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 OPPOSITION TO PLAINTIFFS' MOTION TO STAY PROCEEDINGS ON DEFENDANTS TARA LEVICY, GARY SMITH, DUKE UNIVERSITY, AND DUKE UNIVERSITY HEALTH SYSTEM, INC.'S JOINT MOTION FOR JUDGMENT ON THE PLEADINGS [DE 337]**

The United States Court of Appeals for the Fourth Circuit dismissed the bulk of Plaintiffs' claims that had not already been dismissed by this Court. *See Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012). Based on the *Evans* decision, Defendants Tara Levicy, Gary Smith, Duke University, and Duke University Health System, Inc. (the "Duke Defendants") have moved for judgment on the pleadings, seeking the dismissal of claims controlled by the *Evans* decision. [DE 335]. Plaintiffs seek to delay this Court's consideration of the Duke Defendants' motion because they "expect" to file a petition for a writ of certiorari and attempt to salvage claims that a member of the *Evans* court said were based on a theory "that could succeed only in Never Never Land." 703 F.3d at 664 (Wilkinson, J., concurring). Plaintiffs can not justify further delay, and the Duke Defendants respectfully request that the Court deny their motion for stay.

NATURE OF THE MATTER BEFORE THE COURT

On 12 December 2012, the Fourth Circuit issued its decision in *Evans v. Chalmers*. Because the *Evans* decision controls the claims against them, on 27 February 2013, Tara Levicy, Gary Smith, Duke University, and Duke University Health System, Inc. filed a Joint Motion for Judgment on the Pleadings ("Joint Motion"). [DE 335]. Plaintiffs' response to the Joint Motion was due 25 March 2013, but Plaintiffs did not file a response. Instead, on that date Plaintiffs moved the Court to extend their deadline for responding "until the outcome of Plaintiffs' anticipated petition for a writ of certiorari and any other related appellate proceedings are concluded," or, alternatively, for sixty days so that the proceedings on the Joint Motion could "take into account the issues raised in Plaintiffs' petition for a writ of certiorari." [DE 337, at 2]. The Duke Defendants oppose Plaintiffs' motion.

RELATED PROCEEDINGS

After denying these Plaintiffs' petition for rehearing en banc in *Evans v. Chalmers*, the Fourth Circuit entered judgment on 15 January 2013. [DE 329]. Pursuant to Rule 13 of the Rules of the Supreme Court of the United States, a petition for a writ of certiorari is timely when filed within ninety days of the date

of denial of a petition for rehearing. Sup. Ct. R. 13. Plaintiffs' petition was therefore due 15 April 2013. On 4 April 2013, Plaintiffs served a motion in the United States Supreme Court seeking a forty-five day extension. (Attached hereto as Exhibit A). As per the Supreme Court's 8 April 2013 notice, Plaintiffs' petition for writ of certiorari is now due on 30 May 2013. (Attached hereto as Exhibit B).

QUESTION PRESENTED

Whether briefing on a motion controlled by binding Fourth Circuit law should be stayed based on an expectation that Plaintiffs will file a petition for a writ of certiorari in the United States Supreme Court?

ARGUMENT

Rather than stay the proceedings in their entirety as Plaintiffs propose, which would suspend briefing on the Joint Motion until after the Supreme Court rules on the "anticipated" petition for a writ of certiorari, the Duke Defendants respectfully request that this Court follow the approach taken by the parties in *Evans v. City of Durham*, MDNC Case No. 1:07-CV-739. In that case, certain defendants filed a motion that, like the Joint Motion, seeks the dismissal of specific claims based on the Fourth Circuit's decision in *Evans v. Chalmers*. (*See* Case No. 1:07-CV-739; DE 193). The plaintiffs in that case opposed the motion

on substantive grounds, but also noted, "Plaintiffs intend to seek Supreme Court review of the Fourth Circuit's decision, and thus the [moving defendants'] motion should be held in abeyance pending the outcome of Plaintiffs' petition for writ of certiorari." (*See* Case No. 1:07-CV-739; DE 200, at 1).

The approach taken in *Evans v. City of Durham* means that if the Supreme Court denies the petition for a writ of certiorari, as it does in the overwhelming majority of cases (*see* The Justices' Caseload, available at http://www.supremecourt.gov/about/justicecaseload.aspx (noting that there are more than 10,000 cases on the docket per term, with plenary review granted in about 100 cases per term)), the moving defendants' motion will be ripe for consideration by this Court. The Court's efficiency concerns are addressed by delaying a decision until the resolution of any petition for writ of certiorari, but the delay will be minimized. In contrast, Plaintiffs' approach guarantees additional delay as this Court will not be able to decide the Joint Motion until briefing resumes and is completed.

The court in *Rice v. Astrue*, 4:06-CV-02770-GRA, 2010 WL 3607474 (D.S.C. Sept. 9, 2010), a case that Plaintiffs cite in support of their motion to stay [DE 337, at 2], recognized the benefit of the approach this Court may follow in

Evans v. City of Durham and the Duke Defendants advocate for this case. The Fourth Circuit had consolidated multiple cases in which South Carolina courts had denied fees to two attorneys based on their failure to obtain pro hac vice admission. *See Rice*, 2010 WL 3607474, at *1. After the district court heard argument from both sides, it held in abeyance motions for awards of statutory attorneys' fees pending the Fourth Circuit's resolution of challenges to fees awards to those very same non-admitted, out-of-state attorneys. *Id.* at *2.

