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,	)	**REPLY IN SUPPORT OF MOTION FOR ENTRY OF PROTECTIVE ORDER ON CONFIDENTIALITY AND PROSPECTIVE SEALING ORDER BY DUKE UNIVERSITY**
	)	
v.	)	
	)	
DUKE UNIVERSITY, et al.,	)	
	)	
Defendants.	)	

Duke showed in its moving brief that entry of the protective order it proposed ("Duke Order") is supported by the precedents of this Court and other courts. Plaintiffs rely on precedent that does not apply to blanket protective orders. Such orders are routinely granted upon a generalized showing of good cause, and Duke has made that showing. Entry of the Duke Order is warranted in this case.

ARGUMENT

I. DUKE'S CATEGORIES OF "CONFIDENTIAL INFORMATION" ARE PROTECTIBLE UNDER RULE 26(c).

Plaintiffs challenge Duke's proposed categories of "Confidential Information" with the same overarching arguments: that Rule 26(c) does not protect the information at issue and that Duke has neither identified specific documents in each category nor demonstrated prejudice from the release of those documents. *See* Pls.' Br. at 3-9, 14 [DE 278]. Both of these arguments fail.[1]

[1] Plaintiffs list "personal financial information" among the categories they challenge, but they fail to explain their objection to it. *See* Pls.' Br. at 3. Plaintiffs do, however, cite

A. Plaintiffs' Reading Of Rule 26(c) Is Unduly Narrow.

Plaintiffs contend that a protective order entered under Rule 26(c) is limited to information required by statute to be confidential (*e.g.*, health and educational records) and information expressly mentioned in Rule 26(c), such as trade secrets. *See* Pls.' Br. at 3-4. But Rule 26(c) is not so limited. To the contrary, "a court may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of the rule." 8A Charles Alan Wright, *et al.*, *Fed. Prac. & Proc.* § 2036; *see Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Moreover, although Plaintiffs complain that Duke "offers no authority" that its categories are protectable under Rule 26(c) (*see* Pls.' Br. at 3), Plaintiffs offer no rebuttal to the ***fourteen*** cases cited by Duke that show just that. *See* Duke Br. at 6-11 [DE 272].

B. Plaintiffs Ignore This Court's Relevant Precedent.

Under this Court's precedent, blanket protective orders are to be approved upon a "generalized showing of good cause," which is met where the allegations show that discovery will involve confidential information and the proposed order requires that material be designated confidential in good faith, allowing for opposing parties to contest the designation. *See Hanesbrands Inc. v. Van Stevenson*, No. 1:09-cv-490, 2010 WL 1286669, at *3 (M.D.N.C. Mar. 29, 2010); *Haas v. Golding Transp., Inc.*, 1:09-cv-1016, 2010 WL 1257990, at *5-6 (M.D.N.C. Mar. 26, 2010); *Longman v. Food Lion, Inc.*, 186

Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 411 (M.D.N.C. 1991), where the court held that such information (*i.e.*, tax returns) would be treated as confidential.

F.R.D. 331, 333 (M.D.N.C. 1999); *Parkway Gallery Furniture, Inc. v. Kittinger / Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 267-68 (M.D.N.C. 1988). This standard is met here. *See* Duke Br. at 3-11.

As Plaintiffs tell it, Duke's proposal should be rejected because Duke did not identify or produce the specific documents in dispute and did not explain the harm that would result from their disclosure. *See* Pls.' Br. at 4. To be sure, courts have held that the information sought to be protected under the Duke Order is categorically sensitive, that its public disclosure would be harmful and thus that it is subject to protection under Rule 26(c). *See* Duke Br. at 6-11 (citing cases relating to proposed categories).

Moreover, this Court does not require specific document-by-document identification or demonstrations of harm to enter blanket protective orders. In arguing otherwise, Plaintiffs cite cases that do not apply. In *Kinetic Concepts, Inc. v. Convatec Inc.*, and *In re Wilson*, the courts required a showing of harm where the parties disputed whether specific material should be produced ***at all*** to a party's in-house personnel. *See In re Wilson*, 149 F.3d 249, 252 (4th Cir. 1998) (requiring that party "resisting discovery must establish . . . that it will be harmed by disclosure"); *Kinetic Concepts*, No. 1:08-cv-918, 2010 WL 1947605, at *1, 3-4 (M.D.N.C. May 13, 2010) (requiring "specific demonstration of facts" where party is "resisting discovery"). Similarly, in *Brittain*, the court ***approved*** a protective order that prohibited disclosure of specific material to a party's in-house personnel. *See* 136 F.R.D. at 411, 417. Plaintiffs' primary argument is based on cases that address the discoverability of information in the first instance, not (as

here) whether categories of information that will be exchanged between the parties should be protected against public disclosure.

