

UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, ET AL.,

Plaintiffs,

v.

DUKE UNIVERSITY, ET AL.,

Defendants.

**Civil Action No. 1:07-cv-953**

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**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE  
PLAINTIFFS' OPPOSITION BRIEFS TO DEFENDANTS' 12(B)(6) MOTION**

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Dated: October 6, 2008

**EKSTRAND & EKSTRAND LLP**

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**NOW COME THE PLAINTIFFS** in the above-captioned matter, Ryan McFadyen, Matthew Wilson and Breck Archer, pursuant to LR 7.2 and 7.3, and submit this Memorandum in support of their Motion for Leave to file their opposition briefs to Defendants' 12(b)(6) motions. A complete set of the opposition briefs is attached as exhibits 1-10 to this motion and will be filed with the Court as soon as leave is granted to do so.

### **NATURE OF THE MATTER BEFORE THE COURT**

Plaintiffs request that this Court allow them to file their opposition briefs to Defendants' 12(b)(6) motions six days later than the deadline was set in the April 30<sup>th</sup> scheduling order.

### **STATEMENT OF THE FACTS**

Plaintiffs filed this action on December 18, 2007 and amended that filing on April 17, 2008. Pursuant to a request from this Court regarding the nature of filing the exhibits annexed to the amended complaint, the Plaintiffs filed a second amended complaint on April 18, 2008. Except for the location of the exhibits, the two amended complaints are identical. On April 30, 2008, the Court approved the parties'<sup>1</sup> agreed upon Rule 12 schedule setting the following deadlines:

- a. Motions or Answers Due: July 2, 2008;
- b. Responses Due: no later than 90 days after the date all Defendants' Motions or Answers are filed; and

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<sup>1</sup> This scheduling order did not affect Linwood Wilson, *pro se* Defendant, as he was not party to the consent Motion. He chose to file on July 2, 2008, as opposed to June 13, 2008 the date granted him by Magistrate Judge Dixon on April 23, 2008. Plaintiffs did not oppose his filing his motion late.

- c. Replies Due: no later than 30 days after the date Plaintiffs' Responses are filed.

[Document #38].

Defendants filed twelve 12(b)(6) motions on July 2, 2008. According to the April 30<sup>th</sup> scheduling order, Plaintiffs' responses were due September 30, 2008. Plaintiffs filed a Motion for Extension of Time on October 1, 2008. [Document #66]. Defendants Wilson, *pro se*, and counsel for Defendants City of Durham, Gottlieb, Himan, Soukup, Addison, Michael and Clayton filed motions opposing Plaintiffs' request on October 2, 2008. [Documents #67 -68].

On October 3, 2008, counsel for the Supervising Defendants and Hodge consulted with undersigned counsel, after which she filed a Consent Motion to extend the time allowed to Plaintiffs until 9 a.m. on Monday, October 6, 2008, with Plaintiffs agreeing that she be granted an extension on the reply brief until November 26, 2008, because of commitments she had already scheduled in October. [Document #69]. Counsel for the Duke University Defendants, Duke SANE Defendants and Duke Police Defendants, filed a second response to the Plaintiffs' Motion for Extension of Time in order to note that they do not oppose Plaintiffs filing on Monday, October 6, 2008 and requesting that they too be granted until November 26, 2008 to reply, with no specific reason for said request. [Document #70].

### **QUESTIONS PRESENTED**

1. Should the Court grant leave for the Plaintiffs to file the Opposition Briefs attached to the Motion for Leave to file as exhibits?

## ARGUMENT

### **I. THE COURT SHOULD ALLOW PLAINTIFFS TO FILE THE OPPOSITION BRIEFS ATTACHED TO THE MOTION FOR LEAVE TO FILE AS EXHIBITS**

In support of this motion for leave, and in an attempt to answer the claims laid out in certain Defendants' Motions opposing the extension of time, Plaintiffs show the following:

Plaintiffs filed the Complaint on December 17, 2007. After filing, undersigned counsel has agreed to two requests for significant extensions of time made by Defendants' counsel. First, Plaintiffs' counsel agreed to a significant extension of time to answer or respond to the Complaint by agreeing to an extension to April 25, 2008; and, further, Plaintiffs also agreed to Defendants' request to extend the page limits applicable to briefs supporting their Rule 12 motions.

Again, after counsel filed Plaintiffs' Amended Complaint, which added five causes of action, counsel for Defendants requested undersigned counsel's consent to another significant extension of time—from May to July 2, 2008, and another request of the DUPD Defendants for 50 additional pages to brief their Rule 12 arguments.

Against that background, Plaintiffs filed a Motion for Extension of Time to File Responses to All Defendants' Rule 12 Motions. [Document # 66]. Our motion sought ten days. All Defense counsel opposed our request for ten (10) days. Half of the Defendants have consented to an extension of October 6, 2008 so long as they are granted until November 26, 2008 to reply. [Documents #69-70].

