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 TO COMPEL

Duke and its non-party employees give no reason to deny Plaintiffs' motion to compel them to produce complete responses to Plaintiffs' discovery requests and subpoenas:

1. Duke's Redactions. Duke claims that its redaction of the identities of students in documents that are relevant to Plaintiffs' claims is required by FERPA. Duke is wrong for several reasons. First, Duke does not show that any of documents from which Duke has redacted identifying information are "educational records" under FERPA. Duke only makes the conclusory assertion that all of the hundreds of documents qualify as "educational records" under 20 U.S.C. §1232g(a)(4)(A). Even if that were true—and it is not—Duke completely ignores the second part of FERPA's definition of "educational records," which excludes from its coverage most of the documents at issue here by providing that:

> (B) The term "education records" does not include—
> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of

> the maker thereof and which are not accessible or revealed to any other person except a substitute; [or]
>
> (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement; …

Id. §1232g(a)(4)(B). The vast majority of the redacted documents are either emails made by administrative personnel at Duke or records maintained by the Duke University Police Department (*i.e.*, Duke's "law enforcement unit"). As such, they are not "educational records" protected by FERPA at all, and Duke's assertion that FERPA requires Duke to redact identifying information from them fails at the threshold.

As for any documents that are in fact "educational records," FERPA does not require Duke "to redact … the names of students who are not involved in the current litigation" from materials that Duke concedes are relevant to Plaintiffs' claims. (Br. at 4.) The only authority Duke cites to support its claim to the contrary is 20 U.S.C. § 1232g. (*Id.*) But that is the entire codification of FERPA. Nothing in FERPA "requires that Duke redact" anything, particularly the identities of potential witnesses. To the contrary, FERPA expressly permits Duke to produce "educational records" when "such information is furnished in compliance with a judicial order or pursuant to any lawfully issued subpoena," so long as "the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency." 20 U.S.C. § 1232g(b)(2)(B). Further, Duke's own cases impugn its assertion that FERPA requires redaction. For example, in *Rios v. Read*, the court rejected as "meritless" the claim that FERPA requires redaction of student names. 73 F.R.D. 589, 600 (E.D.N.Y. 1977) ("it is neither required or necessary that the

defendants redact the names of the students from the records"). Similarly, the court *Nastasia v. New Fairfield Sch. Dist.,* ordered a school district to produce documents directly relating to a non-party student, and, to comply with FERPA, the district was required to first issue a notice to the student and her parents. 2006 U.S. Dist. LEXIS 40316 (D. Conn. June 19, 2006).[1]

Duke does not contend that any of the individuals whose identities Duke is concealing object at all to the disclosure of documents containing their names—a remarkable fact given the volume of evidence Duke conceals. *See* Duke's Redaction Log (Exhibit 1). Moreover, even if any "eligible student" actually had asserted a privacy interest, Duke still fails to explain why the sealing requirement in the protective order Duke drafted [ECF #284] is not sufficient to protect them.[2]

Finally, Duke exaggerates FERPA's notice obligation, calling it "a significant burden." (Br. at 5.) But FERPA merely requires Duke to make "a reasonable effort to notify" a student before disclosure. Here, again, Duke is contradicted by its own cases. *See, e.g., Rios*, 73 F.R.D. at 600 ("where exceptionally large numbers of students are involved, it may be enough for a school or school district to publish the notice in a newspaper.") Moreover,

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[1] The *Nastasia* Court also compelled the district "to produce documents potentially dating back many years and involving actions by administrators who may no longer be employed by the district," finding that "the burden on the school district to produce these documents is minimal." *Id.* at *5.

[2] Duke's reliance on *Rios v. Read*, 73 F.R.D. 589 (E.D.N.Y. 1977) is misplaced. In *Rios*, the Court permitted discovery of educational records of an entire class of individuals. The Court reasoned that because an educational program "could not rely on [FERPA] to avoid disclosure to government officials of information that might reveal its" violations of the law, educational programs cannot rely on FERPA "as a cloak" to prevent discovery of unlawful conduct "simply because private plaintiffs rather than the government are conducting the inquiry." *Id.* at 599-600

Duke offers no details about this purported "significant burden" at all; Duke does not tell us how many individuals it would have to make a "reasonable effort to notify."[3]

Because Duke fails to provide any justification for its redaction of the names of potential witnesses from its administrators' emails and Duke police records that is not already amply met by the protective order that Duke itself drafted, Plaintiffs' motion to compel Duke to produce unredacted documents should be granted.