Moreover, Plaintiffs demand (without citation) that the Duke Order be denied because Duke did not provide them with "examples" of confidential material—notably, before any protective order was entered and before Plaintiffs had served comprehensive discovery requests.[2] *See* Pls.' Br. at 3-4. Under Plaintiffs' proposal, Duke would have to (i) predict the specific discovery requests Plaintiffs will serve; (ii) search for, review and identify the specific confidential documents that would be responsive to those hypothetical requests; (iii) allow Plaintiffs to review those confidential documents, in the ***absence*** of a protective order; and (iv) demonstrate in motion practice the harm arising from public disclosure of those documents (which under their scheme, Plaintiffs would already have, with no assurance of confidentiality). Plaintiffs' approach is unreasonable and unsupported, and it is properly rejected.

C. Plaintiffs' Specific Challenges To Duke's Categories Also Fail.

Plaintiffs' specific challenges to two of Duke's proposed categories also fail. First, they complain that information "relating to discipline" would improperly "sweep all material relevant to [Plaintiffs'] claims into the protective order's prospective sealing provisions." Pls.' Br. at 4. The Duke Order preserves the confidentiality of information exchanged between the parties but, consistent with this Court's precedent, requires that a party independently demonstrate good cause before filing non-discovery-related material

[2] Plaintiffs did not serve comprehensive document requests until April 10, 2012.

under seal. *See infra.* p. 7. Plaintiffs also object that information related to discipline by a "public authority" should not be confidential, but that phrase is not intended to cover public records. *See* Pls.' Br. at 5. Rather, for example, internal discussions among Duke student affairs personnel regarding a student's arrest or prosecution also constitute "information relating to discipline by a public authority," would not be publicly available, and thus should remain confidential. *See* Duke Br. at 7-8 (discussing basis for separate "disciplinary information" category).

Second, Plaintiffs argue that information related to Duke "police investigations" should not be confidential because Duke did not investigate Crystal Mangum's allegations, but Plaintiffs' interpretation of this category is unduly narrow. *See* Pls.' Br. at 9. Other sensitive Duke police information unrelated to those allegations may be produced, including that reflecting security procedures related to on-campus protests and lacrosse team practices and games, and that material should remain confidential. *See* Duke Br. at 10-11.[3]

II. PLAINTIFFS' TIMELINESS ARGUMENT FAILS.

Plaintiffs repeatedly allege that Duke did not timely move for a protective order and that the Duke Order, including its provisions regarding insurance policies, thus should not be accepted. Pls.' Br. at 7-8. This argument fails for three reasons.

[3] Plaintiffs challenge the confidentiality of Board of Trustees meeting minutes based on an article from Duke's student newspaper. *See* Pls.' Br. at 7 n.2. But the very premise of that article is that substantive meetings of the Board have been confidential for many years. Those minutes should be included in the protective order. *See* Duke Br. at 9-10.

First, Plaintiffs acknowledge that some version of a protective order is necessary to protect their own educational and health information. *See* Pls.' Br. at 1. But unlike Duke, Plaintiffs have never moved for a protective order. Plantiffs can hardly claim that the Court should reject Duke's position because of an alleged "delay" in filing a motion but accept the position of Plaintiffs, who have never filed one.

