

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

RYAN McFADYEN, et al.,)	
)	
Plaintiffs,)	
)	
v.)	1:07CV953
)	
DUKE UNIVERSITY, et al.,)	
)	
Defendants.)	

ORDER

This matter is before the Court on multiple pending discovery motions filed prior to the decision of the Court of Appeals for the Fourth Circuit on the interlocutory appeal in this case. These pending discovery motions all relate to Counts 21 and 24, which were not the subject of the interlocutory appeal. While the interlocutory appeal was pending, discovery proceeded as to Counts 21 and 24, although discovery was stayed as to the remaining counts that were part of or related to the interlocutory appeal. The Court of Appeals for the Fourth Circuit has issued its Order on the interlocutory appeal, Plaintiffs have filed a petition for certiorari with the Supreme Court, and the Duke Defendants have now filed a Motion for Judgment on the Pleadings in this Court with respect to the claims that were related to the interlocutory appeal.

With respect to Counts 21 and 24, fact discovery has closed and relevant evidence on those counts has been produced and preserved. The Court notes that the Duke Defendants previously filed a Motion for Status Conference [Doc. #304] on scheduling issues, and requested an extension of the dispositive motion deadline with respect to Counts 21 and 24. Given the

proceedings on the interlocutory appeal, it appears that further resolution of dispositive motions on Counts 21 and 24 should not proceed until after the Motion for Judgment on the Pleadings has been resolved and the course and scope of all of the proceedings in this case can be addressed, so that it is clear whether any federal law claims remain in this case before briefing of dispositive motions as to Counts 21 and 24. Therefore, the Court will not set a deadline for the filing of dispositive motions as to Counts 21 and 24 at this time, and this case will be set for a status and scheduling conference as to Counts 21 and 24 after the resolution of the Motion for Judgment on the Pleadings.

With respect to the remaining discovery-related motions that are pending, the Court notes that Plaintiffs previously filed a Motion for Protective Order [Doc. #294] regarding the deposition of Plaintiffs' counsel in a related case,¹ which now appears to be moot. Plaintiffs' related Motion for Extension of Time [Doc. #305] to file a reply brief, Duke's related Motion to Strike [Doc. #310], and Plaintiffs' related Motion for Leave to File Reply Brief [Doc. #312] are also moot.

The parties also filed a Consent Motion to Extend Discovery [Doc. #302] to secure an affidavit from Plaintiff Breck Archer, and a related Motion to Re-open the Deposition of Plaintiff Breck Archer or Compel Production of Affidavit [Doc. #316]. According to a subsequently-filed Notice, the requested affidavit has been provided, and the Motions therefore

¹ The Court notes that the dispute regarding Plaintiffs' counsel involved a subpoena issued in Carrington v. Duke University, Case No. 1:08CV119. However, the pending discovery matters in that case have been rendered moot in light of the settlement and Stipulation of Dismissal as to the Duke Defendants in that case. To the extent that any issues remain in the present case, those issues should be resolved after the course and scope of future proceedings has been determined, as noted above.

appear to be moot.² In addition, the parties filed Consent Motions [Doc. #306, 318] to extend the discovery period to allow Duke to receive documents produced after the close of discovery. It appears that those motions are also moot.

Plaintiffs also filed a Motion to Compel [Doc. #297], seeking to compel additional discovery from Defendant Duke, and a Motion for Oral Argument [Doc. #315] on that request. If Plaintiffs still seek additional discovery, the Motion to Compel may require a hearing and, potentially, a shifting of costs to Plaintiffs to the extent any additional discovery is allowed. However, as noted above, this case will be set for a status conference as to Counts 21 and 24 after the resolution of the Motion for Judgment on the Pleadings, and to the extent any discovery issues remain, the Court can take those up at such a status conference. If any party believes that a more expedited schedule is needed for any reason related to any remaining discovery issues, that party may file a motion for hearing stating the basis therefor. Therefore, the Motion to Compel will be denied without prejudice to further consideration of those issues at a future status and scheduling conference on Counts 21 and 24.

Finally, Plaintiffs filed a Motion to Modify Protective Order [Doc. #289]. In the Motion to Modify, Plaintiffs do not object to the provisions of the Protective Order that provide protection for confidential information, and Plaintiffs agree that “the procedures outlined by the Court for the preliminary sealing of documents designated as confidential upon filing are sufficient and narrowly tailored to apply only to documents that are actually filed.” Instead, Plaintiffs’ Motion to Modify primarily seeks to strike the provision of the Protective Order that

²To the extent the affidavit was provided outside the discovery period, that production will be allowed.

allows a party to object to another party's confidentiality designation. However, the provision that Plaintiffs seek to strike simply gives the parties the option and ability to object to another party's confidentiality designation, if a party believes that an item has been designated as confidential that in fact should not be subject to confidentiality provisions. Thus, the Court finds that the provision challenged by Plaintiff should remain in the Protective Order because it helps to ensure that information is not improperly designated as confidential. Moreover, the Court further notes that a failure to object under that provision does not preclude a party from later contesting another party's confidentiality designation. Thus, there is no need to strike the provision giving the parties the option of challenging another party's confidentiality designation. Any additional issues regarding the Protective Order can be considered at the status and scheduling conference following resolution of the Motion for Judgment on the Pleadings.

For the reasons set out above, the pending discovery-related motions [Doc. #289, #294, #297, #302, #304, #305, #306, #310, #312, #316, #318] will be denied as set out above, without prejudice to further consideration if necessary at a status and scheduling conference after resolution of the Motion for Judgment on the Pleadings.³

³ The Court notes that Plaintiffs request that the Court decide the Motion for Judgment on the Pleadings "after the outcome of Plaintiffs' petition for a writ of certiorari is ruled upon and any subsequent appellate proceedings are concluded." As noted above, if there is a specific need for more expedited consideration of any remaining discovery-related issues, either party may file a motion in that regard.

IT IS THEREFORE ORDERED that the pending discovery-related motions [Doc. #289, #294, #297, #302, #304, #305, #306, #310, #312, #316, #318] are DENIED as set out above, without prejudice to further consideration of any remaining issues if necessary at a status and scheduling conference after resolution of the Motion for Judgment on the Pleadings.

This, the 7th day of August, 2013.

/s/ Joi Elizabeth Peake
United States Magistrate Judge