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

RYAN McFADYEN, *et al.*,
Plaintiffs,

v.

DUKE UNIVERSITY, *et al.*
Defendants.

1:07 CV 953

PLAINTIFFS' RESPONSE TO DUKE'S MOTION FOR A GENERAL PROTECTIVE ORDER

The matter before the Court is Duke University's Motion for a Protective Order (Doc. #271). Plaintiffs do not oppose a protective order governing protected health information and educational records or any other material that is actually protected by law. But Plaintiffs do oppose Duke's attempt to impose blanket prospective sealing provisions to seven sweeping categories of information and material because Duke does not establish that they are protected by Fed. R. Civ. P. 26, nor does Duke even contend that it will be harmed by the disclosure of such information. In addition, Duke's failure to timely move for a protective order when the need for it arose six months ago constitutes grounds to deny each and every modification Duke requests.

STANDARD OF REVIEW

This Court has explained that, a party requesting a protective order under Fed. R. Civ. P. Rule 26(c) must show good cause. *Brittain v. Stroh Brewery Co.,* 136 F.R.D. 408, 412 (M.D.N.C. 1991). Specifically, to obtain a protective order under Rule 26(c), "the party

resisting discovery must establish that the information sought is covered by the rule and that it will be harmed by disclosure." *Kinectic Concepts, Inc. v. Convatec Inc*, No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5 (M.D.N.C. May 13, 2010) (citing *In re Wilson,* 149 F.3d 249, 252 (4th Cir. 1998)). The party seeking a protective order must make a specific demonstration of facts rather than speculative assertions about the need for a protective order and generalized claims of harm that would be suffered without one. *Id.* at *5 (citing *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n.16 (1981)). "This requirement furthers the goal that the court grant as narrow a protective order as is necessary under the facts." *Kinectic Concepts, Inc.*, No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5. "Umbrella" and "blanket" protective orders should be entered only in rare cases such as those "involving a high volume of material that 'contains confidential business information that … could be used by [a party's] competitors to a gain a business advantage.'" *Id.* at *5 (quoting *Longman v. Food Lion*, 186 F.R.F. 331, 333 (M.D.N.C. 1999)). Further, even where a moving party can establish good cause, any "failure to timely move for a protective order constitutes grounds for denying the same." *Brittain*, 136 F.R.D. at 413.

ARGUMENT

A. THE CONSENT OF THE CARRINGTON PLAINTIFFS IS IRRELEVANT TO WHETHER DUKE IS ENTITLED TO PROTECTIONS TO WHICH THESE PLAINTIFFS OBJECT

Duke opens its Brief (Doc. #272) with the remarkable assertion that that the Court should enter the sweeping protective order Duke proposes because the Court entered a similar order – upon the consent of all parties – in a separate action, *Carrington v. Duke University*, Case No. 1:08-CV-119. An order entered upon the consent of all parties in a separate case has no bearing on whether Duke is entitled to a similar order in this case over Plaintiffs' objections, and Duke points to no authority that suggests otherwise. Moreover, this Court has already rejected Duke's motion to join this case with the *Carrington* action for

purposes of discovery. The Court refused to join the cases because, among other things, this case involves very different claims and factual allegations and joining them would only create unnecessary complexity and inefficiencies. (*See* Oral Order denying the Duke Defendant's Motion to Consolidate by Magistrate Judge Wallace W. Dixon (Aug. 21, 2011) (Doc. #232); *see also* Pls.' Br. Opp. Duke Defs' Mot. to Consolidate (Doc. #238)(detailing the significant differences between this case and *Carrington*, and the inefficiencies that joinder would create.)) In addition to those glaring defects, Duke's leading argument supporting its protective order also fails to address the standards that this Court must apply to any protective order prospectively authorizing the filing of documents under seal.

