOSITIONS OF THEIR LITIGATION COUNSEL

Duke squanders its Response (ECF No. 300) by grousing about Plaintiffs' assertion of privilege and the Joint Defense Agreement[1] in unrelated contexts and ignores the specific showing this Court requires to justify taking the deposition of a party-opponent's litigation counsel. As this Court explained:

> [A] request to depose a party's litigation counsel, by itself, constitutes good cause for obtaining a Fed. R. Civ. P. 26(c) protective order, and further, that the motion may, and should, be filed prior to the scheduled deposition. At that point, the burden of going forward then shifts to the party seeking the deposition to show the propriety and need for the deposition. It may do so by demonstrating, among other considerations, that (1) there are no persons other than the attorney available to provide the information; (2) other methods, such as written interrogatories, would not be as effective; (3) the inquiry will not invade attorney-client privilege or work product; and (4) the information is of such relevance that the need for it outweighs the disadvantages and problems inherent in deposing a party's litigation attorney.

Static Control Components v. Darkprint Imaging, 201 FRD 431, 434 (M.D.N.C. 2001) (citations omitted. Plaintiffs established good cause for the protective order they seek

[1] All of the Plaintiffs in this case and *Carrington* are parties to the Joint Defense Agreement ("JDA"). (Ex. 1, Ekstrand Decl., Ex. C (JDA specimen).) The JDA protects communications and work product shared in furtherance of their common interest in these proceedings and in the underlying criminal proceedings.

by showing that Duke issued subpoenas to take the deposition of Plaintiffs' litigation counsel in the related case, *Carrington, et al. v. Duke Univ., et al.* ("*Carrington*"). (Pls' Mot. for a Protective Order (ECF No. 294) ("the Motion").)[2] The burden then shifted to Duke to show that "there are no persons other than [Ekstrand or Smith] available to provide the information" Duke seeks; that "other methods, such as written interrogatories, would not be as effective in obtaining the information" Duke seeks; that Duke's examination of Smith and Ekstrand "will not invade the attorney-client or work product privilege;" and that the information Duke seeks "is of such relevance that the need for it outweighs the disadvantages and problems inherent in deposing a party's litigation attorney." *Static Control*, 201 F.R.D. at 434. For the reasons explained below and in the parallel briefing in *Carrington*,[3] Duke fails to make that showing, and Plaintiffs are entitled to a protective order barring Duke from taking the depositions of Ekstrand or Smith.

1. Duke's claim that Plaintiffs' counsel did not meet and confer with Duke's counsel to resolve the issues raised in the Motion is false. Duke asserts that "no conference occurred in connection with the protective order sought in this case." (Duke Br. at 5-6, n.2.) That is not true. In fact, Plaintiffs' counsel arranged a meeting to confer with Duke's counsel for the purpose of resolving the issues raised in the Motion immediately

[2] Plaintiffs' litigation counsel, Robert C. Ekstrand and Stefanie A. Smith will be referred to throughout this Reply as Ekstrand and Smith, respectively. Ekstrand & Ekstrand LLP will be referred to as "the Firm."

[3] To avoid duplication of argument, Plaintiffs incorporate the points and authorities detailed in Movants' briefing in support of Movants' parallel motion under Fed. R. Civ. P. Rule 45 filed in *Carrington*. (*See* Motion to Quash and Reply, *Carrington,* ECF Nos. 258 and __, respectively.)

after receiving the subpoenas, and the conference took place on February 24, 2012. (Ex. No. 1, Ekstrand Decl. ¶¶ 2-10.) In the conference, Plaintiffs' counsel attempted to resolve the issues raised in the Motion several ways. (*Id.*) First, Plaintiffs' counsel asked Duke's counsel to identify the facts they believed Ekstrand had personal knowledge of that were relevant, not privileged, and not available through other, less burdensome means. (*Id.*) Duke's lawyers could not or would not identify any such facts. (*Id.*) Next, Ekstrand asked Duke's counsel to identify the general topics that they believed Ekstrand had personal knowledge of that were relevant to the claims going forward, not privileged, and not available through less burdensome means. (*Id.*) Again, Duke's counsel could not or would not do so, and Mr. Sun added, "we don't have to tell you that." (*Id.*) Such behavior made resolving the issues raised in this motion a practical impossibility, and, predictably, the issues could not be resolved without court intervention. (*Id.*)

2. Duke misrepresents the history of its subpoena to take Ekstrand's deposition. Without any notice whatsoever, Duke issued a subpoena for Ekstrand's deposition on February 14, 2012. (Ex. No. 1, Ekstrand Decl. ¶¶ 11-18.) In doing so, Duke disregarded a standing agreement among counsel that depositions would not be noticed or subpoenaed without first conferring about the witness's (here, Ekstrand's) dates of availability. (*Id.*) That agreement has been followed for every other witness deposed in this case. (*Id.*) The subpoena that called for Ekstrand's deposition conflicted with pre-existing obligations and did not afford sufficient time for Ekstrand to confer with the holders of the privileges implicated by Duke's subpoenas to determine whether the holders wanted to waive

or assert their privilege. (*Id.*) On February 20, 2012, Smith contacted Duke's counsel to arrange a meeting to confer about the issues raised by Duke's subpoenas. During the conference on February 24, 2012, Ekstrand offered to propose a schedule that would allow sufficient time to consult with the holders of the privileges implicated by the subpoena. (*Id.* ¶¶ 13-14.) Three days later, Ekstrand proposed a schedule for serving responses and objections to Duke's subpoenas including a proposed deposition date of June 11, 2012. (Ex. 1, Ekstrand Decl. ¶¶ 14-15; *id.* Ex. A, Letter from Ekstrand to Sun and Wells, Feb. 27, 2012). Duke rejected Ekstrand's proposed schedule because it was not "reasonable," but did not explain why. (Ex. 1, Ekstrand Decl. ¶ 15; *id.* Ex. B, Letter from Sun to Ekstrand and Smith, Feb. 27, 2012.)

