

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF VIRGINIA  
Lynchburg Division**

WALTER SCOTT LAMB,	)	
Counterclaim Defendant	)	
v.	)	Case No. 6:21-cv-00055
	)	
LIBERTY UNIVERSITY, INC.,	)	
a Virginia corporation,	)	
Counterclaim Plaintiff.	)	

**LAMB’S REPLY CONCERNING HIS MOTION FOR LEAVE TO FILE UNDER SEAL  
CERTAIN EXHIBITS TO LAMB’S RESPONSE TO LIBERTY UNIVERSITY’S  
MOTION TO DISMISS UNDER RULE 41**

Comes now Walter Scott Lamb, by counsel, and in opposition to Liberty University’s fee petition, states as follows.

**I. Procedural Background and Applicable Law**

“Don’t look here!” Liberty cries. “Bad guy over there!” *Cf.* ECF Doc. 167 at 1-2, 5-6; ECF Doc. 165 at 1-2, 11 n.3, 19-23.<sup>1</sup> And thus Liberty University tries to hide 112 records from the public, records that show Liberty knew it had no good faith basis to file its defamation claim against Lamb.

This response is hardly surprising. Distraction has been Liberty’s chief tactic since the start of this suit. *E.g.*, ECF Docs. 165 at 2 (criticizing Lamb for not make a settlement offer). Indeed, the defamation claim is, itself, a distraction attempt, simultaneously driving up the costs to Lamb of this litigation. *See* ECF Doc. 161 at 1-5; ECF Doc. 10, ¶¶ 3, 52. Now, when Liberty

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<sup>1</sup> Liberty argues the Court should deny Lamb any relief under this motion because the Court has found Lamb acted inappropriately. ECF Doc. 167 at 2, 5-6. But the Court should be concerned about the inappropriate conduct of *any* party—not just the first party the Court punishes. And if the Court finds, as it must, that Liberty made false defamation allegations in the counterclaim without good faith, the unclean hands may justify the Court denying both parties any attorney fees.

could try and prove its claim, it instead ducks and covers, trying preserve intact its false narrative that Lamb defamed Liberty.<sup>2</sup>

Liberty sued Lamb for defamation. It did not have to sue Lamb for defamation; it freely chose to. Liberty crowed in its counterclaim that Lamb defamed the University through “objectively false” statements when Lamb said to the media that he spoke about Title IX issues “all spring,” and that Title IX accusations were not “looked into” by Liberty’s Baker Tilly investigators. ECF Doc. 10, Counterclaim ¶¶ 53-54, 57. Liberty likewise claims these statements somehow falsely implied that Lamb was “fired for reasons related to Title IX,” though no reasonable interpretation of the words supports that assertion. ECF Doc. 10, Counterclaim ¶ 53; *Webb v. Virginia-Pilot Media Cos, LLC*, 287 Va. 84, 89 (2014) (requiring the defamatory implication to be reasonably drawn from the words actually used). These defamation claims forced Lamb’s counsel to expend substantial time in discovery collecting the records and information to rebut the allegations of falsity and defamatory intent, only to have Liberty move under Rule 41 to drop its nefarious claims in the last hours before a corporate deposition of Liberty—a deposition Liberty already skipped once. ECF Doc. 161-48 at 1-6, 24-30.

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<sup>2</sup> Liberty claims that it filed its Rule 41 motion “to save both parties the expense of continued litigation.” ECF Doc. 167 at 1. Lamb can decide for himself whether to use his money to defend his reputation; he does not need Liberty’s paternalism. And Liberty did not care about its attorney fees when, for instance, it racked up **\$115,000+** merely in the “preparation of three separate status reports Liberty filed to update the Court on its spoliation recover efforts”—not in the spoliation recovery efforts, but merely *to tell the Court the status of those efforts*. ECF Doc. 151-1 at 6, 19-22.

More to the point, Liberty’s desire to avoid attorney fees *now* does not excuse Liberty pursuing a defamation claim in the first place, with allegations, for instance, that Lamb made an “objectively false” statement when he said he was discussing Title IX mishandling all spring. ECF Doc. 10, Counterclaim ¶¶ 53-54, 57. The evidence submitted shows that Liberty had hundreds of documents showing these springtime communications, including extensive communications with Liberty executives. ECF Doc. 161 at 8-11 and Exhibits 10-11, Exhibit 12 at 4-6, 11-12, Exhibits 15-16, Exhibits 18-19, Exhibit 21-23. Liberty can and should be held responsible for Lamb’s attorney fees for this bad faith conduct.

And so, Lamb asked simply that the dismissal be conditioned on the reimbursement of his attorney fees and costs concerning the defamation claims alone, and the right to use the information collected in discovery if or when Liberty decides to refile its claims.<sup>3</sup> To show the fees should be imposed as a condition because of Liberty's bad faith, Lamb provided the Court with a wealth of indisputable documentary evidence from Liberty. These records show (1) Lamb indeed spoke about Title IX issues being mishandled all spring *and Liberty knew it*; (2) Lamb was correct in saying the Baker Tilly investigators did not look into Title IX issues *and Liberty knew it*; (3) Lamb at least had a good faith factual basis to believe he was terminated for reasons related to Title IX *and Liberty knew it*. Lamb wants the Court to adjudicate the substantive issue of whether Liberty had good faith in filing these claims to rule on the Rule 41 motion.

