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.

DUKE DEFENDANTS' RESPONSE TO THE REQUEST OF DEFENDANTS RICHARD CLARK, DNA SECURITY, INC., AND BRIAN MEEHAN TO INCLUDE PROVISIONS IN SCHEDULING ORDER

Defendants Duke University, Matthew Drummond, Aaron Graves, Robert Dean, and Gary N. Smith (the "Duke Defendants"), by and through their undersigned counsel, respond to the Request of Defendants Richard Clark, DNA Security, Inc. and Brian Meehan (the "DNA Defendants") [Dkt. No. 236] as follows:

The DNA Defendants seek to include various provisions in this Court's Scheduling Order. As they are currently worded, these provisions are overly broad and inject considerable confusion into the discovery process in this already complex case. The confusion is even greater when this case is considered along with the case of Carrington et al. v. Duke University, et al., Case No. 2008 CV 119.[1]

[1] The Duke Defendants have filed a motion [Dkt. No. 232] seeking to consolidate discovery in the Carrington and McFadyen cases. The Carrington Plaintiffs oppose that motion and have instead proposed a system of cross-noticing depositions. (Carrington, Dkt. No. 214, ¶ 2(e).) The McFadyen Plaintiffs also appear to endorse a system of cross-noticing depositions. (Dkt. No. 234 at 5.) Under either proposal, it is likely that at least some depositions would apply to both cases.

I. Discovery Should Not Be Restricted "Solely" on the Basis that It Relates "Directly" to a Count Other than Count 21 or 24. (Paragraphs 1 & 2 of the Request.)

The DNA Defendants have suggested a provision that "[n]o deposition questions may be propounded that directly relate to the issues raised in any Count other than Counts 21 and 24." (Dkt. No. 236, ¶ 2.) While the intent of that request was likely to limit questions to issues related to Counts 21 and 24, the request is broader than that. Legitimate questions may well "directly relate" to Counts other than Counts 21 and 24, but if those questions also relate to Counts 21 and 24, then they should be permitted. (Similarly, if depositions are combined in the Carrington and McFadyen cases, questions that relate to Counts 8, 11, and 19 in Carrington should be permitted.) Stated differently, a question regarding discovery on Counts 21 or 24 should be allowed to go forward. Deposition questions that "solely" relate to issues raised in Counts other than Counts 21 and 24 (and Counts 8, 11, and 19 in Carrington) can be prohibited. However, deposition questions that "directly relate" to Counts 21 and 24, but perhaps also to some other Count, should not necessarily be prohibited. To be sure, there may be issues that apply to more than just Counts 21 and 24. To forestall discovery that might apply to some other Count, even if that is not the thrust of the question, would stymie discovery on the presently discoverable Counts. It would tie the hands of counsel during discovery. That is not the purpose of discovery.

Similarly, written discovery should be allowed on any issue that is raised in Counts 21 and 24, without regard to whether that issue is also raised in Counts other than

Count 21 and 24. Indeed, written discovery is frequently of a background nature and would apply as much to one count as to another; would discovery of such background information be prohibited?

II. The Use of Depositions Should Be Controlled by the Federal Rules of Civil Procedure. (Paragraph 3 of the Request.)

The DNA Defendants also have suggested that "depositions taken during this phase of discovery may not be used at a hearing or trial against any party, other than Plaintiffs, Duke University, and Defendants Smith, Graves, Dean, and Drummond, even if that party was present or represented at the deposition or had reasonable notice of it." (Dkt. No. 236, ¶ 3.)

Because of the many common issues in the McFadyen and Carrington cases, some (if not all) depositions would likely proceed for both cases. The provisions contained in Paragraph 3 of the Request are not compatible with such consolidated discovery (whether truly consolidated or simply noticed in both cases). The clearest example of that incompatibility is that if Paragraph 3 were adopted, then depositions could not be used against the Carrington Plaintiffs, even where the depositions were consolidated.

Further, the Duke Defendants respectfully suggest that the Order sought by the DNA Defendants is in conflict with the Federal Rules of Civil Procedure. Rule 32(a) of the Federal Rules of Civil Procedure provides that "all or part of a deposition may be used against a party on these conditions: (A) the party was present or represented at the taking of the deposition or had reasonable notice of it." Fed. R. Civ. P. 32(a). The DNA Defendants ask this Court to allow all of the parties to attend depositions (and participate)

[Dkt. No. 236, ¶ 5], but not have the deposition used against any party other than (the McFadyen) Plaintiffs, Duke University, and Defendants Smith, Graves, Dean, and Drummond, even if that party was present or represented at the deposition or had reasonable notice of it. As the Duke Defendants understand the Court's June 9, 2011 ruling, discovery is proceeding on Claims 21 and 24. If notice of discovery is provided, discovery developed during the investigation of these claims should be available for use as permitted under the Federal Rules of Civil Procedure.

III. The Duke Defendants Agree with the Remaining Paragraphs of the Request. (Paragraphs 4, 6, and 7.)

The Duke Defendants agree that all discovery requests should be served on all parties. The Duke Defendants also agree that all discovery responses should be served on all parties, provided that those parties are bound by any applicable protective orders entered in either this case or the Carrington case.

Conclusion

The Court's Order of June 9, 2011 [Dkt. No. 218] provided that discovery should proceed on Counts 21 and 24 of the McFadyen case. Those parties who are not defendants to Counts 21 and 24 of the McFadyen case should not be overly burdened by the discovery that is going forward. However, the Duke Defendants should be allowed to conduct whatever discovery is necessary as relates to Counts 21 and 24 (and as relates to Counts 8, 11, and 19 in Carrington) without regard to whether that discovery is also relevant to other Counts.

This the 16th day of August, 2011.

/s/ Richard W. Ellis
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Counsel for Duke Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2011, I electronically filed the foregoing 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 16th day of August, 2011.

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