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

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

RESPONSE OPPOSING DUKE'S MOTION TO RE-OPEN MR. ARCHER'S DEPOSITION

Plaintiffs oppose Duke's Motion to re-open its deposition of Mr. Archer [ECF #316] because Mr. Archer has already answered the question at issue (i.e., whether Mr. Archer had knowledge of any evidence that Mr. Drummond knew that Plaintiffs' DukeCard data had already been produced to law enforcement when Drummond wrote his June 2, 2006 letter to Plaintiffs regarding the subpoena seeking the data).

Mr. Archer testified that, while he did not know it at the time, he later learned that Mr. Drummond knew that his DukeCard data had been released to the police. Mr. Archer explained that the source of his information was the transcript of the deposition of Drummond's subordinate in the DukeCard office, Roland Gettlife. In his deposition, Mr. Gettlife revealed that Mr. Drummond knew that Plaintiffs' DukeCard data had been given to law enforcement because Mr. Gettlife told him so.

Duke's assertion that Mr. Archer's counsel instructed him not to answer that question is false. (Archer Dep. 336:16-336:18.) To the contrary, Mr. Archer's counsel properly instructed him not to answer the question *to the extent that* doing so would reveal his communications with his counsel or the mental impressions of his counsel. (Id.)

> MS. SMITH: Objection, to the extent that it would reveal legal theories of counsel, I'd instruct you not to answer.

> MR. SEGARS: You've opened the door by asking the question, without qualification, on cross-examination, and it's my contention that that has waived any privilege.
>
> MS. SMITH: And it's my contention that the privilege has not been waived.

(Id. 335:16-336:5.)

At that point, of course, Mr. Segars should have allowed Mr. Archer to provide any response subject to the limitation of Ms. Smith's objection. But Mr. Segars did not do so. Mr. Segars then could have asked Mr. Archer if he was withholding anything based upon Ms. Smith's objection. But Mr. Segars chose not to do that either. Instead, Mr. Segars, in a fit of pique, asserted that Mr. Archer's counsel waived her client's privilege and ended the deposition:

> I believe that what occurred just now was a waiver of the privilege, at least with respect to his basis of knowledge about Matt Drummond knowing of the DukeCard information being given to Durham as of June 2nd, 2006, because he was asked that unqualified question, a question to which we routinely receive

> attorney-client privilege instructions when we ask that question. And based on that contention, it's my position that he needs to answer that question, and as an additional reason for leaving this deposition held open, I would mark that. And subject to that, I have no further questions.

(*Id.* 336:7-336-19.)

Mr. Segars thereby ended the deposition without giving Mr. Archer an opportunity to respond to his question.

Because Mr. Segars failed to allow Mr. Archer to answer the question subject Ms. Smith's objection, and because Mr. Segars failed to ask Mr. Archer if he was withholding any information based upon Ms. Smith's objection, there is no factual basis to re-open the deposition. Mr. Segars may not re-open Mr. Archer's deposition to ask the same question that he refused to give Mr. Archer an opportunity to answer in the time that he had under the Rules. Indeed, Mr. Segars had little choice but to end the deposition when he did: his time was up, as had already reached the 7-hour limit imposed by the Rules and this Court's scheduling

order.

In fact, Duke does not contend that it has any reason to believe that Mr. Archer was consciously withholding any information based Ms. Smith's objection, and Mr. Archer's attorneys have given Duke every assurance that, if Mr. Segars had actually allowed Mr. Archer to respond to his question before terminating the deposition, Mr. Archer would have reported that he did not have any response beyond what he had already reported in his testimony and that he was not withholding any information based upon Ms. Smith's objection. Finally, Mr. Archer's counsel prepared an affidavit to that effect for Mr. Archer to sign.

In short, there is nothing to compel, Mr. Archer's counsel have repeatedly reported to Duke's counsel that there is nothing to compel, and Mr. Archer's counsel have even arranged to have a declaration from Mr. Archer that there is nothing to compel.

CONCLUSION

There is nothing to compel. The motion should be denied.

December 6, 2012

Respectfully submitted by:

/s/ Robert C. Ekstrand

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CERTIFICATE OF SERVICE

On the date electronically stamped below, the foregoing Response Opposing Duke's Motion to Re-open Mr. Archer's Deposition was filed with the Court's CM/ECF System, which will send a Notice of Electronic Filing containing a link to download the filing to Defendants' counsel of record, all of whom are registered with the Court's CM/ECF System.

Respectfully submitted,

/s/ Robert C. Ekstrand

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