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' OPPOSITION TO THE DUKE DEFEDANTS' MOTION TO CONSOLIDATE DISCOVERY

Plaintiffs, Ryan *McFadyen*, Matthew Wilson, and Breck Archer, submit this Response in Opposition to the Duke Defendants'[1] Motion to Consolidate Discovery pursuant to Fed. R. Civ. P. Rule 42(a) (the "Motion") and supporting Brief [Docket Entries 232 and 233]. The Motion seeks consolidation of discovery in this action with discovery in *Carrington, et al. v. Duke University, et al.*, 1:08-cv-00119 (M.D.N.C. Feb. 21, 2008) (hereinafter "*Carrington*"). Duke's Motion should be denied because (1) Chief Judge James A. Beaty, Jr. has already ruled on the issue to the contrary; (2) because Rule 42(a) governs consolidation of cases for trial, not discovery; (3) because Duke grossly exaggerates the nominal similarity between

[1] For purposes of this Motion, the Duke Defendants are Duke University, Robert Dean, Matthew Drummond, Aaron Graves, and Gary N. Smith. (*See* Docket Entries 186 and 187.) Plaintiffs refer to them herein collectively as "Duke" and the "Duke Defendants." Many other "Duke Defendants" are not implicated in this Motion because they are named only in Plaintiffs' claims that have been stayed pending resolution of the City of Durham's appeal. Those "Duke Defendants" are Tara Levicy, R.N., Richard H. Brodhead, Ph.D., Robert K. Steel, John Burness, Victor J. Dzau, M.D., and Duke University Health Systems, Inc.

Plaintiffs' claims going forward at this stage and those of the Plaintiffs in *Carrington*; and (4) because Plaintiffs would be prejudiced by consolidation.

BACKGROUND

Plaintiffs filed this action on December 18, 2007, against the City of Durham, Duke University, DNA Security Inc., and employees of those entities seeking compensatory and punitive damages for violations of federal and state law arising out of their attempt to frame Plaintiffs for a crime they knew never occurred. [Docket Entry 1]. Plaintiffs filed an Amended Complaint on April 17, 2008 to clarify their claims [Docket Entries 33 and 34].[2] On February 23, 2010, the Court granted Plaintiffs leave to file a Second Amended Complaint ("SAC") to add a direct cause of action under the North Carolina Constitution [Docket Entry 136]. Before filing an Answer, all Defendants filed Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The City of Durham also moved for partial summary judgment on Plaintiffs' state law causes of action, asserting governmental immunity as a defense to those claims. Those preliminary motions were exhaustively briefed, over the course of nearly three years, and discovery was stayed pending the Court's resolution of all preliminary motions. To date, no formal discovery has been conducted in this action.

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[2] Pursuant to a request from this Court regarding the location of the audio and video exhibits embedded within the First Amended Complaint ("AC"), Plaintiffs re-filed the AC on April 18, 2008 with those embedded exhibits as separate documents. Except for the location of the exhibits, the two "First Amended Complaints" are identical.

On March 31, 2011, the Court ruled on Defendants' preliminary motions in a Memorandum Opinion [Docket Entry 186] and Order [Docket Entry 187] (the "March 31 Order"). The Court denied the City's Motion for Partial Summary Judgment, and granted in part and denied in part the various Motions to Dismiss. The March 31 Order authorizes M*cFadyen*, Wilson, and Archer to proceed on their federal claims under 42 U.S.C. § 1983 for violations of Plaintiffs' Fourth and Fourteenth Amendment rights, related claims for supervisory liability and for municipal liability against the City of Durham under *Monell*. Plaintiffs were also authorized to proceed to discovery on state law claims for obstruction of justice, fraud, breach of contract, several negligence theories, and their direct cause of action under the North Carolina Constitution against the City. Specifically, the Court authorized Plaintiffs to proceed with the claims asserted in Counts 1, 2, 5, 12, 13, 14, 18, 21, 24, 25, 26, 32, 35, and 41. Among these, one or more of the Duke Defendants are named in Counts 1, 2, 18, 21, 24, and 32.

