

**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.

**BRIEF IN SUPPORT OF
MOTION TO STRIKE
IMPROPER REPLY BRIEF
[DE 309] AND TO DECLARE
BRIEFING CLOSED ON
MOTION FOR PROTECTIVE
ORDER FOR THE DEPOSITION
OF PLAINTIFFS' LITIGATION
COUNSEL [DE 294]**

Duke University (“Duke”), by and through counsel, respectfully submits this brief in support of its Motion to Strike Improper Reply Brief [DE 309] and to Declare Briefing Closed as of 18 October 2012 on the Motion for Protective Order for the Deposition of Plaintiffs’ Litigation Counsel [DE 294].

NATURE OF THE CASE AND STATEMENT OF THE FACTS

McFadyen arises out of the investigation of false allegations of rape against members of the 2005-2006 Duke men’s lacrosse team made by a stripper hired by one of the team members to perform at a party. None of the *McFadyen* Plaintiffs was charged or tried for any offense resulting from those allegations.

Plaintiffs seek entry of a protective order regarding subpoenas issued in *Carrington et al. v. Duke University et al.*, No. 08 CV 119 (M.D.N.C.), to Robert Ekstrand and Stefanie Smith, counsel of record in this case, but not counsel of

record in *Carrington*. *Carrington* arises out of the same underlying events as *McFadyen*.

On 14 February 2012, Duke issued a subpoena to Mr. Ekstrand compelling him to testify at a deposition on 20 March 2012. [DE 294-3]. On 14 March 2012, Mr. Ekstrand submitted his objections to that subpoena to Duke. [DE 294-4].

Counsel for Duke and counsel for Mr. Ekstrand agreed to postpone this deposition on two occasions, and on 14 June 2012, agreed to re-schedule Mr. Ekstrand's deposition for 4 September 2012. (Case No. 08-CV-119; DE 261-8). On 14 August 2012, the *Carrington* plaintiffs identified Mr. Ekstrand and Ms. Smith as witnesses with knowledge of facts relating to the claims then pending in discovery. [DE 300-10].

Within three days, on 17 August 2012, Duke issued a deposition subpoena to Ms. Smith for a deposition on 4 September 2012, the same date set for Mr. Ekstrand's deposition. [DE 294-1]. Despite having had Mr. Ekstrand's subpoena for over six months, and having agreed to a date for his deposition over two months earlier, on 3 September 2012 Mr. Ekstrand and Ms. Smith moved in *Carrington* (Case No. 08-CV-119; DE 258) to quash Duke's subpoenas for their depositions. On the same date, Plaintiffs filed in this case their Motion for Protective Order for the Deposition of Plaintiffs' Litigation Counsel. [DE 294].

On 21 September 2012, pursuant to the initial pretrial order in *Carrington*,

(Case No. 08-CV-119; DE 223), fact discovery on Counts 8, 11, and 19 of the *Carrington* complaint closed. On 27 September 2012, Duke filed its Brief in Opposition to the Motion for Protective Order for the Deposition of Plaintiffs' Litigation Counsel. [DE 300].

Under Local Rule 7.3(h), Plaintiffs' reply brief was due 15 October 2012. On 15 October 2012, Plaintiffs did not file their reply brief with this Court. The next day, on 16 October 2012, Plaintiffs filed a Motion to Extend Time to File Reply Brief. [DE 305]. Plaintiffs' Proposed Order would have granted Plaintiffs three additional days to file their reply brief, up to and including 18 October 2012. [DE 305-1].

On 18 October 2012, Duke neither consented nor opposed this motion to extend time, but respectfully requested that the Court consider the implications of extending the time for Plaintiffs' reply, and the Court's subsequent consideration of the motion for protective order, as they related to the overall scheduling in this case. [DE 308].

On 18 October 2012, the date Plaintiffs had requested [DE 305] that their reply brief be due, Plaintiffs did not file their reply brief. Instead, the next day, after the extended deadline Plaintiffs requested had passed, they filed a reply in support of their motion for extension on 19 October 2012. [DE 309]. In that reply, Plaintiffs requested different relief: an order extending the time within which they

might file a reply brief in support of their motion for a protective order to the date on which an order by the Court granting Plaintiffs' motion is entered. [DE 309-1].

While seeking an indefinite extension of time for the filing of the reply, Plaintiffs claimed that "the briefing of Plaintiffs' Motion (ECF No. 305) regarding an extension of time had not been completed until after the date of the proposed extension, October 18, 2012." [DE 309]. Duke filed its response to the extension motion at 2:42 PM on 18 October 2012. [DE 308]. The briefing regarding this extension motion was not completed by 18 October because Plaintiffs chose to file their reply brief in support of that motion at 12:22 PM on 19 October.

The Court has not granted Plaintiffs' motion for an extension of time to file a reply brief in support of their motion for a protective order [DE 305], and Plaintiffs have not filed (or sought leave to file) the reply brief. There is no motion pending that seeks an extension for filing a reply brief beyond 18 October 2012.

