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.

Rule 26(f) Report of the Duke Defendants and the City of Durham

On 17 March 2014, this Court entered an Order setting a pretrial scheduling conference for Friday, 28 March 2014. [DE 352.] In addition to setting dates for the conference required by Rule 26(f) of the Federal Rules of Civil Procedure and for the filing of reports required by Rule 26(f), the Court directed the parties to discuss "the extent of discovery to be conducted and a plan for completing that discovery on an expedited basis." [Id.] On 21 March 2014, this Court granted motions filed by the City of Durham and Linwood Wilson seeking to continue those dates. [DE 359.] The Order further directed the parties to "meet and confer by May 16, 2014, and submit their joint or individual Rule 26(f) Reports by May 20, 2014." [Id.] The Order still further directed that "any discovery plans will need to provide for the completion of all discovery in advance of the October 2014

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trial" because "the case has now been set for trial during the October 2014 Trial Calendar, at the direction of the District Judge." [Id.]

Procedural Posture

A brief review of the procedural posture of this case follows in order to identify the remaining discovery that needs to be conducted:

On 31 March 2011, United States District Judge James A. Beaty entered an order granting in part and denying in part various motions to dismiss that were then pending before the Court. As a result of that Order, six Counts remained against one or more of the following defendants associated with Duke University: Duke University, Richard Brodhead, Robert Steel, Victor Dzau, Larry Moneta, John Burness, Matthew Drummond, Aaron Graves, Robert Dean, and Gary N. Smith, Duke University Health Systems and Tara Levicy (hereafter referenced as the "Duke Defendants"). Those six Counts were Counts 1, 2, 18, 21, 24, and 32. Ten Counts remained against the City of Durham or one of the individual Durham Defendants. Two Counts remained against Linwood Wilson.

On 9 June 2011, Judge Beaty granted Motions to Stay [DE 205, 211, 212] filed by the City of Durham and individual Durham defendants [DE 218]. Pursuant to the terms of that Stay, all proceedings with respect to Counts 1, 2, 5, 12, 13, 14, 18, 25, 26, 32, 35, and 41 were stayed pending resolution of an interlocutory appeal by the Durham Defendants.

A. **Duke Defendants**

The Court ordered that fact discovery proceed with respect to Counts 21 and 24, which were Counts that remained only as to the Duke Defendants and did not include any of the Durham Defendants. Accordingly, fact discovery on Counts 21 and 24 began on 21 September 2011, when Magistrate Judge Dixon entered the LR 16(c) Initial Pretrial Order [DE 244]. (LR 16.1 Initial Pretrial Order ¶2(a).) Judge Dixon stayed expert discovery on Counts 21 and 24. (Id. ¶2(f).) Fact discovery on Counts 21 and 24 closed on 21 September 2012 per the terms of that order. (9/21/11 Order ¶2(b)(1).) During that twelve-month period, the Plaintiffs and the Duke Defendants took thirty-eight depositions, exchanged roughly 45,000 pages of documents, and served and responded to interrogatories and requests for admission.

On 17 December 2012, the Fourth Circuit issued its decision on the interlocutory appeal in Evans v. Chalmers, 703 F.3d 636 (4th Cir. 2012). On 27 February 2013, based on that Fourth Circuit decision, Tara Levicy moved for judgment on the pleadings on Counts 1, 2, and 18,[1] Gary Smith moved for judgment on the pleadings on Count 2, and Duke and DUHS moved for judgment

[1] Plaintiffs also asserted Count 18 against Duke University, Richard Brodhead, Robert Steel, John Burness, and Victor Dzau in addition to Tara Levicy. None of those Duke Defendants moved for Judgment on the Pleadings.

on the pleadings on Count 32 [DE 335]. The Court granted that motion on 20 May 2014 [DE 401].[2]

B. The City of Durham

With respect to Count 41, a claim that is asserted solely against Defendant the City of Durham, North Carolina ("City"), and the only claim asserted against the City, discovery was stayed pursuant to the 9 June 2011 Order [DE 218] referenced above. The City has filed a motion for judgment on the pleadings as to Count 41 [DE 385]. The City's motion for judgment on the pleadings has been fully briefed [DE 386, 399, 400] and is ready for determination. The City respectfully contends that discovery should not begin until after the Court has ruled on its pending motion for judgment on the pleadings, since to do otherwise could require the parties to expend time and resources conducting discovery on Count 41, which is subject to dismissal as a matter of law. Further, the City has filed a motion to sever [DE 395], which the City respectfully submits is necessary to minimize risks of unfair prejudice and confusion. See Watkins v. Hospitality Group Management, Inc., No. 1:02-CV-897, 2003 U.S. Dist. LEXIS 22291 (M.D.N.C. Dec. 1, 2003), and additional authorities cited in brief in support of motion to sever [DE 396].