Since the Court's March 31 Order, the City of Durham and all individual City Defendants[3] filed Notices of Appeal to the Fourth Circuit in connection with their immunity defenses [Docket Entries 196 and 199] and moved for an indefinite stay of discovery as to the City Defendants' pending resolution of their appeal [Docket Entries 205 and 206]. The Duke Defendants consented to the stay of discovery sought by the City. Defs.' Br. Stay Proceedings 3 n.2 (May 13, 2011). On June 9, 2011, the Court granted the City Defendants' Motion to Stay Proceedings, and stayed the proceedings with respect to Plaintiffs' claims

[3] The individual City Defendants are Defendants Patrick Baker, Steven Chalmers, Ronald Hodge, Lee Russ, Beverly Council, Jeff Lamb, Michael Ripberger, David W. Addison, Mark D. Gottlieb, and Benjamin W. Himan.

against the City Defendants: that is, Counts 1, 2, 5, 12, 13, 14, 18, 25, 26, 32, 35, and 41. Additionally, Judge Beaty ordered that discovery for Counts 1, 2, 12, 13, 14, and 18 as to Duke Defendants, Defendant Wilson, DNA Security, Inc., Richard Clark, and Brian Meehan (the "DSI" Defendants") be stayed as to these Defendants in addition to the City Defendants because "these claims...are so intertwined with the claims against the City Defendants, that it would be almost impossible to proceed to discovery...without overstepping into the claims...presently on appeal...and as a practical matter, these claims could not realistically proceed independent of the claims on appeal." Order 7 (June 9, 2011). However, the Court authorized Plaintiffs to proceed with discovery in connection with Counts 21 and 24 because those claims are not asserted against any of the City Defendants. *Id.* at 8-9. In *Carrington,* the Court similarly ordered that proceedings be stayed as to Counts 3, 21, 23, 25, 26, 27, 30, 31, and 32, but authorized the *Carrington* Plaintiffs to proceed to discovery on Counts 8, 11, and 19 [Docket Entry 192].

ARGUMENT

The Court should reject the Duke Defendants' request to "consolidate" discovery in this action with discovery in *Carrington* for several compelling reasons. This brief will address three of them. The first and most obvious is that in his June 9, 2011 Order authorizing Plaintiffs to proceed to discovery, Judge Beaty addressed consolidation of discovery between this action and *Carrington* and expressly left the issue to the discretion of the parties. Second, Duke's reliance on Rule 42(a) is misplaced; Rule 42(a) does not authorize consolidation of cases solely for discovery, and Duke offers no authority to the

contrary. Third, consolidation of discovery will cause prejudice to Plaintiffs' ability to develop evidence to prove their claims, and it will not create any efficiencies that are not substantially outweighed by the confusion, inefficiencies, prejudice, and unnecessary burdens that consolidation would create.

I. JUDGE BEATY'S DISCOVERY ORDER DECIDED THIS ISSUE.

The Duke Defendants' Motion fails at the threshold because Judge Beaty has already ruled on whether discovery in this case should be consolidated with discovery in *Carrington*. In his Order dated June 9, 2011 [Docket Entry 218], the same order that authorizes Plaintiffs to proceed to discovery against the Duke Defendants, the Chief Judge expressly states that "discovery may be coordinated between the [*Carrington* and *McFadyen*] cases at the election of the parties."[4] Order 9 n.6 (June 9, 2011). Judge Beaty's Order therefore expressly provides for consolidation of discovery but only at the election of the parties. That is the rule of this case, and Duke's Motion should be dispensed with on that basis.

