

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

RYAN MCFADYEN, ET AL.,

*Plaintiffs,*

*v.*

DUKE UNIVERSITY, ET AL.,

*Defendants.*

No.: 1:07-CV-953

PLAINTIFFS' RULE 26(f) REPORT  
& PROPOSED SCHEDULING ORDER

Pursuant to Fed. R. Civ. P. 26(f) and LR 16(b) the Parties met via teleconference on July 15, 2011, beginning at 1:00p.m. Robert C. Ekstrand and Stefanie A. Sparks of Ekstrand & Ekstrand LLP, appeared for all Plaintiffs, Ryan McFadyen, Matthew Wilson, and Breck Archer ("Plaintiffs"). Richard W. Ellis, Dixie T. Wells, and Dan J. McLamb appeared for all Duke Defendants. Reginald B. Gillespie, Jr., appeared for the City Defendants. Robert J. King, III, appeared for the DNASI Defendants. Messrs. Gillespie and King did not participate in the conference because Plaintiffs' claims against the City Defendants and the DNASI Defendants are subject to the Court's June 9, 2011, Order (Doc. #218) (the "Stay Order").

The Stay Order authorizes Plaintiffs to proceed with discovery on the two causes of action that do not implicate the City Defendants, and stays Plaintiffs' discovery efforts on their remaining claims until the Fourth Circuit reaches a determination of City Defendants'

interlocutory appeal.<sup>1</sup> Because Plaintiffs are authorized at this time to proceed to discovery only on their Twenty-First and Twenty-Fourth Causes of Action, Plaintiffs and the Duke Defendants agreed to limit the conference, their reports, and proposed orders solely to the two claims that are going forward at this time (i.e., the Twenty-First and Twenty-Fourth Cause of Action in the Second Amended Complaint (Doc. #136)).<sup>2</sup> . As such, Plaintiffs and the Duke Defendants (referred to herein as “the Parties”) have agreed that, after the Fourth Circuit’s determination of the City’s appeal, a second Rule 26(f) conference will be convened to address discovery in connection with the causes of action now subject to the Stay Order. Therefore, this proposed order is limited solely to discovery in connection with Plaintiffs’ Twenty-First and Twenty-Fourth Cause of Action.

### **Rule 26(a)(1) Disclosures**

Plaintiffs propose to make the initial disclosures required pursuant to Fed. R. Civ. P. 26(a)(1) within ten days of the entry of the Court’s Discovery Order. Plaintiffs propose to make initial disclosures subsequent to the entry of the Discovery Order because the scope of the required initial disclosures will depend, in part, upon the Court’s resolution of

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<sup>1</sup> David H. Thompson, Nicole Moss, and Pete Patterson, the Plaintiffs’ counsel in *Carrington, et al. v. Duke University, et al.*, No. 1:08-CV-119 (MDNC), also attended the conference.

<sup>2</sup> Nothing in this Joint Rule 26(f) Report/Scheduling Order should be interpreted to apply to any other counts in the Second Amended Complaint in this case other than Counts 21 and 24. The Parties recognize and agree that, if the United States Court of Appeals for the Fourth Circuit renders its decision on the City Defendants’ Appeal in Case Nos. 11-1458(L) and 11-1460 prior to the close of the discovery period established pursuant to this proposed Order, then the Order in effect at that time will need to be revisited and amended through a Rule 26(f) conference among all parties to this action.

disagreements between the Parties as to the permissible scope of discovery under the Stay Order.

### **Discovery Plan**

Plaintiffs propose the following discovery plan in connection with Plaintiffs' Twenty-First and Twenty-Fourth Cause of Action.<sup>3</sup>

Plaintiffs' Twenty-First Cause of Action states a claim for Breach of Educational Contract. In connection with that cause of action, Plaintiffs expect the scope of their discovery efforts will include, for example, all events relating to the disciplinary proceedings initiated against Plaintiffs, the disciplinary actions taken against Plaintiffs, statements made on behalf of the University in connection with those proceedings and actions; all processes, procedures, communications and events relating to those proceedings and actions; the procedures and safeguards that the University promised Plaintiffs in connection with those proceedings and actions; the procedures and safeguards the University promises in connection with all disciplinary proceedings initiated against its students; the University's administrators' fidelity to those promised procedures and safeguards in practice; and the reasonable expectations of students arising out of the University's promised procedures and safeguards.