But Liberty unilaterally asserted that 112<sup>4</sup> of the crucial documents are “confidential” under an existing protective order, thereby compelling Lamb under that order to ask the court to seal the records—temporarily.<sup>5</sup> Liberty bears the burden to show the records should be sealed

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<sup>3</sup> Liberty mischaracterizes this latter request as a “bizarre demand that he should be able to keep and use Liberty's documents to further his personal aims.” ECF Doc. 165 at 9. But Lamb is not seeking to “use Liberty's documents to further his personal aims,” but instead to use them if Liberty refiles a claim, to reduce the attorneys' fees arising from redoing discovery.

<sup>4</sup> Liberty berates Lamb for producing abundant documentary evidence from Liberty in support of his claim that Liberty acted in bad faith. ECF Doc. 167 at 2, 5. But Liberty has already persuaded the Court that Lamb's word is not to be trusted, ECF Doc. 110 at 14, leaving Lamb little option but to produce indisputable documentary evidence in support of his claims concerning Liberty's bad faith. Ironically, Liberty also says Lamb “cherry picked” supportive documents, without producing a single document in support of its good faith that Lamb omitted. ECF Doc. 165 at 12.

Liberty claims that Lamb has produced these documents to the Court for an improper purpose of using them later. ECF Doc. 167 at 2-3. Liberty does not explain what improper use it envisions. These documents clear Lamb's name after Liberty falsely accused him of lying to the media as part of a personal vendetta. If Lamb were to point to these documents to remediate the damage Liberty caused by its false claims, that would not be improper.

<sup>5</sup> Liberty claims that Lamb “never challenged” Liberty designation of this material as “Confidential” under the protective order “until Lamb lost the sanctions motion and Liberty lodged its Rule 41 motion.” ECF Doc. 167 at 3. This is misleading. Lamb is not challenging

permanently.<sup>6</sup> To do so, it must persuade this Court that either (1) the records are nonjudicial records, and that there is a good faith basis to seal them under Rule 26(c) or some similar power;<sup>7</sup> or (2) to the extent these are (or become) judicial records,<sup>8</sup> Liberty has significant interests in preventing the disclosure of the records, an interest that outweighs the public's interests in accessing these records under the common law right to access judicial records.<sup>9</sup> The records are or will become judicial records when they are used by the Court to adjudicate the

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Liberty's designation of this material as confidential. The process for challenging the designation of material as confidential appears in ¶ 8 of the Protective Order. ECF Doc. 94 at 7-8. However, ¶ 10 of the protective order concerns the separate issue of filing protected material. ECF Doc. 94 at 9. Lamb did not forestall action under the protective order; he merely had no need to file the materials with the Court until the Rule 41 motion was filed.

This is not the first time Liberty has attempted to confuse the Court about the procedural issues in this case. For instance, in response to the Rule 41 assertion of bad faith, Liberty argues, "So solid was Liberty's defamation pleading that Lamb did not file a Rule 12(b)(6) motion to dismiss Liberty's claim" and "Lamb chose not to challenge Liberty's defamation claim with a FRCP 12(b)(6) motion to dismiss—a curious omission given Lamb's assertion that the defamation claim was 'baseless' at the time of filing." ECF Doc. 165 at 3, 10. But as the Court knows, a party is not permitted to dispute factual allegations in a Rule 12(b)(6) motion, and Lamb did not have the documentary records to show the claim was baseless. This was properly reserved for a motion for summary judgment (which Lamb was preparing), or a Rule 41 response as the case may be.

Likewise, Liberty has repeatedly asserted that its case is now over, even though the Court has yet to resolve the Rule 41 motion. *E.g.* ECF Doc. 167 at 7, 14.

<sup>6</sup> Liberty tries to shift the burden to Lamb, by falsely characterizing Lamb's motion as a motion to "unseal" the documents and by mistating the applicable law. *E.g.*, ECF Doc. 167 at 3-5. But the protective order entered by this Court is abundantly clear: "The Producing Party"—that is the party that produced the record in discovery and labeled it as confidential—"shall have the burden of justifying that the materials must be submitted under seal." ECF Doc 94 at 9 (¶10(a)).

<sup>7</sup> *Ohio Valley Envtl. Coal. v. Elk Run Coal Co., Inc.*, 291 F.R.D. 114, 124 (S.D. W. Va. 2013) (citing *Pintos v. Pacific Creditors Ass'n*, 565 F.3d 1106, 1115 (9<sup>th</sup> Cir. 2009)).

<sup>8</sup> Liberty claims, "[T]he Liberty Documents are Liberty's private communications, materials, and data—they do not qualify as 'judicial records' in any manner." ECF Doc. 167 at 3. The Fourth Circuit has indicated that documents exchanged in discovery used to adjudicate substantive rights are judicial records. *United States v. Appelbaum*, 707 F.3d 283, 290 (4<sup>th</sup> Cir. 2013). The Supreme Court has held that access to judicial records is not conditioned by who has property in the information. *Nixon v. Warner Communications*, 435 U.S. 589, 587 (1978).

<sup>9</sup> *United States v. Appelbaum*, 707 F.3d 283, 290 (4<sup>th</sup> Cir. 2013).

substantive issue of Liberty's good faith, in resolving the Rule 41 motion.<sup>10</sup> As the Fourth Circuit has stated, a motion filed by a party seeking action by the court places the documents on a different footing than the "raw fruits of discovery." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576 (2004).