But that is not all. In footnote 94 of his March 31, 2011 Memorandum and Opinion, Judge Beaty noted that "special attention should be given during the discovery process to

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[4] Judge Beaty's June 9 Order provides, in relevant part:

> [T]wo other cases in this District that have been identified by the parties and the Clerk's Office as "related" to the present case, *Carrington*, et al. v. Duke University, et al., 1:08CV119) and Evans, et al. v. City of Durham, et al., (1:07CV739). The *Carrington* case also involves separate claims asserted against Duke University for which limited discovery is possible, **and the discovery may be coordinated between the cases at the election of the parties.**

Order 9 n.6 (June 9, 2011)(emphasis supplied).

ensure that the [City] Supervisors are not unduly burdened, *in light of the potential qualified immunity defense and the protection it affords*." Memorandum and Opinion 218 n. 94 (emphasis supplied). The Court says nothing at all regarding the burdens of discovery in connection with the Duke Defendants, who do not enjoy any "potential immunity defense and the protection it affords." Rather, the Court simply authorized Plaintiffs to proceed to discovery claims with asserted exclusively against the Duke Defendants and merely noted that discovery as to those claims might be "coordinated" with discovery in *Carrington* but only "at the election of the parties." Order 9 n.6 (June 9, 2011).

Moreover, in the 26(f) Conference on July 15, 2011, Plaintiffs offered to consolidate depositions of certain individuals with depositions noticed by the *Carrington* Plaintiffs where doing so was feasible and actual efficiencies would be realized. *See also* Pls.' Rule 26(f) Report & Proposed Sch. Order 5 (Aug. 1, 2011). Surprisingly, in light of the Motion now before the Court, the Duke Defendants rejected that proposal. *See* Rule 26(f) Report of the Duke Defs. 6-10 (Aug. 1, 2011). Having rejected Plaintiffs' offer to coordinate common depositions with *Carrington*, Duke should not be heard now to complain of hypothetical "inefficiencies" they could have avoided by agreement.

II. RULE 42(a) DOES NOT AUTHORIZE CONSOLIDATION OF ACTIONS SOLELY FOR PURPOSES OF DISCOVERY.

Rudimentary principals of statutory construction defeat Duke's Motion to Consolidate just as surely as Judge Beaty's Order does. Rule 42(a) of the Federal Rules of Civil Procedure (hereinafter "Rules") authorizes consolidation of actions or issues for *hearing* or *trial*, not discovery. *See* Moore's Federal Practice Vol. 8, Ch. 42. Rule 42(a) provides:

> If actions before the court involve a common question of law or fact, the court may:
> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. Rule 42(a). By its own terms, Rule 42(a) authorizes the consolidation of actions or issues "for hearing or trial," but the Rule says nothing at all about discovery. *Id.* By operation of the canon of statutory construction, *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another), by including "actions" "hearings" and "trial" in the rule, the drafters' omission of discovery must be read as the expression of their intent to exclude it from the Rule's application. The rudimentary application of the canons of statutory construction bar the use of Rule 42 as a means of consolidating actions solely for purposes of discovery.[5]

Moreover, while it is clear enough that the Rules do not authorize the consolidation of lawsuits solely for discovery, it is just as clear that the Rules do not leave litigants

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[5] The construction of Rule 42(a) that the canons compel is also consistent with the structure of the Federal Rules and Rule 42's placement within it. For example, Rule 42 is \codified in Title VI (the rules governing "Trials") and not Title V (the rules governing "Depositions and Discovery").

defenseless in the face of unduly burdensome, cumulative, or duplicative discovery. For example, Rule 26(c) requires courts to issue orders protecting litigants from the precisely the same harms about which Duke grouses (albeit prematurely) in its Motion. Specifically, Rule 26(c) provides that Courts must order a litigant to limit "the frequency or extent of discovery" whenever the litigant's discovery requests are "unreasonably cumulative or duplicative," "can be obtained from some other source that is more convenient," and when "the burden or expense of the proposed discovery outweighs its likely benefit," among other enumerated circumstances. Fed. R. Civ. P. Rule 26(c). The orders authorized by Rule 26(c) are more than adequate to protect against the horribles Duke conjures up in its Motion. But even Rule 26(c) has its limits: before Duke can invoke it to suppress Plaintiffs' discovery efforts, Plaintiffs must be afforded an opportunity to propound an actual -- not imagined -- discovery request before seeking relief from it.