[2] As part of the same Order, the Court granted Linwood Wilson's Motion for Judgment on the Pleadings. No claims remain against Mr. Wilson.

Rule 26(f) and LR 16.1 Report

The Duke Defendants' and City's report, as required by Rule 26(f) and LR 16.1 and this Court's Order directing that "any discovery plans will need to provide for the completion of all discovery in advance of the October 2014 trial" [DE 359], follows:[3]

1. Pursuant to this Court's Order of 21 March 2014 [DE 352], Rule 26(f) of the Federal Rules of Civil Procedure, and Local Rule 16.1(b), a meeting was held in Winston-Salem on 16 May 2014. Participating in the meeting were Robert Ekstrand and David Hunter of Ekstrand & Ekstrand for the <u>McFadyen</u> Plaintiffs; Paul Sun and Dixie Wells of Ellis & Winters LLP for Defendants Duke University, Richard Brodhead, Robert Steel, Victor Dzau, John Burness, Matthew Drummond, Aaron Graves, Robert Dean, and Gary N. Smith; Dan McLamb, Barbara Weyher, and Allison Becker of Yates, McLamb & Weyher for Defendants Duke University Health Systems and Tara Levicy; Reginald Gillespie of Wilson & Ratledge PLLC and Kimberly

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[3] In the event the City's motion to sever is granted, a separate discovery plan will be warranted. The Defendants submit this combined report in an effort to reduce the Court's workload as to this aspect of the case. It is the City's position that the complexities arising from the submission, consideration, and potential implementation of the matters addressed by this combined report further illustrate the need for severance of Count 41.

Rehberg for Defendant City of Durham; and Linwood Wilson, pro se defendant, on his own behalf.

2. Because of the abbreviated discovery period and the 6 October 2014 trial date, the Defendants respectfully request that this Court issue a schedule that takes into consideration the need to expedite deadlines and avoid potential areas for disputes such that discovery can be completed in the short time remaining. Accordingly, the Defendants are submitting a report that provides more detail than that required under LR 16.1 and 16.3.

3. Pre-Discovery Disclosures. Counsel for the Plaintiffs, the Duke Defendants, and the City have agreed to exchange by 30 May 2014, the information required by Rule 26(a)(1) of the Federal Rules of Civil Procedure for Counts 18 and/or 41 (to the extent applicable). Consistent with the Court's Orders of 9 June 2011 [DE 218] and 21 September 2011 [DE 244], disclosures have already been exchanged between the Plaintiffs and the Duke Defendants regarding Counts 21 and 24 of the Second Amended Complaint in the McFadyen case. (Certain Duke Defendants are the only named defendants in Counts 21 and 24.)

4. Discovery Plan. The Defendants propose to the Court the following discovery plan:

a. Pursuant to this Court's Order of 21 September 2011 [DE 244], fact discovery closed on Counts 21 and 24 on 21 September 2012. The discovery that remains to be done on the claims against the Defendants is fact discovery on Counts 18 and 41 (to the extent Count 41 survives the City's pending motion) and expert discovery on Counts 18, 21, 24, and 41 (again, to the extent Count 41 survives the City's pending motion). The Defendants contend that discovery will be needed only on the following subjects at this stage of the litigation:

i. COUNT EIGHTEEN: COMMON LAW OBSTRUCTION OF JUSTICE AND CONSPIRACY – REMAINING AGAINST STEEL, BRODHEAD, DZAU, BURNESS, AND DUKE UNIVERSITY

- Whether a conspiracy existed as alleged in Count 18.
- Whether false public statements, if any, were made by Duke University or any of the Duke Defendants against whom Count Eighteen is alleged and, if so, the extent to which the person making the statement knew it to be false, and the intention behind that statement.
- Whether Robert Steel, Richard Brodhead, Victor Dzau, John Burness, Peter Lange, Larry Moneta, Aaron Graves, Robert Dean, and/or Sue Wasiolek made plans to conceal their alleged participation in preparing false or misleading investigation reports, false or misleading medical records or reports, or false public statements, including but not limited to a purported email sent in January of 2007 by Larry Moneta as alleged in Paragraph 1198 of the Second Amended Complaint.