Plaintiffs' Twenty-Fourth Cause of Action states a claim for Fraud arising out of the unauthorized disclosure of personal information that the Superior Court of Durham County ruled to be protected from disclosure by Duke University. In connection with this cause of action, Plaintiffs expect the scope of their discovery efforts to include, for example,

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<sup>3</sup> The itemization of expected discovery topics in this Report is intended to be illustrative and not exhaustive. Plaintiffs do not thereby waive any objections authorized by the Federal Rules of Civil Procedure (the "Rules") to any particular discovery request served on them, nor do Plaintiffs waive their right to pursue discovery to the fullest extent authorized by the Rules.

all events relating to the unauthorized disclosure of Plaintiffs' protected information to the Durham Police Department, University administrators' knowledge of the prior unauthorized disclosure; the subsequent subpoenas seeking disclosure of Plaintiffs' protected records; the University's participation in the issuance and service of notice of the subpoenas without disclosing the University's prior disclosure of the information sought by the subpoenas; Plaintiffs' subsequent successful Motion to Quash the subpoenas.

The scope of discovery will also include matters relating to the injuries and damages sustained by Plaintiffs as a result of the conduct giving rise to Plaintiffs' Twenty-First and Twenty-Fourth Causes of Action; the extent and nature of Plaintiffs' damages attributable solely to Plaintiffs' Twenty-First and Twenty-Fourth Causes of Action; all other factual predicates of Plaintiffs' Twenty-First and Twenty-Fourth Causes of Action; and all other matters that become known to Plaintiffs through discovery and are relevant to Plaintiffs' Twenty-First and Twenty-Fourth Causes of Action.

### **Case Management Track**

The Parties discussed the case-management tracks established in LR 26.1, and agree that discovery as to Plaintiffs' Twenty-First and Twenty-Fourth Causes of Action should be placed on the **Exceptional Track**, with certain modifications. However, the Parties do not agree upon the necessary modifications to the Exceptional Track. Plaintiffs' proposed modifications to the Exceptional Track are set forth below. Where the Parties agree upon a modification, Plaintiffs report the agreement:

### **Discovery Period**

The Parties agree that discovery on the claims going forward will require twelve months to complete. Plaintiffs propose that discovery shall commence on the date the Discovery Order is entered, and that the last day to conduct discovery shall be twelve months after that date.

### **Depositions**

Plaintiffs propose that depositions be limited to 30 for all Plaintiffs and 30 for all Defendants.<sup>4</sup> Plaintiffs agree, where practicable, to consolidate the depositions of individuals who are noticed to be deposed in connection with *Carrington, et al. v. Duke University, et al.*, Case No. 1:08-CV-119. Within a reasonable time prior to the date established for the Deposition of an individual in *Carrington*, Plaintiffs will notify Defendants of their intent to depose the individual in this action and request a conference to determine the feasibility of consolidating the deposition. Where depositions can be consolidated, Plaintiffs will utilize best efforts to keep the duration of consolidated depositions to the one-day, seven-hour limit established for one deposition by Fed. R. Civ. P. Rule 30(d)(1). However, Plaintiffs propose that they retain the right to extend any consolidated deposition for up to an additional five hours to the extent necessary to complete their examination of the deponent in any such consolidated deposition.

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<sup>4</sup> This number of depositions does not include any consolidated depositions in connection with *Carrington, et al. v. Duke University, et al.*, Case No. 1:08-CV-119.

### **Interrogatories**

Plaintiffs propose that the use of interrogatories should be governed by the Federal Rules of Civil Procedure.

