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

RYAN McFADYEN, *et al.,* Plaintiffs,	)	
v.	)	1:07-cv-953-JAB-JEP
DUKE UNIVERSITY, *et al.,* Defendants.	)	

MOTION FOR A PROTECTIVE ORDER RE: DUKE'S SUBPOENAS TO TAKE THE DEPOSITION OF PLAINTIFFS' LITIGATION COUNSEL

Plaintiffs Ryan McFadyen, Matthew Wilson, and Breck Archer, respectfully move for a protective order quashing Duke University's subpoena to take the deposition of Plaintiffs' trial counsel, Robert Ekstrand and Stefanie Smith ("Ekstrand" and "Smith"), in the related case of *Carrington, et al. v. Duke University, et al.*, No. 1:08-cv-119-JAB-JEP (M.D.N.C. 2007) (the "*Carrington* Litigation" or Carrington). Further, Plaintiffs ask this Court to Order Duke to

cease all other efforts to circumvent the attorney-client and work product privileges in both this action and in *Carrington*.

FACTS

Robert C. Ekstrand and Stefanie A. Smith (formerly Stefanie A. Sparks) have been and continue to be the only counsel of record for the Plaintiffs in this action (hereinafter, "the *McFadyen* Litigation" or McFadyen). Early on in the proceedings, this Court designated the *McFadyen* litigation and the Carrington litigation as related cases. Since September, 2011, discovery in *McFadyen* and *Carrington* has proceeded solely upon the claims in those cases that do not involve the City of Durham Defendants. [*McFadyen* Doc. # 218, *Carrington* Doc. #192.] All claims against the City of Durham Defendants are stayed pending the resolution of the City Defendants' appeal to the Fourth Circuit of this Court's denial of their motions to dismiss. [*McFadyen* Doc. # 218, *Carrington* Doc. #192.]

Ekstrand & Ekstrand LLP (the "Firm") represented the

McFadyen Plaintiffs and nearly all of the *Carrington* Plaintiffs in connection with the police investigation that gave rise to the claims asserted in *McFadyen* and *Carrington*. The Firm's common representation of those individuals was governed by a Common Representation Agreement, which protects those individuals' communications with the Firm. The *McFadyen* Plaintiffs are all signatories to the Common Representation Agreement, they decline to waive their rights under the agreement, the protections of the attorney-client privilege, or the protections of the work product privilege. The Firm employed Ekstrand and Smith throughout the Firm's representation of the *McFadyen* Plaintiffs and the *Carrington* Plaintiffs, the Firm has continued to employ them since that time, including the Firm's initiation of the *McFadyen* Litigation on December 18, 2007. The work product privileges, both fact and opinion work product, attaches to the work, opinions, mental impressions and thought processes of Ekstrand and Smith throughout that time period. No holder of protections afforded by

the work product privilege, including Ekstrand, Smith, and the Firm, have agreed to waive the protections of the work product privilege.

On August 17, 2012, nearly five years after the *McFadyen* Plaintiffs filed their Complaint, Duke University issued a subpoena commanding Smith to appear and testify at a deposition in the *Carrington* Litigation on September 4, 2012. (Exhibit 1.) Written objections to the Subpoena directed to Smith were served on Duke on August 31, 2012. (Exhibit 2.)

On February 14, 2012, Duke issued similar subpoenas to Ekstrand and the Firm, one of which commanded Ekstrand to appear and testify at a deposition at the office of Duke's lawyers in Cary, North Carolina on March 20, 2012. (Exhibit 3.) Ekstrand was not available to be deposed on March 20, 2012, and, regardless, substantially more time than Duke's subpoenas allotted was required for Ekstrand and the Firm to ascertain whether, apart from themselves, the holders of rights, protections, and privileges

implicated by Duke's subpoenas wished to waive them or assert them in response to Duke's subpoenas. Written objections to Duke's subpoena to take Ekstrand's deposition were timely served on Duke. (Exhibit 4.)[1]

Duke withdrew the subpoena for the deposition of Ekstrand, and never reissued an amended subpoena to take Ekstrand's deposition. Rather, Duke's counsel recently asserted that Duke intends to take Ekstrand's deposition in conjunction with the deposition of Smith on September 4, 2012, without serving a subpoena identifying the time or place of the deposition.