In light of the plain meaning of Rule 42(a) and the role Rule 26(c) plays in addressing the efficiency and burdens of discovery, it is hardly surprising that Duke struggled to identify authorities to support its contention. None of the cases Duke relies upon involve motions to consolidate cases solely for purposes of discovery. To the contrary, they all involve motions to consolidate cases for hearing or trial, and they all stand for the unremarkable proposition that cases with identity among their claims, parties, and counsel may be consolidated unless consolidation would result in prejudice to any party, confusion of the issues, or inefficiencies. The following authorities relied upon by Duke to illustrate this point:

In re Cree, Inc., Securities Litigation involved the consolidation of "19 purported class action suits making substantially similar allegations which would impose a greater burden on all parties, witnesses, and judicial resources if each were maintained separately" and "[n]o party opposed the consolidation of the cases." 219 F.R.D. 369, 371 (M.D.N.C. 2003). Moreover, *Cree* was governed by the Private Securities Litigation Act of 1995 ("PLSA") which specifically provides for consolidation of actions arising under PLSA, including a provision requiring the Court to "appoint lead plaintiff for the consolidated action as soon as practicable." *Id.* (citing the PSLA).[6]

Similarly, *Hanson v. Dist. of Columbia*, involved the consolidation of two cases for trial, not for discovery. 257 F.R.D. 19, 22 n.1 (D. D.C. 2009). Moreover, the Court found that consolidation was proper because there, unlike here, one of the two cases to be consolidated asserted a single cause of action that was identical to a cause of action asserted in the other. *Id.* The overlapping cause of action was an attack on the constitutionality of a specific provision of the District of Columbia's now famous gun laws. *Id.* Also unlike the instant case, both cases involved the same defendant, the same statutory scheme, and all plaintiffs in both cases were represented by the same lawyer. *Id.*

Jenkins v. Trs. of Sandhills Cmty. Coll., et al., No. 1:00-166, 2002 U.S. Dist. LEXIS 25247, *1 (M.D.N.C. Nov. 22, 2002) involved the consolidation of two cases for trial, not

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6 Notably, when quoting *In re Cree*, Duke employs an ellipsis in a manner that obfuscates the highly material fact that the motion at issue involved consolidation actions for all purposes, not solely discovery. *Compare* Defs.' Br. in Support of Mot. to Consolidate Discovery 3 *with Cree*, 219 F.R.D. at 371.

solely discovery. Moreover, unlike this case, in *Jenkins* both cases had been brought by the same plaintiff, "involve[d] the same defendants… ar[ose] from Plaintiff's employment with Sandhills Community College so the witnesses [were] the same; both cases allege[d] racial discrimination; and in both cases, the defendants … filed motions to dismiss for failure to state a claim." *Id.*

Johnson v. Celetox Corp., 899 F.2d 1281 (2d Cir. 1990) involved consolidation of two asbestos tort cases for trial, which the trial court ordered on the day that the trial began. *Id.* at 1285 ("At a pretrial conference on November 4, 1988, the court proposed … Higgins … be consolidated with Johnson which was scheduled for trial on November 7, 1988. The trial court ordered on November 7, 1988 that Higgins and Johnson be consolidated for trial."). Moreover, again unlike here, all plaintiffs were represented by the same attorney. *Id.*

Harris v. L & L Wings, 132 F.3d 978 (4th Cir. 1997) addresses the issue of consolidation only in a footnote, and, there, only to reject Defendant's appeal of the trial court's consolidation of two lawsuits *for trial*. *Id.* at 982 n.2 (approving consolidation of Plaintiffs' lawsuits for trial because Plaintiffs' claims were "brought against the same defendant, rel[ied] on the same witnesses, alleg[ed] the same misconduct, and [were] answered with the same defenses…"). No such identity of parties and claims exists here.