### **Requests for Admission**

Plaintiffs propose that the use of requests for admission should be governed by the Federal Rules of Civil Procedure.

### **Supplementation under Rule 26(e)**

Plaintiffs propose that supplementation under Rule 26(e) shall be ongoing and produced without unnecessary delay upon discovery of information or material that is subject to the supplementation requirement. In addition to ongoing supplementation, Plaintiffs propose that 45 days before the close of discovery, the Parties shall supplement all prior responses or issue a notice to all Parties certifying that, after diligent review, the Party has discovered no material subject to the supplementation requirement as of that date.

### **Expert Discovery**

Plaintiffs believe that commencing expert discovery in the absence of the City and DNASI Defendants – particularly as to damages – would violate the Court’s stay of all discovery in connection with issues that are inextricably bound up in Plaintiffs’ claims against the City. In light of that, Plaintiffs propose that expert discovery be stayed until the City Defendants’ interlocutory appeal has been decided by the Fourth Circuit and the Court’s Stay Order is lifted. At that time, Plaintiffs expect that expert discovery will be incorporated into a second discovery order that all Parties have agreed will need to be

established at that time to govern discovery in connection with issues relating to Plaintiffs' causes of action that are presently subject to the Stay Order.

### **Electronically Stored Information (ESI) Protocol**

The Parties have discussed the discovery of ESI and Plaintiffs have expressed their strong preference that Defendants produce all electronically stored correspondence in .pst format. Plaintiffs have inquired but do not yet know the native format of electronic mail stored on Duke University's servers. Plaintiffs propose that the issue of ESI not be addressed in the Court's Order. Rather, the issue can be raised by the Parties in due course to the extent that becomes necessary, or after the Duke Defendants and Plaintiffs have conferred further about a protocol for production of ESI in this matter.

### **Mediation**

Plaintiffs propose that the court-ordered mediation shall be conducted before the last day to complete discovery on all of Plaintiffs claims in this action, including those subject to the Stay Order. The Parties are currently discussing selection of the mediator, but have not yet agreed upon a mediator. Plaintiffs wish to continue and conclude that selection process, and propose to notify the Court of their designation of a mediator immediately upon reaching an agreement. Plaintiffs propose the last day to designate a mediator shall be August 31, 2011, after which a mediator will be appointed by the Court pursuant to the local rules.

### **Preliminary Deposition Schedule**

The Parties agree that depositions may be taken at any time during the discovery period and Plaintiffs propose that all depositions be conducted in North Carolina.

### **Other Items**

Plaintiffs propose that all Parties should be allowed to request leave to join additional Parties or amend the pleadings up to 90 days before the close of all discovery in this action. After these dates, the Court will consider, *inter alia*, whether granting leave to join additional Parties or amend the pleadings would delay the trial.

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

The Parties have agreed that the interstitial deadlines established by this Order may be modified by agreement of the Parties, except for any modification of the last day discovery may be conducted in connection with Plaintiffs' Twenty-First and Twenty-Fourth Causes of Action, which cannot be modified without the Court's approval.

Plaintiffs expect the trial on all claims (including those subject to the Stay Order) in this action will require up to 40 days. A jury trial has been demanded.

Dated: August 1, 2011

Respectfully submitted by:

**EKSTRAND & EKSTRAND LLP**

*Counsel for Plaintiffs*

By: /s/ Robert C. Ekstrand

Robert C. Ekstrand (N.C. Bar #26673)

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CERTIFICATE OF SERVICE

I certify that on Monday, August 01, 2011, the Plaintiffs' Rule 26(f) Report and Proposed Scheduling Order was served upon each party to this action via the CM/ECF electronic filing system, which will send a notice to counsel for all parties to this action, and to Defendant Linwood Wilson, who is proceeding *pro se* and has been granted access to the CM/ECF electronic filing system.

Respectfully submitted by:

/s/ Robert C. Ekstrand

Robert C. Ekstrand (N.C. Bar No. 26673)