Liberty has now responded to both the Rule 41 motion and the motion to seal with more distraction efforts. *E.g.*, ECF Doc. 167 at 1-2, 5-6; ECF Doc. 165 at 1-2, 11 n.3, 19-23. Most notably, despite unfounded conclusory assertions that the claim of bad faith is "entirely without merit," *Liberty has done nothing to argue (let alone demonstrate) that it had a good faith basis to sue Lamb for defamation for saying he was speaking about Title IX issues "all spring."* Liberty likewise has made no effort to rebut the evidence that it knew Lamb had a good faith basis to believe he was fired for reasons related to Title IX. The only nonconclusory argument Liberty makes to try to establish good faith—*e.g.*, the only argument it makes rooted in the evidence—willfully disregards the known and demonstrable context of the "looked into" comment. ECF Doc. 165 at 3-4, 9-11.

Fortunately, once the Court sets aside Liberty's efforts to distract the Court from the real issues, the analysis as to this motion is fairly simple. First, any records the Court reviews or considers in adjudicating the substantive question of whether Liberty had a good faith basis for its claims are, by that adjudication, classified as judicial records. As judicial records, the public has a presumptive right of access. *United States v. Appelbaum*, 707 F.3d 283, 290-91 (4<sup>th</sup> Cir. 2013). To seal the records permanently, Liberty must show that it has a significant interest in keeping the records confidential, and its interest outweigh the public's interest in accessing these records. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4<sup>th</sup> Cir. 1988). The Court

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<sup>10</sup> *Id.* at 290-91.

must consider, and rule out, the feasibility of alternatives to sealing the records. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576 (4th Cir. 2004). A naked conclusory assertion of expected harm falls woefully short of the kind of showing which raises even an arguable issues as to whether a record should be under seal. *Joy v. North*, 692 F.2d 880, at 894 (2d Cir. 1982). Second, any records the Court does not consider in the adjudication of the Rule 41 motion can only be sealed if there is a good faith basis to seal them under Rule 26(c) or some similar power of the Court. *Ohio Valley Envtl. Coal. v. Elk Run Coal Co., Inc.*, 291 F.R.D. 114, 124 (S.D. W. Va. 2013).

## **II. Arguments**<sup>11</sup>

### **A. Exhibit 7**

This Court should review and consider Lamb's Exhibit 7 in evaluating whether Liberty filed suit in good faith. Exhibit 7 shows that Lamb wanted to know whether or how Liberty would "look into" the Title IX accusations that it would receive from the public in connection with the Baker Tilly investigation *and that Liberty knew this*. This exhibit also shows the ambiguity Liberty created at the time about whether the Baker Tilly investigators would look into the Title IX accusations.

Liberty's only asserted basis for sealing this record is because it supposedly relates to the scope of an internal investigation. ECF Doc. 167 at 11. But this is not a significant interest, capable of overcoming the presumption of public access. Moreover, the record does not disclose anything that ought to be protected, and if it did, further redactions could remedy that. The

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<sup>11</sup> Liberty claims that all of the records at issue would be "traditionally considered private," citing *RLI Ins. Co. v. Nexus Servs., Inc.*, 2020 U.S. Dist. LEXIS 97778 (May 22, 2020). But this case notes that "ordinary civil dispute[s] between private parties . . . historically have not been conducted [in] secret."

record itself shows Liberty has already released substantial information on that topic, lessening the interest in privacy. As such, no significant interest justifies sealing this record permanently.

If the Court finds that Liberty has a legitimate interest in sealing this judicial record, that must be weighed against the public's articulable interests. Like all the records pertinent to this issue of Liberty's good faith, the public has an interest in accessing this record, if only to know the basis of and scrutinize the merits of Court's adjudication, and to monitor in this democracy the litigants' fair use of the judicial system. Additionally, Liberty's procedural compliance with Title IX during and after the Falwell Jr. administration is also a public concern and has become a matter of public interest, as the evidence demonstrates. ECF Doc. 161-13, *Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 820 (11th Cir. 2022); *Whitney v. City of Milan*, 677 F.3d 292, 297 (6th Cir. 2012). Further, given the competing claims published to the general public to and through the media, including by both Liberty and Lamb, concerning the claim that the Title IX accusations would be "looked into," the public has an interest in knowing the indisputable facts. ECF Doc. 161-7, -8 (LU-6936), -13, -20.

If the Court finds this exhibit is not a judicial record, there is still no good cause to keep this record under seal. Liberty has not shown disclosure will cause Liberty any notable improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c). It unilateral, unfounded claim of "confidentiality" should not be the basis for sealing this record.

## **B. Exhibit 9**

This Court should review and consider Lamb's Exhibit 9 in connection with its Rule 41 ruling, because this of all records demonstrates most conclusively that Lamb did not defame Liberty by saying the Title IX accusations have not been looked into, *and Liberty knew it*. This record was Liberty's response to Request for Production 38. ECF Doc. 161-2.

Liberty's only asserted basis for sealing this record is because it supposedly relates to the scope of an internal investigation. ECF Doc. 167 at 11. But the record discloses nothing material that has not been disclosed in substance in open court by Liberty's counsel (Trans. 9/29/2022 37:14-25); it merely provides documentary confirmation that *Liberty knew Lamb's statement was not defamatory*. Liberty has already released substantial information on that topic, lessening the interest in privacy. Trans. 9/29/2022 37:14-25; *see also* ECF Doc 161 at 9-10, 16 (¶¶ 7(a)(ii), (d), 20). No significant interest justifies keeping this record under seal.