With respect to the objections filed to Plaintiffs' original Motion to Extend Time, in filings with the Court, counsel for the City of Durham, Gottlieb, Himan, Addison,

Clayton, Michael, and Soukup, have expressed a concern that the reason for Plaintiffs' request for an extension is a desire "to address arguments that the City Defendants made in their Reply Briefs in the *Carrington* matter, which were filed on September 29." See, Joint Opposition of City Defendants To Plaintiffs' Motion For Extension Of Time [Document #67]. Undersigned counsel has not read, nor will he have time to read, those Replies. Undersigned counsel has spoken with counsel for the City of Durham about that concern and believes counsel for the City is assured that such is not the case.

There has also been a concern expressed with regard to this office's compliance with L.R. 6.1(a) prior to our first motion. Our notes indicate that on October 2, 2008, a partner in this law firm called counsel for the City at 11:34 a.m.; called Counsel for the Duke SANE Defendants, the Duke Police Defendants, and the Duke University Defendants, between 11:36 and 11:40 a.m.; called counsel for Defendant Hodge and the Supervising Defendants at 11:40 a.m.; called counsel for Defendants Soukup, Addison, Michael, and Clayton, at 11:43 a.m.; called counsel for Benjamin Himan, at 11:50 a.m.; called counsel for Mark Gottlieb at 11:46 a.m.; and called counsel for DNASI Defendants at 11:46 a.m. Linwood Wilson's contact information was not readily available to her at the time of these calls, and we regret that he was not reached. We regret the confusion caused by the message that undersigned would be available to them at 4:00 p.m., but the person speaking to opposing counsel and their staff was, in fact, a partner with this firm and was calling to discuss the motion. She did not mean to convey that they could not call on her to discuss the motion.

The "excusable neglect" stated in our Motion was "the number and style" of the briefs presented to them. By that, the motion refers to the greatest source of unexpected delay in completing our responses: the unexpected requirement in a Rule 12 motion that we identify and restate dozens of factual assertions in Defendants' briefs that either recast

the allegations or have no basis in the Amended Complaint. The problem is persistent throughout the briefs. It is also, of course, a significant undertaking to revise, cite-check, refine as many pages as these briefs require. This office did not expect to require additional time in the days leading up to the date for filing; we structured the firm's schedule to clear it of all events for a significant period of time prior to the deadline. Undersigned counsel felt it better to request a short extension than to submit briefs that would be made complicated by errors in cross-referencing among the multiple briefs and parties. We believe our efforts to meet the deadline meet the standards of excusable neglect.

Undersigned counsel has consulted with the parties by telephone in some cases and via email after filing the initial Motion for Extension of Time. In the email, undersigned counsel proposed to file an amended motion seeking an extension of one-half of the original time requested to 9 a.m. on Monday, October 6, 2006. Among those who responded to our proposal, only counsel for the Supervising Defendants and Hodge, Patricia Kerner, has agreed to consent to our revised proposed extension up to 9:00 a.m. Monday, October 6, 2008. That agreement is reflected in Consent Motion for Extension of Time to File Response and Reply, filed October 3rd by Counsel for [Document #69].

Shortly after that consent motion was filed, the three Duke University Defendant groups filed a "Joint Response of 'Duke University Defendants,' 'Duke Police Defendants,' and 'Duke SANE Defendants' to Plaintiffs' Motion for Extension of Time" [Document 70]. The Duke Defendants' counsel did not respond to undersigned counsel's requests to discuss the proposal to amend the requested extension to five days, but it appears from Document #70, filed after Ms. Kerner's consent motion was filed, that the three Duke Defendant groups seek an additional 20 days beyond the 30 days they would naturally have under the Court's current Order. Counsel for the Duke Defendants

did not consult with this office regarding the proposal, nor did they consult with this office prior to filing their “Response.”

In the intervening time, undersigned counsel, in keeping with his agreement with Kerner, has completed the revisions to the Plaintiffs’ Memoranda in Opposition to all Defendants’ Motions to Dismiss. In light of the foregoing, counsel for the Plaintiffs respectfully requests that the Court grant Plaintiffs’ leave to file Opposition Briefs to Defendants Rule 12 Motions. The completed briefs are attached as Exhibits to this Motion and are ready to be filed as soon as the Court grants leave; this Motion is filed prior to Monday, October 6, 2008, at 9:00 a.m. in order to comply with the Consent Motion filed by counsel for Supervising Defendants and Hodge. Should the Court grant Plaintiffs’ Request For Leave to File Plaintiffs’ Opposition Briefs, by operation of the current scheduling order, Defendants may file Replies within 30 days of the date of filing of Plaintiffs’ Opposition Briefs, with the date for the Supervising Defendants and Hodge to Reply to be set consistent with the Court’s ruling on the Consent Motion filed by the Supervising Defendants [Document # 69].

Dated: October 6, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2008, I electronically filed the foregoing BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE PLAINTIFFS' OPPOSITION BRIEFS TO DEFENDANTS' 12(B)(6) MOTION with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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