After Duke rejected Ekstrand's proposed schedule, Duke's lawyers failed to propose an alternative, allowed months to pass without acting at all, and never re-issued a subpoena to take Ekstrand's deposition. (*Id.* ¶¶ 15-18.) In late May, 2012, Duke's lawyers asked for dates of Ekstrand's availability, and Smith reminded them that he had proposed June 11, 2012. This time, Duke's counsel said that June 11 would "not work" for them. Smith advised Duke of Ekstrand's next available day, September 4, 2012. (*Id.*) Duke had still failed to issue a subpoena compelling Ekstrand to appear and testify on that date, and, on August 31, 2012, Ekstrand asked Duke's lawyers to issue a subpoena to appear and testify on September 4, 2012. (*Id.*) Duke's lawyers refused to do so, despite Ekstrand's offer to wait after a deposition at Duke's lawyers' offices in Cary while they prepared a subpoena. (*Id.*)

Thus, any delay in adjudicating the issues raised in this Motion was caused by Duke's dilatory conduct.

3. The *Carrington* Plaintiffs have repeatedly asserted the privilege and the protections of the Joint Defense Agreement. Duke misleads by suggesting that Smith was the only person who asserted the protections of the Joint Defense Agreement in depositions of the team members who participated in the Joint Defense Agreement. To the contrary, counsel for the *Carrington* Plaintiffs repeatedly asserted the Agreement. Moreover, contrary to Duke's claim that it is unclear who participated in the Joint Defense Agreement, counsel for the *Carrington* Plaintiffs have expressly taken the position that *all* of the Carrington Plaintiffs are parties to the Joint Defense Agreement. Moreover, the *Carrington* Plaintiffs' counsel repeatedly asserted the protections of the privilege and the Joint Defense Agreement on their clients' behalf throughout discovery. Thus, the *Carrington* Plaintiffs and their lawyers have repeatedly asserted the same protections of the Joint Defense Agreement that Smith has asserted on behalf of the *McFadyen* Plaintiffs.

4. Duke's Misunderstanding of Privilege. Throughout discovery, Duke's lawyers repeatedly instructed witnesses not to answer questions on grounds of privilege where no privilege applied. By way of illustration, in the deposition of Duke's former general counsel, David Adcock, Mr. Sun directed Mr. Adcock not to disclose the "communication" that caused Mr. Adcock to review Crystal Mangum's medical records after her allegations became public. (Ex. No. 2, Adcock Dep. 232:2-238:22.) Three times, Plaintiffs' counsel asked Mr. Adcock to identify who made the communication that Mr. Sun asserted was subject to the

attorney-client privilege. Finally, after Mr. Adcock claimed he did not know the person who made the purported "communication" to him, Mr. Adcock finally admitted that there was no such communication at all. As it turned out, the purported "privileged communication" was a patently non-privileged police report regarding Crystal Mangum:

> Adcock: There was no individual who communicated with me that caused sufficient concern for me to request [Crystal Mangum]'s medical record. I initially reviewed the police reports and from the Duke police reports, and as a consequence of reviewing that document, I decided that it would be appropriate for a number of reasons to review [Mangum's] medical record.
>
> Ekstrand: Are you saying, just so I can understand this, are you calling the Duke police reports communications?
>
> Adcock: They're written documents. I don't know what else they would be.
>
> Ekstrand: Are you saying those were the communications that caused you—
>
> Adcock: You asked me why I had that concern, and that's why I had that concern.
>
> Ekstrand: Okay. So it's those documents and what they reported that caused you concern?
>
> Adcock: A concern sufficient to ask to see [Mangum's] medical records.

(*Id.* 238:15-238:22.) After Mr. Sun's defecting assertion of the attorney-client privilege to protect communications that were plainly not privileged in Mr. Adcock's deposition and others, he continued to direct witnesses not to answer Plaintiffs' questions, but modified his approach by refusing to identify the privilege being asserted or the basis for it, in violation of Fed. R. Civ. P. Rule 26(c)(5)(A).[4]

[4] Fed. R. Civ. P. Rule 26(c)(5)(A) requires that "when a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation

Mr. Sun employed this approach, for example, in Plaintiffs' deposition of Richard Brodhead:

Ekstrand: Who is Chauncey Nartey?

Brodhead: Chauncey Nartey is a student who graduated, and I would take a minute to think.

* * *

Ekstrand: All right. And the question I asked you was, how long did you put him on interim suspension?

Sun: Objection. President Brodhead, I instruct you not to answer that question. …

Ekstrand: He wasn't suspended for a single minute, was he?

Sun: President Brodhead, I instruct you not to answer that question.

Ekstrand: He was not suspended for a single minute, was he?

Sun: President Brodhead, I instruct you not to answer that question.

Ekstrand: On what basis?

Sun: Federal law.

Ekstrand: Which one?

Sun: Federal law.

Ekstrand: Which one?

Sun: I'm not answering. I'm not debating the issues with you, Counsel. Move on.

(Brodhead Dep 33:25-37:16 (reproduced as Ex. No. 3).)

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material, the party must expressly make the claim; and describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." *Id.* (internal numbering omitted).

5. There has been no waiver of any privilege or protection. Duke's bald assertion that Plaintiffs' counsel waived the work product privilege has no merit. Duke points to nothing that constitutes a waiver under North Carolina law. Instead, Duke claims that Smith and Ekstrand corrected (unidentified) factual errors in drafts of books about the underlying criminal proceedings. But Duke identifies no North Carolina authority governing waiver of privilege to support the proposition that correcting errors in material to be published operates as an implied waiver under North Carolina law. Nor could it. Implied waivers do not extend to material that "would convey the attorney's opinion work product or mental impressions." *In re Martin Marietta Corp*., 856 F.2d 619, 625 n.1 and 626 (4th Cir. 1988), *cert denied*, 490 U.S. 1011 (1989); *Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 638 (2009) (materials reflecting attorney's mental impressions, conclusions, opinions, or legal theories are "opinion work product" that is absolutely privileged under North Carolina law). Further, this Court has held that "because the line between non-opinion work product and opinion work product can be a fine one, this Court hesitates to order [a lawyer] to reveal even non-opinion work product" based on an implied waiver, particularly where other means of obtaining the information are available. *Static Control*, 201 F.R.D. at 435 (internal citations omitted). Duke's waiver argument has no merit.

