

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

RYAN MCFADYEN, et al)	
)	
Plaintiffs,)	
)	
v.)	No. 1:07-CV-953
)	
DUKE UNIVERSITY, et al)	
)	
Defendants.)	

**CONSENT MOTION TO EXTEND TIME TO REPLY TO PLAINTIFFS’
RESPONSE TO THE MOTIONS TO DISMISS OF DEFENDANTS BAKER,
CHALMERS, HODGE, RUSS, MIHAICH, COUNCIL, LAMB,
RIPBERGER, and EVANS**

Defendants Baker, Chalmers, Hodge, Russ, Mihaich, Council, Lamb, Ripberger, and Evans move the Court, pursuant to FED. R. CIV. P. 6, for an extension of time to serve their replies to Plaintiffs’ responses to their Motions to Dismiss, up to and including November 26, 2008. In support thereof respectfully show the Court as follows:

1. On March 25, this Court entered an order, on the joint motion of all parties, establishing deadlines and page limitations for briefs on anticipated motions to dismiss. The Court ordered therein that all defendants had until April 25, 2008, to file Answers or Motions to Dismiss.

2. In the March 25 Order, the Court also set page limitations for briefs in support of, and in response to, those motions. Although Defendants Baker, Chalmers, Hodge, Russ, Mihaich, Council, Lamb, Ripberger, and Evans (hereinafter collectively referred to as “Defendants”) all have issues in common and are represented by the same

counsel, certain claims are asserted in the Complaint that are unique to Defendant Hodge. Thus, Defendants requested, and the Court allowed, Defendant Hodge to file his own motion to dismiss and supporting memoranda, separate from the remaining Defendants.

3. Shortly before the deadline for motions to dismiss, Plaintiffs amended their complaint. Thus, the parties jointly filed a motion seeking an order extending the deadlines for briefs in support of, and in opposition to, motions to dismiss.

4. On April 30, 2008, this Court entered an Order on the joint motion, allowing all defendants in this action until July 2, 2008, to file answers or motions in response to Plaintiffs' Amended Complaint. Further, the Court allowed Plaintiffs 90 days after the date that all defendants filed their motions to file their responses, and allowed all defendants 30 days after the responses were filed to file their replies.

5. On July 2, 2008, all defendants filed motions to dismiss. Thus, under the Court's order, Plaintiffs' replies were due on September 30, 2008.

6. The undersigned counsel, Patricia Kerner (hereinafter "Kerner") also represents most of these Defendants in the matters of *Evans et al, v. City of Durham, et al*, Case No. 1:07-CV-00739, and *Carrington, et al v. Duke University, et al*, No. 1:08-CV-119, pending before this Court. The briefing process on the motions to dismiss filed in those cases is now complete.

7. After this Court's orders were entered setting the deadlines for briefs in this case and in the *Evans* and *Carrington* cases, Kerner made arrangements for her first vacation in several years. She scheduled the vacation to commence after the briefs in all

three cases had been filed. She leaves the country for this vacation on October 31, 2008, and will return on November 12, 2008.

8. Kerner has also agreed to represent the defendant attorney in a disciplinary hearing pending before the North Carolina State Bar. That matter is set for hearing on November 21, 2008. She agreed to handle that matter, knowing that the briefs in this case, as well as those in *Evans* and *Carrington*, would have been filed, and she would be able to devote her time upon her return from vacation to that case.

9. Kerner expected to receive the email notice of the filing of the response brief in this matter on September 30, 2008, and planned to commence work on the reply briefs the next day, to have them filed before her vacation.

10. However, on October 1, 2008, at some point between 11:30 a.m. and noon, the wife of Plaintiffs' counsel, Robert Ekstrand (hereinafter "Ekstrand") called Kerner's office, and left a message with her assistant, stating that Plaintiffs were filing a motion for extension of time for an additional ten days to file their responses, and that Ekstrand would be available for discussion after 4:00 p.m. on that day. This message left Kerner with the impression that she could call Ekstrand after 4:00 to discuss whether her clients would consent. However, Ekstrand filed his Motion at 1:17 p.m. on October 1, 2008. After seeing the filing, Kerner called Ekstrand, and unable to reach him, left a message with his wife, who is also an attorney and works in his office, indicating that she could not consent to the extension, for the reasons detailed above.

11. Upon receipt of Plaintiff's motion to extend time, Kerner began preparation of a response, planning to oppose the motion, and in the alternative, to seek additional

time to file replies to Plaintiffs' response up until December 5, 2008, to allow her to take her vacation and adequately prepare for and try the matter before the State Bar, and have sufficient time to prepare the replies.

12. In compliance with her obligation under L.R. 6.1(a), Kerner called Ekstrand to obtain his position on her alternative request to extend time to file her reply. Ekstrand indicated that he would agree to some extension of Kerner's time to reply on behalf of her clients, because of her unique circumstances. After some discussion, Kerner and Ekstrand agreed:

a. Kerner will not oppose Ekstrand's motion to file his responses to her clients' Motions to Dismiss, on the express condition that all responses to any motion filed by any defendant in this action is filed on or before Monday, October 6, 2008; and

b. Ekstrand consents to an extension of time for Kerner to file replies on behalf of her clients until November 26, 2008.