In response to Duke's declared intention to depose him, Ekstrand made multiple requests for a copy of a subpoena to take his deposition on September 4, 2012. Duke refused to produce one.

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[1] Duke also served several subpoenas for production of documents on the Firm, Ekstrand, and Smith. (Exhibit Nos. 5, 6, and 7.) Written objections to Duke's subpoenas for production of documents were timely served by the Firm, Robert Ekstrand, and Stefanie Smith. (Exhibit Nos. 2 and 4.) The written objections were parallel to those asserted in response to Duke's subpoena for the deposition of Robert Ekstrand and Duke's subpoena for the deposition of Stefanie Smith.

Instead, Duke's counsel could only produce a Notice of Deposition of Ekstrand for September 4, 2012, in the *Carrington* action. However, Ekstrand is not a party to either the *Carrington* or the *McFadyen* action, and, as such, Duke must issue a subpoena to compel his appearance and testimony at a deposition. Duke incorrectly assumes that its withdrawn subpoena to take Ekstrand's deposition on March 20, 2012, is sufficient to compel his testimony on September 4, 2012, at a different location.

Of course, any personal knowledge that Ekstrand and Smith may have that may be relevant to the claims going forward in *Carrington* are protected by the work product and attorney-client privileges. Any such knowledge is also protected by the Common Representation Agreement and the common-interest doctrine. After conducting an inquiry of the holders of privileges implicated by Duke's subpoenas or their representatives, no holder of the rights, protections, or privileges arising from those sources has waived any right, protection, or privilege. To the contrary, they have all directed

Ekstrand, Smith, and the Firm to assert their rights, protections, and privileges in connection with all of the subpoenas Duke issued to Ekstrand, Smith, and the Firm.

Finally, Ekstrand and Smith arranged a conference with Duke's counsel to resolve the issues raised by Duke's subpoenas issued in February. During the conference, Ekstrand asked Duke's lawyers what non-privileged matter Duke wished to inquire about at his deposition,[2] and Duke's counsel refused to identify any subject or subjects that Duke would inquire about in any deposition of Ekstrand or Smith. The only response any of Duke's lawyers gave to Ekstrand's question was, "we don't have to tell you that." After Ekstrand and Smith pressed that inquiry further, it became clear that Duke's lawyers had no specific answer to that rudimentary question. In any event, Duke's lawyers refusal to identify the subject(s) about which Duke wished to examine the *McFadyen* Plaintiffs' trial counsel foreclosed any possibility for resolving this matter without involving

[2] At the time, Duke had not issued its subpoena for the deposition of Smith, and would not do so for nearly six months.

the Court.

Therefore, counsel for the *McFadyen* Plaintiffs have sought an order in the *Carrington* litigation quashing Duke's subpoenas, and the McFadyen Plaintiffs seek similar relief by way of this motion for a protective order in this litigation. As explained below, Ekstrand and Smith are authorized to make this motion prior to the time for the depositions, and the motion is therefore timely, pursuant to the rules adopted by this Court in connection with similar efforts to depose a party-opponent's trial counsel. *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83 (M.D.N.C. 1987); *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001).

ANALYSIS

The Federal Rules of Civil Procedure provide near absolute protection of an attorney's mental impressions or opinion work product. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975). Among other

things, Rule 45 provides that a court must quash any subpoena compelling disclosure of attorney-client communications, work product, or any "other privileged matter." Fed. R. Civ. P. Rule 45(c)(3)(A)(iii). Rule 26 of the Federal Rules of Civil Procedure similarly requires the Court to issue protective orders when necessary to prevent the disclosure of privileged matters, work product, and any other matter that would reveal the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Specifically, Rule 26(b)(1) prohibits discovery of privileged matters and Rule 26(c)(3)(A) prohibits discovery of all trial preparation materials. Further, Rule 26(c)(3)(B) requires that, if a litigant has shown that it has a substantial need for certain trial preparation material and cannot obtain their substantial equivalent by other means, the court may not permit but instead "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the

litigation.")

Thus, pursuant to Rule 45 of the Federal Rules of Civil Procedure, the Court must quash Duke's subpoenas purporting to compel the deposition testimony of Ekstrand and Smith. And pursuant to Rule 26 of the Federal Rules of Civil Procedure, the Court must provide similar relief in the form of a protective order providing that that the discovery sought by Duke's subpoenas may not be had, and "protect[ing] against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.")