Second, any alleged "delay" was not solely caused by Duke. Duke first proposed a protective order to Plaintiffs on October 7, 2011. *See* Email from Wells to Ekstrand (Ex. A). Plaintiffs did not provide Duke with a counter-proposed draft until November 30—nearly two months later. *See* Email from Ekstrand to Ellis (Ex. B). Duke promptly responded with a revised draft on December 1. *See* Email from Wells to Ekstrand (Ex. C) (rejecting Plaintiffs' proposed "bridge agreement"). Because Plaintiffs provided no drafts in response, Duke again prompted them by sending a copy of the *Carrington* protective order on February 10, 2012. *See* Email from Sun to Ekstrand (Ex. D). Plaintiffs did not provide a mark-up until March 3—nearly a month later, and over three months after Plaintiffs had sent their prior draft. *See* Pls.' Br., Ex. 1. And on March 16, Duke responded with its final proposal, to which Plaintiffs did not respond. *See* Sun Email to Ekstrand (Ex. E). Duke has been diligent in negotiating with Plaintiffs.[4]

[4] Plaintiffs' delay is evidenced in other ways. Although the Court ordered Plaintiffs to file their opposition by April 26, 2012 [*see* DE 277], they did not do so until April 27, with no explanation for their delay and without moving for leave to file a brief out of time. And although Plaintiffs committed to "submit a clean version of their proposed protective order to the Court," Duke is not aware that any such version has been submitted. *See* Pls.' Br. at 14 n.3.

Third, Plaintiffs repeatedly cite *Brittain v. Stroh Brewery Co*. There (as here), plaintiffs opposed defendant's motion for protective order by arguing that it was untimely, but the court ***rejected*** plaintiffs' argument. *See Brittain*, 136 F.R.D. at 412-14 (holding that where party attempts to negotiate protective order in good faith, a motion to enter that order is timely if made within time for opposing motion to compel discovery at issue). Here, Duke in good faith initiated and sustained the parties' negotiations, and Plaintiffs never moved to compel Duke's responses because they had no basis to do so.

III. PLAINTIFFS IGNORE DUKE'S PROSPECTIVE SEALING PROVISIONS.

Plaintiffs argue that Duke ignored the Court's precedent regarding the sealing of judicial records. Pls.' Br. at 9-11. Under this precedent, parties may not file non-discovery-related material under seal without first demonstrating the need for confidential protection and receiving the Court's permission. *See Haas*, 2010 WL 1257990, at *6-8.

Yet that is exactly what is required by paragraph 21(a) of the Duke Order, which this Court approved in *Carrington*. *See* Duke Order ¶ 21(a) (Ex. A to Duke Br.); Duke Br. Ex. C. Plaintiffs fail to mention that provision in their brief—a provision that is tailored to meet the Court's precedent. Moreover, in their version, Plaintiffs ***strike this provision entirely***, rendering their own proposal unacceptable under the very cases they cite. *See* Duke Br. at 12.

IV. DUKE'S PROPOSED PROCEDURES ARE APPROPRIATE.

A. Parties Should Be Allowed To Redact Irrelevant Confidential Information.

Plaintiffs argue that Duke should not be allowed to redact irrelevant confidential information, even FERPA-protected information relating to other students. *See* Pls.' Br. at 11-12. Duke's proposal is supported by good cause. For example, in response to Plaintiffs' recent discovery requests, Duke identified charts summarizing disciplinary action taken against dozens of students, where both Plaintiffs and the other students are identified. Student disciplinary information is at the heart of FERPA's protections, and Plaintiffs are not entitled to know the names of other students who have been disciplined by Duke. *See Ragusa v. Malverne Union Free School Dist.*, 549 F. Supp. 2d 288, 293 (E.D.N.Y. 2008) (allowing redacted versions of FERPA-protected records).

B. Duke's Timing Provisions Are Reasonable.

Plaintiffs complain that "Duke offers no facts" showing that counsel should have 30 days after a deposition transcript is available to make confidentiality designations. *See* Pls.' Br. at 12. For their part, Plaintiffs claim that their 10-day proposal means, in effect, that designations would be due 18-20 days after the deposition itself, since it allegedly takes 8-10 days for the transcript to become available. Yet the deposition of Breck Archer took place on April 19, 2012, and Plaintiffs still have failed to provide their promised designations—25 days later. *See* Letter from Smith to Segars dated May 3, 2012 (Ex. F). Plaintiffs' 10-day proposal—itself unsupported by any "facts"—should not be adopted when Plaintiffs themselves have not provided such designations within that time period. Further, because Plaintiffs have not explained why a party should be given

an unlimited time to designate its document productions as confidential, paragraph 15 of the Duke Order also should be adopted. *See* Pls.' Br. at 12.[5]

C. Plaintiffs' Proposal Regarding Alleged "Unlawful" Disclosure Of Confidential Documents Is Unreasonable.

To support their proposal that documents should remain confidential where they allegedly were disclosed "through a violation of law," Plaintiffs argue that "confidential matter does not lose its status by a party-opponent's wrongful public disclosure of that material." *See* Pls.' Br. at 12-13. But that scenario already is covered by Duke's proposal. Documents disclosed in violation of the protective order—which binds the parties—will remain confidential. *See* Duke Order ¶ 4. Moreover, under the Duke Order, any party may designate a document confidential, even if that party did not produce the document. *See id.* at ¶ 6.