The other authorities Duke relies upon offer more of the same, and nothing to support its Motion. In fact, only one case Duke cites actually involves the consolidation of cases for discovery without formally consolidating them for trial, *Pariseau v. Anodyne Healthcare Management, Inc.*, No. 3:04-630, 2006 U.S. Dist. LEXIS 21950 (W.D.N.C. Feb. 9,

2006). But Duke's reliance on *Pariseau* comes to nothing. At best *Pariseau* is the exception that proves the rule: there, the Court ordered consolidation of two actions for discovery and pre-trial motions, but it did so expressly because the motion to do so was **unopposed** and it was part of a broader motion to consolidate the cases for trial. *Id.* at *7. ("Defendants do not present any arguments [opposing] consolidation until the close of discovery, ... by granting the Motion to Consolidate for discovery matters and pre-trial motions, ... Defendants' objections to consolidation become moot."). The court deferred ruling upon consolidation of the actions for trial because the motion was opposed in that regard. *Id.*

Here, unlike the cases upon which Duke relies, Duke seeks consolidation of discovery in M*cFadyen* and C*arrington,* and expressly objects to consolidating the actions for trial. Rule 26(f) Report of the Duke Defs. 3. While there is no support for the proposition that consolidation of discovery, standing alone, may be compelled under Rule 42(a), it is untenable, if not schizophrenic, to urge the Court, as Duke does here, to consolidate discovery in two very different actions while, at the same time, objecting to consolidation of the actions for trial. By contrast, Plaintiffs' position on those questions has the virtue of internal consistency: Plaintiffs oppose consolidation for both discovery and trial.

IV. THE CLAIMS, PARTIES, AND OPERATIVE FACTS IN *MCFADYEN* AND *CARRINGTON* ARE ALMOST ENTIRELY DISTINCT.

Duke asserts, like a mantra throughout its briefing, that this case and C*arrington* involve similar claims, parties, and operative facts. Defs.' Br. in Support of Mot. to Consolidate Discovery 3-6 (Aug. 1, 2011) (hereinafter "Duke Br."). But Duke's conclusory assertion is hardly enough to compel consolidation, and Duke offers no factual detail to

support it. Such detail would be difficult to find, as illustrated by two charts annexed hereto as EXHIBIT 1. The charts show how different the two actions are, even at the general level of claims and parties.

The first chart in EXHIBIT 1 shows that among all the claims going forward now in *McFadyen* and *Carrington* there is only one "common" claim[7] and, even that claim is asserted against different parties in the two actions. For example, Plaintiffs' do not assert their "common claim" against Defendant Hendricks, and, in fact, assert no claim at all against her. Hendricks is a primary defendant the *Carrington* Fraud claim. Similarly, Defendant Smith is a primary defendant in Plaintiffs' Fraud claim; yet, Smith is not only absent from the Fraud claim in *Carrington* but also the entire *Carrington* Complaint. Thus, even at the level of claims and parties, there exist few commonalities, even among the only "common" claim going forward at this time.

The remaining claims going forward now in *McFadyen* and *Carrington* are all different. In this case, Plaintiffs are going forward on their claims for Breach of Educational Contract. Roughly 80% or more of Plaintiffs' discovery on the claims going forward now will be directed to Plaintiffs Breach of Educational Contract claims. Meanwhile, the *Carrington* Plaintiffs will be directing their discovery efforts on their wholly unrelated claims for Constructive Fraud through Abuse of Confidential Relationship and Negligent Supervision of Duke Professors and Employees (Counts 11 and 19 in *Carrington*). Thus, even at the level of parties, claims and operative facts, the lone claim that is "common" has little commonality

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[7] The "common claim" is Plaintiffs' claim for Fraud in Count 24 and the *Carrington* Plaintiffs' claim for "Fraud and Conspiracy to Commit Fraud" in Count 8.

across the two actions. The remaining claims going forward at this time share nothing, save one common Defendant: Duke University. And even in that regard, the claims going forward in the two cases against Duke University seek to hold Duke liable for different conduct engaged in by a different set of employees.

