IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:07-CV-00953

RYAN McFADYEN, et al., Plaintiffs, v. DUKE UNIVERSITY, et al., Defendants.	)	**BRIEF IN SUPPORT OF MOTION TO CONSOLIDATE DISCOVERY**

Defendants Duke University, Robert Dean, Matthew Drummond, Aaron Graves and Gary N. Smith ("Duke Defendants") submit this Brief in Support of their Motion to Consolidate Discovery in the above-captioned case ("McFadyen") with the related action, Carrington, et al. v. Duke University, et al., No. 1:08-CV-00119 ("Carrington"). In support thereof, the Duke Defendants show the Court the following:

NATURE OF THE CASE AND STATEMENT OF THE FACTS

McFadyen and Carrington are cases that arise out of the investigation of members of the 2005-2006 Duke men's lacrosse team stemming from false allegations of rape made by a stripper hired by one of the team members to perform at a party. None of the Plaintiffs in these cases was charged or tried for any offense resulting from those allegations. Nevertheless, the McFadyen Plaintiffs have sued Duke University, certain Duke University employees, the City of Durham, various individuals associated with the City of Durham, and a DNA laboratory that was involved in the investigation for

purported violations of their legal rights in connection with the investigation. The Carrington Plaintiffs have sued many of these same Defendants, alleging similar claims.

Pursuant to this Court's Order of 9 June 2011, all proceedings in McFadyen with respect to Counts 1, 2, 5, 12, 13, 14, 18, 25, 26, 32, 35 and 41 of the Second Amended Complaint, including discovery, are stayed pending the resolution of the interlocutory appeal in this case.[1] (9 June 2011 Order [DE 218] at 9.) Discovery is proceeding only with respect to Counts 21 and 24. Similarly, pursuant to a separate order also issued on 9 June 2011, all proceedings in Carrington with respect to Counts 3, 21, 23, 25, 26, 27, 30, 31 and 32 of the First Amended Complaint, including discovery, are stayed pending the resolution of the interlocutory appeal in that case. (9 June 2011 Order [DE 192] at 9.) Discovery is proceeding only with respect to Counts 8, 11 and 19.

Discovery as to Counts 21 and 24 of McFadyen and Counts 8, 11 and 19 of Carrington will entail depositions of and discovery requests to many of the same parties and witnesses about many of the same operative facts and issues.

[1] The City of Durham and individual Defendants Patrick Baker, Steven Chalmers, Beverly Council, Ronald Hodge, Jeff Lamb, Lee Russ, Michael Ripberger, David Addison, Mark Gottlieb, and Benjamin Himan (collectively, the "City Defendants"), joined by Defendant Linwood Wilson, have sought an interlocutory appeal in the McFadyen case before the Court of Appeals for the Fourth Circuit with respect to claims against one or more Durham-related defendants. Likewise, the City Defendants, joined by Defendant Linwood Wilson and Defendants DNA Security, Inc., Richard Clark, and Brian Meehan (the "DSI Defendants") have sought an interlocutory appeal in Carrington before the Court of Appeals for the Fourth Circuit for similar claims.

QUESTIONS PRESENTED

1. Whether McFadyen and Carrington involve common questions of law or fact such that the actions should be consolidated for the purpose of discovery.

2. Whether the convenience and economy of consolidated discovery are adequate to justify such consolidation.

ARGUMENT

Rule 42(a) of the Federal Rules of Civil Procedure provides that a district court has authority to order consolidation when actions before the court involve "a common question of law or fact." Once a common question of law or fact is shown, district courts have broad discretion under Rule 42(a) to consolidate cases. See Pinehurst Airlines, Inc. v. Resort Air Servs., Inc., 476 F. Supp. 543, 559 (M.D.N.C. 1979); see also A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Co., 559 F.2d 928, 933 (4th Cir. 1977). In determining whether to grant a motion to consolidate discovery in cases involving common questions of law or fact, courts weigh a number of factors, including "the burden on the parties, witnesses, and judicial resources . . ." In re Cree, Inc., Sec. Litig., 219 F.R.D. 369, 371 (M.D.N.C. 2003) (citing Arnold v. E. Air Lines, 681 F.2d 186, 193 (4th Cir. 1982)).