6. Duke waived any claim that Ekstrand is a necessary witness by failing to assert it for 5 years. Duke notes references in Plaintiffs' Complaint to "Plaintiffs' Defense Counsel" and "undersigned counsel." Indeed, Duke counts them up, but, in doing so, Duke only amplifies its failure to raise the issue for at least 5 years after being placed on notice of

the facts it raises here. Duke's delay in asserting it dooms its claim that Ekstrand is a witness, particularly where it is as unconvincing as Duke's is here.

7. Duke failed to use available means to discover facts regarding the Joint Defense Agreement. Duke complains that Ekstrand and Smith suggested to Duke's lawyers that they obtain the information they sought regarding the JDA through formal discovery, specifically, interrogatories and document requests. (Duke Br. at 14.) Duke correctly notes that Duke is not permitted to issue interrogatories to Ekstrand, Smith, or the Firm. But nothing prevented Duke from issuing interrogatories to the Plaintiffs in *McFadyen* and *Carrington*. But Duke failed to do so. Indeed, Duke felt free to issue subpoenas for the production of documents to Ekstrand and the Firm. Notably, Ekstrand and the Firm complied fully with Duke's subpoenas for documents; Duke made no motion to compel further production from Ekstrand or the Firm. Duke's problems are the result of its own lawyers' failure to make appropriate, timely discovery requests of the Plaintiffs in *Carrington* and *McFadyen*. That, of course, does not justify Duke's attempt to take the deposition of its party opponents' litigation counsel, and Duke does not even attempt to make the showing required by *Static Control*, 201 FRD 431, 434.

8. Duke—not Smith—confused witnesses when Smith asserted privilege and the protections of the Joint Defense Agreement ("JDA"). Duke misleads by suggesting that Smith instructed witnesses not to answer questions. Smith never instructed a witness not to answer a question posed to them; instead, she advised witnesses not to disclose matters protected by privilege or the JDA but to answer the question to the extent that they

could answer based upon personal knowledge or information they learned from non-privileged sources. Witnesses were not confused by Smith's instruction or by the same or similar instruction given by the *Carrington* Plaintiffs' counsel. Witnesses became confused by Duke's lawyers' failure to comprehend privilege or refusal to honor it by, among other tactics, instructing the witness to answer with any "facts" the witness knew or heard and by demanding that the witness report if he was "withholding facts" based on the instruction given by Smith or the *Carrington* Plaintiffs' counsel. All of this, of course, has nothing whatsoever to do with the showing that *Static Control* required Duke to make in its Response. Having squandered its Response in that way, Duke failed to make that showing, and Plaintiffs are entitled to a protective order barring Duke from taking the depositions of their litigation counsel.

CONCLUSION

Duke has ignored the specific and substantial showing this Court requires a party to make in order to justify taking the deposition of a party-opponent's litigation counsel; and Plaintiffs are entitled to a protective order barring Duke from taking the depositions of Ekstrand and Smith.

Respectfully submitted by:

/s/ Robert Ekstrand

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

RYAN McFADYEN, *et al.*
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v.

DUKE UNIVERSITY, *et al.*
Defendants.

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CERTIFICATE OF SERVICE

I certify that, on the date electronically stamped below, the foregoing Reply was filed via the Court's CM/ECF system, which will send a Notice of Electronic Filing to all parties' counsel who are registered with the CM/ECF system, and that all parties are represented by at least one attorney registered with the CM/ECF system, except Defendant Linwood Wilson, who appears *pro se* but is personally registered to receive all Notices of Electronic Filing in this action.

/s/ Robert Ekstrand
Robert C. Ekstrand, N.C. Bar No. 26673

EXHIBIT 1

Declaration of Robert C. Ekstrand

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

RYAN McFADYEN, *et al.,*
Plaintiffs,

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DUKE UNIVERSITY, *et al.,*
Defendants.

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DECLARATION OF ROBERT EKSTRAND

1. I am over the age of eighteen, under no disability, and make this declaration upon my own personal knowledge as of October 15, 2012 under penalty of perjury pursuant to 28 U.S.C. § 1746.

A. Certification of Conference Required by Fed. R. Civ. P. Rule 26(c)(1) and LR 37.1

2. Duke has represented to the Court that "no conference occurred in connection with the protective order sought in this case." (Duke Br. n.2, ECF No. 300). That is false.

3. My colleague, Stefanie Smith, and I arranged a meeting with Duke's counsel within a week after we received Duke's subpoenas. The meeting was conducted via telephone on February 24, 2012. Ms. Smith and I participated in the meeting on behalf of the Plaintiffs. Mr. Sun participated in the conference on behalf of the Duke Defendants, along with Ms. Wells, and other counsel for the Duke Defendants.

4. During the meeting, Ms. Smith and I made a diligent effort to avoid the need to move for a protective order or move to quash the subpoenas.

5. Specifically, Ms. Smith and I explained that many privileged communications were implicated by any deposition of me in connection with this case. We explained that the work product privilege also protects our thoughts about the claims going forward in the *Carrington* case because we have either brought or considered bringing the same claims in the complaint we filed for the *McFadyen* Plaintiffs. And we explained that the protections of the Joint Defense Agreement were also implicated by the subpoena for my deposition on subjects related to the civil actions and the underlying criminal case because all of the *Carrington* Plaintiffs and all of the *McFadyen* Plaintiffs are parties to that agreement.

6. In light of those obvious limitations, Ms. Smith and I asked Duke's counsel to identify the facts that they believed I had personal knowledge of that were relevant, not privileged, and could not be obtained by other means. Duke's lawyers could not or would not identify any such facts.

