

EXHIBIT 1

TO

**FIRST SUPPLEMENT TO MOTION FOR PARTIAL
SUMMARY JUDGMENT (GOVERNMENTAL IMMUNITY)**

DURHAM



1869
CITY OF MEDICINE

CITY OF DURHAM

Office of the City Clerk

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919.560.4166 | F 919.560.4835

www.durhamnc.gov



SUBJECT: CERTIFICATION BY ARCHE L. McADOO, ASSISTANT FINANCE DIRECTOR/TREASURER OF THE CITY OF DURHAM, NORTH CAROLINA

**NORTH CAROLINA
DURHAM COUNTY**

I, D. Ann Gray, duly appointed City Clerk of the City of Durham, North Carolina (the "City"), do hereby certify that, with respect to the accompanying **CERTIFICATION**, Arche L. McAdoo is employed by the City as Assistant Finance Director/Treasurer and that his signature on the accompanying Certification is genuine.

WITNESS my hand and the corporate seal of the City of Durham, North Carolina, this the 17th day of March, 2009.


D. Ann Gray, MMC
City Clerk





CERTIFICATION

I, ARCHE L. McADOO, do hereby certify that:

I am employed by the City of Durham, North Carolina (the "City") as Assistant Finance Director/Treasurer. As such, and in such capacity, the City's Division of Risk Management and the Director of Risk Management report to me. The City's Director of Risk Management is the custodian of the records of the City's Division of Risk Management. Because the position of Director of Risk Management is at the present time open and unfilled, I am for the time being the custodian of the records of the City's Division of Risk Management. The accompanying letter from Everest National Insurance Company to the City, dated January 8, 2009, is a true, correct, and complete copy of the original document that was received by the City's Division of Risk Management and is an official public record of the City appearing in the files of the City's Division of Risk Management.

This the 17th day of March, 2009.

ARCHE L. McADOO

Sworn to and subscribed before me
this the 17th day of March, 2009.

Laverne V. Brooks

Notary Public



My commission expires: 6/25/2012

Everest National Insurance Company
477 Martinsville Road
P.O. Box 830
Liberty Corner, NJ 07938-0830
Tel: 908.604.3000 Fax: 908.604.3525

JAN 12 2009



EVEREST

January 8, 2009

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

City of Durham, North Carolina
c/o Risk Management Office
2609 North Duke Street, Suite 301
Durham, NC 27704

RE: Insured: City of Durham, NC
Policy#: 71P2000024-071
Effective Date: April 1, 2007 to April 1, 2008
Claimant's: David F. Evans, et al; Ryan McFadyen, et al; Edward
Carrington, et al.
Claim#: 071-1820

Dear Sir/Madam:

Everest National Insurance Company, on behalf of Everest Reinsurance Company ("EverestRe"), previously forwarded correspondence dated February 28, 2008, March 3, 2008 and March 17, 2008 regarding its position concerning the above-referenced matters (we note that we received no response to our correspondence). This letter should be read in conjunction with, and as a supplement to, that prior correspondence. **For the reasons set forth in our prior correspondence and as further discussed below, EverestRe disclaims coverage for these matters and will not incur any defense, expense or indemnity payments on your behalf.**

The information provided to us in the Complaints alleges that the defendants maliciously conspired to bring unsupported charges of rape, sexual assault, and kidnapping against Duke University lacrosse players stemming from an incident which took place on March 14, 2006. The plaintiffs further allege that the City of Durham ("City") defendants allowed District Attorney Michael Nifong to directly control the criminal investigation and prosecution of the alleged incident. It is undisputed that as a result of complaints filed against him, on January 12, 2007, Nifong recused himself from the investigation and prosecution of the plaintiffs and referred the case to the North Carolina Attorney General, such that neither Nifong nor the City of Durham had anything to do with the investigation and prosecution of the plaintiffs after that date. On April 11,

2007, the Attorney General dismissed all of the remaining charges against the plaintiffs after conducting an independent review of the investigation and evidence.

EverestRe issued Public Entity Excess Liability Policy number 71P2000024-071 (the "Policy") to the City for the period of April 1, 2007 to April 1, 2008. The Policy contains a \$10,000,000 Errors and Omissions liability aggregate, other than "wrongful acts" of "personal injury offense" or "advertising injury offense." It also contains a per "occurrence" or "wrongful act" limit of \$10,000,000 for any one "occurrence," "wrongful act" or series of continuous, repeated, or related "occurrences" or "wrongful acts" in excess of your "retained limit." A \$1,000,000 retained limit applies for any one "occurrence" or "wrongful act" or series of continuous, repeated, or related occurrences or wrongful acts.

Your Policy contains the following relevant Insuring Agreements and applicable Definitions:

1. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

We will pay on behalf of the insured, the "ultimate net loss", in excess of the "retained limit", that the insured becomes legally obligated to pay by reason of liability imposed by law because of "bodily injury" or "property damage" caused by an "occurrence" to which this insurance applies and that takes place in the "coverage territory" during the Policy Period.