If there is a significant interest, the public has an interest in accessing this record for the reasons stated above, in connection with Exhibit 7.

If the Court finds this is not a judicial record, there is still no good cause to keep this record under seal. Liberty has not shown its disclosure will cause Liberty any notable improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c). It unilateral, unfounded claim of "confidentiality" should not be the basis for sealing this record.

### **C. Exhibit 11**

The Court should consider the 28 documents filed as Exhibit 11 in evaluating Liberty's lack of good faith, as they clearly show Lamb was discussing Title IX concerns "all spring." These documents aid the Court because they show clearly that substantial Liberty personnel knew Lamb was involved in these discussions "all spring," and so they clearly foreclose any claim of good faith for this defamation claim on Liberty's part.

Notably, Liberty has also asked this Court to rely on Exhibit 11 in evaluating its claim of good faith in connection with Lamb's comment about the Title IX accusations not being "looked into," indicating that these communications show the Title IX accusations were "looked into." ECF Doc. 165 at 10. While Liberty thereby disregards the context of Lamb's "looked into"



remarks—that is, the fact that Lamb was discussing the accusations made to Baker Tilly, and a substantive investigation by Baker Tilly or Liberty (see ECF Doc. 161 at 16 ¶ 20)—it does not matter whether the Court reviews this record under Liberty’s argument or Lamb’s argument, or what the Court ultimately decides. If the Court reviews this record for the Rule 41 motion in the evaluation of the substantive issue of whether the suit was filed in good faith, it would become a judicial record.

Liberty has disclaimed any interest in keeping 8 of this 28 records private.<sup>12</sup>

Liberty has claimed that 9 of these records should be private as they concern FERPA compliance.<sup>13</sup> ECF Doc. 167 at 10-11. But the relevant FERPA restriction does not fall on the *records* but on the release of *personally identifying information* contained in the records. 34 CFR §§ 99.31 and .33. The names and identifying information have already been redacted, and so FERPA is no barrier to disclosure. Additionally, the disclosure of these records by Liberty has already occurred when Liberty released them in discovery, and there is no prohibition in FERPA on the *redisclosure* of records that do not contain personally identifying information. *See* 34 CFR §§ 99.33. Additionally, the school has no standing to assert a FERPA privacy interest on behalf of the students, as that interest belongs to the student. Further redactions could remedy any legitimate concerns. Finally, several of these records are excluded from FERPA as they are “Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.” 34 CFR §§ 99.33 (definition of “Educational records” (b)(5)).

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<sup>12</sup> LU-5880 to -5882, -5883 to -5887, -5888 to -5889, -6055, -6057 to -6058, -6059 to -6060, -6087 to -6088, -6089 to -6090.

<sup>13</sup> LU-6039 to -6040, -6042, -6044 to -6045, -6046 to -6047, -6048 to -6050, -6478, -6479 to -6480, -6483 to -6485, -6486 to -6487.

Liberty has claimed that 7 of these records should be private as they concern internal communications about media matters.<sup>14</sup> ECF Doc. 167 at 11-12. This is not a significant interest. And in fact, given the existing redactions, and setting aside the emails from outside sources (e.g., the media), these records include, for instance, three meeting confirmations, one email receipt confirmation, one forward of a link to an article, and one that is only the outside media request. The only remaining record is highly probative of the claim that Liberty knew Lamb was discussing these Title IX issues in the spring.

Liberty has claimed that two of these records concern the Gentry Locke investigation.<sup>15</sup> ECF Doc. 167 at 11. In fact, one of the two records makes no reference to the Gentry Locke investigation, and the other tends to confirm that Title IX accusations were likely submitted to through the Gentry Locke portal, *and both Liberty and Lamb knew this*. That record discusses communications a Liberty employee had with a former student about the portal, and so there is no real basis for keeping private this report of the third-party communications. Information about it is already public. ECF Doc. 161-13 (SL-972 to -973), -47 (SL-1396 to -1403). This is not a significant interest.

Liberty claims that two of these records are draft responses to the media.<sup>16</sup> ECF Doc. 167 at 12. In fact, the content of the responses are redacted, and these are little more than email receipt confirmations. This is no significant interest in keeping these private.

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<sup>14</sup> LU-6051, -6053 to -6054, -6073 to -6074, -6103 to -6104, -6105 to -6106, -6148, -6474 to -6476.

<sup>15</sup> LU-6148, -6149. Liberty notes that in a discovery ruling, the Court found that a request for request pertaining to the Gentry Locke investigation was disproportionate. ECF Doc. 167 at 11 (citing ECF Doc. 133 at 8). It did not, however, review individual records in order to rule in a dispositive matter that all Gentry Locke records are irrelevant.

<sup>16</sup> LU-6507 to -6508, -6509 to -6511.

If Liberty has shown a significant interest, the public has a legitimate interest in accessing these records to monitor the judiciary and the litigants' use of the judicial system, as stated in connection with Exhibit 7. Additionally, Liberty has now claimed that these records prove that Liberty "looked into" the Title IX accusations (ECF Doc. 165 at 10), and this is a matter of public concern and interest. Additionally, the records all relate to a reporter and an alumnus trying to access the alumnus's records under FERPA, and Liberty's compliance with FERPA is a matter of public concern and interest. *Zimmerman v. Univ. of Utah*, No. 2:13-cv-1131-JNP-BCW, 2016 U.S. Dist. LEXIS 86261, at \*26 (D. Utah July 1, 2016). Further redactions may alleviate any legitimate concern.

