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.	**REPLY BRIEF IN SUPPORT OF DUKE DEFENDANTS' MOTION TO CONSOLIDATE DISCOVERY**

Plaintiffs oppose Duke's Motion to Consolidate Discovery in the McFadyen and Carrington cases [DE 238 ("Plaintiffs' Opposition")], but their arguments fail to set forth any actual bar to consolidation. Plaintiffs incorrectly assert that Chief Judge James A. Beaty, Jr. has already ruled on the consolidation issue and that Federal Rule of Civil Procedure 42(a) does not authorize discovery consolidation. In fact, Rule 42(a) provides for discovery consolidation, an issue upon which Judge Beaty has not yet ruled.

Moreover, Plaintiffs highlight variances among certain *claims* alleged in McFadyen and Carrington, disregarding the fact that common questions of fact or law, not identity of claims, governs whether consolidation is warranted under Rule 42(a). Similarly, Plaintiffs suggest that consolidated discovery will prejudice their trial preparation efforts and will lead to confusion. Plaintiffs fail to show, however, how any prejudice or confusion would arise from consolidated discovery. Finally, Plaintiffs

underestimate the burden of separate discovery and fail to counter the benefits that will arise from consolidated discovery.

ARGUMENT

A. This Court has Discretion to Consolidate McFadyen and Carrington for Discovery.

Plaintiffs urge the Court not to consolidate McFadyen and Carrington for discovery, incorrectly asserting that Judge Beaty "has already ruled on the issue to the contrary" and advancing a narrow and unsupported interpretation of Rule 42(a).

1. Judge Beaty Has Not Ruled on Consolidation.

The Duke Defendants do not understand Judge Beaty's prior ruling to bar the Court's discretion to consolidate discovery. The McFadyen Plaintiffs rely on this footnote: "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." (9 June 2011 Order [DE 218] at 9 n.6.) While Judge Beaty no doubt intended to encourage cooperation in discovery, the language of the footnote does not abandon the Court's discretion to manage discovery where circumstances warrant; nor does it bar whether and by what means discovery may be consolidated.

2. Discovery Consolidation is Authorized Under Rule 42(a).

Plaintiffs argue that Rule 42(a) does not authorize consolidation for discovery. (Pl. Opp. [DE 238] at 4.) This interpretation of Rule 42(a) ignores case law cited by the Plaintiffs in their own brief.

Under Rule 42(a), a motion to consolidate must first identify a common question of law or fact. (See Defs. Br. [DE 233] at 3.) When, as here, that threshold requirement is met, whether to grant the motion to consolidate discovery is a matter of judicial discretion. See Pariseau v. Anodyne Healthcare Mgt., No. Civ. A 3:04-CV-630, 2006 WL 325379, at *1 (W.D.N.C. Feb. 9, 2006) (cited in Pls.' Opp. at 10, 11, 14). Judicial discretion to manage litigation to lower costs and increase efficiency for the parties and the Court during discovery is essential to the litigation process. Courts have indeed exercised this discretion and consolidated cases for discovery while opting not to consolidate for trial. See, e.g., id. at *2 (consolidating for purposes of discovery and saving consideration of whether to consolidate for trial for a later time); Hill v. Stryker Corp., Nos. 3:08-cv-295, 3:08-cv-406, 2010 WL 2253547 (E.D. Tenn. June 1, 2010) (consolidating cases only for discovery where risks of prejudice and jury confusion were too great to consolidate for trial).

Further, courts have specifically cited Pariseau as authority for consolidating for discovery and not for trial under Rule 42(a). In Flick Mortg. Inv., Inc. v. Chicago Title Ins. Co., the court consolidated cases only for pretrial matters and not for trial. Nos. 3:09-cv-125, 3:09-cv-154, 2009 WL 1444695, at *2 (W.D.N.C. May 21, 2009). The

Flick court explained that the two cases involved common legal and factual questions, and that consolidation "would save judicial resources," while consolidation of "these cases only for pretrial matters alleviates any possible confusion of the jury or prejudice to [a party] that might result by consolidating these cases for trial." Id. at *2. Simply put, consolidating McFadyen and Carrington for discovery, where there are undeniable common issues of fact and law, is proper under Rule 42(a).