- Fact discovery with regard to whether any alleged acts of the Duke Defendants caused injury to any of the Plaintiffs.

- Fact discovery on any purported damages that resulted from the allegations included in Count Eighteen of the Second Amended Complaint.

- Expert discovery on any purported damages that resulted from the allegations included in Count Eighteen of the Second Amended Complaint.

ii. COUNT TWENTY-ONE: BREACH OF CONTRACT – REMAINING AGAINST DUKE UNIVERSITY

- Per Magistrate Judge Dixon's Order of 21 September 2011, fact discovery on this Count closed on 21 September 2012 [DE 244]. Accordingly, any additional fact discovery on Count Twenty-One should be prohibited.

- Expert discovery on any purported damages that resulted from the allegations included in Count Twenty-One of the Second Amended Complaint.

iii. COUNT TWENTY-FOUR: FRAUD – REMAINING AGAINST SMITH, GRAVES, DEAN, DRUMMOND, AND DUKE UNIVERSITY

- Per Magistrate Judge Dixon's Order of 21 September 2011, fact discovery on this Count closed on 21 September 2012 [DE 244]. Accordingly, any additional fact discovery on Count Twenty-Four should be prohibited.

- Expert discovery on any purported damages that resulted from the allegations included in Count Twenty-Four of the Second Amended Complaint.

iv. COUNT FORTY-ONE: VIOLATIONS OF ARTICLE I AND ARTICLE IX OF THE NORTH CAROLINA CONSTITUTION – REMAINING AGAINST THE CITY

- Whether the City violated Plaintiffs' rights under the North Carolina Constitution in the issuance and execution of the Nontestimonial Identification Order (the "NTO") that is the subject of Count 41.[4]

- Whether the City violated Plaintiffs McFadyen's rights under the North Carolina Constitution in the issuance and execution of the search warrant for his dorm room that is the subject of Count 41.[5]

- Fact and expert discovery related to the foregoing.[6]

- Fact discovery on any purported damages that resulted from the allegations included in Count 41 of the Second Amended Complaint.

- Expert discovery on any purported damages that resulted from the allegations included in Count 41 of the Second Amended Complaint.

c. Discovery shall be placed on a case-management track established in LR26.1. The undersigned parties propose that the appropriate plan for

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[4] As set forth in the City's motion for judgment on the pleadings and supporting brief [DE 386], Plaintiffs have failed to give adequate notice of the underlying basis or bases for Count 41. This item is set forth here based on Plaintiffs' opposition [DE 399] to the City's motion for judgment on the pleadings. The City does not waive any defects or failures on the part of Plaintiffs in the articulation of their claim(s) in Count 41.

[5] Please see preceding n.4.

[6] Please see preceding n.4.

this case (with any modification as set out below) is that designated in LR26.1(a) as:

__X__Standard

_____Complex

_____Exceptional

d. Provided that special accommodations are made with respect to the deadlines for written discovery and for dispositive motions as described in greater detail in Part 7 below, the date for the completion of all discovery (fact and expert) should be 15 July 2014, to allow adequate time for motions for summary judgment to be briefed on an expedited basis and decided before the 6 October 2014 trial date.

e. Stipulated modifications of the case management track include:

(1) Because fact discovery has closed on Counts 21 and 24, fact discovery, including depositions, should be limited to discovery regarding any nonprivileged matter that is relevant to the Plaintiffs' claims in Counts 18 and 41 of the Second Amended Complaint in the McFadyen case and the Duke Defendants' and City's defenses to those same Counts.