If the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Liberty has not shown its disclosure will cause Liberty any notable improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c). Its unilateral, unfounded claim of "confidentiality" should not be the basis for sealing this record.

#### **D. Exhibit 16**

The Court should consider the 5 documents filed as Exhibit 16 in evaluating Liberty's lack of good faith. The only unredacted information in this exhibit are media requests for information. Liberty redacted all internal communications in connection with those requests, but Liberty's privilege log (Exhibit 12 at 5-6) shows the redacted material were internal communications (1) that including Lamb, and (2) which concerned Title IX issues, and (3) which began in the spring of 2021. They therefore support of Lamb's claim that he was speaking about Title IX concerns all spring, and Liberty knew it. The redacted records have been provided as an exhibit so that the Court will not assume Lamb has withheld relevant, unredacted information in

a manner prejudicial to Liberty. Liberty has disclaimed any interest in keeping these records under seal.

**E. Exhibit 19**

The Court should consider the 13 documents filed as Exhibit 19 in evaluating Liberty's lack of good faith in the Rule 41 motion. These were communications (1) that including Lamb, and (2) which concerned Title IX issues, and (3) which began in the spring of 2021. They support of his claim that he was speaking about Title IX concerns all spring, and Liberty knew it.

Liberty claims these communications should be sealed because they involve litigation strategies. ECF Doc. 167 at 11. But Liberty was not a party to the litigation in question, and any privilege was waived by producing these records in discovery. Furthermore, the litigation has now concluded, lessening the significance of any legitimate concern.<sup>17</sup> Liberty has also not shown that redactions cannot attenuate any legitimate concerns.

Liberty also claims that six of these records should be confidential because they concern responding to media requests.<sup>18</sup> ECF Doc. 167 at 11-12. But in fact, this appears solely based on a *non-media* individual—a lawyer with a conservative nonprofit advocacy group, the Alliance Defending Freedom—forwarding to Liberty an article about the litigation, and Lamb forwarding an online social media post from one of the parties to the suit. There is no significant interest of Liberty University protected by keeping this under seal.

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<sup>17</sup> See <https://adflegal.org/sites/default/files/2023-01/Hunter-v-US-Department-of-Education-2023-01-12-Decision.pdf>

<sup>18</sup> LU-5966 to -5969, -5970 to -5975, -5976 to -5981, -5982 to -5988, -5989 to -5996, -5997 to -6004.

If Liberty has shown a significant interest, the public has a legitimate interest in accessing these records to monitor the judiciary and the litigants' use of the judicial system, as stated in connection with Exhibit 7. Further redactions may alleviate any legitimate concern.

If the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Liberty has not shown its disclosure will cause Liberty any notable improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c). It unilateral, unfounded claim of "confidentiality" should not be the basis for sealing this record.

**F. Exhibit 21**

The Court should consider the 7 documents filed as Exhibit 21 in evaluating Liberty's lack of good faith. The only unredacted information in this exhibit is a copy of a news article. Liberty redacted all internal communications in connection with this article, but Liberty's privilege log (Exhibit 12 at 4 (LU-6005 to 6033)) shows the redacted material were internal communications (1) that including Lamb, and (2) which concerned Title IX issues, and (3) which occurred in the spring of 2021. They therefore support of Lamb's claim that he was speaking about Title IX concerns all spring, and Liberty knew it. The redacted records have been provided as an exhibit so that the Court will not assume Lamb has withheld relevant, unredacted information in a manner prejudicial to Liberty. Liberty has disclaimed any interest in keeping these records under seal.

**G. Exhibit 23**

The Court should consider the 5 documents filed as Exhibit 23 in evaluating Liberty's lack of good faith. These documents are correspondences to and from Lamb about Title IX issues

in May 2021—that is, in the spring. They support the fact that Lamb was speaking of Title IX issues being mishandled “all spring,” *and Liberty knew it*.

Liberty articulates no basis to withhold 2 of these documents, and these documents are particularly significant in showing Liberty knew Lamb was discussing, in the spring, Liberty mishandling sexual assault allegations.<sup>19</sup> Liberty objects to the other three as they are communications concerning media, but this does not articulate a significant interest, much less one that overweighs the public’s interest.<sup>20</sup> ECF Doc. 167 at 11-12. Liberty also objects that one of these involves a former student.<sup>21</sup> ECF Doc. 167 at 12. But as discussed in connection with Exhibit 11, the person’s identifying information has already been redacted, and the record has already been disclosed in discovery and this is a permissive “redisclosure.” 34 CFR §§ 99.31 and .33. Further FERPA does not apply as this is a “Record[] created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual’s attendance as a student.” 34 CFR §§ 99.33 (definition of “Educational records” (b)(5)).

The public has an interest in accessing these records for the reasons stated in connection with Exhibit 7. And even if the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Fed. R. Evid. 26(c).

#### **H. Exhibit 26**

The Court should consider the 3 documents filed as Exhibit 26 in evaluating Liberty’s lack of good faith. These records are, again, communications in the spring of 2021 that show Lamb was communicating about Title IX violations *and Liberty knew it*.

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<sup>19</sup> LU-6053 to -6054, -7133 to -7135.