2. Duke must produce all documents and ESI within Duke's possession, custody or control that are responsive to Plaintiffs' production requests—not just those that are associated with a handful of custodians Duke picked before discovery began. Duke cites no authority to support its contention that a party may unilaterally limit the documents and ESI it will review and produce to comply with the mandatory initial disclosures required by Rule 26 or a party's requests for production under Rule 34. Nor could it—the Federal Rules require a party to produce all discovery "that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed R. Civ. P. Rule 26. With respect to a party's obligations in responding to requests for production of documents, tangible things, and ESI, the Rules require responding parties to "to produce … any designated documents or electronically stored information" that is "in the responding party's possession, custody, or

[3] Duke is putting the cart before the horse when it claims that Plaintiffs must show a "need for the information that outweighs the privacy interests of the students" (Br. at 5) because no student has asserted a privacy interest at step one.

control." *Id.* Rule 34. The Rules do not permit a party to unilaterally limit its review and production to only a fraction of an entity's "custodians."

Duke's self-selection of "17 custodians" to limit its review and production of materials relevant to Plaintiffs' claims does not suffer for a lack of gall, particularly since this Court rejected Duke's request to impose the same limitation in the Court's Initial Pretrial Order. Specifically, on 1 August 2011, before discovery opened, Duke proposed in a Rule 26(f) report that limited Duke's obligation to review and produce documents and ESI associated with only "17 custodians" that Duke unilaterally selected even before Plaintiffs made their first request for production. [ECF 231 ¶ 3(h)(1), pp. 14-16]. This Court rejected Duke's "17 Custodian" limitation, and, as such, the limitation does not appear in the Court's Initial Pretrial Order [ECF 244]. Yet, incredibly, Duke ignored the Court's refusal to adopt its "17 Custodian" limitation, and conducted discovery in this case according to the same "17 Custodians" limitation that this Court rejected. Duke's only argument in support of its flagrant violation of the Rules and this Court's Pretrial Order is that the plaintiffs in another case voluntarily agreed to the limitation. But the Plaintiffs in this case are not bound by discovery agreements Duke reaches with plaintiffs in another case.

Duke also suggests that Plaintiffs took too long to catch Duke engaging in the practice that Plaintiffs convinced this Court to exclude from its Pretrial Order [ECF #244]. Duke fails to mention, however, that it produced virtually all of its documents and ESI in the final weeks of discovery (one-third of Duke's document production was delivered to Plaintiffs' counsel at 7:00 p.m. on the day discovery closed). Most of those documents were responsive to Plaintiffs' first discovery request for production made 11 to 12 months prior

to Duke's production. Regardless, this Court has already rejected Duke's contention that a party requesting discovery must seek the Court's intervention to override a limitation that a party asserts in responding to a discovery request. *Thomas v. City of Durham*, 1999 U.S. Dist. LEXIS 5361, 9-10 (M.D.N.C. Apr. 6, 1999). In *Thomas*, Judge Eliason explained:

> Defendant mistakenly assumes that plaintiff has the duty to file a motion for a protective order or prepare a proposed protective order [to address defendant's objections]. In fact, it is the proponent of the [limitation] confidentiality that bears the burden of proof and for seeking protection. The failure to timely seek protection can waive the right to protection. At a minimum, the Court will seriously consider sanctions.

Id. at n.2 (ordering defendant to "turn[] over all of the information in defendant's possession" that defendant withheld from plaintiffs throughout discovery) (internal citations omitted).

Duke concedes that its responses to Plaintiffs' requests for admissions are demonstrably false, but contends that it cannot be compelled to correct its false responses because the evidence of their falsity can be found elsewhere. While it is true that Plaintiffs developed ample evidence showing that Duke's responses are false, Duke must supplement its *demonstrably* false responses to Plaintiffs' requests for admission by correcting them. The only authority Duke cites to support its contention that it cannot be compelled to correct a false response to a Rule 36 request for admission is *Shuster v. Olem* 1997 U.S. Dist. LEXIS 528 (S.D.N.Y. 1997). However, in *Shuster*, the *pro se* plaintiff produced no evidence suggesting that defendant's responses to his requests for admission were "false, misleading

or made in bad faith."[4] Here, Plaintiffs have documented evidence (*i.e.*, admissions made by its own employees in sworn testimony) showing that Duke's responses are all three: false, misleading, and maintained in bad faith. Duke cannot merely rest upon the fact that Plaintiffs proved through depositions that Duke's responses to Plaintiffs' requests for admissions are false. The duty to supplement responses to discovery requests includes the obligation to correct responses to requests for admissions. Fed. R. Civ. P. Rule 26(e) (a party's responses to requests for admissions must be "corrected in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect.")

