

**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,

v.

DUKE UNIVERSITY, et al.,

Defendants.

**CONSENT MOTION TO
EXTEND DISCOVERY PERIOD
SOLELY TO SECURE AN
AFFIDAVIT FROM PLAINTIFF
BRECK ARCHER**

Duke University, by and through counsel, pursuant to the Rule 6(b) of the Federal Rules of Civil Procedure, Local Rule 6.1, and the Initial Pretrial Order [Dkt. No. 244], respectfully moves for an order extending the discovery period through and including October 31, 2012 solely for the purposes of the production of Plaintiff Breck Archer's signed affidavit. A proposed order accompanies this Motion.

In support of this Motion, Duke states as follows:

1. Plaintiff Breck Archer was deposed on April 19, 2012.
2. During his deposition, a dispute arose between the parties. Through the meet and confer process, the parties agreed to resolve the dispute by Mr. Archer providing an affidavit.
3. On June 11, 2012, the parties agreed on the text of the affidavit .

(Affidavit of Breck Bernard Archer, attached as Exhibit A.) Plaintiffs' counsel indicated she would "contact Breck and return the signed affidavit" to Duke. (June 11, 2012 Email from Stefanie Smith to Tom Segars, attached as Exhibit B.)

4. As described in Plaintiffs' Motion to Extend Time to Respond to Defendants' Requests for Admissions [Dkt. No. 295], Mr. Archer is abroad in Japan in connection with his employment by the United States. The affidavit had not been produced as of September 21, 2012.

5. Accordingly, on September 21, 2012, the parties jointly moved to extend the discovery period through and including September 25, 2012, solely for the purpose of obtaining the affidavit from Breck Archer and the production of certain billing records responsive to Duke's September 2011 requests that remained outstanding. [Dkt. No. 296.] On September 24, 2012, this Court granted that motion. [Dkt. No. 298.]

6. On September 25, 2012, after being notified that Plaintiffs would be unable to produce the affidavit and billing records at that time, Duke again moved to extend the discovery period through and including October 2, 2012, solely for the purpose of obtaining the affidavit from Breck Archer and the production of certain billing records. [Dkt. No. 299.] On September 28, 2012, this Court granted that Motion. [Dkt. No. 301.]

7. On October 5, 2012, Duke received the billing records that Plaintiffs'

counsel indicated had been mailed on October 2, 2012.

8. As of October 5, 2012, the affidavit has not been produced.

9. Because Plaintiffs' counsel has promised to produce the affidavit since June and the affidavit has still not been produced, Duke considered filing a motion to compel on the underlying dispute that gave rise to the agreement to produce the affidavit. When counsel for Duke contacted counsel for Plaintiffs in anticipation of filing that motion to compel, Plaintiffs' counsel indicated that communication issues with Mr. Archer have caused the delay. Plaintiffs' counsel indicated:

[A]fter some research the past week, we were able to find out that the reason we've had so much difficulty getting in touch with Breck the past couple of months is because he has been deployed to some type of intense training on Mount Fuji in Japan. While he is there, he has no access to internet, etc. We understand that Breck will be returning to his home station in Okinoia [sic] this month. At that time, we will finally be able to communicate and coordinate with Breck.

10. The original time period for producing the affidavit has expired as of the date of this motion. Given Plaintiffs' representations, Duke submits this motion to extend time rather than consume the Court's time with a motion to compel at this time. Duke's failure to raise this issue earlier was, under the circumstances, excusable. See Fed. R. Civ. P. 6(b)(1)(B).

11. Plaintiffs' counsel consented to the extension requested in this Motion.

12. Duke seeks to extend the discovery period through and including October 31, 2012, solely for the purposes of the production of Plaintiff Breck Archer's signed affidavit.

13. This Motion is brought in good faith and not for the purposes of delay.

WHEREFORE, Duke respectfully requests that the Court enter an Order extending the discovery period through and including October 31, 2012, solely for the purposes of the production of Plaintiff Breck Archer's signed affidavit.

This the 5th day of October, 2012.

/s/ Jeremy M. Falcone
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 5th day of October, 2012.

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