IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:07-CV-00953

RYAN MCFADYEN, *et al.*,	
Plaintiffs,	**DEFENDANT CITY OF DURHAM'S AND ALL INDIVIDUAL CITY DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO STAY PROCEEDINGS**
v.	
DUKE UNIVERSITY, *et al.*,	
Defendants.	

INTRODUCTION

The City Defendants[1] have moved for a stay of discovery and other proceedings in this Court for several compelling reasons.

First, the individual City Defendants are appealing the denial of their motions to dismiss as to each and every claim that currently survives against them. In addition, Defendant the City of Durham, North Carolina (the "City") itself is appealing a number of this Court's rulings. These appeals divest this Court of jurisdiction over the claims on appeal, and bar further proceedings regarding those claims. Furthermore, since the claims on appeal constitute the core of Plaintiffs' Complaint, the Court should stay all proceedings, including proceedings with respect to any surviving claims that are not on appeal.

[1] The City Defendants are: Patrick Baker, Steven Chalmers, Beverly Council, Ronald Hodge, Jeff Lamb, Lee Russ, Michael Ripberger, David Addison, Mark Gottlieb, Benjamin Himan, and the City of Durham.

Second, allowing discovery or other proceedings to continue with respect to any isolated matters not on appeal would undermine the immunity protections afforded to the City Defendants under both federal and state law. The City Defendants would inevitably be forced to participate in those proceedings, rendering their right to be free from the "concerns of litigation," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009), an empty promise.

Third, a stay would serve the interest of judicial efficiency and conserve the limited resources of this Court and of the City Defendants. Resolution of the appeals in the City Defendants' favor could wholly remove all or many of the Defendants and/or claims from this litigation and moot the need for all or much of discovery. And there is no efficient way to confine ongoing proceedings to the claims and defendants that are not the subject of the appeals, since those claims are tightly entangled with the claims on appeal.

Finally, a stay of proceedings will provide time to resolve a separate dispute regarding the insurance proceeds available for the defense of these matters. Until that dispute is resolved, the City cannot make informed decisions during discovery regarding the allocation of its limited financial resources.

Accordingly, for the reasons stated herein, this Court should stay all proceedings in this matter pending the outcome of the City Defendants' appeals.

All of the non-City codefendants[2] consent to the stay of proceedings herein requested, while Plaintiffs object to a stay. The City Defendants have also contemporaneously filed a Motion to Expedite Response and Reply with respect to the present Motion to Stay Proceedings so that these concerns may be addressed by the Court prior to the imminent deadlines for filing Answers in each of the three cases, as well as the anticipated start of discovery.

BACKGROUND

The City and the individual City Defendants have timely filed notices of appeal from this Court's Orders partially denying their motions to dismiss and denying the City's motion for partial summary judgment. *See* Doc. Nos. 196, 199. The individual City Defendants are entitled to an immediate interlocutory appeal of the Court's decisions that 1) they do not have qualified immunity against Plaintiffs' federal claims, and 2) they do not have public official immunity against all of Plaintiffs' state law claims. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (order denying a public official's claim of qualified immunity is immediately appealable because a trial would threaten to disrupt governmental functions and inhibit the initiative of government officials); *see also Bailey v. Kennedy*, 349 F.3d 731, 738 (4th Cir. 2003) ("Because, under North Carolina law, public officers' immunity is an immunity from suit, we have jurisdiction over the police officers' appeal of the district court's denial of [such] immunity . . . .").

[2] The non-City codefendants are: Duke University, Duke University Health System, Inc., Richard Brodhead, John Burness, Matthew Drummond, Aaron Graves, Robert Dean, Tara Levicy, Victor Dzau, Linwood Wilson, Gary N. Smith, Robert K. Steel, Richard H. Brodhead, Matthew Drummond, DNA Security, Inc., Richard Clark, and Brian Meehan.

