

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

RYAN McFADYEN, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action Number
)	1:07-cv-00953
DUKE UNIVERSITY, et al.,)	
)	
Defendants.)	
_____)	

**DEFENDANT’S BRIEF IN RESPONSE TO PLAINTIFFS’ REQUEST
TO MODIFY THE PROTECTIVE ORDER**

Defendant Duke University, through counsel, submits this Brief in Response to Plaintiffs’ Request to Modify the Protective Order in place in this action. Plaintiffs have not presented any reasoned basis to modify the Protective Order and, therefore, Duke respectfully requests that the Court deny Plaintiffs’ Request.

I. PROCEDURAL POSTURE.

Duke established the good cause required for entry of the Protective Order. (*See* Brief in Support of Motion for Entry of Protective Order on Confidentiality and Prospective Sealing Order by Duke University [DE 272]; Reply in Support of Motion for Entry of Protective Order on Confidentiality and Prospective Sealing Order by Duke University [DE 279]). The Court’s independent review confirmed

that Duke's proposed Protective Order meets the requirements this Court has set for protective orders. Indeed, the Court has entered essentially the same Protective Order in two other pending cases, including a case in which Plaintiffs' counsel are involved and agreed to entry of the protective order. *See* Order, at 2, *Rouse v. Duke University*, No. 1:11-cv-548 (M.D.N.C. July 23, 2012) [DE 63]; Consent Protective Order on Confidentiality and Prospective Sealing Order, *Carrington v. Duke Univ.*, No. 1:08-cv-119 (M.D.N.C. January 19, 2012) [DE 236]).

Plaintiffs have now requested the Court to modify three paragraphs of the Protective Order. As discussed below, Plaintiffs have not presented any reasoned basis to justify any modification of the Protective Order.

II. PLAINTIFFS HAVE NOT PRESENTED ANY BASIS TO MODIFY THE PROTECTIVE ORDER.

A. The Protective Order Properly Allows Redaction Of Irrelevant Confidential Information from Discovery Materials.

Paragraph 8 of the Protective Order provides that a party may redact irrelevant confidential information from documents it produces in discovery, so long as it serves a log describing the nature of redacted information upon request of counsel. (*See* Protective Order [DE 284], ¶ 8). Where portions of responsive documents contain irrelevant confidential information, courts allow the producing party to redact the irrelevant information even where a protective order is in place.

See, e.g., Delanda v. Cnty. of Fresno, No. 1:10-cv-1857, 2012 WL 201727, at *3-4 (E.D. Cal. Jan. 23, 2012) (finding that “the privacy interests of . . . third parties would require production subject to a protective order as well as redaction of the records that would serve to protect the identity of any third party”); *In re Heraeus Kulzer GmbH*, No. 09-MC-17, 2011 WL 3330307, at *3 (E.D. Pa. Aug. 2, 2011) (allowing redaction of irrelevant information in commercial dispute); *Spano v. Boeing Co.*, No. 3:06-cv-743, 2008 WL 1774460, at *2-3 (S.D. Ill. Apr. 16, 2008) (allowing redaction of information related to employee benefit plans not at issue).

Duke believes a provision that allows redaction of non-relevant confidential information is specifically warranted in this case. For example, if responsive documents contain confidential information that is protected by the Family Educational Rights and Privacy Act (FERPA) concerning students who are not involved in this case, federal law requires Duke to redact that information. (*See Defendant’s Brief Regarding FERPA’s Impact on Production of Duke’s Educational Records, Rouse v. Duke University*, No. 1:11-cv-548 [DE 65]).

Plaintiffs request the Court to strike paragraph 8 in the Protective Order, because the Protective Order “provides strict protections and procedural safeguards to preserve the confidentiality of information,” and because “relevancy is for trial.” (Request to Modify, at 1). Neither basis has merit. First, the

Protective Order does provide appropriate procedural and substantive safeguards for confidential information, but there are additional reasons, as discussed above, that support a specific provision allowing redaction of irrelevant confidential information. Second, Plaintiffs fundamentally misunderstand Rule 26 to the extent they contend that relevancy is solely a matter for trial. “Parties may obtain discovery regarding any nonprivileged matter *that is relevant* to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1) (emphasis added); *see Spano*, 2008 WL 174460, at *2 (rejecting argument that redaction is improper method of challenging relevance and following courts that “found redaction appropriate where the information redacted was not relevant to the issues in the case”). Duke respectfully requests that the Court reject Plaintiffs’ request to strike paragraph 8 of the Protective Order.