(2) Because expert discovery on Counts 21 and 24 was stayed by Magistrate Judge Dixon, expert discovery, including

depositions, should be limited to discovery regarding any nonprivileged matter that is relevant to the Plaintiffs' claims in Counts 18, 21, 24, and 41 of the Second Amended Complaint in the McFadyen case and the Duke Defendants' and the City's defenses to those same Counts.

(3) Interrogatories (including subparts) should be limited such that each group (i.e., the Plaintiffs, the Duke Defendants, and the City), whether the members of such group are acting individually or collectively, is allowed to serve a maximum of 15 interrogatories (including subparts) upon each named party in any other group. (For example, after plaintiff A submits 10 interrogatories to a particular Duke Defendant, neither plaintiff A nor any other individual plaintiff nor any group of plaintiffs may submit more than 5 additional interrogatories to that particular Duke Defendant. However, the City of Durham may serve an additional 15 interrogatories on that same Duke Defendant.)

(4) Requests for admission:

(a). Requests for admission should be limited such that each group (i.e., the Plaintiffs, the Duke Defendants, and the

City), whether the members of such group are acting individually or collectively, is allowed to serve a maximum of 15 requests for admission (including subparts) upon each named party in any other group. (For example, after plaintiff A submits 10 requests for admission to a particular Duke Defendant, neither plaintiff A nor any other individual plaintiff nor any group of plaintiffs may submit more than 5 additional requests for admission to that particular Duke Defendant. However, the City of Durham may serve an additional 15 requests for admission on that same Duke Defendant.) Such requests for admission should be labeled clearly as being substantive requests for admission to distinguish them from the requests for admission allowed in paragraph b below.

(b). In addition to the 15 requests for admission allowed above, each group, whether the members of such group are acting individually or collectively, should be able to serve an unlimited number of requests for admission purely for the purposes of authenticating documents that

may be used as exhibits in the trial of this action. Such requests for admission should be labeled clearly as being requests for admission for the purposes of authenticating documents to distinguish them from the requests for admission allowed in paragraph a above.

(5) Fact depositions should be limited to 8 depositions by the Plaintiffs, 8 depositions by the Duke Defendants, and 8 depositions by the City. Depositions should be noticed at least 5 days before the date of the deposition.

(6) In addition to the depositions allowed under (5), any party should be entitled to depose any expert witness properly disclosed by any other party, as well as treating physicians of Plaintiffs.

(7) Because this Court has directed that the parties propose "a plan for completing . . . discovery on an expedited basis" and because extensive discovery has already been conducted relating to a significant portion of the general subject matter at issue in this case, the deposition of any witness (other than a witness noticed under Rule 30(b)(6) of the Federal Rules of Civil Procedure), who was previously deposed by the party

noticing the deposition should be limited in duration to 2 hours. Accordingly, if any party notices the deposition of any witness in his or her individual capacity whom that party previously deposed as an individual witness during the first phase of discovery on Counts 21 and 24, then that party's time with the witness should be limited to 2 hours, with the overall deposition limited to 7 hours. Depositions of any witness who was not previously deposed by the party noticing the deposition should be limited to seven hours as set forth in Rule 30(d)(2), unless the parties agree otherwise or the Court allows additional time. For purposes of clarity, the City has not noticed any depositions previously, so the deposition of any witness noticed by the City should be limited to seven hours as set forth in Rule 30(d)(2).

(8) For purposes of determining how many depositions have been taken, each Rule 30(b)(6) deposition should be counted as a single deposition. Further, the seven hour limit should apply to any Rule 30(b)(6) deposition, without regard to the number of witnesses who are designated to testify on behalf of the corporation and without regard to whether the corporation was deposed in the discovery related to Counts 21 and 24.

f. Reports required by Rule 26(a)(2)(B) and disclosures required by Rule 26(a)(2)(C) of the Federal Rules of Civil Procedure should be due during the discovery period:

(1) From Plaintiff(s) by 16 June 2014. At the same time that the reports or disclosures are produced, Plaintiffs should provide at least three alternative dates on which each witness may be deposed before 30 June 2014. The Parties should have agreed in advance on days during this time period that should be held by all Parties to facilitate scheduling. The Defendants should notify the Plaintiffs of the dates selected for each deposition within 24 hours.