B. THE SEVEN ADDITIONAL CATEGORIES DUKE SEEKS TO INCLUDE IN THE SCOPE OF THE ORDER ARE VAGUE, OVERBROAD, AND NOT SUBJECT TO LEGAL PROTECTION

Plaintiffs have, from the beginning, sought a protective order to govern all medical records and information protected by HIPAA, educational records and information protected by FERPA, and materials that are subject to a valid claim of privilege. Duke does not disagree. Instead, Duke insists that seven additional categories of material Duke should be included in the scope of any protective order because they "warrant confidential treatment." (Defs.' Mot. 2.) Those categories are: personal financial information, disciplinary information, personnel records, minutes of meetings of the Duke University board of trustees, information related to faculty hiring, retention, and compensation, insurance policies and information related to police investigations. (*Id.*)

Duke offers no authority to show that any of the foregoing are categorically protected by Rule 26(c). Further, Duke should not now be heard regarding the confidential nature of these categories of materials after Duke refused Plaintiffs' request that Duke define the legal and factual basis for their claim of confidentiality and explain the rationale for giving them the same protections accorded to medical records, educational records, and trade secrets

under Rule 26. In fact, as part of Plaintiffs' same request, Duke further refused to provide Plaintiffs with examples of what Duke will consider to be within the scope of each category. As explained below, by failing to provide the same information to this Court, Duke fails to carry its burden of justifying the categorical prospective sealing order covering expansive categories of materials that Duke seeks here.

1. All Information that *Relates to* FERPA-Protected Information or Discipline by a Public Authority

Duke's seeks to protect as "confidential" all "information *related to* discipline by a school, college, athletic team or public authority." Duke misleadingly labels this "Disciplinary Information." (Defs.' Br.7-8.) Educational disciplinary information is protected by FERPA, and Plaintiffs propose to include FERPA information in the protective order. What Duke seeks to add here is anything "relating to" disciplinary information protected by FERPA or "discipline … by a public authority" (whatever that is). (*Id.* at 7.)

For months, Duke would not explain why this category was necessary in light of the parties' agreement to include FERPA-protected information.[1] Now, Duke reveals that this category would protect as "confidential" all "Duke emails and memoranda *relating to*" any "discipline" imposed by an educational institution. (*Id.*) Thus, Duke seeks a blanket protective order for any material or information that "relates" in any way to, for example, to Plaintiffs' suspensions. Of course, Plaintiffs' Breach of Contract Claims all arise out of Duke's wrongful suspension of them, and, as such, "disciplinary information" as Duke defines it in its order would sweep all material relevant to those claims into the protective order's prospective sealing procedures. Duke points to no authority suggesting that Rule 26

[1] Duke also refused to define "public authority" or illustrate it with an example.

covers material that is not FERPA-protected itself but "relating to" some information protected by FERPA. (*Id.*)

While Duke includes protections for information relating to "discipline by … a public authority," Duke does not define what that phrase means, establish that information relating to discipline by a public authority" is protected by Rule 26, or show that Duke "will be harmed by disclosure" of "information related to discipline … by a public authority" in this case. *See Kinectic Concepts,* No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5; *In re Wilson*, 149 F.3d at 252 (4th Cir. 1998)). In fact, Duke does not even assert that it expects to produce any specific "information relating to discipline … by a public authority." In short, Duke makes no argument supporting its motion for a blanket prospective protective order for "information relating to discipline by … a public authority" and thereby abandons the claim. *See Kinectic Concepts,* No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5.

Plaintiffs are satisfied with a protective order that would seal FERPA-protected materials, and respectfully request that the Court exclude from its protective order any protection of information or materials "relating to" FERPA-protected information or "discipline" imposed by a "public authority."

2. Personnel Records and Information Related to Hiring, Retention, and Compensation

Next, Duke asks this Court for a blanket order and prospective sealing requirement for all "information related to faculty hiring, retention, and compensation" and "personnel records." (Defs.' Br. 8-9.) Duke does not define the scope of "personnel records" or "information related to faculty hiring, retention, and compensation" despite Plaintiffs' prior requests for that clarification and Duke's lawyers' agreement to provide it. *See* Letter from

Ekstrand, counsel for Plaintiffs, to Segars, Sun, and Wells, counsel for Defendants, dated March 3, 2012 (attached hereto as Exhibit 1).

Again, Duke fails to carry its burden (or even attempt to do so). Duke makes no argument that Rule 26 protects all "material relating to faculty hiring, retention, and compensation issues" or "personnel records" at a private university. (Defs.' Br. 8.) Duke does not identify what "information related to faculty hiring, retention, and compensation" or what "personnel records" Duke expects to produce in this case (apart from one oblique reference to "performance reviews"). (*Id.*) And even if Duke could make those showings, the effort would still come to nothing because Duke does not contend that it "will be harmed by disclosure" of any information related to hiring, retention, and compensation or personnel records likely to be produced in this case. *Kinectic Concepts,* No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5 (citing *In re Wilson,* 149 F.3d at 252). Thus, Duke fails to establish good cause for a blanket protective order and prospective sealing requirement for "material relating to faculty hiring, retention, and compensation" or "personnel records." (Defs.' Br. 8.)