B. Common Questions of Fact and Law Warrant Discovery Consolidation.

The existence of common questions of fact or law – not the identity of claims or parties – controls whether consolidation is warranted. Nat'l Assoc. of Mortg. Brokers v. Bd. of Govs. of the Fed. Reserve Sys., Nos. 1:11-cv-00506, 1:11-cv-0489, 2011 WL 941609, *2-3 (D.D.C. Mar. 21, 2011). McFadyen and Carrington involve common questions of fact *and* law, and Rule 42(a) is satisfied. (See Defs. Br. [DE 233] at 4-6.)

Plaintiffs repeatedly press differences among the *claims* in McFadyen and Carrington as reasons not to consolidate the cases for discovery. (See e.g., Pl. Opp. [DE 238] Ex. 1.) However, even where there are "significant differences among the claims in the various cases," consolidation remains appropriate where there is a "common core of facts and legal issues." In re BP, PLC Sec. Litig., 758 F. Supp. 2d 428, 432-33 (S.D. Tex. 2010) (allowing consolidation motion under Rule 42(a)); see also Flick, 2009 WL 1444695, at *2 (allowing discovery consolidation under Rule 42(a) where there were common legal and factual questions). As the Duke Defendants explain in their Opening Brief, the surviving claims in McFadyen and Carrington arise out of the false allegation

of rape and the resulting investigation. (Defs. Br. [DE 233] at 4-6.) The Plaintiffs in both cases allege that they were injured in connection with that investigation and their claims involve many of the same individuals and sets of circumstances. For example, the fraud claims in McFadyen and Carrington involve the same issues of law and fact pertaining to certain individuals' knowledge and actions with regard to disclosure of DukeCard data. Further, even though the cases allege claims against different Defendants, it is certain that some of the Defendants named in one case will be deposed in the other case, even though they may not be defendants in that case. (Similarly, many of the witnesses will be deposed in both cases.) While there are some differences in the other claims, that does not change the fact that the claims involve similar issues of law and fact because they arise out of the false allegations of rape.

C. Consolidated Discovery Will Not Prejudice Parties or Cause Undue Confusion.

Plaintiffs contend that "consolidating discovery will create confusion and prejudice Plaintiffs' ability to prepare for trial." (Pl. Opp. [DE 238] at 14.) They argue that consolidated discovery will prejudice their trial preparation efforts insofar as differences in claims call for different discovery. (Id. at 15.) Plaintiffs' argument does not connect with the realities of litigation. Although some claims may differ, discovery in both cases will inevitably involve many of the same parties, witnesses and documents. (See, e.g., Defs. Br. [DE 233] at 5-6.) In any event, as described above, variance in claims does not preclude consolidation.

Plaintiffs suggest that consolidation of discovery will lead to more filing mistakes, but they do not show how inadvertent mistakes cause prejudice or confusion. (Pl. Opp. [DE 238] at 17-18.)[1] Moreover, Plaintiffs cite no cases showing that consolidated discovery risks prejudice to parties or confusion. To the contrary, consolidation for discovery, but not for trial, *restricts* confusion in the litigation process, and *advances* judicial economy. Pariseau, 2006 WL 325379, at *2; Flick, 2009 WL 1444695, at *2.

