MCFADYEN et al v. DUKE UNIVERSITY et al Doc. 241

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' RESPONSE TO DSI DEFENDANTS' REQUEST FOR TO MODIFY THE RULE 26(f) SCHEDULING ORDER

Plaintiffs, Ryan McFadyen, Matthew Wilson, and Breck Archer, submit this Response to DNA Security, Inc., Richard Clark, and Brian Meehan's (the "DSI Defendants") Request to Include Provisions in Scheduling Order (the "Request") [Docket Entry 236].[1] The DSI seek seven different provisions for the Scheduling Order concerning Counts 21 and 24 against Defendants Duke University, Gary N. Smith, Aaron Graves, Robert Dean, and Matthew Drummond (the "Duke Defendants").

BACKGROUND

On March 31, 2011, the Court resolved all defendants' motions to dismiss, authorizing Plaintiffs to proceed on multiple federal and common law claims. Thereafter,

[1] Duke Defendants submitted also submitted a response [Docket Entry 237].

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the City Defendants[2] filed Notices of Appeal to the Fourth Circuit in connection with their immunity defenses [Docket Entries 196 and 199] and moved to stay discovery as to the City Defendants' during the pendency of their appeal [Docket Entries 205 and 206]. The DSI Defendants filed a motion joining the City Defendants' Motion to Stay Proceedings [Docket Entry 211]. On June 9, 2011, the Court issued an order staying all proceedings in connection with the claims Plaintiffs asserted against the City Defendants. The Court authorized Plaintiffs to proceed to discovery on their remaining claims (Counts 21 and 24 of Plaintiffs Second Amended Complaint) [Docket Entry 218].

Because Plaintiffs' claims against DSI Defendants are also asserted against City Defendants, DSI Defendants are the unintended and entirely derivative beneficiaries of the stay imposed to protect the immunities claimed by the City Defendants. Looking the proverbial gift horse in the mouth, DSI now seeks to impose a raft of novel rules to govern the discovery process in connection with claims Plaintiffs do not assert against them.

The Duke Defendants correctly explain in their Response that DSI's proposed modifications will "inject considerable confusion into the discovery process" in this already complex case" and that "[t]he confusion is even greater when this case is considered along with *Carrington et al. v. Duke University, et al*." Duke Defs.' Resp. 1 (Aug. 16, 2011). Plaintiffs

[2] The City Defendants are the City of Durham, North Carolina, Patrick Baker, Steven Chalmers, Ronald Hodge, Lee Russ, Beverly Council, Jeff Lamb, Michael Ripberger, David W. Addison, Mark D. Gottlieb, and Benjamin W. Himan.

could not agree more.[3] At the risk of belaboring the obvious, Plaintiffs will address the layers of bureaucracy DSI proposes to add to the Federal Rules of Civil Procedure and the Initial Pre-Trial Order governing discovery in two claims not asserted against DSI.

DSI's first two requests would establish a rule that "no written discovery may be propounded to any party except as to the issues raised in Counts 21 and 24" and that "[n]o deposition questions may be propounded that directly relate to the issues raised in any count other than Counts 21 and 24." DSI Request at 2. These two rules are beyond even the imaginings of Orwell. The multitude of problems that these two rules would cause begin with the practical question of who would officiate the fine line between deposition questions "that directly relate to any count other than Counts 21 and 24" and deposition questions that *in*directly relate to a count other than Counts 21 and 24? And what if a deposition question relates directly to all Counts? The problems go on and on. And they are compounded by the fact that they all arise every time a question trips of the tongue of a lawyer in the depositions conducted in this initial discovery phase. This is the picture of confusion and inefficiency. While there is much more to say in this regard, it is enough to point out that Judge Beaty's carefully drafted June 9, 2011 Discovery Order clearly addresses the scope of discovery in this initial phase of the litigation, and what is not. *See* Order 8-9 (June 9, 2011). Indeed, in light of Judge Beaty's Discovery Order, DSI's proposals appear to be more a motion for reconsideration of that ruling, scantily dressed up as a "Request to Include

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[3] Plaintiffs note that the same reasoning Duke employs in opposition to DSI's motion also explains why Duke's proposal to consolidate this case with *Carrington* is misguided.

Provisions in Scheduling Order." The Federal Rules, together with Judge Beaty's Order, provide ample protections for the DSI Defendants' *protectable* interests in connection with the discovery going forward on claims not asserted against them. *See, e.g.*, Discovery Order at 7-9. The Court should reject them both.

DSI's third proposed rule would provide 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, Smith, Graves, Dean and Drummond, *even if that party was present or represented at the deposition or had reasonable notice of it*." DSI Request at 2 (emphasis supplied). This one does not suffer for a lack of gall. Among other things, the rule turns Rule 32 inside out. *Cf.* Fed. R. Civ. P. Rule 32(a)(1)(A) ("At a hearing or trial, all or part of a deposition may be used against a party" where "the party was present or represented at the taking of the deposition or had reasonable notice of it.") If adopted, DSI's rule would quickly emerge as the poster child for wasteful litigation. For example, under the rule, deposition testimony authenticating a document could not be used against not only DSI Defendants, but also other Duke Defendants (e.g., Tara Levicy), or the City Defendants. Rather, the rule would require Plaintiffs to re-depose the same deponent to re-authenticate the document by re-asking the same foundational questions just to prepare the document for use "against" most of the defendants in this case. That is an absurd result. And it would be repeated endlessly Here too, Judge Beaty's June 9th Order and the Federal Rules provide ample protections for any legitimate interest the DSI Defendants seek to protect through this new rule. DSI's proposal should be rejected.

DSI's remaining requests do not address any concern not already addressed by Judge Beaty's Order of June 9th, the Federal Rules of Civil Procedure, the Local Rules of this Court, and the Initial Discovery Order. Plaintiffs know of no reason to add another layer of procedural protections to discovery on claims not asserted against DSI, and DSI has not explained why any of them are necessary. Respectfully, the Court should reject them all.

For all the foregoing reasons, all of DSI's Request to Include Provisions in Scheduling Order should be denied.

Dated: September 2, 2011

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 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 Response 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.

/s/ Stefanie A. Sparks

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