3. Minutes of Meetings of the Duke University Board of Trustees

Duke fails to show entitlement to a blanket protective order and prospective sealing requirement for all "minutes of meetings of the Duke University board of trustees." (Defs.' Br. 9-10.) Duke makes no argument that Rule 26(c) protects the minutes of meetings among the board of trustees, is protected by Rule 26, or show that Duke "will be harmed by disclosure" of "information related to discipline … by a public authority" in this case. *Kinectic Concepts,* No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5 (M.D.N.C. May 13, 2010); *Wilson*, 149 F.3d 249, 252 (4th Cir. 1998)). In fact, Duke does not even assert that it expects to produce any specific minutes nor does Duke describe the "competitive harm" that could result. In short, Duke does not provide the Court with a specific demonstration

of facts, but rather makes speculative assertions in support of their argument for a blanket prospective protective order for the "minutes of the Duke University board of trustees" and thereby abandons the claim. *See Kinectic Concepts,* No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5.[2]

4. Insurance Policies

Finally, Duke asks this court to impose a blanket protective order and prospective sealing requirement for Duke's "insurance policies." (Defs.' Br. 10.) Given that Duke was compelled by the Federal Rules to produce such "insurance policies" in its initial disclosures to Plaintiffs, the motion for a protective order is six months late. This Court has repeatedly imposed the standard requirement that failure to file a timely motion for a protective order constitutes a waiver of any right to one. *See Brittain*, 136 F.R.D. at 413. Thus, even where a party can establish good cause, its "failure to timely move for a protective order constitutes grounds for denying the same." *Brittain*, 136 F.R.D. at 413. There is no excuse whatsoever for Duke's failure to seek this protective order for six months, particularly in connection with its insurance policies, because Duke knew it would be obliged to produce them in its initial disclosures, and Duke had nearly four years after the Complaint was filed to move for a protective order before the Rules compelled Duke to produce them, but Duke did nothing to seek any protection relating to insurance policies for six months after the Rules compelled Duke to produce them. This Court should not tolerate such dilatory conduct in connection with any discovery requirement, least of all the obligation of every party to make mandatory initial disclosures under Rule 26 at the outset of discovery.

[2] Furthermore, it is important for the Court to note that Duke University's Board of Trustees' meetings have not always been closed meetings. In fact even members of the Board have recently noted the importance of "greater openness and transparency" and that in general, the "more forthright an organization can be with the public and the media, the better off it will be in the long term." Taylor Doherty, *Board changes media policies,* The Chronicle, Feb. 8, 2012 (attached hereto as Exhibit 2).

Of course, even if Duke was not six months late in seeking a protective order for its insurance policies, Duke, again, completely fails to carry its burden under Rule 26(c). And here, again, Duke fails to address any of the elements of proof required for imposing a sealing requirement on Duke's insurance policies. (*See* Defs.' Br. 10.) Duke makes no argument that all its insurance agreements are or contain any specific information that is protected by Rule 26. (*Id.*) Duke does not even identify the insurance policies that it was required to produce with its initial disclosures six months ago. (*Id.*) And even if Duke had identified the information it believes to be subject to Rule 26's protections with any specificity, Duke's request would still fail because Duke makes no claim that it "will be harmed by disclosure" of the insurance agreements the Federal Rules required Duke to disclose. *Kinectic Concepts,* No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5) (citing *In re Wilson*, 149 F.3d at 252. Thus, Duke's motion for a protective order in connection with insurance policies due with its initial disclosures is six-month too late and does not to establish good cause for a blanket protective order and prospective sealing requirement for Duke's insurance policies

5. Information Related to Police Investigations

Next, Duke asks this Court for a blanket order and prospective sealing requirement for all "information related to police investigations." (Defs.' Br. 10-11.) Here, again, Duke does absolutely nothing to carry its burden under Rule 26. Duke makes no argument that any "information related to police investigations" is protected by Rule 26. *Id.* Duke does not identify what "information related to police investigations" that Duke expects to produce in this case. *Id.* Rather, Duke refers broadly to "investigations, practices, and methods used by the Duke police to provide security on campus." *Id.* Finally, Duke makes no claim that it "will be harmed by disclosure" of any "information related to police investigations" in this

case. *Kinectic Concepts,* No. 1:08-CV-918, 2010 U.S. Dist. LEXIS 47007, at *5 (citing *In re Wilson,* 149 F.3d at 252. Thus, Duke fails to establish good cause for a blanket protective order and prospective sealing requirement for "information related to police investigations."