As in *Rice*, this Court's efficiency concerns may favor holding the Joint Motion for ruling until the Supreme Court rules on the petition Plaintiffs anticipate filing. If briefing were completed, however, this Court would then be in a position to rule promptly, as the district court was in *Rice*. Plaintiffs' stay request guarantees additional and unnecessary delay. Thus, Plaintiffs' request is contrary to mandate of the Federal Rules of Civil Procedure to ensure the "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Plaintiffs will seek to justify their stay request as an unnecessary burden should they file a petition, the Supreme Court grant the petition, and then ultimately rule in their favor, but that argument is unpersuasive. The court in *SAS Inst. Inc. v. World Programming Ltd.*, No. 5:10–CV–25–FL, 2011 WL 322408

(E.D.N.C. Jan. 28, 2011), considered and rejected similar arguments. The *SAS* court ruled that complaints about the anticipated cost of responding to a preliminary injunction motion did not justify holding that motion in abeyance pending a decision on a motion to dismiss, even though a favorable ruling on the motion to dismiss (which challenged personal jurisdiction) would moot the motion for a preliminary injunction. *Id.* at *3. The court reasoned that non-movants generally bear the costs of responding, regardless of whether the motion is without merit or is mooted by subsequent events. *Id.*

As in *SAS*, the "burden" on Plaintiffs in this case of responding to the Joint Motion does not justify their request for a stay. While courts enjoy broad discretion in deciding whether to grant a motion to stay any proceedings, the decision entails "weigh[ing] competing interests and maintain[ing] an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *see Okocha v. Adams*, No. 1:06CV00275, 2007 WL 1074664, at *2-3 (M.D.N.C. April 9, 2007) (denying motion to stay pending appeal of interlocutory orders); *Doe v. Bayer Corp*., 367 F. Supp. 2d 904, 914 (M.D.N.C. 2005) (denying stay of personal injury action pending "Vaccine Court's" decision). The *Landis* balancing test weighs the hardship to the moving party against the prejudice to the opposing

party. *See AvalonBay Communities, Inc. v. San Jose Water Conservation Corp*., Civil Action No. 07-306, 2007 WL 2481291, at *1 (E.D.Va. Aug. 27, 2007) (denying motion to stay; holding that although movants' Constitutional rights were burdened, prejudice to non-movant outweighed that burden). Here, the balance does not support Plaintiffs' request for a stay.

The Joint Motion, filed on 27 February 2013, is tied directly to the Fourth Circuit's decision in *Evans v. Chalmers*. [DE 336, at 1]. Plaintiffs contend that they need time to "take into account the issues raised in Plaintiffs' petition for a writ of certiorari." [DE 337, at 2]. But whatever arguments Plaintiffs may present to the Supreme Court, the *Evans* decision is binding on this Court unless and until it is reversed. The mandate rule prohibits lower courts, with limited exceptions inapplicable here, "from considering questions that the mandate of a higher court has laid to rest." *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007). Therefore, Plaintiffs' petition is not relevant to their response to the Joint Motion. The only burden on Plaintiffs is that of responding to a motion, which is a cost they must generally bear. *See SAS*, 2011 WL 322408, at *3.

In contrast, the Duke Defendants are prejudiced by extended delays. Plaintiffs sued the Duke Defendants and others more than five years ago, and all

of the defendants have incurred the costs of defending a lawsuit described by Judge Wilkinson as "overblown" and "a case on the far limbs of law and one destined, were it to succeed in whole, to spread damage in all directions." *Evans*, 703 F.3d at 659 (Wilkinson, J., concurring). It is axiomatic that "justice delayed is justice denied." *See, e.g.*, *In re PSLJ, Inc.*, No. 89-2863, 904 F.2d 701, 1990 WL 76571, at *1 (4th Cir. May 24, 1990); *Robinson v. Presbyterian Wound Care Ctr.*, No. 3:07-cv-00021-FDW, 2008 WL 2789341, at *1 (W.D.N.C. July 10, 2008). Plaintiffs have used almost every possible procedural device to delay consideration of the impact of *Evans v. Chalmers* on the claims pending in this Court. They filed a petition for rehearing in the Fourth Circuit; they moved to extend the generous time permitted to file a petition for a writ of certiorari; and now they seek to delay briefing on the Joint Motion. The Duke Defendants should not have to wait any longer than reasonably necessary to have this Court consider whether claims against them should be dismissed.

Plaintiffs' anticipated burden is not greater than the prejudice to the Duke Defendants. To avoid any claim of prejudice, in lieu of granting a prolonged stay contingent on the anticipated filing of a now-postponed petition, the Duke Defendants ask this Court to order that Plaintiffs' response time is extended for

sixty days, the alternative relief that Plaintiffs proposed. Plaintiffs' response would then be due on 24 May 2013, giving Plaintiffs more than thirty days to prepare a response. The Duke Defendants commit to file their reply promptly, and the Joint Motion will be ready for decision by this Court after the Supreme Court rules on any petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Duke Defendants respectfully request that the Court enter an Order denying the stay of proceedings sought in Plaintiffs' Motion to Stay Proceedings. [DE 337]. The Duke Defendants further request that the Court direct Plaintiffs to file any substantive response to the Joint Motion [DE 335] by 24 May 2013.

This the 18th day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2013, 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 the 18th day of April, 2013.

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