

**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 FOR
LEAVE TO TAKE LIMITED
DISCOVERY FROM DR.
ROBERT DAVID “KC”
JOHNSON OUTSIDE OF
DISCOVERY PERIOD**

Duke University, by and through counsel, with the consent of Plaintiffs and 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 15 November 2012, solely for the purpose of permitting Duke to take discovery from third party Dr. Robert David “KC” Johnson, as that discovery has been permitted by the United States District Court for the District of Maine. A proposed order accompanies this Motion.

In support of this Motion, Duke states as follows:

1. Pursuant to this Court’s Initial Pretrial Order [Dkt. No. 244], fact discovery on Counts 21 and 24 of Plaintiffs’ Complaint was to be completed by 21 September 2012.

2. On 9 July 2012, after first conferring with Dr. Johnson about his schedule and availability, Duke issued two subpoenas in this matter to Dr. Johnson – one seeking Dr. Johnson’s production of certain documents by 30 July 2012 (attached as Exhibit A), and another setting Dr. Johnson’s deposition for 6 August 2012 (attached as Exhibit B). In accordance with Federal Rule of Civil Procedure 45(a)(2), both subpoenas were issued from the United States District Court for the District of Maine, the judicial district in which Dr. Johnson resides.

3. Following issuance of the subpoenas, Duke voluntarily extended Dr. Johnson’s time for compliance to enable him to obtain counsel. Dr. Johnson retained counsel, and that counsel objected to the subpoenas on Dr. Johnson’s behalf on 7 August 2012.

4. Over the following weeks, Duke conferred with Dr. Johnson’s counsel on several occasions, offering to narrow the scope of its document subpoena and proposing multiple compromises to address Dr. Johnson’s concerns. Dr. Johnson refused to produce any documents or to appear for a deposition.

5. On 17 September 2012, before the close of fact discovery, Duke filed a motion to compel Dr. Johnson’s compliance with the subpoenas in the United States District Court for the District of Maine. With agreement of Dr. Johnson’s counsel, Duke also sought to expedite briefing and consideration of the motion. On 21 September 2012, Dr. Johnson, through counsel, filed both a response to

Duke's motion to compel and a motion to quash Duke's subpoenas. A copy of the docket report for the District of Maine proceeding is attached hereto as Exhibit C.

6. On 4 October 2012, the Honorable John H. Rich III of the United States District Court for the District of Maine heard oral argument on Duke's motion to compel Dr. Johnson's compliance with the subpoenas and on Dr. Johnson's motion to quash Duke's subpoenas.

7. On 12 October 2012, Judge Rich entered a Memorandum Decision on Motions to Compel and to Quash Subpoenas (attached as Exhibit D). Judge Rich granted in part Duke's motion to compel Dr. Johnson's compliance with the subpoenas and denied Dr. Johnson's motion to quash the subpoenas.

8. In light of the decision compelling Dr. Johnson's compliance with the subpoenas, Duke submits this motion. Duke seeks leave to extend the discovery period through and including 15 November 2012, for the sole purpose of permitting Duke to take the discovery from Dr. Johnson allowed by the Honorable Judge Rich.

9. The undersigned has contacted Dr. Johnson's counsel in an effort to reach agreement on a mutually convenient schedule for Dr. Johnson's deposition and document production. The relevant email is attached hereto as Exhibit E. That schedule remains to be determined, but Duke will endeavor to work with Dr. Johnson's counsel to complete this limited discovery within the extended period

requested in this motion.

10. Duke respectfully submits that good cause for permitting this limited purpose extension of the discovery deadline exists and that Duke's failure to obtain discovery from Dr. Johnson prior to 21 September 2012 was, under the circumstances, excusable. See Fed. R. Civ. P. 6(b)(1)(B). The good cause for taking discovery from Dr. Johnson was argued to Judge Rich and is set forth in Judge Rich's Memorandum Decision. See Ex. D. Duke issued its subpoenas and set dates for compliance well in advance of the 21 September 2012 deadline to complete discovery as set by this Court. Dr. Johnson refused to comply with subpoenas that were issued on 9 July 2012 and, following weeks of negotiation, declined several compromise offers from Duke to limit the scope of its initial requests. Duke thus could not obtain fact discovery from Dr. Johnson without a court order compelling his compliance with the subpoenas. Duke moved to compel Dr. Johnson's compliance before the discovery deadline passed and endeavored to expedite the briefing and hearing schedule.

11. Allowing Duke to take discovery from Dr. Johnson will not delay this matter or otherwise impede the Court's schedule. Duke has already moved to toll the deadline for the filing of dispositive motions pending the resolution of discovery motions currently before this Court [Dkt. No. 304], including the "Motion for a Protective Order re: Duke's Subpoenas to Take the Deposition of

Plaintiffs' Litigation Counsel" [Dkt. No. 294], and completion of any discovery allowed as a result of the Court's resolution of such motions. Further, because discovery has only proceeded on a limited number of the overall claims because of the pending appeal by some of the defendants to this action, no trial date has been set.

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

13. Plaintiffs, through counsel, have confirmed their consent to this motion.

WHEREFORE, Duke respectfully requests that the Court enter an Order extending the discovery period through and including 15 November 2012, solely for the purpose of permitting Duke to take discovery from Dr. Johnson, as permitted by the United States District Court for the District of Maine.

This the 16th day of October, 2012.

/s/ Thomas H. Segars
Thomas H. Segars
N.C. State Bar No. 29433
Email: thomas.segars@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

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 16th day of October, 2012.

/s/ Thomas H. Segars

Thomas H. Segars

N.C. State Bar No. 29433

Email: thomas.segars@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