

IN 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

**PLAINTIFFS' RESPONSE TO THE DUKE DEFENDANTS'
ALLEGATIONS CONCERNING COUNT 21**

Plaintiffs hereby respond to the Duke Defendants' false assertion that Plaintiffs have violated two Court Orders, see Reply Brief in Further Support of Motion for Protective Order Concerning Plaintiffs' Subpoenas Addressed to Burson-Marsteller and Edelman (Doc. No. 261) ("Reply"), by stating the following:

In the Duke Defendants' Reply, they make the conclusory assertion that Plaintiffs' Count 21 "has nothing to do with 'public perception,' statements to a 'nationwide audience,' or 'public humiliation or obloquy.'" Defs.' Reply 5. Lacking facts to back up their claim, the Duke Defendants attempt to do so with another conclusory assertion; that the "subpoenas seek irrelevant information on their face." *Id.* at 7. They complain that Plaintiffs seek documents relating to the public relations

strategy that drove the Duke Defendants' conduct and decisions in responding to Crystal Mangum's false accusations. Specifically, they assert that "the firing of former Head Coach Mike Pressler," "President Brodhead's television interviews," the establishment of "a committee to examine the culture of the lacrosse team," and the "decision to cancel the remainder of the Duke University Men's Lacrosse 2006 Season" are all irrelevant to the suspensions giving rise to Plaintiffs' breach of contract claims. Defs.' Reply 7-8. This is extraordinarily misleading to the Court.

Duke ignores the glaring fact that all of the events cited above occurred on April 5, 2006, the same day (within hours) that Ryan McFadyen was unilaterally suspended in violation of every procedural protection the University promises to all students before taking such action, giving rise to his breach of contract claim. In fact, all of the events – including the suspension of Ryan McFadyen – were discussed together in Duke's publically issued Statement on April 5, 2006 and President Richard Brodhead's April 5, 2006 Letter to the Community; both the Statement and Letter to the Community were posted together on Duke University's website on April 5, 2006. The Statement and Letter to the Community are attached hereto as **Exhibit 1**. Furthermore, President Brodhead announced these events and the University's decisions together during nationally televised interviews he gave on April 5, 2006. Pls.' Second Amended Compl. (Doc. No. 136) ("SAC"), ATTACHMENT 17 at 221

and ATTACHMENT 26 at 262 (video recordings of President Brodhead’s interviews with CNN and WRAL).

Duke also ignores the correspondence among its most senior administrators (*e.g.*, the President of the University, the Provost, and the Vice President for Student Affairs) which show that the their April 5th decisions were all closely related and were all driven by the Duke Defendants’ media and public relations “strategy” and “script.” For example, in an email from President Brodhead to Vice President for Student Affairs Larry Moneta, the President states:

“Friends: a difficult question is, how can we support our lacrosse players at a devastatingly hard time **without seeming to lend aid and comfort to their version of the story? We can’t do anything to side with them, or even, if they are exonerated, to imply that they behaved with honor.** The central admin can[?]t, nor can Athletics.”

Exhibit 2 (President Brodhead’s email to VP Larry Moneta) (emphasis supplied). In response to President Brodhead’s email, Vice President Moneta wrote: “The dilemma, of course, is with public acknowledgement of our support without feeding the ‘coverup’ [sic] allegations...” *See id.* (Email from VP Moneta to President Brodhead dated April 10, 2006).

Later, President Brodhead reported to Provost Lange that he and Chairman of the University's Board of Trustees Robert Steel have been faithful to the PR "script" saying:

"I have been careful **not** to say that I am confident the players are innocent *though certainly a large number of them are* of the criminal charge. I continue to her [sic] this message and so does Bob Steel, who will beat up on me about it again later today."

Exhibit 3 at 2 (Emails from President Brodhead to Provost Lange dated April 24, 2006) (emphasis supplied). President Brodhead reminds Provost Lange that all of them "need to be on script" regarding Plaintiffs and their teammates. *See id.* at 1.¹

But that is not all. Further proof of Duke's media strategy has recently been established in former Athletic Director Joe Alleva's sworn testimony. During his deposition on January 20, 2012, Mr. Alleva testified that he made positive and truthful statements about Plaintiffs and their teammates' character at the University's press conference on March 28, 2006. Mr. Alleva testified that he was "crucified" immediately afterwards for making those statements by President Brodhead himself

¹ Plaintiffs did not obtain any of this correspondence among the University's senior leadership (attached as Exhibit 2 and Exhibit 3) until weeks after Plaintiffs' Response to the Duke Defendants' Motion for a Protective Order was due.

and in front of the Crisis Management Team, all of whom knew how “off-message” Mr. Alleva’s truthful, positive statements about Plaintiffs were.

The University’s “strategy” and “script” of course, were designed by the consulting firms targeted by Plaintiffs’ subpoenas. Because Plaintiffs’ suspensions were driven by the University’s “strategy,” Plaintiffs’ subpoenas seeking documents relating to that “strategy” is well within the scope of discovery and this Court’s two Orders.

From the beginning of this litigation, Plaintiffs alleged that Plaintiffs’ suspensions were driven entirely by Duke’s decision to protect its corporate brand at the expense of the Plaintiffs’ good names and their reputations. *See, e.g.*, SAC ¶¶ 451-55, at 139-40 and ¶¶ 693-702 at 220-28; *see also id.* ¶ 91 at 34-35; ¶¶ 1223-28 at 384-86; ¶¶ 85-92 at 32-35; and ¶¶ 713-18 at 226-27. Plaintiffs even embedded footage of Duke’s President executing Duke’s media strategy on nationally broadcast interviews in which he announces that Ryan McFadyen was suspended without notice or hearing, thereby subjecting him to national and international public obloquy on the eve of indictments. SAC, ATTACHMENT 17 at 221-22 (video of President Brodhead announcing that the University suspended Ryan McFadyen indefinitely).

Finally, Duke is plainly aware that the materials sought in Plaintiffs’ subpoenas to Duke’s public relations consultants will produce materials that evince their willful and wanton conduct, their malice, their deliberate indifference to Plaintiffs’ rights, and

their participation in and ratification of that wrongful conduct by their officers, directors, and managing employees. The materials are therefore directly relevant to Plaintiffs' entitlement to punitive damages, for the egregiously wrongful conduct accompanying the conduct giving rise to Plaintiffs' claims for breach of contract and of the covenant of good faith and fair dealing.

Plaintiffs have not violated Rule 26 or the Court's two Orders in any way. The Duke Defendants ignore this Court's rule limiting reply briefs solely "to discussion of matters *newly raised in the response*." LR 7.3. Instead, they abandon most of their opening arguments (e.g., claims of "confidential commercial information," "harassment," and the need for a "general protective order") and fashion entirely new arguments to support their purported need for a protective order preventing Plaintiffs from discovering the materials sought in their subpoenas. Such shifting of claims and contentions in a reply brief is precisely what LR 7.3(h) forbids. Thus, even if Duke's new contentions had merit (and they do not), they would be entitled to no weight in this Court's consideration of Duke's unfounded motion for protection from subpoenas directed to other entities.

The Motion should be denied.

Dated: February 3, 2012

Respectfully submitted by:

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CERTIFICATE OF SERVICE

The foregoing Plaintiffs' Response to the Duke Defendants' Allegations Concerning Count 21 was filed with the Clerk of Court via the Court's CM/ECF system on February 3, 2012, which automatically serves the filing upon all parties to this action by delivering notice of and a link to the filing to the e-mail address that counsel of record have registered in the CM/ECF system for service.

Dated: February 3, 2012

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