(2) From Defendant(s) by 1 July 2014. At the same time that the reports or disclosures are produced, Defendants should provide at least three alternative dates on which each witness may be deposed before 15 July 2014. The Parties should have agreed in advance on days during this time period that should be held by all Parties to facilitate scheduling. The Plaintiffs should notify the Defendants of the dates selected for each deposition within 24 hours.

g. Supplementations under Rule 26(e) should be due within 5 days after a party discovers new information that must be disclosed, provided, however, that during the final 10 days of discovery, all supplementations shall occur as soon as practicable so as not to prejudice the other party. In addition, 5 days before the close of fact discovery, the parties should certify that they have produced all supplementations currently available to them.

h. Discovery of Electronic Stored Information ("ESI"). After learning of potential litigation against Duke University arising out of the indictment of three members of the Duke men's lacrosse team, Duke University began its efforts to preserve electronic data on 20 April 2007. The preservation efforts have continued through the present with considerable expense to Duke University. The Duke Defendants believe that the following plan is consistent with Rule 26(b)(2) of the Federal Rules of Civil Procedure and avoids discovery that is "unreasonably cumulative or duplicative." Further, this plan is proposed taking into consideration whether the "burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and

the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii). In order to reasonably mitigate costs while still complying with discovery mandates, the Defendants propose that the following actions be taken:

(1) Relevant information and custodians:

The Duke Defendants propose to limit the review of data for documents responsive to Count 18 to a specified group of 12 custodians.[7] Twelve custodians is a significant number of custodians for the one narrow claim going forward in this phase of discovery as to the Duke Defendants, and the Duke Defendants believe that these custodians will yield the most substantial and complete data in accordance with Plaintiffs' discovery requests, without being "unreasonably cumulative or duplicative."[8] Further, going beyond this list of 12 custodians

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[7] The Duke Defendants have identified these custodians as Jeffrey Best, Richard Brodhead, John Burness, Robert Dean, Victor Dzau, Aaron Graves, Allison Haltom, Peter Lange, Larry Moneta, Bob Steel, Tallman Trask, Sue Wasiolek.

[8] This approach, including the selection of the specific custodians whose data should be reviewed, is consistent with the approaches taken by other courts. When dealing with ESI, courts have generally deferred to the producing party to identify the custodians likely to possess responsive documents. See generally Garcia v. Tyson Foods, Inc., No. 06-2198-JWL-DJW, 2010 WL 5392660, at *2-4

imposes both a "burden" and "expense" that "outweighs" the "likely benefit" to be gained from searching the electronic records of additional custodians.[9] Once the data of the

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(D. Kan. Dec. 21, 2010). This is because responding parties are "best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information." Kleen Products LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012) (quoting The Sedona Conference, The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, 8 Sedona Conf. J. 189, 193 (Fall 2007)). Courts tend to limit the required custodians to those "likely to possess responsive documents." See, e.g., CDW LLC v. NETech Corp., No. 1:10–cv–00530–SEB–DML, 2011 WL 1743749, at *2 (S.D. Ind. May 5, 2011).

[9] Courts have been particularly likely to limit the number of custodians where a party can demonstrate that production of documents without such a restriction would be unjustifiably costly, as it would be in this case. See, e.g., Thermal Design, Inc. v. Guardian Bldg. Prods., Inc., No. 08–C–828, 2011 WL 1527025, at *1 (E.D. Wis. Apr. 20, 2011) (holding that a search of "all archived e-mail accounts and shared network drives, without any restriction as to custodian or individual" that would take "several months" and cost "an additional $1.9 million dollars" not including an additional thirteen weeks and $600,000 to review "is not reasonably accessible"). The court in Thermal Design explained that "even if the information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence, [the requesting party] doesn't explain why the extensive amount of information it seeks is of such importance that it justifies imposing an extreme burden on the [defendants]. Fed. R. Civ. P. 26(b)(2)(C)(iii) (factors include 'the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues'). Courts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply." Id.; see also Assured Guardian Mun. Corp. v. UBS Real Estate Securities, Inc., 2013 WL 1195545, *3-4 (S.D.N.Y Mar. 25, 2013) (denying motion to compel search of additional custodians without a showing that they would be likely to have non-cumulative relevant documents); Little Hocking Water Assn., Inc. v. E.I. Du

custodians has been reviewed for relevance and privilege as set forth below, the Duke Defendants will produce data responsive to the requests made by the Plaintiffs. If after that review, Plaintiffs affirmatively show that the data from additional custodians should be produced in order to comply with the discovery that the Court has ordered, the Duke Defendants could review data from those additional custodians at that time.