Plaintiffs are entitled to the entire scope of the protections contemplated by Rule 26 and Rule 45 because Duke's subpoena(s) unequivocally seek disclosure of matters given the highest degree of protection under the Rules. Specifically, Duke's subpoenas purport to compel Ekstrand and Smith -- the only attorneys of record in the *McFadyen* litigation -- to appear and give testimony regarding the *Carrington* Plaintiffs' claims that overlap in whole or in part with the

claims Ekstrand and Smith have asserted against Duke on behalf of the *McFadyen* Plaintiffs, as well as an additional claim that Ekstrand and Smith may still assert against Duke going forward.

While the Rules do not expressly prohibit discovery from any particular source *per se,* the Rules do expressly prohibit discovery of information that is uniquely in the possession of a party's counsel. Thus, discovery from counsel is exceptionally rare, and if permitted, is narrowly tailored to avoid disclosure of an attorney's work product, and only under circumstances where the party seeking disclosures can prove that (1) no other means exist to obtain the information; and that (2) the information sought is (a) relevant, (b) nonprivileged, and (c) crucial to the preparation of the case. *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84-85 (M.D.N.C. 1987); *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628-629 (6th Cir. 2002); *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

As such, Rules 26 and 45 of the Federal Rules of Cvil Procedure explicitly require trial courts to issue orders necessary to prevent the disclosure of privileged information, particularly the opinions and work product of counsel. F. R. Civ. P. Rule 45(c)(3)(A)(iii) (requiring district courts to quash any subpoena that "requires the disclosure of privileged or other protected matter"); *id.* Rule 26(b)(1) (prohibiting discovery of privileged matters); *id.* Rule 26(c)(3)(A) (prohibiting discovery of trial preparation materials); *id.* Rule 26(c)(3)(B) (requiring courts to issue any protective order necessary to meet the obligation that all courts "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.")

For all for all of the reasons this Court explained long ago, the reasons for the Rules' prohibition against any attempt by a party to obtain discovery directly from a party-opponent's trial counsel have greatest force when a party seeks to compel the testimony of a

party-opponent's trial counsel:

> [E]xperience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney. In addition to disrupting the adversarial system, such depositions have a tendency to lower the standards of the profession, unduly add to the costs and time spent in litigation, personally burden the attorney in question, and create a chilling effect between the attorney and client. For these reasons, it is appropriate to require the party seeking to depose an attorney to establish a legitimate basis for requesting the deposition and demonstrate that the deposition will not otherwise prove overly disruptive or burdensome.
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> Because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c) protective order unless the party seeking the deposition can show both the propriety and need for the deposition. This procedure is superior to requiring the attorney to submit to a deposition and make his objections at that time.

N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 84-85 (M.D.N.C. 1987) (internal citations and quotations omitted)*; Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434

(M.D.N.C. 2001); *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

In adopting that rule, the Middle District adopted the reasoning expressed in *Walker v. United Parcel Services* (among others), which held that:

> Short of prohibiting the deposition, it is hard to imagine how to protect UPS from revelation of its attorney's mental impressions, opinion, legal theories, or litigation strategy. Such revelations should not be permitted absent a strong showing of necessity or prejudice or hardship in the preparation of plaintiffs' case. … Moreover, if the deposition were to proceed, rulings would occasion significant further delays. Further controversies over privilege and work product claims would inevitably require further imposition on the resources of the Court . . . .

87 F.R.D. 360, 362 (E.D. Pa. 1980) (internal citations omitted) citing *Hickman v. Taylor*, 329 U.S. 495, 509 (1947).

A corollary to the rule in this District is that attorneys need not first submit to a deposition and assert objections at that time for the obvious reasons that, as this Court explained, deposing an

party-opponent's trial counsel "merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine--that involving an attorney's mental impressions or opinions." *N.F.A.*, 117 F.R.D. at 85 citing *Shelton*, 805 F.2d at 1327. Moreover, this Court expressly "declined to follow those cases which hold that a motion for a protective order or a motion to quash is prematurely made prior to the deposition and that the attorney must raise his particular objections at the deposition." *N.F.A.*, 117 F.R.D. at 85, n.1. "A request to depose a party's litigation counsel, by itself, constitutes good cause for obtaining a Fed. R. Civ. P. 26(c) protective order and further, that the motion may, and should, be filed prior to the scheduled deposition." *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) (citing with approval *N.F.A.*, 117 F.R.D. at 85)