7. I then asked Duke's lawyers to identify the subjects Duke believed I had personal knowledge of that were relevant, not privileged, and could not be obtained by other means. Duke's lawyers could not or would not identify any subject.

8. Mr. Sun, speaking for the group, asserted, "we don't have to tell you that."

9. We explained to Mr. Sun that, regardless of whether he "had to" or not, it would be impossible for us to assess whether and to what extent the deposition implicated the many privileges that protect my thought processes, my impressions, and much of my knowledge about the underlying criminal proceedings and the claims going forward in the *Carrington* litigation.

10. Duke's refusal to identify the subjects of their intended inquiry in particular made it impossible for Ms. Smith and I to resolve the issues raised in this motion, and, despite our best efforts, we were unable to resolve them.

B. Duke's failure to schedule or issue a subpoena to take my deposition.

11. Duke's lawyers issued only one subpoena to take my deposition, which set the deposition on March 20, 2012, at Duke's lawyers' office in Cary, North Carolina. (Subpoena issued to Robert Ekstrand, ECF No. 300-7).[1]

12. March 20, 2012 conflicted with pre-existing obligations and did not allow sufficient time for me to identify all of the holders of privileges implicated by Duke's subpoena and confer with each of them regarding their instructions for waiving or asserting the privilege protecting their communications with Ekstrand & Ekstrand LLP (the "Firm") as well as information and communications protected by the Joint Defense Agreement.

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[1] Contrary to the standing agreement among all counsel, Duke issued its subpoena to me without notice or requesting the dates of my availability. That agreement has been followed for every other witness deposed in this case.

13. In the February 24th conference Ms. Smith and I explained that significantly more time than the subpoena allowed (March 20, 2012) was necessary to give notice to and confer with the holders of the privileges. I offered to propose a schedule that would allow sufficient time for us to identify, notify, and confer with the holders. Duke agreed to withdraw the subpoena to take my deposition at Duke's lawyers office in Cary on March 20, 2012, and Ms. Smith and I promised to propose a schedule in connection with the deposition.

14. Three days after the conference, I sent a letter to Duke's counsel proposing the following schedule:

> Last day to notify and consult with the privilege holders: May 14, 2012;
> Last day to serve written objections to Duke's subpoenas: May 14, 2012;
> Last day to serve responses to Duke's subpoenas *duces tecum*: May 30, 2012;
> First day my deposition could be scheduled: June 4, 2012; and
> I proposed a deposition date of June 11, 2012.

(Ex. A, Letter from R. Ekstrand to Duke's Counsel, dated February 27, 2012).

15. Duke rejected all of those proposed dates. (Ex. B, Letter from Paul Sun to Ekstrand.) But Duke's counsel subsequently did nothing, and allowed months to pass without proposing a different schedule or re-issuing a subpoena.

16. Long after rejecting the schedule I proposed in February, Duke's lawyers asked Smith to provide dates of my availability, and she responded that the first available day on my calendar was September 4, 2012. But Duke failed to issue a subpoena to take my

deposition on September 4, 2012, and fixing the location. So, on Friday, August 31, 2012, I informed Duke's counsel, Jamie Weiss, that Duke had not issued a subpoena to take my deposition on September 4, 2012, and offered to wait after a deposition at their offices for one of them to prepare a subpoena.

17. After some time went by, Mr. Weiss reported that Duke was not going to issue a subpoena to take my deposition on September 4, 2012. Yet, at the same time, Mr. Sun insisted that Duke intended to proceed with my deposition on September 4, 2012, anyway.

18. On September 3, 2012, Ms. Smith and I filed the motion for a protective order in this case and a parallel motion to quash the subpoenas in the *Carrington* action.

C. No holder of any privilege or the protections of the Joint Defense Agreement has waived any privilege or protection.

19. Upon receiving Duke's subpoenas, the Firm notified the holders of privileges implicated by the subpoenas. All of the privilege holders—including the *Carrington* Plaintiffs, the *McFadyen* Plaintiffs, and the *Evans* Plaintiffs—have instructed the Firm, Ms. Smith, and me to assert every privilege each of them holds in connection with any deposition, subpoena, or other discovery request Duke makes of Ms. Smith, the Firm, or me.

20. Upon receiving Duke's subpoenas, the Firm also notified the parties to the Joint Defense Agreement ("JDA"). A true and accurate copy of the JDA is annexed hereto as Exhibit C. All of the *McFadyen* Plaintiffs are parties to the JDA, and, likewise, the

Carrington Plaintiffs' counsel has confirmed that in writing to Duke's counsel and to me that all of the *Carrington* Plaintiffs are parties to the JDA.

21. Each of the *McFadyen* and *Carrington* Plaintiffs have instructed the Firm, Ms. Smith, and me to assert all protections available to them under the JDA in connection with any deposition, subpoena, or other discovery request Duke makes of Ms. Smith, the Firm, or me.

Under penalty of perjury and pursuant to 28 U.S.C. § 1746, I certify that the foregoing is true and correct, this the 15th day of October 2012.

/s/ Robert Ekstrand

Robert C. Ekstrand

Exhibit A

LAW OFFICES
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Robert C. Ekstrand
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February 27, 2012

VIA ELECTRONIC MAIL
Dixie Wells, Esq.
Paul Sun, Esq.
dixie.wells@elliswinters.com
paul.sun@elliswinters.com

Re: Three Subpoenas Issued by Duke University dated February 14, 2012

Counsel:

This is to follow up, in part, on the issues we discussed during the conference we requested regarding the three subpoenas Duke University issued to me and my firm seeking documents and my deposition. Stefanie and I explained our impression that the subpoenas seek privileged material. We explained that it will take substantial time to provide the necessary notice of the subpoenas to those individuals and obtain their position vis-à-vis whether they will direct me to assert their privilege and, if so, to what extent. As a result of those requirements, the dates for production and for the deposition designated by Duke's subpoenas are not practicable.