WHEREFORE, Defendants Baker, Chalmers, Hodge, Russ, Mihaich, Council, Lamb, Ripberger, and Evans respectfully pray the Court to issue an Order extending the time for filing their replies to Plaintiffs' response to their Motions to Dismiss up to and including **November 26, 2008.**

This the 3rd day of October, 2008.

TROUTMAN SANDERS LLP

By: /s/ Patricia P. Kerner

Patricia P. Kerner

N.C. State Bar No. 13005

Attorneys for Defendants Baker, Chalmers,

Hodge, Russ, Mihaich, Council, Lamb,

Ripberger, and Evans

Post Office Drawer 1389

Raleigh, North Carolina 27602

Telephone: (919) 835-4117

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

RYAN MCFADYEN, *et al*,)
)
 Plaintiffs,)
)
v.)
)
DUKE UNIVERSITY, *et al*,)
)
 Defendants.)

Case No. 1:07-CV-00953

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Robert C. Ekstrand
EKSTRAND & EKSTRAND, LLP
811 Ninth Street, Suite 260
Durham, North Carolina 27705
rce@ninthstreetlaw.com
Attorneys for Plaintiffs

James D. Cowan, Jr.
Dixie T. Wells
ELLIS & WINTERS, LLP
100 N. Greene Street, Suite 102
Greensboro, NC 27401
don.cowan@elliswinters.com
dixie.wells@elliswinters.com
*Attorneys for Defendants Duke
University, Duke University Health
System, Inc., Richard Brodhead,
Peter Lange, Larry Moneta,
John Burness, Tallman Trask,
Suzanne Wasiolek, Matthew
Drummond, Aaron Graves,
Robert Dean, Tara Levicy, Theresa
Arico, Kate Hendricks, Victor Dzau*

Dan J. McLamb
Shirley M. Pruitt
T. Carlton Younger, III
YATES, MCLAMB & WEYHER, LLP
P.O. Box 2889
Raleigh, NC 27602-2889
dmclamb@ymwlaw.com
spruitt@ymwlaw.com
cyounger@ymwlaw.com
*Attorneys for Defendants Duke
University Health Systems, Inc.,
Tara Levicy, and Theresa Arico*

Jamie S. Gorelick
Jennifer M. O'Connor
Paul R.Q. Wolfson
William F. Lee
WILMER, CUTLER, PICKERING, HALE,
and DORR, LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
jamie.gorelick@wilmerhale.com
jennifer.oconnor@wilmerhale.com
paul.wolfson@wilmerhale.com
william.lee@wilmerhale.com
*Attorneys for Defendants Duke
University, Duke University Health System,
Inc., Richard Brodhead,
Peter Lange, Larry Moneta,
John Burness, Tallman Trask,
Suzanne Wasiolek, Matthew
Drummond, Aaron Graves,
Robert Dean, Tara Levicy, Theresa
Arico, Kate Hendricks, Victor Dzau*

Robert A. Saar
Nicholas J. Sanservino, Jr.
OGLETREE DEAKINS NASH SMOAK
& STEWART, PC
2301 Sugar Bush Rd., Suite 600
Raleigh, NC 27612
Attorneys for DNA Security

Robert J. King, III
Kearns Davis
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP
Post Office Box 26000
Greensboro, NC 27420
*Attorneys for Defendants DNA Security,
Inc. and Richard Clark*

Paul R. Dickinson, Jr.
LEWIS & ROBERTS, PLLC
590 Fairview Rd., Suite 102
Charlotte, NC 28210
Attorneys for Brian Meehan

Edwin M. Speas
Eric P. Stevens
POYNER & SPRUILL, LLP
3600 Glenwood Avenue
Raleigh, NC 27612
Attorneys for Defendant Gottlieb

James B. Maxwell
MAXWELL, FREEMAN & BOWMAN,
P.A.
Post Office Box 52396
Durham, NC 27717
Attorneys for Defendant Addison

James A. Roberts, III
LEWIS & ROBERTS, PLLC
1305 Navaho Drive, Suite 400
Raleigh, NC 27605
Attorneys for Brian Meehan

Reginald B. Gillespie, Jr.
FAISON & GILLESPIE
Post Office Box 51729
Durham, NC 27717
rgillespie@faison-gillespie.com
Attorneys for Defendant City of Durham

Joel M. Craig
Henry W. Sappenfield
KENNON, CRAVER, BELO, CRAIG &
MCKEE, PLLC
Post Office Box 51579
P.O. Box 51579
Durham, NC 27717-1579
Attorneys for Defendant Himan

I further certify that a copy of the foregoing was served today upon each of the following non CM/ECF participants by United States mail, postage prepaid, addressed as follows:

Linwood Wilson
6910 Innesbrook Way
Bahama, NC 27503-9700
Pro Se

Roger E. Warrin
Michael A. Vatis
John P. Nolan
Leah M. Quadrino
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave. N.W.
Washington, DC 20036
Attorneys for Defendant City of Durham

This the 3rd day of October, 2008.

Respectfully submitted,

By: /s/ Patrica P. Kerner

Patricia P. Kerner
N.C. State Bar No. 13005
*Attorneys for Defendants Baker, Chalmers,
Council, Evans, Hodge, Lamb, Mihiach,
Ripberger, and Russ*
434 Fayetteville Street, Suite 1900
Raleigh, North Carolina 27601
Telephone: (919) 835-4100
Facsimile: (919) 829-8714
tricia.kerner@troutmansanders.com