Consistent with these rules, Ekstrand and Smith have

unequivocally asserted that neither will appear to testify in the absence of a court order compelling them to do so. (Ekstrand made this representation despite Duke's failure to produce a subpoena that had been served on him purporting to compel his appearance for a deposition on September 4, 2012.) Further, Ekstrand and Smith have filed a motion to quash Duke's subpoenas in the *Carrington* action pursuant to Rule 45 of the Federal Rules of Civil Procedure.

In addition to the foregoing measures, Ekstrand, Smith, and the McFadyen Plaintiffs now seek, through this motion, an order securing all of the protections and all of the relief available to them under Rule 26 of the Federal Rules of Civil Procedure. Of course, they are entitled to all of the protections and relief available under Rule 26 for the same reasons that they are entitled to the protections and relief available under Rule 45. Duke seeks disclosure of privileged communications and work product, including "the mental impressions, conclusions, opinions, or legal theories of a party's

attorney or other representative concerning the litigation," which courts "must" protect from disclosure in any event. To the extent that Ekstrand or Smith may have personal knowledge relevant to the claims going forward that would not reveal a privileged communication or their mental impressions, conclusions, opinions, or legal theories, Duke cannot show what the Rules require; namely, that (1) no other means exist to obtain the information it seeks to obtain from Ekstrand and Smith; and that (2) the information Duke seeks to obtain from Ekstrand and Smith is (a) relevant, (b) nonprivileged, and (c) crucial to the preparation of Duke's defense to the claims now proceeding against Duke in the *Carrington* litigation. *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84-85 (M.D.N.C. 1987)*; Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001); *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

In *Hickman v. Taylor*, the United States Supreme Court established the straightforward rule that an attorney's work product

must be protected from discovery. The Court explained the normative basis for this protection by making the unremarkable observations that:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and

the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510-511 (U.S. 1947). If allowed to stand, Duke's subpoenas would stand the protection the Court established for an attorney's work product on its head, and would turn the normative basis for them inside out. Therefore, pursuant to *Hickman* and its progeny, including Rules 26 and 45 of the Federal Rules of Civil Procedure, this Court "must" issue a protective order providing that the discovery sought in Duke's subpoenas "not be had," protecting the *McFadyen* Plaintiffs and their counsel, Ekstrand and Smith, from any obligation to comply with Duke's subpoenas, and prohibiting Duke from engaging in any other, similar attempts to elicit disclosures that are protected by the work product or attorney-client privileges.

CONCLUSION

For all of the foregoing reasons, Duke's subpoena(s) must be quashed and a protective order should be issued forbidding Duke

from continued efforts to obtain disclosure of the work product of Stefanie A. Smith, Robert C. Ekstrand, and the law firm of Ekstrand & Ekstrand LLP, privileged communications to them by any plaintiff in the *McFadyen* and *Carrington* litigation, and information protected by the Common Representation Agreement and the common interest protections.

Further, to address Duke's continuing efforts to invade the privileges at issue in this motion, it is necessary that this Court's Order prohibit Duke from engaging in other efforts to circumvent the attorney-client privilege and work product doctrine in this case and in the related proceedings.

Finally, Ekstrand, Smith, and the *McFadyen* Plaintiffs respectfully request that the Court order all other and further relief that the Court deems necessary and proper to address the serious concerns raised by Duke's conduct in this matter.

Dated: September 3, 2012.

Respectfully submitted by:

/s/ Robert C. Ekstrand

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CERTIFICATE OF SERVICE

On the date electronically stamped below, the foregoing Motion for a Protective Order Regarding Duke's Subpoenas for Deposition of Plaintiffs' Trial Counsel was filed with the Court's CM/ECF System, which will send a Notice of Electronic Filing containing a link to download the filing to Defendants' counsel of record, all of whom are registered with the Court's CM/ECF System.

Respectfully submitted,

/s/ Robert C. Ekstrand

Robert C. Ekstrand