QUESTIONS PRESENTED

I. Whether a reply brief that seeks new relief and attaches a new proposed order should be stricken as non-conforming.

II. Whether the briefing should be closed on a Motion for a Protective Order regarding deposition subpoenas, where Plaintiffs untimely filed a motion to extend the time for filing a reply brief in support of the Motion to for a Protective Order, and where the most recent request for an extension of time was not only

untimely, but sought new relief by way of a reply brief, and Plaintiffs have never shown good cause or excusable neglect.

ARGUMENT

The Local Rules begin with the goal at Rule 1.1 of ensuring “just and prompt determination of all proceedings.” Plaintiffs’ delaying tactics offend this principle, and further delays in the resolution of Plaintiffs’ attempt to avoid their depositions as fact witnesses are not warranted. Duke subpoenaed Mr. Ekstrand on Valentine’s Day. As of 23 October 2012, Plaintiffs have submitted ten pages of motion papers asking for more time to draft a ten-page reply brief. Plaintiffs have had the opportunity to include any arguments they would have addressed in a reply brief regarding the protective order. Duke respectfully submits that the time has come and gone to close briefing on these subpoenas.

I. THE REPLY BRIEF IN SUPPORT OF THE EXTENSION OF TIME IS IMPROPER.

There are two reply briefs at issue: the existing one Plaintiffs filed in further support of their Motion for Extension of Time, and the substantive one that is the subject of the extension sought. Duke respectfully requests that the reply brief Plaintiffs submitted in support of the Motion for Extension of Time [DE 309] be stricken. Local Rule 7.3(h) limits reply briefs “to discussion of matters newly raised in the response.” Duke filed a neutral response to Plaintiffs’ motion in

which Duke “neither consent[ed] to nor oppose[d] the present motion to extend time, but respectfully request[ed] that the Court consider the scheduling implications of extending the time for Plaintiffs’ reply.” [DE 308 at 1]. In their reply to Duke’s response, Plaintiffs did not discuss “matters newly raised in the response.” Instead, Plaintiffs requested that rather than entering an order extending the time for the filing of their substantive reply to 18 October as requested in the Motion itself, the Court enter an order extending the time for the filing of their substantive reply “to the date on which an order by the Court granting Plaintiffs’ Motion is entered.”

Plaintiffs cannot seek new relief in a reply brief. *See Jarvis v. Stewart*, No. 1:04CV00642, 2005 WL 3088589, at *1 (M.D.N.C. Nov. 17, 2005) (holding that it is not appropriate to present new arguments in a reply). Rather than a “discussion of matters newly raised in the response,” the reply brief is another motion for an extension of time. Because a “request for a court order must be made by motion,” Fed. R. Civ. P. 7(b)(1), Duke respectfully requests that this Court strike the reply brief [DE 309].

II. PLAINTIFFS HAVE WAIVED THE RIGHT TO FILE A REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER.

Local Rule 7.3(k) provides that the failure to submit a brief within the specified time constitutes a waiver of the right to file the brief “except upon a

showing of excusable neglect.” Likewise, Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure provides that when an act must be done within a specified time period, this Court may, for “good cause” extend the time on motion made after the time has expired if the failure to act was because of “excusable neglect.” Fed. R. Civ. R. 6(b)(1)(B); *see Curtis v. Norfolk S. Ry. Co.*, 206 F.R.D. 548, 550 (M.D.N.C. 2002) (after time expires, burden is “more rigorous” excusable neglect standard). Plaintiffs have waived the right to file a reply brief in support of their Motion for Protective Order where they did not timely file their reply and have not attempted to show, and cannot show, good cause and excusable neglect.

The deadline for Plaintiffs to file a reply brief in support of the Motion for Protective Order was 15 October 2012. LR 7.3(h). Plaintiffs did not file their reply brief by 15 October 2012, thereby waiving their right to file a brief “except upon a showing of excusable neglect.” *See* LR 7.3(k). Nothing in Plaintiffs’ extension motion, filed in the early morning of 16 October 2012 [DE 305], addressed or explained why Plaintiffs were filing it after the deadline, nor did Plaintiffs attempt to establish good cause and excusable neglect for the late filing in their reply [DE 309].

Although Plaintiffs sought an extension, the Court has not granted one. Nor did Plaintiffs attach their reply brief to the extension motion and seek leave from the Court to file that brief.

Even if the Court were inclined to excuse Plaintiffs' failure to file a reply brief based on their motion to extend the time for filing a reply, Plaintiffs' motion sought an extension only until 18 October 2012, and that deadline passed without Plaintiffs filing a reply. There is no motion pending with the Court seeking a further extension of the deadline for Plaintiffs to file their reply brief in support of the Motion for a Protective Order. Thus, even if Plaintiffs' deadline did not expire on 15 October because they filed an untimely motion seeking an extension of that deadline, the deadline expired on 18 October – the extended deadline sought in the motion for extension.

Plaintiffs' attempt to create the appearance they were not acting out of time on 19 October by filing a reply in support of their extension motion fails for two reasons.