With respect to the City, it did not learn of potential litigation until September 2007, when counsel for the players who were indicted—not the Plaintiffs—gave the City notice of potential claims. The City commenced preservation efforts, but data stored on City servers and copied to backup tapes were not then and are not now available prior to September 2006, long

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Pont De Nemours & Co., 2013 WL 608154, *10 (S.D. Ohio Feb. 19, 2013) (denying motion to compel to search additional custodians because burden of doing so outweighed movant's "speculation" that additional responsive documents would be located).

The onus should be on the Plaintiffs to put forward evidence that additional custodians were involved in the relevant events and would likely possess responsive documents and that this benefit would outweigh the additional costs. See, e.g., Harris v. Koenig, 271 F.R.D. 356, 367 (D.D.C. 2010). Limiting the initial productions does not prevent the Plaintiffs from making additional requests in the future if a need should arise.

after the issuance and execution of the NTO and search warrant that are apparently the subject of Count 41.[10] As discussed at the Rule 26(f) conference on 16 May 2014, the City ceased using the tape library system that wrote the subject backup tapes several years ago, as it was outmoded technology. The City does not currently have access to a tape library system or server that would be capable of restoring the backup tapes and retrieving data from them. As a result, the data on these tapes cannot be retrieved by the City itself, and if data can be retrieved at all from a third-party firm specializing in data recovery, such retrieval could be done only at enormous cost to the City. Such exorbitant expense for restoration and retrieval of data from the tapes cannot be justified given that the data postdate significantly the issuance and execution of the NTO and search warrant, and would as a result have limited, if any relevance or value. With respect to the 15 City personnel who were named as Defendants but as to whom the legally unsupportable claims against them were dismissed by this Court or the Court of Appeals, the City has preserved hard

[10] Please see supra n. 4.

drives of the 12 former City Defendants who are no longer employed by the City.

(2) Review end date for Duke Defendants and the City. The Duke Defendants and the City propose an end-date of 31 August 2007 for review of the Duke Defendants' and City's data. The Attorney General of the State of North Carolina made his statement in April 2007, four months before this proposed end-date. The Second Amended Complaint alleges in Count 18 that the Duke Defendants disbanded their alleged conspiracies in January 2007 and that the alleged conspirators met "immediately" to "get their stories straight." There is no allegation or inference that responsive documents would have been created more than seven months later. The burden and expense of examining data created after 31 August 2007, in general, likely outweighs any benefit in that there is little likelihood that any relevant information regarding McFadyen Count 18 was created after August 2007. The City likewise believes the burden and expense of examining data created after 31 August 2007, in general, likely outweighs any benefit in that there is little likelihood that any relevant information regarding

Count 41 was created after January 2007, when the criminal investigation that is the subject of this Count was referred to the North Carolina Attorney General. The Duke Defendants and the City intend to question relevant witnesses as to whether any relevant documents were created after 31 August 2007. In the event that relevant documents exist, the Duke Defendants and/or the City, as the case may be, would undertake to collect and review those documents on a case-by-case basis.

(3) Preservation and review end date for Plaintiffs. With respect to the Plaintiffs, because the Plaintiffs contend that their damages are ongoing and continue to the present, there should be no such end-date for preservation and review of the Plaintiffs' data. So long as the claims for damages continue, the need for documents that support or rebut those claims exists.

(4) Search Methodology. The Duke Defendants and the City propose that they work together with the Plaintiffs to develop a reasonable set of "keyword" search terms to be run against the preserved data for the 12 Duke Defendants' custodians and the

City's data.[11] This subset of documents will then be reviewed by the Duke Defendants or the City, as the case may be, for responsiveness and privilege, and responsive, non-privileged documents should be produced. Because of the type of damages sought by the Plaintiffs and the multitude of information that would be relevant to those damages claims, a keyword search cannot be used to limit the volume of the Plaintiffs' data that is reviewed. Accordingly, the Plaintiffs should review their entire set of data for responsiveness, relevance, and privilege, and only responsive, relevant, non-privileged documents should be produced.