<sup>20</sup> LU- 4188, -4500 to -4501, -6512.

<sup>21</sup> LU-4500 to -4501

Liberty states no interest with respect to keeping two of the documents confidential.<sup>22</sup> It complains that the other document is a surreptitious audio recording, which it then asserts is “illicit” without demonstrating that Lamb lacked implied or pre-existing authority to make the recording. ECF Doc. 167 at 13. More importantly, it states no basis to keep the recording confidential. The recording is particularly probative on the topic.

The public has an interest in accessing these records for the reasons stated in connection with Exhibit 7. And even if the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Fed. R. Evid. 26(c).

### **I. Exhibit 27**

The Court should consider the 8 documents filed as Exhibit 27 in evaluating Liberty’s lack of good faith. Liberty has claimed that Lamb was terminated as a result of a review of his department (ECF Doc. 10, Counterclaim ¶¶ 42-43, 52), and these records show the initiation of this review. These records pertain to Liberty’s claim that Lamb defamed Liberty by allegedly implying he was terminated for reasons related to Title IX, and particularly to the question of whether Lamb had the requisite knowledge of falsity or reckless disregard for falsity. As discussed in the prior briefing, these records show that acting President Prevo personally initiated the review of the department, and the other evidence show that acting President Prevo did so soon after Lamb’s discussions with acting President Prevo about Title IX issues being mishandled. ECF Doc. 161 at 11-12 (¶ 8). The evidence collectively shows that Lamb had a factual basis to believe that this investigation was initiated to create a pretext for his termination, *and Liberty knew it*. This would negate any good faith claim that Lamb had the requisite

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<sup>22</sup> LU-6053 to -6054, -7133 to -7135.

defamatory intent, even if his allegedly defamatory statements reasonably implied he was terminated for reasons related to Title IX (which they did not).

Liberty claims that these records are confidential as they are private text messages and internal business. ECF Doc. 167 at 13. But Liberty injected the issue into the defamation claim. ECF Doc. 10, Counterclaim ¶¶ 42-43, 52. Liberty has no reasonable expectation of privacy after doing so. Moreover, these records contain no sensitive matter that would establish Lamb had a significant interest in keeping these records confidential.

The public has an interest in accessing these records for the reasons stated in connection with Exhibit 7. The public has an interest in verifying the accuracy of the allegations Liberty has made, that Lamb was terminated for reasons unrelated to Title IX, as Title IX compliance is a matter of public concern. ECF Doc. 10, Counterclaim ¶¶ 42-43, 52. And even if the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Fed. R. Evid. 26(c).

#### **J. Exhibit 31**

The Court should consider the 9 documents filed as Exhibit 31 in evaluating Liberty's lack of good faith. These documents, from late July 2021, show Lamb's continued involvement in matters related to Title IX in the last few months of his employment. This is pertinent to the allegation that Lamb defamed Liberty by implying he was terminated for reasons related to Title IX, as it is part of the evidence that Lamb had a good faith basis to believe he was terminated for reasons related to Title IX *and Liberty knew it*. Some of these are also pertinent to the claim that Lamb knew the Baker Tilly investigators did not look into the Title IX accusations it received, as discussed below.



Liberty claims that six of these documents should remain under seal as litigation strategy-related communications.<sup>23</sup> ECF Doc. 167 at 11. The first of these, however, may be part of a strategy, but does not communicate a strategy. It is a statement that it indicates should be circulated to the people that may interact with victims of Title IX issues. Notably, the statement evidences the fact that the Baker Tilly investigators did not look into the truth or falsity of the Title IX accusations, as Liberty claims not to know the truth of the allegations. It also shows the beginning of a public position Liberty would take that Lamb would oppose in the months to come, leading to his termination. The other five “strategy” documents likewise do not have any unredacted strategy discussions meriting protection. Liberty claims that two of these documents are also draft documents, but that does not appear to be the case.<sup>24</sup> ECF Doc. 167 at 12. Liberty has no significant interest.

Liberty claims that three of these documents concern how to respond to media inquiries, including one that also purportedly involves internal business.<sup>25</sup> ECF Doc. 167 at 11-13. Not only do the documents contain nothing that ought to be protected by being sealed, but also they are communications that include the Liberty University Police Department, and so are subject to being released upon request under the Virginia Freedom of Information Act. Va. Code §§ 2.2-3701 (defining “public body” as including “private police departments”), -3704 (requiring public bodies to release records upon request).

If Liberty has shown a significant interest, the public has a legitimate interest in accessing these records to monitor the judiciary and the litigants’ use of the judicial system, as stated in connection with Exhibit 7. Further redactions may alleviate any legitimate concern.

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<sup>23</sup> LU-4372, -6169, -6170, -6171 to -6172, -6275 to -6276, -6277 to -6280.

<sup>24</sup> LU-6275 to -6276, -6277 to -6280.

<sup>25</sup> LU-4374 to -4375, -4377 to -4379, -4412.

If the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Liberty has not shown its disclosure will cause Liberty any notable improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c). It unilateral, unfounded claim of “confidentiality” should not be the basis for sealing this record.

**K. Exhibit 32**

The Court should consider the 6 documents filed as Exhibit 32 in evaluating Liberty’s lack of good faith. As discussed in the previous briefing, these documents set the stage for some of Lamb’s final Title IX-related acts at Liberty, in the last weeks before his termination, including showing the first draft Lamb received of the proposed convocation remarks. ECF Doc. 161 at 13-15. The Court has already found the materials related to the convocation speech “could be used to prove substantial truth.” ECF Doc. 133 at 8.