As promised, I have identified (at least preliminarily) the parties entitled to notice of the subpoenas because matters to which a privilege they hold appears to be sought by the subpoenas. The notice to and related discussions with those parties should require no more than ten weeks. Following that notice period, a

brief period will be necessary to serve written objections to the subpoenas and to file motion(s) seeking protection of privileged information and material.

Therefore, I propose a schedule providing that written objections will be due ten weeks from now, that any production of documents and deposition will be done four weeks thereafter, and that, if necessary, motions for protective orders will be due prior to the time set for production and my deposition. This yields the following schedule, which I propose here:

- Last day to serve written objections: May 14, 2012
- Last day for production pursuant to subpoenas *duces tecum*: May 30, 2012
- First day deposition may be taken: June 4, 2012.

Finally, I propose that any deposition be taken on June 11, 2012, and will reserve it for that purpose.

Please advise me prior to Tuesday of this week (the date objections to the subpoenas are otherwise due) of your position on the proposed schedule. I look forward to hearing from you.

Cordially,

Robert C. Ekstrand, Esq.

CC: David Thompson (via email only)

EXHIBIT B

EW
ELLIS & WINTERS

Writer's E-Mail Address:
Paul.sun@elliswinters.com

Writer's Direct Dial Number:
(919) 865-7014

February 27, 2012

VIA ELECTRONIC MAIL
Robert C. Ekstrand, Esq,
Stefanie Sparks Smith, Esq.
Ekstrand & Ekstrand LLP
811 Ninth Street
Durham, North Carolina 27705

Re: Subpoenas Issued in *Carrington v. Duke*

Dear Bob and Stefanie:

Thank you for taking the time to talk with us on Friday about the subpoenas that we recently served on Bob and on Ekstrand & Ekstrand LLP. During that call, you raised several questions about why we are seeking to take Bob's deposition. As we said on the call, we believe that Bob is a fact witness to many of the events that are the subject of the *Carrington* lawsuit.

Discovery in the *Carrington* case, like that in the *McFadyen* case, is proceeding only on a limited number of claims. In the *Carrington* case, there are three claims on which discovery is now proceeding. Given your comment that you are not involved in the *Carrington* lawsuit and are not familiar with the claims in that lawsuit – other than the fraud claim that is similar to the one that the *McFadyen* plaintiffs have asserted – we thought it might be helpful to you if we briefly describe those claims. They are as follows: Count 8 is a fraud claim that is similar to Count 24 in the *McFadyen* case; Count 11 is a constructive fraud claim that according to the Court's March 31, 2011, Order, focuses on advice that Dean Sue Wasiolek allegedly gave the lacrosse players, communications between Vice President Tallman Trask and the co-captains, and communications between President Richard Brodhead and the co-captains; and Count 19 is a negligent supervision claim against Duke based on the underlying torts alleged in Counts 8 and 11.

As reflected in the document subpoenas and consistent with what we said on the phone, we believe the record establishes that Bob is a fact witness to the substantive tort claims proceeding in discovery in *Carrington*. Further, and consistent with both the subpoenas and our discussion on Friday, we do not intend to seek testimony regarding any matters that are protected by the attorney-client privilege or the work product doctrine at the time of the deposition. It is our position, however, that we are entitled to depose Bob as a fact witness with personal knowledge of topics that are related to Counts 8, 11, and 19.

We received Bob's transmittal from early this morning. The proposed schedule is not acceptable. I used the word "reasonable" during our call. The proposed schedule is not reasonable. Duke will agree that if you serve any objections to the subpoenas on or before 13 March 2012, Duke will not assert that such objections are untimely. Further, provided you produce the documents responsive to the subpoenas on or before 30 March 2012, Duke will not assert that the production is untimely. As we have consistently maintained, we will agree to work with you on a date following the document production when we will take your deposition.

Please let me know if I can provide any additional information at this time.

Sincerely,

ELLIS & WINTERS LLP

Paul K. Sun, Jr.

cc: Dixie Wells, Esq.
David H. Thompson, Esq. (via electronic mail)

EXHIBIT C

REPRESENTATION AGREEMENT

This is an agreement between Ekstrand & Ekstrand, LLP (the "Firm") and _____ (the "Client"). Client has been notified that, by virtue of his status as members of the Duke Lacrosse Team, he is a subject of a criminal investigation being conducted by Durham law enforcement, and has reason to believe that he also may be the subject of civil and/or administrative investigations and/or proceedings by such governments as well as proceedings within Duke University. Specifically, Client has been 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. This agreement is retro-active to the date of client's initial contact with the Firm, and covers all communications between client and the Firm since that time. The accusations as well as information received by counsel indicate that there exists a possibility that Client may become the subject of the same or a similar criminal, civil or administrative investigation or proceeding (including proceedings conducted by Duke University's Judicial Affairs office). Client understands that the Firm has been retained by a significant majority of the Duke Men's Lacrosse Team, and that he may have a list of all Team members who are now or have been represented in this matter by this Firm. Further, Client understands that the Firm may have Joint Representation arrangements with other counsel who represent individual members of the Team in this investigation and any subsequent proceedings.

This Joint-Representation Agreement contemplates that EKSTRAND & EKSTRAND, LLP ("the Firm") will represent all members of the Duke University Men's Lacrosse Team who execute this agreement in all matters relating to or arising from the investigation of allegations of criminal wrongdoing at the residence located at 610 N. Buchanan Boulevard in Durham, North Carolina on or about March 13, 2006. Based upon the information available to the Firm at this time, the Firm does not believe that its representation of all Members currently involves any actual conflict of interest. Moreover, Client believes and agrees that he and the other individuals represented by the Firm in this matter have a mutual interest in presenting a unified response to the allegations and a coordinated approach to the development of evidence in this matter. The Client understands, however, that, in the future, the Firm's representation of client in this multiple representation may give rise to actual conflicts of interest, should the interests of Client become inconsistent with the interests of the other Clients subject to the same investigation and proceedings.