The second chart in EXHIBIT 1 shows that, among the claims going forward upon resolution of the City's appeal, there are only two claims and three defendants in common with the claims going forward in *Carrington*. And even then, the two "common claims" are demonstrably different. For example, the *McFadyen* Plaintiffs assert one of the "common" claims against four defendants who are not named at all in the "common claim" asserted by the *Carrington* Plaintiffs.

In summary, among the total nine Counts proceeding at some point in discovery, six of the claims are distinct (three of which are presently going forward with discovery). Furthermore, among the Counts in *McFadyen* and *Carrington* both going forward with discovery and currently stayed, half of the named Defendants are *only* named in one of the cases. Thus, Plaintiffs' case is in fact quite dissimilar with respect to the claims and parties in the *Carrington* case.

Additionally, the cases do not involve the same set of operative facts.[8] For example, both cases asserted a claim for Breach of Educational Contract, yet the operative facts of

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[8] This Court can take judicial notice of the fact that the Court of Appeals for the Fourth Circuit deny the City Defendants' request to consolidate the appellate briefing in *McFadyen*, *Carrington*, and *Evans, et al. v. City of Durham, et al.*, No. 1:07-cv-00739 (M.D.N.C. Oct. 5, 2007). *See* Briefing Order, No. 11-1458 (L) (4th Cir. July 22, 2011).

Plaintiffs' claims and those alleged in *Carrington* were so completely distinct that the Court allowed Plaintiffs' breach of educational contract claim to proceed in this case and dismissed the breach of educational contract claim (Count 15) in *Carrington*. Thus, even where the *McFadyen* and *Carrington* Plaintiffs assert the same, narrow cause of action, the operative facts vary so markedly that this Court held that Plaintiffs in this case stated an actionable claim and the *Carrington* Plaintiffs did not.[9]

VI. CONSOLIDATING DISCOVERY WILL CREATE CONFUSION AND PREJUDICE PLAINTIFFS' ABILITY TO PREPARE FOR TRIAL.

A motion to consolidate actions under Rule 42(a) should be denied where consolidation is likely to: 1) cause prejudice any party; 2) create juror confusion; and 3) impose additional requirements of time and expense. See *Pariseau*, 2006 U.S. Dist. LEXIS 21950 at *6 (citing *Arnold v. Eastern Airlines,* 681 F.2d 186 (4th Cir. 1982)). Of course, these considerations all relate to trials, not discovery. Nevertheless, Plaintiffs will address them briefly here.

Duke's asserts that consolidation of all discovery in *Carrington* and *McFadyen* is necessary to avoid duplicative and time-consuming depositions[10] and discovery requests

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[9] By way of illustration, the two cases allege very different facts in connection with Tara Levicy's role in the initial conspiracy to fabricate forensic medical evidence to corroborate the false claims Gottlieb and Himan made to obtain a non-testimonial identification order directed to every white member of the men's lacrosse team. Compare *McFadyen*, Second Amended Complaint, Section XXXI, The SANE Conspiracy, ¶¶ 779-799 with *Carrington*, First Amended Complaint ¶¶ 148-154.

