



## ***INSTANT MOTIONS***

While Defendant's preliminary objections to Plaintiff's Initial Complaint were pending, the parties filed the essentially dueling motions presently before the Court. On April 8, 2022, Defendant filed a Motion for Protective Order; three days later, Plaintiffs filed a Motion to Compel.

In its Motion for Protective Order, Defendant asks the Court "to stay discovery in this putative class action until the pleadings are closed," in order to "relieve [Defendant] from responding to onerous and overburdensome discovery requests that would be moot if the Court sustains [Defendant's] Preliminary Objections...." Defendant characterizes Plaintiffs' discovery requests as "expansive," especially in light of the fact that pleadings are not yet closed, and highlights that Plaintiffs made seventy-eight separate requests for production of documents along with eighteen interrogatories. Defendant suggests that, as a putative class action, any discovery in this case must initially be limited to the question of class certification – a phase of litigation that necessarily follows immediately after the close of pleadings – until that question is resolved.

Plaintiffs' Motion to Compel explains that Plaintiffs served their discovery requests on Defendant on January 18, 2022, but Defendant indicated it would not respond to discovery requests until after the resolution of preliminary objections, and only then to issues relating to class certification. Plaintiffs note that, on March 25, 2022, they sent a letter to Defendant stating that Defendant had failed to timely respond to Plaintiffs' discovery requests and indicating they would file a motion to

compel the requests. After the parties were unable to reach an agreement following a meeting on April 4, 2022, Plaintiffs filed the instant Motion to Compel.

The Court heard argument on the parties' motions on May 16, 2022. On June 29, 2022, the Court issued its Opinion and Order ruling on Defendant's seven outstanding preliminary objections to the Initial Complaint, sustaining four of them. The Court granted Plaintiffs twenty days to, *inter alia*, file an Amended Complaint attaching the documents and alleged contracts that form the basis of their claims. Following an extension of time agreed upon by the parties, Plaintiffs filed their Amended Complaint on July 28, 2022. On August 15, 2022, Defendant filed Preliminary Objections to the Amended Complaint, essentially contending that Plaintiffs' amendments were insufficient to resolve the issues at the heart of the sustained preliminary objections to the initial Complaint. Argument on Defendant's Preliminary Objections to Plaintiffs' Amended Complaint is scheduled for October 18, 2022 at 9:30 a.m.

### **ANALYSIS**

A trial court "has broad discretion to take such action as it deems appropriate to insure prompt and adequate discovery."<sup>1</sup> This Court's typical practice is to issue a scheduling order providing a discovery deadline only after pleadings are closed; this does not, however, preclude the parties from engaging in discovery prior to the close of pleadings (or indeed prior to the filing of the complaint, as explicitly contemplated by Rule of Civil Procedure 4003.8(a)). Thus, the matter before the Court is ripe for a

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<sup>1</sup> *Kerns v. Methodist Hosp.*, 574 A.2d 1068, 1073 (Pa. Super. 1990).

decision and implicates the Court's broad discretion to conduct discovery in a manner that promotes both the liberal exchange of information as well as judicial economy.

The Rules of Civil Procedure governing putative class actions explicitly contemplate discovery addressed to the question of class certification. Specifically, Rule 1707(b) provides that "the court may postpone the [class certification] hearing<sup>2</sup> to a later date pending the disposition of other motions or to permit discovery with respect to the class action issues." Rules 1708 and 1709 require the court to consider criteria that may be disputed or otherwise not facially apparent from the pleadings, thus necessitating discovery in some putative class actions.<sup>3</sup>

The Court agrees with Defendant that general discovery regarding the underlying merits of the case is premature prior to the resolution of Defendant's preliminary objections and the anticipated motion for class certification to be filed by Plaintiffs if some of their claims survive. If the Court ultimately denies the motion for class certification, such a ruling could render a number of discovery requests – and any corresponding disputes concerning issues such as confidentiality under FERPA<sup>4</sup> – moot. Conversely, delaying discovery concerning issues beyond the class certification ruling will not prejudice the parties.<sup>5</sup>

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<sup>2</sup> Rule 1707(a) provides that within thirty days after the close of pleadings the plaintiff must move to certify the action as a class action, at which time the court must schedule an evidentiary hearing on that issue.

<sup>3</sup> For instance, discovery is often required to ascertain the size of the putative class and whether it would be logistically impractical or economically unfeasible for individual class members to maintain their own actions.