Moreover, there is substantial evidence showing that there is no reason to expect much information reflecting Duke Police "investigations, practices, and methods" will be produced in this case. Duke Police officers have already testified, when the Durham Police Department inquired whether the Duke University Police Department intended to investigate Crystal Mangum's allegations beyond its initial investigation, the Duke University Police Department reported that it would not. Smith Dep. 30:1-14, Dec. 30, 2011 (attached hereto as Exhibit 3). That decision not to investigate Mangum's allegations further was final and ratified by Duke University Police Department's supervising officers. *Id.* at 29-30. Thus, wholly apart from Duke's failure to establish good cause to include this category of information in any blanket order or prospective sealing requirement, the testimony of Duke's own police witness impugns any claim that Duke reasonably expects to produce significant quantities of material reflecting Duke Police "techniques and procedures."

C. DUKE'S BLANKET PROSPECTIVE SEALING PROVISIONS VIOLATE THE PROCEDURAL REQUIREMENTS THE FOURTH CIRCUIT ESTABLISHED TO PROTECT THE PUBLIC'S RIGHT OF ACCESS TO THE COURTS

Independent of all of the foregoing defects in Duke's proposed protective order, Duke's proposed protective order nor anything in its briefing even mentions the procedural safeguards or substantive requirements the Fourth Circuit has clearly established to protect the public's right of access to judicial records and documents in any decision to seal documents filed with the Court. The public right of access to judicial records is protected both by common law and by the First Amendment.

The common law presumes the public's right to inspect and copy judicial records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978). The common law presumption of public access may be overcome only where if competing interests outweigh the public's interest in access. *See Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986).

Where the First Amendment guarantees access, such access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest. *Rushford*, 846 F.2d at 253 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S. Ct. 819 (1984)). Because the First Amendment and the common law provide different levels of protection, it is necessary to determine the source of the public's right of access to a particular document filed with a court before the court can properly weigh any interest that competes with the public's right to access it. *Stone v. University of Maryland Medical Sys. Corp.*, 855 F.2d 178 (4th Cir. 1988).

Clearly, different levels of protection will attach to the various records and documents involved in this case, including those Duke seeks to protect with a prospective sealing order. While the common law presumption in favor of access attaches to all "judicial records and documents," *Nixon*, 435 U.S. at 597, the First Amendment guarantee of access has been extended only to particular judicial records and documents. *See, e.g., Rushford*, 846 F.2d at 253 (documents filed in connection with summary judgment motion in civil case); *In re Washington Post*, 807 F.2d at 390 (documents filed in connection with plea hearings and sentencing hearings in criminal case).

Because this Court cannot order sealed broad categories of information without indicating exactly what they contain, Duke must provide sufficient information about the documents to be sealed to enable the Court to determine, at step one, the source of the right

of access with respect to each document to be sealed. *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 181 (4th Cir. 1988). "Only then can it accurately weigh the competing interests at stake." *Id.*

Those competing interests must be weighed in accord with the procedures mandated by *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984). Under *Knight*, district courts in this Circuit must first give the public notice of a request to seal and a reasonable opportunity to challenge it. *Id.* at 235. While individual notice is not required, the court must docket it "reasonably in advance of deciding the issue." *Id.* The court must consider less drastic alternatives to sealing and, if it decides to seal documents, must "state the reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review." *Id.*

To illustrate this Circuit's insistence upon these requirements, in *Stone*, the Fourth Circuit reversed a district court's seal order because the district court "failed utterly to meet the requirements of *Knight*." *Stone*, 855 F.2d at 181. Among other things, the district court "failed to give notice of the request to seal, to docket it reasonably in advance of deciding the issue, or to provide the public "a reasonable opportunity to object to the entry of the order." *Id.* The Fourth Circuit also remanded the matter to the district court to state its reasons for ordering the sealing of documents filed with the court and to support its reasons with specific findings. *Id.*