The City is similarly entitled to seek immediate interlocutory review of this Court's denial of the City's motion for partial summary judgment on governmental immunity grounds. *See Showalter v. N.C. Dep't of Crime Control & Pub. Safety*, 643 S.E.2d 649, 651 (N.C. Ct. App. 2007) ("[T]his Court has repeatedly held that the denial of a motion for summary judgment grounded on the defense of governmental immunity affects a substantial right and is immediately appealable."); *see also Block v. County of Person*, 540 S.E.2d 415, 419 (N.C. Ct. App. 2000) (immediate appeal is also available "where a defendant has asserted governmental immunity from suit through the public duty doctrine"). The Fourth Circuit has jurisdiction over the denial of immunity if "under state law, the immunity is an immunity from suit, but we lack such jurisdiction if it is an immunity from liability only." *Bailey v. Kennedy*, 349 F.3d 731, 738-39 (4th Cir. 2003) (citation omitted). As *Showalter* and *Block* demonstrate, governmental immunity, including governmental immunity under the public duty doctrine, is immunity from suit under North Carolina law.

In addition, the City Defendants are appealing as to other claims under the doctrine of pendent appellate jurisdiction. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (pendent jurisdiction is proper (1) when an issue is "inextricably intertwined" with a question that is the proper subject of an immediate appeal, or (2) when review of an issue is "necessary to ensure meaningful review" of an immediately appealable issue).

ARGUMENT

I. THE PENDING APPEALS DIVEST THIS COURT OF JURISDICTION OVER ALL CLAIMS THAT ARE ON APPEAL

The City Defendants' appeals divest this Court of jurisdiction over any and all appealed claims while the appeals are pending. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Dixon v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002) (timely notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal); *United States v. Christy*, 3 F.3d 765, 767 (4th Cir. 1993) (same); *United States v. Perate*, 719 F.2d 706, 711 (4th Cir. 1983) (same); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (same).[3]

When a court is divested of jurisdiction over a particular claim, it is divested of *every aspect* of the adjudication of that claim, including discovery. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed."); 15A Wright & Miller, Federal Practice & Procedure § 3914.10 ("[O]rdinarily, the district court should not proceed to trial, nor even

[3] *See also Eckert Int'l, Inc. v. Government of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 174 (E.D. Va. 1993) ("Fiji's § 1291 interlocutory appeal [of denial of sovereign immunity] divests this Court of jurisdiction over the remaining matters."); *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) (district court automatically divested of jurisdiction by an interlocutory appeal of denial of qualified immunity where court did not certify the appeal as frivolous or forfeited); *Williams v. Brooks*, 996 F.2d 728, 729-30 (5th Cir. 1993) (filing of interlocutory appeal on immunity issue divested the district court of jurisdiction to proceed against appealing defendant) (citing cases); *Krycinski v. Packowski*, 556 F. Supp. 2d 740, 741 (W.D. Mich. 2008) (court divested of jurisdiction over state-law claims where state-law immunity from suit "was asserted, denied, and appealed"); *K.M. v. Ala. Dep't of Youth Servs.*, 209 F.R.D. 493, 496 (M.D. Ala. 2002) ("Once a non-frivolous appeal of a denial of immunity has been filed, a stay of discovery is obviously appropriate until the appellate court resolves the immunity issue.").

impose substantial pretrial burdens, pending appeal."); *Apostol*, 870 F.2d at 1338 ("It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one . . . ."). Accordingly, no discovery or other proceedings should be permitted with respect to those claims that have been appealed.

II. THE COURT SHOULD ALSO STAY DISCOVERY AND OTHER PROCEEDINGS REGARDING CLAIMS THAT ARE NOT ON APPEAL

The City Defendants also respectfully submit that the Court should stay discovery and other proceedings with respect to claims that are not on appeal, because allowing proceedings to continue would: a) undermine the City Defendants' immunity defenses, which are the subject of the appeals; b) impose unnecessary burdens and costs on this Court and the Defendants and result in piecemeal litigation; and c) require the City Defendants to make crucial litigation decisions before they know what insurance is available to cover their defense costs.

A. Failure to Stay Proceedings Would Undermine the City Defendants' Immunity Defenses

The issues that have not been appealed are closely intertwined with the issues that have been. For example, Plaintiffs have asserted multiple conspiracies between City and non-City Defendants during the course of the investigation. *See, e.g.*, Claim 1 (alleging conspiracies between City and non-City defendants as to DNA testing); Claim 18 (alleging conspiracy to obstruct justice against all defendants). Discovery related to non-City defendants' potential liability therefore would clearly require significant participation by the City Defendants—in the form of responses to interrogatories and document requests as well as depositions. But the Supreme Court has made clear that

requiring such participation in discovery would effectively negate the immunity protections that those defendants are asserting on appeal. *See, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); *id*. at 1945-46 ("Qualified immunity is a privilege that provides an immunity from suit rather than a mere defense to liability. This doctrine . . . is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation."); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("[T]he trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings."); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc*., 506 U.S. 139, 145 (1993) ("[T]he value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials is for the most part lost as litigation proceeds past motion practice.") (citations omitted).