Although the Firm is not currently aware of any actual conflicts, events may develop that cause the Firm's representation of an individual Client to become adverse to the representation of the one, some or all of the other Clients involved in this joint representation. Client recognizes his right to employ separate counsel now, or at any later time in the investigation or subsequent proceedings, if any. This agreement does not in any way bind Client—or anyone—to continuing representation by the Firm. Client understands that he may terminate the Firm's representation of him at any time.

Client recognizes that, in the event an individual client involved in this representation exercises his right to employ his own separate counsel, certain acts might require the Firm to

withdraw from its common representation of the remaining individuals. Further, Client recognizes that forcing such an immediate withdrawal, under some circumstances could cause severe hardship, potential prejudice, and undue expense to the clients who would otherwise remain subject to the agreement. Therefore, Client agrees that, absent an actual conflict of interest in the continued representation of the remaining parties, Client may not demand the Firm's withdrawal from that continued representation of the remaining parties.

Further, Client acknowledges that the Firm cannot continue to represent an individual client if an actual conflict arises with one or more other clients. In such an event, the Client whose circumstances create a conflict with any other client shall immediately advise the Firm of the conflict, but will not discuss the specific circumstances with the Firm. Communication of such a conflict shall be made to Robert Ekstrand personally; and, in the event Robert Ekstrand is not available, this communication must be made to a current employee of the Firm. Upon confirmation of that communication, the Firm will immediately withdraw from its representation of that conflicted client. Further, Client hereby agrees that, if an actual conflict arises and is asserted, Client shall immediately return all materials, notes or other work product that any employee of the Firm has provided to him in the course of the representation, and those materials are not to be shared with any individual at any time. Similarly, if it becomes apparent to the Firm that an actual conflict exists between Client and other clients in this representation, the Firm, on its own initiative, will notify the Client of the circumstances, ascertain the accuracy of them, and, if an actual conflict exists and is not waived by Client, the Firm will immediately withdraw from its representation of Client. Further, Client agrees not to assert any such conflict of interest against the Firm or to undertake to disqualify the Firm from its continuing common representation of the remaining clients subject to this multiple representation.

None of the information obtained by any party hereto as a result of this agreement shall be disclosed to third parties without the consent of those Members made available in the first instance information protected by the attorney-client and/or attorney work product privilege.

Modifications of this agreement must be in writing and signed by all parties hereto.

Any party hereto may voluntarily withdraw from this agreement upon giving or express and written notification to all other parties to this agreement, in which case this agreement shall no longer be operative as to the withdrawing party, but the agreement shall continue to protect all communications and information covered by the agreement and disclosed to the withdrawing party or to the party's counsel upon notification of withdrawal. Immediately upon demand, a withdrawing party and his counsel shall immediately return all joint defense materials and copies thereof.

The signatories to this agreement agree that the confidentiality prescribed above will not become retrospectively inoperative if adversity should subsequently arise among the signatories (or between any of them), irrespective of any claim that the joint defense privilege may otherwise become prospectively inoperative by virtue of such claimed adversity.

Client understands and acknowledges that the Firm may enter into Joint Defense Agreements with counsel for individuals who are also subjects in the same investigation without

obtaining the express prior authorization of Client. At the same time, Client may—and should—notify the Firm if Client has any objections to entry into such an agreement with counsel for an individual subject to this investigation and any subsequent proceedings.

By signing this agreement, Client certifies that he has read this agreement, understands it and agrees to abide by it.

_____

Client Signature

FOR THE FIRM:

_____

EXHIBIT 2

Deposition of David B. Adcock

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

EDWARD CARRINGTON, et als., Plaintiffs, v. DUKE UNIVERSITY, et als., Defendants.	No. 1:08-cv-119
- AND -	
RYAN McFADYEN, et als., Plaintiffs, v. DUKE UNIVERSITY, et als., Defendants.	Civil Action No. 1:07-CV-00953

DEPOSITION OF DAVID BROOKS ADCOCK
DURHAM, NORTH CAROLINA
THURSDAY, JANUARY 12, 2012, 9:05 A.M.

The Deposition of DAVID BROOKS ADCOCK, taken pursuant to notice before KAREN K. KIDWELL, a Registered Merit Reporter and Notary Public in and for the State of North Carolina, on January 12, 2012, at Thomas, Ferguson & Mullins, L.L.P., 119 East Main Street, Durham, North Carolina, at 9:05 a.m.

A. Typically, we would.
Q. Okay. When you were reviewing Ms. Mangum's medical records, was your inquiry directed to whether or not Duke provided appropriate care or was your inquiry directed to whether or not the allegations were credible?
MR. SUN: Objection.
MR. EKSTRAND: On what basis?
MR. SUN: You asked two questions.
BY MR. EKSTRAND:
Q. Okay. When you were looking at Mangum's, Ms. Mangum's medical records and reviewing them, were you reviewing them to ascertain whether or not Duke had provided adequate care to her? And let the record reflect --
MR. SUN: Yeah, you can answer that question.
THE WITNESS: There was a multitude of reasons, but that was one of them.
BY MR. EKSTRAND:
Q. Okay. Elaborate on that. What do you -- what were you looking --
A. I can't say that I did it for one reason.
Q. I know. With respect to that reason?
A. Adequacy of care was certainly a reason.

Q. Okay. And in what way?
A. At that point, I'm going to have to defer to you.
MR. EKSTRAND: I'm sorry. Just let the record reflect that that was a statement made to counsel by the witness at the table, and there seems to be a pattern here where I've heard no objection, and there's a question on the table, and it seems to be an invitation to make an objection. So we object to that pattern.
MR. SUN: Let me just say that Mr. Adcock is an attorney. He is aware that Duke University has not authorized him to waive the privilege, any privilege.
BY MR. EKSTRAND:
Q. I'm not asking about any communications, sir.
A. What was your question again?
Q. Why were you reviewing Ms. Mangum's medical records for purposes of determining whether Duke provided her adequate care?
A. I -- as I mentioned, you asked specifically about adequacy of care, and I said that was certainly one of the reasons, but to further characterize that would be a matter that Duke would

have to explicitly waive the attorney-client privilege for me to answer.