(5) Production of ESI and Documents. The Duke Defendants and the City propose rolling productions from all parties. The Defendants also propose that the parties produce electronic files and documents as outlined below:

[11] "The use of key words has been endorsed as a search method for reducing the need for human review of large volumes of ESI to be followed by a cooperative and informed process [that includes] sampling and other quality assurance techniques." Romero v. Allstate Ins. Co., 271 F.R.D. 96, 109 (E.D. Pa. 2010). Because of the significant volume of ESI associated with these 12 custodians, if a keyword search were not used, and the ESI was to be manually searched, the time required to conduct such a search would likely result in the "burden of the proposed discovery outweigh[ing] its likely benefit." Ulyanenko v. Metro. Life Ins. Co., No. 09 Civ. 3513, 2011 WL 2183172, at *5 (S.D.N.Y. June 3, 2011).

(a) ESI and non-ESI should be produced to the requesting party as text searchable image files (e.g., PDF or TIFF). The parties should produce their information in the following format:

- Electronic files should be converted to group IV single page tiff or multi-page PDF. All paper documents should, at the option of the producing party, be produced in paper or be scanned to group IV single page tiff or multi-page PDF.
- Each file should have a unique bates number applied to the images matching the image file name. (I.e. Bates number = ABC0000123.tif or ABC0000123.pdf)
- All confidential documents should have the 'Confidential' designation applied to the image.
- Each searchable native/near-native file should have an extracted text file in multipage .txt format named with the Bates number of the corresponding file. Each non-searchable file containing text should have a

multipage OCR text file named with the Bates number of the corresponding file. (I.e., Bates number = ABC0000123; Filename = ABC0000123.txt.)

- OCR for redacted files in multipage .txt format. Each file should be named the same as the Bates number of the corresponding document. (I.e. Bates number = ABC0000123.tif; OCR Filename = ABC0000123.txt.)
- Load file(s) for native/near-native, images, extracted text and OCR files should be produced in Concordance database format if reasonably possible.

(b) Native files: Spreadsheets and files that are not usable in image format should be produced in native or near-native format and named the same as the Bates number. (I.e. Bates number = ABC0000123; Filename = ABC0000123.xls for MS Excel document.)

(c) Metadata fields: The parties should provide the following metadata for all ESI produced, to the extent such metadata exists: Custodian, Native File Path, File Name, Email Subject, From, To, CC, BCC, Date Sent, Date Modified, Control Number Begin, Control Number

End, Attachment Begin, and Attachment End. (Not all of the foregoing metadata may be available for ESI produced by the City.)

(d) Electronic data should be produced using hard drives that will be shipped to the party requesting the data.

(6) Cost allocation. When requests for production of ESI that are not reasonably accessible without undue burden or cost are served, the party asked to produce the ESI should be allowed to move the Court for an order that requires the requesting party to pay the reasonable expenses of producing the ESI.

(7) Privileged and protected ESI. The parties should be able to reserve the right to withhold any relevant ESI subject to a common law or statutory privilege.

5. Mediation. Mediation has already been conducted in this case, with Jonathan Harkavy serving as the mediator pursuant to the Court's 21 September 2011 Order. After working diligently with the Plaintiffs and the Duke Defendants in attempts to reach a settlement, Mr. Harkavy declared an impasse.

6. Preliminary Deposition Schedule. The Defendants propose the following schedule for depositions:

a. Because the entire discovery period proposed is about 7 weeks (for the purposes of allowing sufficient time for expedited briefing and decision of motions for summary judgment as discussed below) and many of the witnesses the Duke Defendants anticipate the Plaintiffs will want to depose have calendars that are booked months and even years in advance, the Duke Defendants are concerned about coordinating schedules of counsel and witnesses with respect to depositions. Accordingly, the Duke Defendants have identified the following witnesses whom Plaintiffs reasonably might want to depose and have collected dates on which these witnesses are available to be deposed. The Duke Defendants are proposing these dates to facilitate the discovery process and minimize scheduling conflicts.