Consolidation of discovery in McFadyen and Carrington fits the consolidation criteria. The cases arise out of the same set of operative facts and involve similar claims and parties. Further, separate discovery would burden parties and witnesses with

duplicative and time-consuming depositions and discovery requests. Consolidating discovery will promote judicial economy by reducing the time and relative expense of discovery. Without consolidation, repetitive motion practice may also occur.

1. McFadyen and Carrington Arise Out of the Same Set of Operative Facts.

Rule 42 emphasizes that consolidation of two cases is appropriate when common questions of law or fact are present. This is precisely the case here. See Jenkins v. Trs. of Sandhills Cmty. Coll., et al., No. 1:00CV00166, 2002 WL 31941502 (M.D.N.C. Nov. 22, 2002) (granting defendants' motion to consolidate where cases involved common questions of law and fact); Pinehurst Airlines, 476 F. Supp. at 559; see also Nat'l. Assoc. of Mortg. Brokers v. Bd. of Govs. of the Fed. Reserve Sys., 1:11-cv-00506, 2011 WL 941609, at *2 (D.D.C. Mar. 21, 2011) ("Consolidation is particularly appropriate when the actions are likely to involve substantially the same witnesses and arise from the same series of events or facts.") (citing Hanson v. District of Columbia, 257 F.R.D. 19, 21 (D.D.C. 2009)).

McFadyen and Carrington originated from an identical set of operative facts and involve many common questions of law or fact. Both cases arise from the investigation of members of the Duke University men's lacrosse team on charges of rape, sexual assault, and kidnapping. (31 March 2011 Memorandum Opinion [DE 186] at 4.) The Plaintiffs in both actions were members of the Duke University 2005-2006 men's lacrosse team who were never charged with any crime that was the subject of the investigation. Nevertheless, the Plaintiffs in both actions allege that they were injured by

the Duke Defendants' conduct in connection with that investigation. For example, both Count 24 of McFadyen and Count 8 of Carrington allege fraud based on the same factual scenario involving letters written by Kate Hendricks and Matthew Drummond in response to subpoenas seeking DukeCard records.

Although there is not exact identity in the claims alleged in McFadyen and Carrington, the minor differences in the claims do not preclude discovery consolidation. McFadyen alleges a claim that is not alleged in Carrington (Count 21 "Breach of Contract") and Carrington alleges claims that are not alleged in McFadyen (e.g., Count 11 "Constructive Fraud" and Count 19 "Negligent Supervision"). Nevertheless, the facts underlying these claims and the discovery necessary to adjudicate them are similar. Indeed, Courts maintain that variance in certain questions of law does not preclude consolidation. See Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990) (upholding consolidation of two asbestos exposure product liability actions even though the workers' periods of exposure and injuries differed); Hanson, 257 F.R.D. at 21-22 (consolidating two actions with the same defendant and different plaintiffs, where one action involved a "narrow challenge to the constitutionality of the District's gun laws" while the other action challenged "a host of other aspects of the District's gun laws").

Discovery in McFadyen and Carrington will involve largely the same parties and witnesses. Duke University, Aaron Graves, Robert Dean, and Matthew Drummond are named Defendants in both McFadyen and Carrington and likely witnesses in both cases.

Moreover, the McFadyen and Carrington Plaintiffs will likely seek discovery of many of the same non-party witnesses in connection with the fraud claims.