The Fourth Circuit has likewise recognized that "qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Jackson v. Long*, 102 F.3d 722, 727 (4th Cir. 1996) (citation omitted); *see also Gray-Hopkins v. Prince George's County*, 309 F.3d 224, 233 (4th Cir. 2002) (in the context of qualified immunity, "even such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be peculiarly disruptive of effective government."); *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) ("The defense exists to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of

'such pretrial matters as discovery.'"); *Stewart v. Donges*, 915 F.2d 572, 575-76 (10th Cir. 1990) ("the divestiture of jurisdiction brought about by the defendant's filing of a notice of appeal is virtually complete, leaving the district court with jurisdiction only over peripheral matters unrelated to the disputed right not to have to defend the prosecution or action at trial").

The Supreme Court has made plain that "[i]t is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants." *Iqbal*, 129 S. Ct. at 1953. To the contrary:

> It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Id.; *see also Eggert v. Chaffee County*, No. 10-cv-01320-CMA-KMT, 2010 U.S. Dist. LEXIS 95245, at *14 (D. Colo. August 25, 2010) ("[B]ecause a stay as to some defendants but not others does not relieve the defendant asserting immunity from the burdens of litigation, a stay of all proceedings is appropriate when an immunity defense is asserted."); *see also Rank v. Jenkins*, No. Civ. A. 2:04-0997, 2005 WL 1009625 (S.D. W.Va. April 28, 2005) (granting stay as to all defendants when only some defendants had qualified immunity).

Allowing any proceedings to continue in this Court while the immunity issues are on appeal thus would directly undermine the City Defendants' rights to be free from the

burdens of litigation. For this reason alone, the Court should grant a stay of all proceedings.

B. A Stay Would Serve the Interest of Judicial Efficiency and Conserve the Limited Resources of This Court and the City Defendants

If the City Defendants prevail in the Fourth Circuit, it could make all—or significant portions—of this litigation disappear. This would render all or much of any discovery that occurred before the Fourth Circuit's decision superfluous and a waste of resources. On the other hand, if the *Plaintiffs* prevail in the Fourth Circuit, the City Defendants would likely be subjected to additional, supplemental discovery on the claims that would be returned to this Court's jurisdiction. This sort of piecemeal discovery would waste this Court's resources and impose unnecessary burdens on the City Defendants. Staying discovery until the appeals are decided and the scope of the litigation is clear therefore would serve the interests of judicial efficiency. For these reasons, courts have granted full stays of proceedings in similar circumstances. *See, e.g.*, *K.M. v. Ala. Dep't of Youth Servs.*, 209 F.R.D. 493, 496 (M.D. Ala. 2002) (granting stay of discovery as to all defendants—including non-appealing defendants—pending appeal by several defendants of denial of qualified or sovereign immunity and rejecting plaintiffs' argument to proceed with claims against the non-appealing defendants because of "the danger of wasting judicial resources through piecemeal litigation, which far outweighs any advantage for any of the parties."); *see also Speers v. County of Berrien*, No. 4:04-CV-32, 2005 WL 1907525, *3 (W.D. Mich. Aug. 10, 2005) (not reported) (noting that "[d]istrict courts enjoy considerable discretion in establishing the framework

for the orderly progression of a case" and rejecting "[p]laintiffs' proposal that the case proceed to trial while the rest of the case is on appeal [as] a recipe for needless duplication, waste, and expense").