<sup>4</sup> The Federal Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

<sup>5</sup> The Court is sensitive to the fact that this case has proceeded slowly, due in part to the venue dispute, subsequent transfer, and motions practice concerning the pleadings. The Court will endeavor to move this case towards a conclusion as expeditiously as possible;

The question remains whether it is appropriate to allow the parties to begin limited discovery on the question of class certification at this time, as opposed to after the resolution of Defendant's pending Preliminary Objections to the Amended Complaint. In light of the Court's June 28, 2022 Order sustaining some and overruling some preliminary objections to the initial Complaint, the Court believes the commencement of limited discovery strikes an appropriate balance between ensuring this case progresses in a timely fashion while minimizing the risk to the parties of wasted time or resources. Unless none of Plaintiffs' claims survive and this case is dismissed on the pleadings,<sup>6</sup> Rule 1707 will require a Motion for Certification of Class Action. At this stage, the Court has already ruled on one set of Preliminary Objections, and the issues concerning class certification are fairly well defined; variations in which claims ultimately survive the pleadings and in what form will not materially alter the character of discovery to determine whether class certification is appropriate. Allowing the parties to begin some limited discovery will reduce the chances of having to continue the class certification hearing and will allow the parties to reach the merits of the dispute at the heart of Plaintiffs' claims sooner rather than later.

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however, given the nature of this dispute – a putative class action touching on novel issues affecting thousands of people – discovery and motions practice may to some extent be unavoidably cumbersome.

<sup>6</sup> Of course, the Court cannot say at this time how it will rule on Defendant's Preliminary Objections to the Amended Complaint, let alone any subsequent motions. However, there is only one situation – the complete grant of a demurrer – that will render class discovery moot; any other situation will require such a period of discovery.

The question remains as to which of Plaintiffs' Interrogatories and Requests for Production of Documents are aimed toward Class Certification as opposed to the merits of the underlying case. The Court has reviewed the discovery requests, and believes the following are appropriate requests at this time, inasmuch as they relate to the identification of the class:

- Plaintiffs' Interrogatories: Defendant shall respond to Interrogatories 1; 2; 3(a), (b), and (f); 4(a); 5(a); 6(a); 7(a) and (b); 9 (limited to any experts Defendant intends to call concerning class certification); 13; 14 (limited to providing the total number of students falling into each category identified in Interrogatories 3 through 6, or an estimate of that number if it is impossible to determine the precise number; Defendant need not provide a list of each student or a unique identifier for each student); and 18.
- Plaintiffs' Requests for Production of Documents: Defendant must respond only to those Requests for Production of Documents which seek documents relating to the limited Interrogatories listed above, or any other documents Defendant intends to introduce or utilize at the class certification stage.
- Defendant may request discovery from Plaintiff limited to class certification.

Defendant shall respond to Plaintiffs' discovery requests, limited to those enumerated above, within thirty (30) days.<sup>7</sup>

In limiting the scope of discovery in this manner, the Court believes that none of the discovery requests approved by this Opinion and Order require the disclosure of information protected by FERPA. If Defendant believes any discovery responsive to the limited discovery requests listed in this Opinion and Order does ostensibly

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<sup>7</sup> Or such other time as the parties may agree or the Court allows.

include material protected by FERPA or another statute, Defendant shall indicate such in its discovery responses.

### ORDER

AND NOW, for the foregoing reasons, the Court GRANTS IN PART Defendant's Motion for Protective Order and DENIES IN PART Plaintiffs' Motion to Compel for all discovery except that related to class certification as enumerated below. With regard to the enumerated discovery requests below, the Court DENIES IN PART Defendant's Motion for Protective Order and GRANTS IN PART Plaintiffs' Motion to Compel. Defendant shall respond within thirty (30) days<sup>8</sup> to the following discovery requests:

- Plaintiffs' Interrogatories: Defendant shall respond to Interrogatories 1; 2; 3(a), (b), and (f); 4(a); 5(a); 6(a); 7(a) and (b); 9 (limited to any experts Defendant intends to call concerning class certification); 13; 14 (limited to providing the total number of students falling into each category identified in Interrogatories 3 through 6, or an estimate of that number if it is impossible to determine the precise number; Defendant need not provide a list of each student or a unique identifier for each student); and 18.
- Plaintiffs' Requests for Production of Documents: Defendant must respond only to those Requests for Production of Documents which seek documents relating to the limited Interrogatories listed above, or any other documents Defendant intends to introduce or utilize at the class certification stage.

Furthermore, Defendant may seek discovery from Plaintiffs similarly limited to the question of class certification. Should Defendant believe any discovery

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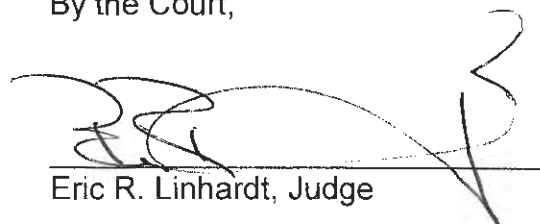
<sup>8</sup> Or such other time as the parties may agree or the Court allows.



responsive to the enumerated discovery requests includes material protected by FERPA or other statute, Defendant shall indicate such in its discovery responses.

IT IS SO ORDERED this 3<sup>rd</sup> day of October 2022.

By the Court,



Eric R. Linhardt, Judge

ERL/jcr

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