Liberty seeks to withhold these records as draft materials. ECF Doc. 167 at 12. But apart (perhaps) from the draft convocation remarks, these drafts disclose nothing sensitive. They merely articulate the well-established procedural rights arising under Title IX. Liberty therefore has no significant interest in keeping it confidential. As to the draft convocation remarks, Liberty has also claimed that these are strategy communications. ECF Doc. 167 at 11. But any interest Liberty may have in the confidentiality of these documents has been greatly impaired by Liberty’s decision to file this counterclaim. As the Court has already ruled, Liberty has waived its attorney-client and work-product privileges as to the convocation speech materials by filing this lawsuit, and the records are probative of the substantial truth of Liberty’s defamation claim. ECF Doc. 133 at 8-13. Liberty’s interest in keeping these records confidential no longer constitutes a significant interest.

The public has an interest in accessing these records for the reasons stated in connection with Exhibit 7. The public has an interest in verifying the accuracy of the allegations Liberty has made, as Title IX compliance is matter of public concern. These records—particularly the records concerning the convocation speech—are central to that analysis. Redactions may also aid in addressing any legitimate concerns of Liberty. And even if the Court finds these are not a judicial record, there is no good cause to keep this record under seal, especially in light of the waiver of the privileges. Fed. R. Evid. 26(c).

**L. Exhibit 34**

The Court should consider the 3 documents filed as Exhibit 34 in evaluating Liberty's lack of good faith. These are, again, internal communications on a Title IX issue in the days before the convocation speech. They help to show some of the tensions among Liberty executives about how to address student-led Title IX advocacy, which would erupt in connection with the convocation speech, providing Lamb a factual grounds to believe that he was terminated for reasons related to Title IX. This helps to show that Liberty knew Lamb lacked the requisite defamatory intent for the allegedly implied statement that Lamb was terminated for reasons related to Title IX.

Liberty claims that it has a significant interest in keeping these records confidential, asserting that these records relate to media communications, they are drafts, and they are internal business. ECF Doc. 167 at 11-13. None of these arise to the level of a significant interest, as the records contain nothing that might be considered sensitive.

But if the Court finds there is a significant interest, the public has an interest in accessing these records, for the reasons stated in connection with Exhibit 7. Redactions may also aid in

addressing any legitimate concerns of Liberty. If the Court finds these are not a judicial record, there is no good cause to keep this record under seal. Fed. R. Evid. 26(c).

**M. Exhibit 36**

The Court should consider the 14 documents filed as Exhibit 36 in evaluating Liberty's lack of good faith. These documents, in conjunction with Exhibit 42, all on the same Title IX-related subject, show Lamb's Title IX-related advocacy (particularly at LU-4900) which was flatly rebuffed by acting President Prevo two days before Lamb's termination. As such, it shows that Lamb had a good faith belief in the truth of the alleged defamatory implication that he was terminated for reasons related to Title IX.

Liberty claims that eight of these documents should be protected as student communications.<sup>26</sup> ECF Doc. 167 at 12. But all student-identifying information has been redacted, making the FERPA-related arguments from Exhibit 11 equally applicable here.

Liberty also claims that six of the documents involve drafts, but these are not the sort of sensitive work product where Liberty has a significant interest in maintaining confidentiality of the drafts.<sup>27</sup> ECF Doc. 167 at 12.

Liberty claims that three of these documents should be exempt from public review as internal business.<sup>28</sup> ECF Doc. 167 at 13. Nothing in the records appears sensitive, such that Liberty would have a significant legitimate interest in keeping it from the public, but if so, that can be addressed by redactions, as the material information relates to one line that expressly references Title IX, and the date in the context of the other events of the time.

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<sup>26</sup> LU-4521, -4522, -4605 to -4610, -6590 to -6591.

<sup>27</sup> LU-4521, -4522, -4570, -4605 to -4610, -4611 to -4614, -6590 to -6591.

<sup>28</sup> LU-4523 to -4524, -4525 to -4526, 4897 to -4899.

Liberty claims that one document should be kept private as it relates to responding to media, but this does not represent a legitimate significant interest, especially as applied in this context.<sup>29</sup> ECF Doc. 167 at 11-12.

The public has an interest in ensuring Title IX compliance, including in ensuring that employees are not terminated for Title IX advocacy. *Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 820 (11th Cir. 2022); *Whitney v. City of Milan*, 677 F.3d 292, 297 (6th Cir. 2012). As such, the public has an interest in this evidence that Lamb was terminated for Title IX related advocacy. That interest is elevated by Liberty's defamation claim, as the public has an interest in ensuring the integrity of the court process. For these reasons and the other reasons cited in connection with Exhibit 7, even if Liberty has a significant interest in keeping these records out of the public eye, that interest does not outweigh the public interests.

If the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Liberty has not shown its disclosure will cause Liberty any notable improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c). It unilateral, unfounded claim of "confidentiality" should not be the basis for sealing this record.

**N. Exhibit 39**

The Court should consider the 4 documents filed as Exhibit 39 in evaluating Liberty's lack of good faith. These records concern Lamb's objections to a convocation speech concerning Title IX issues in the last days before his termination. The Court has found Liberty has waived its attorney-client and work-product privileges as to the convocation speech materials by filing this lawsuit, and the records are probative of the substantial truth of Liberty's defamation claim. ECF

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<sup>29</sup> LU-4900.