Q. Okay. Well, who is the holder of that specific privilege?

MR. SUN: Duke University, and Duke University has not waived any privilege.

BY MR. EKSTRAND:

Q. Who is the -- who is the person who communicated what you are not disclosing? I understand that it is somebody who is de facto Duke University. Who's the person?

MR. SUN: I'm going to object to that because I didn't understand the question.

BY MR. EKSTRAND:

Q. Who is the person who communicated whatever you are not disclosing on the grounds of an attorney-client communication? Identify the person, please. Sir, I'm over here. Please identify the person.?

MR. SUN: You can answer that question. Who is the person?

THE WITNESS: I know who the person is not. And the person is not me. I don't possess the privilege. I have an ethical obligation to honor the privilege. If the privilege is waived, the entity

holding the privilege has to be in the position to waive it. I cannot ethically do that.

BY MR. EKSTRAND:

Q. Your counsel has just said -- sir, your counsel has just said, you may answer the question. I am not asking you to disclose a communication. Let me make that abundantly clear. I am asking instead for you to provide one fact, among several that will follow, that will enable us to assess your claim of privilege. We're entitled to that, and we've been entitled to that all day, and frankly, we haven't gotten it once. But this time I'm insisting on it.

Identify the person who made the communication that you are not disclosing.?

MR. SUN: So I'll consult --

THE WITNESS: Person that made the communication -- which communication? I don't understand what your question --

BY MR. EKSTRAND:

Q. You're not disclosing a communication, correct? You've asserted the attorney-client privilege; have you not?

A. That wasn't the question. The question -- the question I thought that you asked was what was the basis of my concern as to the adequacy of this

woman's care.

Q. Right. And you said?

A. And I said that I -- I feel like I cannot answer that unless instructed.

MR. EKSTRAND: And counsel.

MR. SUN: If that information was provided to you for the purposes of then providing legal advice, then it would be appropriate for you not to answer the question, and I instruct you not to answer in that record.

THE WITNESS: And so I am not going to answer that question.

BY MR. EKSTRAND:

Q. Okay. Who is the person who made the communication, without telling me what the communication was?

MR. SUN: I'm going to permit the witness to answer as to whether that was a Duke University employee or not someone from Duke.

THE WITNESS: It was -- it was not -- it was a Duke employee to the extent that there was an individual whose communication to me caused me concern. If there was such a person and there did not necessarily have to be such a person, it would have been a Duke employee.

BY MR. EKSTRAND:

Q. I'm sorry. But could you state that differently, so that I -- I might understand it? I'm really not sure what you mean.

A. There are circumstances that routinely occur in a clinical setting where those responsible for the adequacy of clinical care become concerned not because of a communication from a person, but because of the facts and circumstances surrounding the care. That's the nature of medicine. I don't know how much clearer I can make it.

Q. Well, you're asserting attorney-client communication privilege, right? That's what you asserted here.?

MR. SUN: I instructed him not to answer as to that kind of a privilege, yes.

MR. EKSTRAND: You're asserting the attorney-client?

MR. SUN: I just answered that question. I instructed him not to answer to the extent of attorney-client privilege, yes.

MR. EKSTRAND: Okay. All right.

BY MR. EKSTRAND:

Q. So who made -- now wait. Let me make -- take a little, small step. Attorney-client privilege

covers communications, correct? Can we agree?
MR. SUN: You can answer that.
THE WITNESS: Communications in a number of forms, yes.
BY MR. EKSTRAND:
Q. Okay. So what is the identity of the person whose communication you're asserting the privilege to protect?
MR. SUN: I'm going to consult with the witness on a privilege question.
(Off-the-record discussion between Counsel Sun and the witness.)
MR. SUN: Mr. Adcock can answer that question.
THE WITNESS: There was no individual who communicated with me that caused sufficient concern for me to request this person's medical record. I initially reviewed the police reports and from the Duke police reports, and as a consequence of reviewing that document, I decided that it would be appropriate for a number of reasons to review the medical record.
BY MR. EKSTRAND:
Q. Okay. What were those reasons?
A. So there were no -- there was no person

EXHIBIT 3

Deposition of Richard Brodhead

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

- - - - - - - - - - - - - - - - - - - X
EDWARD CARRINGTON, et als., :
Plaintiffs, : Civil Action No.
v. : 1:08-cv-119
DUKE UNIVERSITY, et als., :
Defendants. :
- AND - :
RYAN McFADYEN, et als., :
Plaintiffs, : Civil Action No.
v. : 1:07-CV-00953
DUKE UNIVERSITY, et als., :
Defendants. :
- - - - - - - - - - - - - - - - - - - X

Durham, North Carolina
Thursday, September 20, 2012

Videotaped Deposition of RICHARD BRODHEAD, a witness herein, called for examination by counsel for Plaintiffs in the above-entitled matters, the witness having been duly sworn, taken at 705 Broad Street, Room 203, Durham, North Carolina, at 7:33 a.m. on Thursday, September 20, 2012, and the proceedings being taken down by KAREN K. KIDWELL, RMR, CRR.