Duke does not dispute that Plaintiffs developed affirmative proof "that (1) Sgt. Smith and (2) Sgt. Stotsenberg provided a (3) key card report for (4) 3/13/06 to (5) 3/14/06 of (6) [members of the men's lacrosse team] to (7) Defendant M.D. Gottlieb." Duke claims that "none of the testimony cited by Plaintiffs states whether or not the DukeCard data Duke Sgt. Smith provided to Durham Sgt. Gottlieb included data for Plaintiffs Archer, McFadyen, or Wilson." (Br. at 19.) Nonsense. Sgt. Smith testified that he gave Gottlieb the DukeCard data of all the team members in the list, entitled "the 46," that Smith attached to his email to Roland Gettliffe. (Exhibit 2 (Smith Dep. 74:11-74:12; *see also id.* 52:5-75:25; *id.* Exhibits 4-6).) That list included McFadyen, Wilson, and Archer. (*Id.* (Smith Dep. Exhibit 6).) Thus, Duke is wrong when it asserts that Plaintiffs have not affirmatively refuted its denial. But

[4] Further, in *Shuster*, the *pro se* plaintiff sought admissions on "the ultimate issues in the case and, if admitted, would appear to constitute admissions of liability." *Shuster v. Olem*, 1997 U.S. Dist. LEXIS 528, *2 (S.D.N.Y. 1997). For example, plaintiff's first two requests for admissions sought defendant's admission that "[defendant] has funds that belong to plaintiff" and that "Federal agts [sic] and employees of the Fed Gov't and others have asked [defendant] to conceal plaintiff's Funds" *Id.* at *2 n.1.

Duke is missing the point: federal discovery rules do not permit a party to deny a request for admission without conducting any inquiry, and then contend that its false denial should stand uncorrected until a party gives the lie to it. To the contrary, in answering a request for admission:

> If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

Fed R. Civ. P. Rule 36(a)(4). Duke should be compelled to correct its demonstrably false responses to Plaintiffs' requests for admissions.

3. Duke's current and former employees must produce the documents and ESI that Duke fails or refuses to produce for them. Duke argues from both sides of its mouth to assert that its current and former employees should not be required to produce documents and ESI that Plaintiffs have requested from Duke. But, as the foregoing makes clear, Duke did not produce the documents and ESI in Plaintiffs' requested in their requests for production to Duke unless they were in the possession of one of Duke's "17 custodians." The targets of Plaintiffs' subpoenas were identified because Plaintiffs had reason to believe that Duke had failed to review or produce documents and ESI from them. As it happened, many of the targets of Plaintiffs' subpoenas are among Duke's "17 Custodians." Duke's production of documents and ESI even from the custodians Duke hand-picked before discovery began was demonstrably incomplete. Duke's only other

argument regarding the subpoenas to non-party Duke employees is that they were served late in the discovery process. But, as Duke concedes, Plaintiffs should not have needed to serve the subpoenas at all because Duke should have produced many of the documents sought by the subpoenas long before but refused to do so.

Duke cannot arrogate the responsibility for producing all documents on behalf of non-party employees, students, and former employees and still be heard to complain that the burden it voluntarily assumed is too much for its lawyers to handle. Moreover, none of the individuals subpoenaed have demonstrated any basis for limiting the subpoenas, and to the extent that they need more time to comply, Plaintiffs consent to extending the time for them to do so, at least until Duke's extensions of the discovery period expire, which is in addition to the six weeks they have already had to comply.[5] Regardless, because no recipient of Plaintiffs' subpoenas has made the specific showing of undue burden or privilege required to justify the imposition of any limitation on the scope of Plaintiffs' subpoenas, Plaintiffs motion to compel their compliance with Plaintiffs' subpoenas must be granted.

CONCLUSION

Plaintiffs' motion to compel should be granted in every respect.

[5] Duke's assertions that Plaintiffs somehow filed their motion to compel after discovery closed is belied by the multiple requests to extend discovery that Duke has made since discovery closed, including its belated effort to depose an author in Maine which will be delayed further if not quashed altogether by the author's appeal of the Maine court's ruling.

Dated: November 3, 2012

Respectfully submitted by:

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CERTIFICATE OF SERVICE

On the date electronically stamped below, the foregoing Reply in Support of Plaintiffs' Motion to Compel was 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 notice of and a link to download the filing to all parties who are all represented by a CM/ECF registrant or are personally registered with the Court's CM/ECF system.

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