[10] Avoiding any duplicative depositions of certain Defendants and witnesses is practically impossible in light of Judge Beaty's Order on June 9, 2011. Some Defendants and witnesses who

because, Duke contends, discovery in *McFadyen* and *Carrington* will involve the same universe of witnesses and documents. Duke Br. at 3-4, 6-7. This is plainly wrong. As explained above, there is, in fact, very little that is "the same" about the claims and operative facts going forward in the two cases. Here, again, Plaintiffs' cause of action against Duke for Breach of Educational Contract (Count 21) is illustrative. While the *Carrington* action has no similar claim going forward at all, all three Plaintiffs in this case have stated actionable breach of educational contract claims, and discovery on those claims will necessarily involve a thorough examination of the University's Office for Judicial Affairs, its staff, the faculty and students who participated in disciplinary proceedings conducted by that office, and the internal investigations of misconduct in the administration of that office. By contrast, none of the claims going forward in *Carrington* will involve this particular "universe of witnesses and documents." Duke Br. 6-7. It simply makes no sense to consolidate discovery where Plaintiffs expect to direct most of their efforts in this first phase of discovery on a "universe of witnesses and documents" that, in fact, bears no relation to of the claims the *Carrington* Plaintiffs are authorized to pursue. *Id.*

In the end, Duke's Motion is little more than a premature motion for a protective order limiting discovery under Rule 26. But efficient discovery is not synonymous with limited discovery, and radically altering the rights and responsibilities established by the Federal Rules of Civil Procedure seems an unlikely path to "judicial economy." One

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will be deposed with regard to the Counts that are permitted to go forward at this time will have to be deposed once the stay is lifted as to the other Counts because Plaintiffs will be unable to ask questions of these deponents regarding the facts relating to the causes of actions that are currently stayed. Defendant Brodhead is a clear example of this that is demonstrated in EXHIBIT 1.

obvious example of that, of course, arises in this very briefing. Presumably, the purpose of the Rule 26(f) Conference between Plaintiffs and the Duke Defendants on July 15, 2011 was to "confer" about proposed departures from the Federal and Local Rules governing discovery, and to "report" on the matters about which the parties actually conferred. Duke did not raise consolidation of the actions for purposes of discovery during the conference or in the two weeks between the conference and the submission of its report on the conference. Rather, Duke raised this radical departure from the Rules in its Motion to Consolidate Discovery, filed contemporaneously with its 26(f) Report on the conference. It clearly would have more efficient to follow the rules, confer about Duke's proposal and the concerns that animate it, and, perhaps find some common ground. Instead, because Duke departed from the Rules in this seemingly minor respect, the Court is now being asked to bridge a chasm on an issue that may have been entirely resolved if it had been first raised at the conference.

Another incongruity in Duke's position on consolidation is its insistence on consolidation for purposes of discovery while peremptorily objecting to consolidating the cases for trial. Duke estimates that the trial of this case and *Carrington* will each require 20 days, for a total of 40 days. If, as Duke contends, the two cases involve the same universe of issues, witnesses, and operative facts and will entail investigation, depositions, and discovery requests to many of the same parties and witnesses, consolidating the trials would reduce the time required for trial by nearly one half. *Id.* However, as explained above, the two cases do not involve the same universe of claims, witnesses, and operative facts.

And Duke has produced in this very briefing a window into the confusion that consolidation of discovery in these two cases would cause. Repeatedly, Duke erroneously reports even the objective facts of the *McFadyen* and *Carrington*, particularly where the two diverge. For example, Duke opens its Brief on this Motion by incorrectly reporting[11] that the City Defendants' were joined by Defendants Wilson, and the DSI Defendants in the *Carrington* case, while only the City Defendants and Defendant Wilson have sought an interlocutory appeal in this case. Duke's report of these objective facts is wrong in nearly every respect. First, the DSI Defendants did not join the City's appeal in *Carrington* – DNASI was never named as a defendant in that action. With respect to this case, Plaintiffs have stated several actionable claims against the DNASI Defendants. Those claims are stayed pending resolution of the City Defendants' appeal. But those claims are stayed – not because DNASI has joined the appeal (they have not) – but, instead, because Plaintiffs' claims against DNASI are all asserted against the City as well. Furthermore, the caption of the Supplemental Rule 26(f) Report [Docket Entry 235] that Duke filed in this case incorrectly bears the caption and civil action number of the *Carrington* action. *See* EXHIBIT

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[11] Duke's Brief states, in relevant part:

> 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 … . 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.