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email?
A. No, I did not.
Q. Did you talk to Ryan McFadyen about his suspension before you talked to the world about his suspension?
A. No, I didn't.
Q. And within 24 hours, you knew that that email was a parody, right?
MR. SUN: Objection.
THE WITNESS: I knew that it was a quotation from a book.
BY MR. EKSTRAND:
Q. Within 24 hours of talking about it to all those news organizations and the rest of the world, you knew that it was a parody?
MR. SUN: Asked and answered.
BY MR. EKSTRAND:
Q. Correct?
A. I have answered your question.
Q. Is it correct? Maybe I missed the answer. I'm just asking you to confirm. You knew within 24 hours that his email was a parody of a book?
MR. SUN: Objection.
THE WITNESS: I came to know that. It remains true that the email functioned within the

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situation. The quotation functioned within the situation. And to explain that it was a quotation from a book didn't really terminate that situation.
BY MR. EKSTRAND:
Q. Within 24 hours, you knew that that email was the parody of a book, yes or no?
MR. SUN: Objection.
THE WITNESS: Yes, I did.
BY MR. EKSTRAND:
Q. How many statements did you make about that fact?
A. I have no ability to tell you the number.
Q. I've got a guess for you. Let me run zero by you. Is that true, that you made no statements about the fact that you incorrectly characterized his email in those interviews?
MR. SUN: Objection.
THE WITNESS: I don't acknowledge that I incorrectly characterized his email.
BY MR. EKSTRAND:
Q. Okay. Did you disclose to the world, as you excoriated Mr. McFadyen, did you disclose: By the way, this was a parody of a book we teach here at Duke and some of our students have written reports on at Duke?

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MR. SUN: Objection.
THE WITNESS: I didn't. What I said was that the email was sickening, and I actually think the email remains sickening even after it was learned it was a quotation.
BY MR. EKSTRAND:
Q. We understand. We understand that your perception is that it was sickening, and I'm asking you something very different.
A. Okay.
Q. Right. Have you read the book?
A. I have not.
Q. You're an English professor, right?
A. Indeed.
Q. And English professors teach that book, don't they?
A. Some do. Not me.
Q. Okay. Did you convey the fact that while you don't, some of your colleagues who teach English literature for a living teach the book that Ryan was using as a parody?
A. No.
Q. Did it ever occur to you that maybe you should give some kind of a correction or a clarification as soon as you learned that that email

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was a parody of a book?
MR. SUN: Objection.
THE WITNESS: No, it didn't.
BY MR. EKSTRAND:
Q. It didn't? It didn't occur to you, sir?
MR. SUN: Asked and answered.
BY MR. EKSTRAND:
Q. Answer the question. It didn't occur to you, sir?
MR. SUN: Asked and answered. Move on, Counsel.
MR. EKSTRAND: Paul, we're not going to get into this --
MR. SUN: He answered the question. Read the transcript back, Madame Court Reporter.
MR. EKSTRAND: No, we're not going to waste time reading the transcript. You've got your objection on the record.
BY MR. EKSTRAND:
Q. It did not occur to you once that you should go back to the same reporters you spent all that time talking about Ryan McFadyen with and make a correction? It didn't occur to you?
A. It did not.
Q. Who is Chauncey Nartey?

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A. Chauncey Nartey is a student who graduated, and I would take a minute to think.
Q. I don't care when he graduated. He was a student?
A. Yes.
Q. All right. You know him?
A. I know him a little.
Q. Yeah. How do you know him?
A. I first learned his name because in the middle of the month of April, I asked Coach Pressler to come in for a conversation with me. In the course of that conversation, he told me of a letter he had received from Chauncey Nartey. This was the first I ever heard of it. In the letter, the letter mentioned his daughter in a -- and in the wake of that, I contacted Chauncey Nartey and asked if he would come to see me.
Q. Did he come see you?
A. Yes, he did.
Q. What did you all talk about?
A. We talked about the letter he had written.
Q. What did you say?
A. I told him I thought it was a great error of judgment. I told him that I thought if he -- if he regretted it, he ought to apologize. And I'm told

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he wrote a letter of apology.
Q. Okay. All right. How long was he on interim suspension?
A. He was not on interim suspension.
MR. SUN: Objection.
MR. EKSTRAND: You can have a transcript and redact it all you want later.
BY MR. EKSTRAND:
Q. Is this his email? Exhibit 1?
(Brodhead 1 was marked for identification.)
THE WITNESS: That's what I was told the message had been.
BY MR. EKSTRAND:
Q. Which is what?
A. Troubling.
Q. Troubling? What's the message? Translate it for us. What did you understand the message to be?
A. Something bad happened to someone else. What if it had been a member of your own family it had happened to?
Q. Really? Is that what you understand this to say?
A. Yes.
Q. If it happened to a member of your own

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family?
A. That's what I interpret it to say.
Q. Who is Janet Lynn?
A. I believe it is Mike Pressler's daughter.
Q. Right. And it doesn't say, "What if it had happened," does it? Does it?
A. What if it were to happen.
Q. It says, "What if Janet Lynn were next?" "Next," right?
A. I see those words.
Q. "Next." Not, what if it happened to someone in your family. What if your daughter were next? Right?
A. Um-hmm.
Q. Is that sickening to you?
A. I consider it an extremely inappropriate letter to have written.
Q. Doesn't sicken you?
A. I told you it troubled me.
Q. All right. And the question I asked you was, how long did you put him on interim suspension?
MR. SUN: Objection. President Brodhead, I instruct you not to answer that question.
BY MR. EKSTRAND:
Q. We'll come back, and you can answer it.

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You can answer it now or later. How long -- he wasn't suspended for a single minute, was he?
MR. SUN: President Brodhead, I instruct you not to answer that question.
BY MR. EKSTRAND:
Q. He was not suspended for a single minute, was he?
MR. SUN: President Brodhead, I instruct you not to answer that question.
MR. EKSTRAND: On what basis?
MR. SUN: Federal law.
MR. EKSTRAND: Which one? Which one?
MR. SUN: Federal law.
MR. WEISS: Which one?
MR. SUN: I'm not answering. I'm not debating the issues with you, Counsel. Move on.
MR. EKSTRAND: We'll be coming back then.
MR. SUN: That will be fine.
BY MR. EKSTRAND:
Q. So after you didn't suspend Mr. Nartey for a single minute for threatening the coach's daughter, what else did you do with Chauncey Nartey?
A. Some months later, I did an event. I think it was in Charlotte, North Carolina.
Q. You brought Chauncey with you?