D. Parties Should Not Be Forced To Itemize All Confidential Information.

Plaintiffs cite no authority to support their demand that parties be "required to itemize all confidential information that appears on the face of any document." *See* Pls.' Br. at 13. Further, the purpose of a privilege log is to allow parties to evaluate privilege claims regarding documents they, by definition, are not allowed to see. That concern is not present with respect to documents marked confidential, which ***are*** exchanged

[5] Plaintiffs also argue that the Court's entry of a protective order in *Carrington* that is identical to the Duke Order is "irrelevant." Pls. Br. at 2-3. But there is no reason to impose different time periods for confidentiality designations when many depositions are cross-noticed and attended by counsel in both cases, nor any reason to establish different definitions of "Confidential Information" such that a document produced as confidential in *Carrington* must be deemed not confidential here.

between the parties. Moreover, if Plaintiffs do not believe a document should be marked confidential, they are entitled to challenge that designation. *See* Duke Order ¶ 17.

E. Plaintiffs Do Not Support Their Proposal Regarding Documents Produced For Inspection.

Where a party elects to produce documents for inspection (often when there is a large volume of material), Plaintiffs believe that the producing party should stamp every document "confidential," whether the inspecting party copies it or not. *See* Pls.' Br. at 13. There is no reason why a party should be forced to stamp its own (often original) documents "confidential" when no copies actually leave the party's possession.[6]

CONCLUSION

For the foregoing reasons, and the reasons stated in its opening brief, Duke respectfully requests that the Court grant its Motion for Entry of Protective Order on Confidentiality and Prospective Sealing Order and enter a protective order in the form attached as Exhibit A to Duke's Brief in Support.

This the 14th day of May, 2012.

/s/ Paul K. Sun, Jr.
Richard W. Ellis
N.C. State Bar No. 1335
Email: dick.ellis@elliswinters.com
Paul K. Sun Jr.
N.C. State Bar No. 16847
Email: paul.sun@elliswinters.com

[6] In their brief, Plaintiffs do not contest Duke's proposal (i) prohibiting release of confidential information to non-parties (Duke Order ¶ 5); (ii) requiring that individuals sign a confidentiality agreement (*id.* at ¶ 1); (iii) requiring that modifications be made only upon court order (*id.* at ¶ 26); and (iv) allowing parties to preserve the confidentiality of the identities of consulting experts (*id.* at ¶ 13(e)).

Jeremy M. Falcone
N.C. State Bar No. 36182
Email: jeremy.falcone@elliswinters.com
Thomas H. Segars
N.C. State Bar No. 29433
Email: tom.segars@elliswinters.com
James M. Weiss
N.C. State Bar No. 42386
Email: jamie.weiss@elliswinters.com
Ellis & Winters LLP
1100 Crescent Green, Suite 200
Cary, North Carolina 27518
Telephone: (919) 865-7000
Facsimile: (919) 865-7010

Dixie T. Wells
N.C. State Bar No. 26816
Email: dixie.wells@elliswinters.com
Ellis & Winters LLP
333 N. Greene St., Suite 200
Greensboro, NC 27401
Telephone: (336) 217-4197
Facsimile: (336) 217-4198

Counsel for Duke University

CERTIFICATE OF SERVICE

It is hereby certified that on May 14, 2012, I electronically filed the foregoing **Reply in Support of Motion for Entry of Protective Order on Confidentiality and Prospective Sealing Order** 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 the 14th day of May, 2012.

/s/ Paul K. Sun, Jr.
Paul K. Sun, Jr.
N.C. State Bar No. 16847
Email: paul.sun@elliswinters.com
Ellis & Winters LLP
1100 Crescent Green, Suite 200
Cary, North Carolina 27518
Telephone: (919) 865-7000
Facsimile: (919) 865-7010

Counsel for Duke University