The Policy defines "bodily injury" as "bodily injury, disability, sickness, or disease sustained by a person, including care, loss of services and death resulting from any of these at any time. "Bodily injury" includes mental anguish, mental injury, humiliation, shock or death if resulting from "bodily injury."

The Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

2. ERRORS AND OMISSIONS LIABILITY

We will pay on behalf of the insured, the "ultimate net loss" in excess of the "retained limit", that the insured becomes legally obligated to pay to compensate others for loss arising out of your "wrongful act" to which this insurance applies and that takes place in the "coverage territory" during the Policy Period.

The term "wrongful act" is defined by the Policy as: "any actual or alleged error or misstatement, omission, negligent act, or breach of duty including misfeasance, malfeasance, and nonfeasance by you." "Wrongful act" also means any "personal injury offense" or "advertising injury offense." The term "personal injury offense" is defined as:

any act, error, or omission constituted by or arising out of one or more of the following:

1. False arrest, detention or imprisonment;

2. Malicious prosecution;
3. Oral or written publication, in any manner, of material that slanders or libels a person or organization, or disparages a person or organization's goods, products, or services . . .

The term "advertising injury offense" is defined as any act, error or omission constituted by one or more of the following:

1. Oral or written publication, in any manner, of material that slanders or libels a person or organization, or disparages a person's or organization's goods, products, or services;
2. Oral or written publication, in any manner, of material that violates a person's right of privacy;

Based upon the above-referenced policy language, in order to trigger coverage under the EverestRe insuring agreements, the alleged occurrence(s) and/or wrongful act(s) must take place between April 1, 2007 and April 1, 2008. However, the complaints allege that the conspiracy-driven investigation of the rape allegations took place from March 2006 until January 12, 2007, when the State's Attorney General took over this matter from the City of Durham. From that point forward, the City of Durham had no involvement in the investigation or prosecution of the claims against the plaintiffs, meaning that no "wrongful act" or "occurrence" involving the City of Durham defendants could have occurred after January 12, 2007. Presumably for that reason, none of the complaints even allege that the City of Durham defendants engaged in any wrongful acts or that any bodily injury was caused by an occurrence that took place after the inception of the Policy on April 1, 2007. Therefore, since no "wrongful act" or "occurrence" involving the City of Durham defendants took place or is alleged to have taken place during the Policy period, the EverestRe Policy is not triggered and no coverage is available for plaintiffs' claims under the Policy.

Your Policy also contains the following Defense provision, cited in relevant part:

B. DEFENSE

However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", or "wrongful acts" to which this insurance does not apply.

As stated above, we have determined that the allegations of bodily injury caused by an occurrence(s) and/or wrongful act(s) on the part of the insureds are alleged to have occurred before the inception of the EverestRe Policy. As the allegations fall clearly outside the scope of policy coverage, EverestRe has no duty to defend you with regard to these matters.

In addition to the fact that plaintiffs' claims are not covered under the Policy due to the fact that no wrongful act or occurrence took place or is alleged to have taken place during

the policy period, the Policy contains coverage exclusions which would potentially preclude coverage for the plaintiffs' claims. These exclusions are set forth below.

The Policy contains known loss language in paragraph 5 of Section I ("Coverages"), A ("Insuring Agreements") which provides, in pertinent part, as follows:

5. This insurance applies to "bodily injury" or "wrongful acts"...only if, prior to the Policy Period, no insured listed under Paragraphs 1. or 2. of **SECTION II. WHO IS AN INSURED**, and no "employee" authorized by you to give or receive notice of an "occurrence", "wrongful act"...or "claim" knew that the "bodily injury", or "wrongful act"...had occurred or had taken place, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the Policy Period, that the "bodily injury" or "wrongful act"...occurred or took place, then any continuation, change or resumption of such "bodily injury" or "wrongful act"...during or after the Policy Period will be deemed to have been known prior to the Policy Period.

...

The "bodily injury" or "wrongful act"...will be deemed to have been known to have taken place or occurred at the earliest time when any insured listed under Paragraphs 1. or 2. of **SECTION II. WHO IS AN INSURED**, or any "employee" authorized by you to give or receive notice of an "occurrence", "wrongful act"...or "claim":

- a. Reports all, or any part, of the "bodily injury" or "wrongful act"...to us or any other insurer;
- b. Receives a written or verbal demand or "claim" for damages because of "bodily injury" or "wrongful act"...; or
- c. Becomes aware by any other means that "bodily injury" or "wrongful act"...has taken place, occurred or has begun to occur.

Pursuant to the above policy language, coverage would be precluded if any insured knew that a "bodily injury" or "wrongful act" had occurred or had taken place, in whole or in part, prior to the policy period.