B. The Protective Order’s Provision For Challenging A Confidentiality Designation Is Warranted.

Paragraph 17 of the Protective Order provides that the parties may object to the confidential designation of Discovery Material. (Protective Order [DE 284], ¶ 17). If a party objects to a designation, the Protective Order further provides for a procedure by which the parties are to “meet and confer” to discuss such designations and, if agreement cannot be reached, the complaining party may file a

motion with the Court challenging the designation. (*Id.*). Protective orders routinely employ similar procedures for objecting to confidentiality designations. *See, e.g., Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 332 (M.D.N.C. 1999); *Commercial Defeasance, LLC v. Stranger*, 3:06-CV-422, 2008 WL 822491, at *3 (W.D.N.C. Mar. 26, 2008).

Plaintiffs ask the Court to strike paragraph 17 on the ground it “will cause the parties to unnecessarily litigate the confidentiality of documents that may never be filed.” (Request to Modify, at 1). Forecasting that the parties will engage in “unnecessar[y]” litigation is no basis to strike paragraph 17. Presumably Plaintiffs are not suggesting that they would engage in “unnecessar[y]” litigation over Duke’s confidentiality designations, and they have no basis to contend that Duke would engage in unnecessary litigation. Thus, the forecasted concern has no basis.

As Plaintiffs note, the propriety of a confidentiality designation will be considered by the Court if a party seeks to file designated “Confidential Information.” (Protective Order [DE 284], ¶ 21). The Court, however, applies a more comprehensive test at that time, considering, among other things, whether there are less drastic alternatives to sealing. *See, e.g., Va. Dep’t of State Police v. Washington Post*, 386 F.3d 567, 576 (4th Cir. 2004). Furthermore, requiring the

parties to wait until filing a document to contest a confidentiality designation will result in delay and undue burden on the Court. The Court may face a large number of challenges to designations in connection with briefing on merits motions that complicates the disposition of such merits motions. Plaintiffs have presented no reason to justify modification of a provision commonly included in protective orders.

C. The Sealing Provisions In The Protective Order Comply With This Court's Requirements.

Paragraph 21 of the Protective Order sets forth the procedure for filing “Confidential Information” with the Court. Consistent with this Court’s requirements, a party may file “Confidential Information” under seal in connection with dispositive and substantive motions only with the Court’s approval (or provisionally if the Court has not yet ruled on a motion seeking that approval). *See Haas v. Golding Transport Inc.*, No. 1:09CV1016, 2010 WL 1257990, *8-9 (M.D.N.C. Mar. 26, 2010). For discovery motions, a party may file “Confidential Information” under seal without first obtaining court approval. *See id.* at *9 n.8.

Plaintiffs ask the Court to “[m]odify paragraph number 21 to conform to the Court’s procedures for sealing.” (Request to Modify, at 2). To the contrary, the Protective Order’s procedures conform to this Court’s procedures for sealing, and

Plaintiffs' argument for a different approach is unwarranted. Plaintiffs imply that the Protective Order always places the burden to justify filing under seal on the party that seeks to file the document. (*See* Request to Modify, at 2 (arguing that "the Order bars the parties from filing under seal any document or information that the opposing party designated 'confidential' unless the filing party first obtains an Order from the Court expressly permitting the material to be filed under seal")). The Protective Order, however, places the burden to justify filing under seal on the party that designated the "Confidential Information":

In the event that the person seeking to file, reference or quote Confidential Information is not the person who designated the material as Confidential Information, the person seeking to file, reference or quote such material shall give the designating person ten (10) days advance notice that it intends to do so. The designating person then may file a motion with the Court seeking an order that such material must be filed under seal as provided in this sub-paragraph.

(Protective Order, ¶ 21(a)). This provision meets this Court's requirements. *See, e.g., Va. Dep't of State Police*, 386 F.3d at 576 (noting that on motion to seal, court "must determine the source of the right of access with respect to each document"); *United States v. Moussaoui*, 65 F. App'x 881, 889 (4th Cir. 2003); *Colony Ins. Co. v. Peterson*, No. 1:10-cv-581, 2012 WL 1047089, at *2 (M.D.N.C. Mar. 28, 2012). Plaintiffs' request to modify Paragraph 21 is properly rejected.

CONCLUSION

For the foregoing reasons, Duke respectfully requests that the Court deny Plaintiffs' Request to Modify the Protective Order.

This the 27th day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on 27 August 2012, I electronically filed the foregoing **Brief in Response to Plaintiffs' Request to Modify the Protective 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 27th day of August, 2012.

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