D. DUKE FAILS TO JUSTIFY THE PROCEDURAL PROVISIONS PLAINTIFFS OPPOSE

1. Parties should not be authorized to redact information they deem to be "irrelevant." Information need not be relevant to be discoverable, including information protected by the Federal Educational Rights and Privacy Act ("FERPA"). Already, we have

seen Duke redact the names of individuals who are referred to, for example, in reports relating to Plaintiffs' activities. It is clear from the reports the individuals whose names Duke redacted are witnesses to the events described in the report. Duke's unilateral redaction of the names of fact witnesses obstructs Plaintiffs access to that highly relevant information. Such conduct should not be tolerated by this Court, and the Court certainly should not adopt Duke's proposed provision expressly authorizing it.

2. Duke offers no facts to justify its request for 30 days after every deposition transcript is made available to designate portions of it as confidential. Plaintiffs' proposal of 10 days is more than enough for Duke's lawyers to review the transcript of a deposition they personally attended.

3. Duke is incorrect when it contends that Plaintiffs propose an "indefinite 'claw back'" provision. A "claw back" provision applies to privileged material that an opposing party has no right to possess. A "claw back" provision removes the protected materials from the opposing party altogether. Plaintiffs' removal of time limits applies only to the designation of "confidential" material that is, by definition, not protected by privilege. Duke makes no argument opposing Plaintiffs' actual proposal, and thereby concedes it.

4. Plaintiffs do not propose that the parties be required to "scrutinize the history of a non-confidential, publicly-available document in order to determine whether it was disclosed in violation of law." Rather, Plaintiffs' proposal merely clarifies the fact that confidential material does not lose its status by a party-opponent's wrongful public

disclosure of that material. Duke makes no argument opposing Plaintiffs' proposal, and therefore concedes it.

5. Parties should be required to itemize all confidential information that appears on the face of any document that a party claims to contain information subject to any protective order. Duke's assertion that the protected information will always be "obvious" is nonsense, and any party seeking to protect information from disclosure should be required to do more than mark as "Confidential" documents containing the information.

6. Finally, Duke asks this Court to order that special treatment be given to material produced for inspection and copying. Specifically, when documents are produced for inspection and copying, Duke's order would allow the producing party to designate materials as confidential after the requesting party has selected certain documents for copying. The only support Duke offers for this is a "scenario" in which "the usual method of stamping documents 'Confidential' can be impractical," if they "are originals and the requesting party often copies only a portion of those made available." (Defs.' Br. 20.) Moreover, Plaintiffs' counsel's practice, in the extremely unusual circumstance where a party produces originals for inspection and copying, is to scan them at the time of inspection. Therefore, any protected material should be identified as such at the time of production. Furthermore, "stamping" a document "Confidential" is not the only way to designate it as such. For example, any document inventory should identify any pages or portions thereof that are subject to the protective order, in the same way that the Rules require parties to produce a log of material subject to a claim of privilege.

CONCLUSION

Duke completely fails to justify the inclusion of any of the seven sweeping categories of information and material in a blanket protective order with a prospective sealing provision. Duke does not specify what materials and information those categories cover, Duke does not establish that Rule 26 protects them, Duke does not show a likelihood that sufficient volume of documents within those categories will be produced, and Duke does not even assert – much less establish – that Duke will be harmed by disclosure of any of the information or materials within any of those additional categories. Moreover, Duke completely ignores the common law and constitutional rights of access to judicial materials, and does not even distinguish between the treatment of materials subject to the common law protections and those subject to the constitutional protections. Except insofar as Plaintiffs have consented to specific protections for materials protected by privilege, educational records protected by FERPA, and personal health information protected by HIPPAA, Duke's proposed protective order should be rejected.[3]

[3] Plaintiffs will submit a clean version of their proposed protective order to the Court for their consideration and convenience.

Dated: April 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

On Friday, April 27, 2012, Plaintiffs' Response to Duke's Motion for a General Protective Order as filed with the Clerk of Court via the Court's CM/ECF system, which will automatically serve the filing upon all parties to this action by delivering a notice of the filing and a link to download it to the email address that the parties or their counsel have identified for delivery of service in the Court's CM/ECF system.

Respectfully submitted,

/s/ Robert C. Ekstrand
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