Your Policy also contains the following Exclusion which provides, in pertinent part, as follows:

This insurance does not apply to a "claim" or "suit" against you for:

1. "Bodily injury"...expected or intended from the standpoint of the insured...

Based upon the above Exclusion, coverage would be precluded if any insured expected or intended "bodily injury."

Exclusion 17 (b) of the Policy provides:

This insurance does not apply to a "claim" or "suit" against you for:

17. Any liability for "personal injury offense" or "advertising injury offense":

b. Arising out of oral or written publication of material whose first publication took place before the beginning of the Policy Period. All "personal injury offense" or "advertising injury offense" arising out of publication of the same or similar material subsequent to the beginning of the Policy Period is also excluded.

The plaintiffs' claims of damages based on oral and written publication of material are alleged to have occurred no later than the date on which Nifong recused himself from the prosecution, which date was January 12, 2007 - nearly four months before the beginning of the EverestRe Policy period. Accordingly, liability for "personal injury offense" or "advertising injury offense," if any, would necessarily arise out of oral or written publication of material first published before the beginning of the EverestRe Policy period and thus be barred by this exclusion.

In light of the various allegations in the underlying complaints of criminal and dishonest conduct, fraud, conspiracy and other wrongdoing, we note that Exclusion 15 of the Policy provides:

This insurance does not apply to a "claim" or "suit" against you for:

15. Any liability arising out of criminal, fraudulent, dishonest or malicious acts or omissions committed by or at the direction of the insured. We may, at our sole discretion, agree to waive this exclusion in order to supply certain payments under Paragraph C. **Defense Costs of SECTION I COVERAGES.** If the judgment or final adjudication is adverse to you, you will reimburse us for all defense costs.

This exclusion does not apply to liability arising from the managerial, advisory, supervisory, or controlling obligations of any insured over the actions of another insured.

Based upon the above Exclusion, coverage would be precluded if there was any liability arising out of criminal, fraudulent, dishonest or malicious acts or omissions committed by or at the direction of the insured (other than liability arising from the managerial, advisory, supervisory, or controlling obligations of any insured over the actions of

another insured). In this regard, coverage for any punitive damages awarded may also be precluded.

Exclusion 16 of the Policy provides:

This insurance does not apply to a "claim" or "suit" against you for:

16. Any liability arising out of your "wrongful act" for gain, profit, or advantage to which you are not legally entitled. We may, at our sole discretion, agree to waive this exclusion in order to supply certain payments under Paragraph C. **Defense Costs of SECTION I. COVERAGES** as respects any "claim" or "suit" arising from an alleged criminal, fraudulent, dishonest or malicious act or omission committed by or at the direction of you, for any "claim" or "suit" arising out of your wrongful act for gain, profit, or advantage to which you are not legally entitled until final adjudication, judgment or settlement to which we have agreed. If the judgment or final adjudication is adverse to you, you will reimburse us for all costs associated with the defense.

This exclusion does not apply to liability that any insured has with regard to the managerial, advisory, supervisory, or controlling obligations over the actions of another insured.

Based upon the above Exclusion, coverage would be precluded if there was any liability arising out of your "wrongful act" for gain, profit, or advantage to which you are not legally entitled (other than liability that any insured has with regard to the managerial, advisory, supervisory, or controlling obligations over the actions of another insured).

The Policy also contains an Exclusion for non-monetary relief. Exclusion 25 provides:

This insurance does not apply to a "claim" or "suit" against you for:

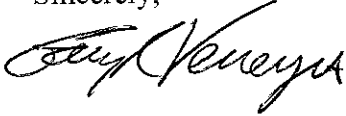
25. Any liability for injunctions, equitable relief, or any other form of relief other than the payment of money damages.

Based upon the above-referenced Exclusion, coverage would be precluded for any injunctive, equitable, or any other form of relief, other than payment of money damages, sought by the underlying plaintiffs.

Please be advised that our position is based upon the facts and information available to us at this time and is subject to the availability and review of additional information. We may revise our position and raise any other coverage issues or coverage defenses without prejudice, waiver, or estoppel. Furthermore, this letter does not constitute a waiver of any policy provisions or defenses available to us. All rights are expressly reserved.

To reiterate, as set forth above, EverestRe disclaims coverage for these matters and will not incur any defense, expense or indemnity payments on your behalf. If any of the factual information relied upon by us in this letter is materially incorrect, or if you possess any additional information which you believe impacts the coverage position taken herein, please immediately contact the undersigned at 908-604-7248.

Sincerely,



Gary R. Venezia
Manager, Excess Casualty Claims

cc: Theodore B. Smyth
Smyth & Cioffi
3221 Blue Ridge Road
Suite 101
Raleigh, NC 27612

Marsh USA, Inc.
100 North Tryon Street
Suite 3200
Charlotte, NC 28202