There is strong similarity, but not complete identity, of parties in the surviving counts in the McFadyen and Carrington cases. Gary Smith is a named Defendant in Count 24 of McFadyen but is not named in Carrington; Kate Hendricks, Richard Brodhead, Sue Wasiolek and Tallman Trask III are named Defendants in Counts 8 and 11 of Carrington, but not in the present McFadyen claims. That does not preclude consolidation, however, because identity of parties is not a requirement for consolidation. See Harris v. L & L Wings, Inc., 132 F.3d 978, 982 n.2 (4th Cir. 1997) (affirming consolidation of cases brought by different plaintiffs where both cases relied on the same witnesses and alleged the same misconduct); see also Nat'l Assoc. of Mortg. Brokers, 2011 WL 941609, at *2 ("cases may be consolidated even where certain defendants are named in only one of the Complaints or where, as here, the plaintiffs are different but are asserting identical questions of law against the same defendant"); Hanson, 257 F.R.D. at 21-22 (ordering consolidation of two actions with the same defendant and different plaintiffs). Because these cases arise from the same set of operative facts, the Plaintiffs' claims in both cases will entail investigation of many of the same witnesses, whether they are named Defendants or not.

In summary, because the claims alleged in McFadyen and Carrington arise from the same set of operative facts and will entail discovery from the same universe of

witnesses and documents, consolidated discovery will promote efficiency for the parties, the witnesses and the Court.

2. Separate Discovery Would Subject Parties and Witnesses to Duplicative and Burdensome Discovery.

Consolidated discovery will reduce the burdens imposed on parties and witnesses. See, e.g., In re Cree, 219 F.R.D. at 371 (consolidation of substantially similar suits would "lessen the time and expense required for all parties"). In Pariseau v. Anodyne Healthcare Management., Inc., No. Civ. A. 3:04-CV-630, 2006 WL 325379, at *1 (W.D.N.C. Feb. 9, 2006), the court granted the plaintiff's motion to consolidate her case with a similar action pending against the same defendant for the purposes of handling discovery and pre-trial motions only. Upon establishing that the two actions each involved a common question of law and fact under Rule 42(a) (whether the sale of the defendant's assets was legal), the court considered the discretionary bases of consolidation. Id. at *2. Deciding in favor of discovery consolidation, the court explained that "many of the same witnesses and documents will be part of the discovery process in the two cases" and that by "consolidating the cases for the discovery process, the expense incurred by the parties and the burden on the parties and witnesses should be significantly reduced." Id. at *3.

Similarly, consideration of the burdens imposed on the McFadyen and Carrington parties and witnesses by separate discovery warrants consolidation here. The Duke Defendants anticipate that the McFadyen and Carrington Plaintiffs will serve discovery requests upon all Duke Defendants and will seek to depose many of the same parties and

non-party witnesses. Requiring the parties and non-party witnesses to schedule and attend multiple depositions covering the same topics and to respond to duplicative discovery requests is costly and manifestly inefficient for the parties, the witnesses and, quite often, the Court.

3. Consolidation of Discovery Promotes Judicial Economy.

The McFadyen and Carrington cases are currently at the same pretrial stage. The parties held a joint Rule 26(f) pretrial conference that was attended by counsel for both the McFadyen and Carrington Plaintiffs. The Duke Defendants have proposed nearly identical discovery plans in their respective Rule 26(f) Reports. For example, the Duke Defendants have proposed consolidated discovery such that each deponent will sit for only one deposition and each party will be served with only one set of interrogatories and one set of requests for admissions in both McFadyen and Carrington.

Consolidation of discovery is particularly appropriate where, as here, the two cases are in the same procedural posture. See Pariseau, 2006 WL 325379, at *3 (consolidating cases for purpose of discovery where discovery plans "are nearly identical" and "both cases are at virtually the same point in the pre-trial process"); see also Nat'l Assoc. of Mortg. Brokers, 2011 WL 941609, at *3 (consolidating cases "in same procedural posture and stage of litigation"). Consolidation of cases at the same stage of litigation can result in "substantial savings in judicial time and effort." Pinehurst Airlines, 476 F. Supp at 559.

For the reasons set forth above, the Duke Defendants respectfully request consolidation of McFadyen and Carrington for discovery.

This the 1st day of August 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on 1 August 2011, I electronically filed this **Brief in Support of Motion to Consolidate Discovery** 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 1st day of August, 2011.

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