First, the reply brief impermissibly seeks new relief, as discussed above. Second, Plaintiffs did not even attempt to show good cause and excusable neglect, and they cannot do so. In deciding whether an omission is excusable, “the determination is ... an equitable one, taking account of all relevant circumstances surrounding the party's omission.” *St. Clair v. GMC*, 10 F. Supp. 2d 523, 528 (M.D.N.C. 1998) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). Relevant circumstances include: “[1] the danger of prejudice to the [adverse party] ... [2] the length of the delay and its potential

impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.” *Id.*

Plaintiffs’ purported excuse for not filing their reply brief in support of the Motion for Protective Order on or before 18 October is that “the briefing of Plaintiffs’ Motion (ECF No. 305) regarding an extension of time had not been completed until after the date of the proposed extension.” [DE 309]. The briefing regarding the extension motion was not completed by 18 October because Plaintiffs chose to file their reply brief in support of that motion for extension on 19 October, in an effort to further delay the disposition of the Motion for Protective Order and avoid the appearance of missing the 18 October deadline. In other words, Plaintiffs’ excuse for the failure to timely file another motion for an extension of time to file their substantive reply brief, is their decision to file an unnecessary reply to their extension motion. This cannot be good cause or excusable neglect.

This is not just a one-day delay – from 18 October to 19 October– because Plaintiffs have not yet filed a motion to extend the deadline past 18 October. But any claim that a one-day or other short delay has not prejudiced Duke does not establish the good cause necessary to extend the deadline. *See Kinetic Concepts, Inc. v. Convatec Inc.*, No. 1:08CV00918, 2010 WL 1418312, at *3 (M.D.N.C. Apr.

2, 2010). Moreover, this is not so much a one-day delay, as a cumulative eight-month delay by Mr. Ekstrand to avoid his deposition.

Plaintiffs offered no other excuse. Courts routinely deny untimely efforts to extend deadlines when, as here, the movants do not establish any excusable neglect. *See, e.g., St. Clair*, 10 F. Supp. 2d at 529 (finding no excusable neglect for failure to comply with expert discovery deadline); *Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746, 748-750 (M.D.N.C. 2003) (striking plaintiff's untimely and non-conforming response and granting defendant's motion for summary judgment where plaintiff failed seek extension until time had expired without showing grounds for excusable neglect, misrepresented that consent of defendant's counsel had been obtained, and ultimately filed response that did not conform to local rules).

III. PLAINTIFFS HAVE FLOUTED THE SCHEDULING ORDER.

Duke has respectfully requested that this Court consider Plaintiffs' motion for extension of time as it relates to the overall scheduling in this case. [DE 308]. Under the *Carrington* Scheduling Order, discovery closed, as of 21 September 2012, on the claims where Plaintiffs are fact witnesses without Duke being able to depose Mr. Ekstrand or Ms. Smith. (Case No. 08-CV-119; DE 223).

On several levels, Plaintiffs flouted both the *Carrington* Scheduling Order and the Scheduling Order in this case by ignoring the deadline to either file their

reply brief or yet another extension of time.

One consequence of continuously extending the time to file a reply brief with respect to a protective order concerning the subpoenas is, of course, that the depositions of Mr. Ekstrand and Ms. Smith, despite timely notices, were not held within the Court-ordered discovery period, in contravention of Local Rule 26.1(c). In effect, Plaintiffs succeeded in extending the discovery period, something that a moving party normally must request prior to the expiration of the discovery period by setting forth good cause and showing diligent pursuit of discovery. *See* LR 26.1(d).

Plaintiffs cannot downplay the significance of the close of discovery. This Court has made clear that a “scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987) (quotation omitted). The Scheduling Order represents “the critical path chosen by the [Court] and the parties to fulfill the mandate of Rule 1 [of the Federal Rules of Civil Procedure] in securing the just, speedy, and inexpensive determination of every action.” *Halpern v. Wake Forest Univ. Health Sciences*, 268 F.R.D. 264, 274 (M.D.N.C. 2010) (quotation omitted). Mindful of these tenets, Duke reaffirms its request that the Court consider all of Plaintiffs’ delaying efforts as those efforts relate to the overall scheduling not only in *Carrington* but in this case as well.

IV. A REPLY BRIEF SUPPORTING THE MOTION FOR A PROTECTIVE ORDER IS UNNECESSARY.

The Court already has the benefit of the Plaintiffs' twenty-page Motion [DE 294] with seven exhibits, and Duke's twenty-page Opposition [DE 300] with twenty-five exhibits. Plaintiffs have given no indication what their reply brief would contain, but as per Local Rule 7.3, Plaintiffs' ten-page reply brief would be limited to matters newly raised in Duke's response. Duke respectfully submits that, at this late hour, the Court is informed sufficiently on the circumstances surrounding, and the issues implicated by, the subpoenas to make a reasoned determination without the submission of a reply brief by Plaintiffs.

CONCLUSION

For the reasons set forth above, Duke respectfully requests that the Court enter an Order striking Plaintiffs' improper reply brief [DE 309] and declaring briefing closed as of 18 October 2012 on the Motion for Protective Order for the Deposition of Plaintiffs' Litigation Counsel [DE 294].

This the 23rd day of October, 2012.

/s/ Paul K. Sun, Jr.

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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 23rd day of October, 2012.

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