A full stay of discovery is even more compelling here, where the issues and claims that have been appealed are tightly tangled with the issues and claims that have not been. *See, e.g.*, *Gaalla v. Citizens Medical Center*, 2011 WL 23233, 2 (S.D. Tex. Jan. 4, 2011) ("In light of the close relationship between the claims against [non-appealing defendant] and the other Defendants [appealing denial of immunity], it is appropriate to stay this case in its entirety pending resolution of the qualified immunity issues on interlocutory appeal."); *K.M.*, 209 F.R.D. at 496 (agreeing that "discovery stay should generally extend to all discovery in this case, as there is no ascertainable line between that discovery needed in the case of the claims against [the non-appealing defendants] and the claims of the other defendants [appealing denials of qualified or sovereign immunity]"); *In re: Cotton Yard Antitrust Litigation*, No. 1:04-MD-1622, 2006 WL 1030406 (M.D.N.C. Jan. 31, 2006) (Beaty, J.) (staying entire case for jurisprudential reasons when defendants properly appealed court's denial of arbitration demands as to a subset of claims at issue).

Even if it were possible to draw rational and appropriate lines of discovery while some claims and defendants are the subject of appeal and others are not, the effort expended in drawing such lines would itself unduly burden the Court and the parties in time- and resource-consuming motion practice—all over disputes that may turn out to be purely hypothetical, depending on the outcome of the appeals. Moreover, the existence of these three lawsuits proceeding simultaneously makes discovery all the more complex

and the ability to draw appropriate lines all the more difficult. The simplest solution is the most cost-effective for all involved—a complete stay of discovery pending the outcome of the appeals. *See Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *see also Whiteside v. UAW Local 3520*, 576 F. Supp. 2d 739, 742 (M.D.N.C. 2008) (Beaty, J.) (granting a stay of proceedings pending the outcome of a related arbitration proceeding "to ensure that any determination by this Court is made at the appropriate time with all of the relevant information").

C. A Stay Would Enable the City to Make Informed Litigation Judgments Once It Knows the Extent of Its Insurance Coverage

As this Court is acutely aware, the three amended complaints in this and the two related matters total over 800 pages. And they required 499 total pages from this Court to address the related motions to dismiss and motions for partial summary judgment. It seems quite clear, then, that the Plaintiffs in these cases intend to conduct discovery, and any trial proceedings, on a similarly massive scale. This will obviously impose substantial financial burdens on the City.

Following the Court's recent decisions, the City filed an arbitration demand against its insurance carriers to ascertain the amount of coverage that is available to provide a defense of the City Defendants during the course of these three lawsuits. Absent certainty regarding the scope of coverage, and in particular the funds available to defend and/or indemnify the City and the individual City Defendants, the City is unable

to make reasoned decisions about the allocation of its limited resources—for discovery and trial obligations or any potential settlements with the various plaintiff groups.

Moreover, the costs associated with electronic discovery alone will be prohibitive absent adequate insurance defense funds. The City will also be unable to represent accurately its financial position to the Court when explaining what type of discovery would be feasible for it to complete. And in pursuing its own defense, the City will be unable to make accurate assessments of the appropriate reach of its own discovery efforts, absent knowledge of the total funds available to it.

Courts routinely stay proceedings where the outcome of a separate proceeding may have a powerful impact on it. *See, e.g.*, *Bernardo v. Eastern Associated Coal, LLC*, No. 1:08CV221, 2009 U.S. Dist. LEXIS 17493, *5 (N.D. W.Va. Mar. 3, 2009) (staying a civil lawsuit pending the outcome of a related workers compensation proceeding to "serve the interests of judicial economy and possibly prevent unnecessary expenditures on discovery by the parties"); *Whiteside*, 576 F. Supp. 2d at 742 (staying litigation proceedings pending outcome of an arbitration proceeding "to avoid any interference in the . . . arbitration and to ensure that any determination by this Court is made at the appropriate time with all of the relevant information"). The City Defendants respectfully request that this Court do the same here.

CONCLUSION

For the reasons discussed above, all proceedings in this Court should be stayed pending adjudication of the City Defendants' appeals.

This the 13th day of May, 2011.

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

The undersigned hereby certifies that, pursuant to Rule 5 of the Federal Rules of Civil Procedure and LR5.3 and LR5.4, MDNC, the foregoing pleading, motion, affidavit, notice, or other document/paper has been electronically filed with the Clerk of Court using the CM/ECF system, which system will automatically generate and send a Notice of Electronic Filing (NEF) to the undersigned filing user and registered users of record, and that the Court's electronic records show that each party to this action is represented by at least one registered user of record (or that the party is a registered user of record), to each of whom the NEF will be transmitted.

This the 13th day of May, 2011.

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