- Richard Brodhead: 17 June 2014; 18 June 2014
- John Burness: 13 June 2014; 16 June 2014; 20 June 2014; 23 June 2014; 25 June 2014
- Victor Dzau: We are working with Dr. Dzau to obtain available dates and will provide those promptly.
- Larry Moneta: 19 June 2014; 26 June 2014
- Robert Steel: 9 June 2014; 10 June 2014

Likewise, to facilitate scheduling, the Plaintiffs should be required to provide at least two dates within the discovery period on which each of them can be deposed.

b. The Defendants should be able to depose the experts retained by the Plaintiffs before having to produce their own expert disclosures. The schedule proposed above so provides.

7. Other items.

a. Written Discovery: Because the period for discovery is short, the Court should order that the time for responding to written discovery should be expedited as allowed under Rules 33(b)(2), 34(b)(2)(A), and 36(a)(3) of the Federal Rules of Civil Procedure. The Court should order that responses to all written discovery should be served electronically on opposing counsel within 20 days of actual receipt of the discovery requests, rather than the 30 days (plus three days for service by mail) allowed under Rules 33, 34, and 36.

b. Summary Judgment

(1). Under LR 56.1(b), a party has 30 days following the close of the discovery period in which to file dispositive motions. Under LR 56.1(d), a party opposing the dispositive motions must file its opposition within 30 days, and the party filing the

dispositive motion then has 14 days in which to file its reply. When the 3 additional days that are allowed for service are included and assuming that each party takes the full time that it is allowed under the Local Rules, if the discovery period ended on 15 July 2014, then any dispositive motion would not be ripe for decision until 3 October 2014, a mere 2 calendar days (0 business days) before the 6 October 2014 trial date.

(2) To allow for the longest possible discovery period while still preserving time for briefing of summary judgment motions and decision of those motions before trial, the Defendants propose that

(a) Any dispositive motions be due within 14 days following the close of the discovery period.

(b) Any responsive briefs be due within 21 days following service of the dispositive motions and briefs, and that the 3 additional days allowed for service not be allowed, such that any responsive briefs are due in a true 21 days.

(c) Any reply briefs be due within 7 days following service of the responsive briefs and that the 3 additional days

allowed for service not be allowed, such that any reply briefs are due in a true 7 days.

(d) This proposed schedule would provide the Court with 40 calendar days (24 business days) during which to decide any dispositive motions.

c. If any party seeks to request leave to join additional parties or amend the pleadings, the Court should consider, inter alia, whether the granting of leave would delay trial, as well as the dictates of Rule 16. Because the original complaint in the McFadyen case was filed over six years ago, has already been amended twice, and has been the subject of extensive motions to dismiss, the Defendants contend that good cause should be shown under Rule 16(b) for any amendment and/or the addition of parties that occurs at any point from this date forward.

d. Because fact discovery has closed on Counts 21 and 24, no additional fact discovery, including but not limited to questioning during depositions, should be allowed on those counts.

e. By the written consent of counsel for the Plaintiffs, the City, and the Duke Defendants, the parties should be able to agree to modify this Rule 26(f) Report without the consent of the Court, except that the

close of discovery should not be changed by consent of the parties without the consent of the Court.

f. The protective order that was entered in this case on 24 July 2012 [DE 283] should remain in effect during this second phase of discovery and should apply to discovery provided/produced by the City. In this regard, criminal investigative files and employee personnel records shall retain their confidential status as provided by applicable North Carolina law and subject to the protective order.

g. The parties have discussed special procedures for managing this case, including reference of the case to a Magistrate Judge on consent of the parties under 28 U.S.C. §§636(c), or appointment of a master: The parties do not consent to either procedure.

h. The Defendants anticipate that trial of all of the counts in McFadyen that survive this Court's Orders of 31 March 2011 and 20 May 2014, is expected to take 3 weeks.[12] A jury trial has been demanded.

[12] Please see preceding notes 4-6. This estimate is based on the articulation of Plaintiffs' claim(s) comprising Count 41, and it remains the City's position that such articulation is insufficient and defective.

This the 20th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on 20 May 2014, I electronically filed the foregoing **Rule 26(f) Report of the Duke Defendants and the City of Durham** 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 20th day of May, 2014.

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