

**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’S MOTION TO RE-OPEN  
THE DEPOSITION OF  
PLAINTIFF ARCHER AND  
COMPEL ANSWERS TO  
QUESTIONS PROPOUNDED BY  
COUNSEL**

Defendant (“Duke”) by and through counsel, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, respectfully moves this Court to enter an order re-opening the deposition of Plaintiff Breck Archer and requiring him to answer the questions his attorney instructed him not to answer. Alternatively, Duke seeks an order compelling the production of the affidavit that Mr. Archer agreed to provide after the parties conferred about this dispute. In either case, Duke respectfully requests the Court grant costs associated with this Motion.

In support of this Motion, Duke states as follows:

1. On 20 April 2012, Duke deposed Mr. Archer. (*See* 20 April 2012 Deposition of Breck Archer, attached to the brief as Exhibit A (selected portions of

the deposition due to the narrow issue before the Court<sup>1</sup>))

2. In its Order on Duke's motion to dismiss, this Court noted "[i]t will ultimately be Plaintiffs' burden to prove all of the elements of this claim, including that Drummond was aware that the Duke Card reports had previously been provided to the Durham police. . . ." [DE 186 at 174]. Duke asked Mr. Archer specific questions as to Defendant Drummond's knowledge of the prior release of DukeCard data. Mr. Archer had no responsive information. (*See* Ex. A at 318)

3. Following the completion of Duke's counsel's questions, counsel for Mr. Archer stated, "We're just going to take two minutes to see if we have anything." (Ex. A at 330) After conferring with Mr. Archer in private, counsel for Mr. Archer began her examination of Mr. Archer. (Ex. A at 331)

4. As part of this examination, counsel for Mr. Archer asked the same questions Duke's counsel had asked previously regarding Defendant Drummond's knowledge of the prior release of DukeCard data, but now Mr. Archer had responsive information:

Q. At the time of the motion to quash the subpoena, did you have knowledge that Matthew Drummond knew that the DukeCards had already been given to the Durham police?

A. No.

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<sup>1</sup> Some portions of the deposition have been designated as confidential. Should the Court wish to examine the entire transcript, Duke would be able to provide the entire transcript under seal.

Q. What do you know about that since –

A. I know that -- I know that at the time that he wrote this letter, he'd already known that his assistant had given that information to the police.

Q. And what's your source of that information?

A. Just basic -- uh, just rumors, talking; I mean, just heard it.

Q. Are you aware that Mr. Gettlief has been deposed?

A. Yes. It's -- I'm sorry -- well, I mean, rum -- obviously rumors from the deposition. The deposition was the source, but . . .

(Ex. A at 331)

5. In a final examination, Duke questioned Mr. Archer on this new information and asked “[o]ther than what you know from the testimony of Mr. Gettlife, do you know of any other facts that support your contention that as of June 2nd, 2006, Mr. Drummond knew that Sergeant Smith had turned over DukeCard information to Durham?” (Ex. A at 335-36) Mr. Archer’s counsel then instructed him not to answer the question “[t]o the extent that it would reveal legal theories of counsel.” (*Id.*) Mr. Archer responded, “It’s the – I mean, there’s theories within counsel, but . . .” (*Id.*)

6. When Duke’s counsel asked Mr. Archer what those theories were, counsel for Mr. Archer objected and instructed Mr. Archer not to answer the question. Mr. Archer followed that instruction. (*See* Ex. A at 336.)

7. In accordance with Fed. R. Civ. P. 37(a)(1), the undersigned counsel for Duke certifies that they conferred in good faith with Mr. Archer's counsel in an effort to resolve this discovery dispute prior to filing this Motion. Specifically, counsel conferred by telephone conference on 11 May 2012, and then by continued e-mail communication after that time, as described below. Counsel for Mr. Archer rejected the request to re-open Mr. Archer's deposition to answer the questions identified above.

8. Through the meet and confer process, however, the parties agreed that Mr. Archer would provide an affidavit regarding the extent of his knowledge of these issues as part of a resolution of this discovery dispute. (*See* 11 June 2012 E-mail from Stefanie Smith to Tom Segars, attached to the brief as Exhibit B)

9. On 25 July 2012, Duke's counsel inquired about the status of the affidavit. (*See* 25 July 2012 E-mail from Tom Segars to Stefanie Smith, attached to the brief as Exhibit C) On 1 August 2012, Mr. Archer's counsel stated that she had "been in contact with Breck and he has the affidavit to sign and send." (*See* 1 August 2012 E-mail from Stefanie Smith to Tom Segars, attached to the brief as Exhibit D)

10. On 21 September 2012, discovery closed and Mr. Archer had not yet provided his affidavit. Duke sought and received multiple extensions of time for Mr. Archer to provide his affidavit, as agreed. [*See* DE 296, 298, 299, 301]

11. Mr. Archer did not provide his affidavit during these extensions of time. Duke's counsel reached out to Plaintiffs' counsel regarding a potential meet and confer in advance of filing a motion to compel. However, at that time, Mr. Archer's counsel stated that:

[A]fter some research the past week, we were able to find out that the reason we've had so much difficulty getting in touch with Breck the past couple of months is because he has been deployed to some type of intense training on Mount Fuji in Japan. While he is there, he has no access to internet, etc. We understand that Breck will be returning to his home station in Okinoa [sic] this month. At that time, we will finally be able to communicate and coordinate with Breck.

(3 October 2012 E-mail from Stefanie Smith to Jeremy Falcone, attached to the brief as Exhibit E) Accordingly, Duke sought a further extension of the discovery period through and including 31 October 2012, to allow Mr. Archer to finalize his affidavit. [DE 302] That motion remains outstanding.

12. Mr. Archer has not yet provided his affidavit. Having not heard from Mr. Archer's counsel, on 9 November 2012, Duke's counsel inquired as to the status and indicated that a motion to compel would be forthcoming if the affidavit was not provided. (9 November 2012 E-mail from Jeremy Falcone to Stefanie Smith, attached to the brief as Exhibit H) Mr. Archer's counsel replied that it had been and continued to "make efforts to contact and communicate with Mr. Archer," but that Duke could "choose to do whatever [it] think[s] [it] should do." (9 November 2012 E-mail from Stefanie Smith to Jeremy Falcone, attached to the

brief as Exhibit I)

13. Given Mr. Archer's failure to provide the affidavit after nearly six months, Duke believes it is now appropriate to move forward with this Motion.

14. Accordingly, as more fully explained in Duke's brief contemporaneously filed with this Motion, Duke respectfully requests that the Court re-open the deposition of Mr. Archer. Alternatively, Duke seeks an order compelling Mr. Archer to produce the signed affidavit. In either case, the Duke seeks its costs in connection with this Motion and the re-opening of the Archer deposition.

WHEREFORE, Duke respectfully requests that the Court enter an Order compelling the re-opening of Breck Archer's deposition and requiring him to answer the questions his attorney instructed him not to answer, or, in the alternative, compelling Mr. Archer to complete and return the affidavit he agreed to provide. Duke requests that the Court enter an Order awarding Duke its costs in bringing this Motion.

This the 12th day of November, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 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 the 12th day of November, 2012.

/s/ Thomas H. Segars  
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