Doc. 133 at 8-13. These records show that Liberty knew Lamb had a factual basis to believe that he was terminated for reasons related to Title IX, negating any defamatory intent, for the statements allegedly implying as much.

Liberty claims these records are confidential as they involve draft and strategy communications. ECF Doc. 167 at 11-12. If Liberty wanted to keep these materials confidential, it should not have made a baseless claim that Lamb defamed Liberty when it knew Lamb had a factual basis to believe he was terminated for reasons related to Title IX. Any interest Lamb may have had in confidentiality has been impaired by filing this suit and maintaining it through discovery, to the point that its interest is not significant now. The public has an interest in ensuring compliance with Title IX, including the non-retaliatory provisions. The public has an interest in ensuring honest use of the Court system. The public has an interest in evaluating the truth of the competing public claims concerning Liberty's termination of Lamb. The public has an interest in evaluating the factual basis of the Court's determination concerning whether Liberty had a good faith basis for his claims. *Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 820 (11th Cir. 2022); *Whitney v. City of Milan*, 677 F.3d 292, 297 (6th Cir. 2012).

If the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Liberty has not shown its disclosure will cause Liberty any improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c).

**O. Exhibit 40**

The Court should consider the document filed as Exhibit 40 in evaluating Liberty's lack of good faith.<sup>30</sup> This record evidences the increasing tensions among Liberty executives concerning the student-led Title IX advocacy after the convocation speech, days before Lamb's

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<sup>30</sup> LU-34 to -35.

termination. It therefore evidences that Lamb had a factual basis to believe that he was terminated for reasons related to Title IX, *and Liberty knew this*. The Court has previously found both that Liberty has waived its attorney-client and work-product privileges as to this record by filing this lawsuit, and that the records are probative of the substantial truth of Liberty's defamation claim. ECF Doc. 133 at 8-13. ECF Doc. 133 at 8-13.

Liberty claims that this document should be withheld as strategy discussions (ECF Doc. 167 at 11), but there is little here that indicates a strategic plan, and nothing indicating sensitive information. Liberty has no significant interest in keeping this material confidential. The public has an interest accessing these records for the reasons stated in connection with Exhibits 7 and 39. Redactions may also aid in addressing any legitimate concerns of Liberty. If the Court finds this is not a judicial record, there is no good cause to keep this record under seal. Fed. R. Evid. 26(c).

**P. Exhibit 42**

The Court should consider the 2 documents filed as Exhibit 42 in evaluating Liberty's lack of good faith.<sup>31</sup> These records, created in the last day and a half of Lamb's employment, follow up on Exhibit 36, and show that Lamb had a factual basis to believe that he was terminated for reasons related to Title IX, *and Liberty knew this*.

Liberty has claimed that these documents are drafts, but they are not. ECF Doc. 167 at 12. There is no sensitive information in these records giving Liberty a significant interest in maintaining confidentiality. For the reasons stated in connection with Exhibits 7, 36, 39, and 40 the public has an interest in accessing these records. If the Court finds this these are not judicial records, there is no good cause to keep this record under seal. Fed. R. Evid. 26(c).

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<sup>31</sup> LU-4617, -6590 to -6591.

**Q. Exhibit 44**

The Court should consider the document filed as Exhibit 44 in evaluating Liberty's lack of good faith.<sup>32</sup> This record shows Lamb's continued involvement in Title IX-related matters even the day before his termination. It is a record available upon request pursuant to the Virginia Freedom of Information Act, for the same reasons discussed in connection with Exhibit 31. Liberty has disclaimed any interest in keeping this record confidential.

**R. Exhibit 45**

The Court should consider Exhibit 45 in evaluating Liberty's lack of good faith.<sup>33</sup> It shows that Lamb did communicate certain Title IX concerns, and these concerns were then communicated to acting President Prevo literally on the eve of Lamb's termination. As such, Liberty knew that Lamb had a good faith factual basis for his belief that he was terminated for reasons related to Title IX, and so lacked the requisite defamatory intent for the allegedly defamatory implication.

Liberty claims that this record should be sealed in the Court files because it is internal business. ECF Doc. 167 at 13. But Liberty can hardly claim it is strictly an internal matter when Liberty sued Lamb in the public courts for the allegedly defamatory implication that Lamb was terminated for reasons related to Title IX. Liberty does not have a significant interest, or if it does, the public's interest in ensuring Title IX compliance and the integrity of the courts, as discussed in connection with Exhibit 7, outweigh Liberty's interest, especially as Liberty's lawsuit greatly reduces its legitimate expectation of privacy in this matter.

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<sup>32</sup> LU-5824.

<sup>33</sup> LU- 7283 to -7284.



If the Court finds these are not a judicial record, it still would have to find good cause to keep this record under seal. Liberty has not shown its disclosure will cause Liberty any notable improper annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Evid. 26(c). It unilateral, unfounded claim of “confidentiality” should not be the basis for sealing this record.

**IV. Conclusion**

For the reasons stated, Liberty’s University’s request for these records to be permanently sealed should be denied.

Respectfully submitted,  
WALTER SCOTT LAMB

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of June, 2023, I presented the foregoing document(s) to the Clerk of the Court for filing and uploading to the CM/ECF system, which will provide electronic notice and copies of such filing(s) to counsel of record.

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