Duke Br. 2 n.1.

2 attached. These and other errors in reporting even the rudimentary objective facts of each case are amplified by orders of magnitude whenever any Defendant in this case undertakes to recite the factual basis of Plaintiffs' claims. Consolidating the cases for purposes of discovery will only breed more errors, leading to more confusion, and ultimately prejudicing Plaintiffs' ability to prepare *their* case for trial. Perhaps aware of the incessant recasting of Plaintiffs' allegations in the briefing on Defendant's Rule 12 motions, Judge Beaty did not order that discovery be consolidated when authorizing Plaintiffs to proceed on their claims against Duke; rather, he ordered that Discovery may be coordinated between the two cases but only "at the election of the parties" and only in connection with "common" claims.

Duke contends that separate discovery will subject parties and witnesses to duplicative and burdensome discovery. Duke Br. 7- 8. The Court may take judicial notice of Plaintiffs' willingness to consolidate their discovery efforts with those of the *Carrington* Plaintiffs where consolidation is likely to promote efficiency and judicial economy. For example, at the outset of discovery, rather than conduct separate Rule 26(f) conferences, the *McFadyen* and the *Carrington* Plaintiffs elected to conduct a joint discovery conference with the Duke Defendants. Plaintiffs also proposed a procedure to facilitate the consolidation of depositions in order to avoid duplication of efforts and to minimize the burdens on all concerned. *See* Pls.' Rule 26(f) Report & Proposed Sch. Order 5. One might expect a champion of judicial efficiency to seize upon Plaintiffs' offer. But Duke did not. To the contrary, Duke rejected it.

And there is more. Plaintiffs, who do not live or work in North Carolina, have also generously agreed to Duke's request that depositions be conducted in North Carolina. Pls.'

Rule 26(f) Report & Proposed Sch. Order 8. Thus, before conducting any discovery at all, Plaintiffs have shown – by their conduct – that they have no interest in conducting inefficient, burdensome, or wasteful discovery.

CONCLUSION

For all of the foregoing reasons the Duke Defendants' Motion to Consolidate Discovery should be denied.

Dated: August 25, 2011

Respectfully submitted by:

EKSTRAND & EKSTRAND LLP

/s/ Robert C. Ekstrand

Robert C. Ekstrand (NC Bar No. 26673)
811 Ninth Street
Durham, North Carolina 27705
E-mail: rce@ninthstreetlaw.com
Tel: (919) 416-4590
Fax: (919) 416-4591
Counsel for Plaintiffs

/s/ Stefanie A. Sparks

Stefanie A. Sparks (NC Bar No. 42345)
811 Ninth Street
Durham, North Carolina 27705
E-mail: sas@ninthstreetlaw.com
Tel: (919) 416-4590
Fax: (919) 416-4591
Counsel for Plaintiffs

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

CERTIFICATE OF SERVICE

I hereby certify that on Thursday, August 25, 2011, pursuant to Rule 5 of the Federal Rules of Civil Procedure and Local Rules 5.3 and 5.4, I electronically filed the foregoing Plaintiffs' Response in Opposition to Duke Defendants' Motion to Consolidate Discovery with the Clerk of the Court using the CM/ECF system, which will automatically generate and send notification of such filing to the undersigned and registered users of record. The Court's electronic records show that each party to this action is represented by at least one registered user of record (or that the party is a registered user of record), to each of whom the Notice of Electronic Filing will be sent.

Dated: August 25, 2011

Respectfully submitted by:

EKSTRAND & EKSTRAND LLP

/s/ Stefanie A. Sparks

Stefanie A. Sparks (NC Bar No. 42345)