D. Consolidated Discovery Was Raised by the Defendants Early in the Rule 26 Process.

Plaintiffs mistakenly assert that the Duke Defendants "did not raise consolidation of the actions for purposes of discovery during the [Rule 26(f)] conference or in the two weeks between the conference and the submission of its report on the conference." (Pl. Opp. [DE 238] at 16.) That statement is demonstrably incorrect. The Duke Defendants *did* raise the issue of consolidated discovery during communications about a Rule 26 proposal. Indeed, the undersigned counsel sent two separate emails attaching comments on a 26(f) Report proposed by the McFadyen Plaintiffs and addressing issues raised by the Carrington Plaintiffs, respectively. Plaintiffs' counsel in the McFadyen case was a recipient of both emails. These communications, attached hereto in their entirety as

[1] Plaintiffs accurately identify errors made by the Duke Defendants in their Opening Brief and in their Supplemental Rule 26(f) Report. (Id.) The Duke Defendants apologize for the inconvenience caused to the Court and the Plaintiffs by these mistakes. While the Duke Defendants regret these errors, Plaintiffs fail to show how consolidation of discovery will cause such errors and, more importantly, why any confusion or "prejudice" arising from errors such as these should bar discovery consolidation.

Exhibits 1 and 2, reflect the Duke Defendants' proposal of consolidated discovery in the two weeks between the conference and the submission of their report.[2]

E. Consolidated Discovery Will Minimize Burdens on Parties, Witnesses, and the Court.

Additional factors also warrant consolidated discovery of McFadyen and Carrington. The Second Amended Complaint in McFadyen and the First Amended Complaint in Carrington set forth hundreds of pages of factual allegations. The McFadyen Complaint alone is over 400 pages long. That Complaint alone references over 162 names. As a harbinger of discovery, this Complaint (especially combined with the Carrington Complaint) leaves little doubt that the burden of discovery in these two cases will be enormous. Without consolidation, there will be many repeat depositions and written discovery. Consolidated discovery will control this duplication.

[2] The Duke Defendants explicitly reference discovery consolidation in Exhibit 1 in the third, fourth and sixth bullets under "Discovery Plan" ("If the case are consolidated for discovery. . .," "We propose that discovery should be consolidated such that . . .," and "If discovery is consolidated . . ."). References to discovery consolidation appear in Exhibit 2 as part of "Duke's Response" to the Carrington Plaintiff's Position on Depositions on pages 1 and 2 (". . . we propose that all discovery be consolidated" and "if the two case are consolidated for discovery . . ."). It is also worth noting that contrary to the Plaintiffs' assertion on pages 6 and 10 of their Opposition, the Duke Defendants did not reject the proposal to cross-notice depositions. (See Ex. 1 at 1 ("We propose that discovery should be consolidated such that anytime that a deposition is noticed, it is noticed for both cases. If we are to use a system like the one that you suggest whereby depositions would be cross-noticed, we would want it agreed that if the deposition is not cross-noticed, then that deponent will not be deposed in the other case. In short, each deponent sits for only one deposition in both Carrington and McFadyen."); Ex. 2 at 1.). Instead, the Duke Defendants advocated for a more comprehensive approach to consolidation.

Further, consolidated discovery – including written discovery – will prevent duplicative discovery motions. Just as the Duke Defendants have filed the instant motion in both cases, the Duke Defendants expect that most discovery issues will need resolution in both cases. Consolidated discovery will promote judicial efficiency; it will, quite simply, alleviate the need for duplicative motions and orders.

In summary, consolidated discovery can save substantial time and expense for the parties and the Court. See Diagnostic Devices, Inc., 2010 WL 2560316 at *3 ("the time, judicial resources and witness burdens that would be saved by consolidation is substantial"); see also Flick, 2009 WL 1444695, at *2 ("Consolidation of these cases would save judicial resources.") (citing Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)).

CONCLUSION

For the reasons set forth above and in the Duke Defendants' Opening Brief, the Duke Defendants respectfully request that the Court consolidate McFadyen and Carrington for discovery.

This the 26th day of August 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on 26 August 2011, I electronically filed this **Reply Brief in Support of Duke Defendants' 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 26th day of August, 2011.

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