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

| | |
|---|---|
| **RYAN MCFADYEN, *et al.*,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**DUKE UNIVERSITY, *et al.*,**<br><br>**Defendants.** | **REPLY BRIEF IN SUPPORT OF CITY DEFENDANTS' MOTION TO STAY PROCEEDINGS** |

1. In their opening brief in support of the stay motion, the City Defendants noted, with ample case support, that case law holds that this Court lacks jurisdiction to proceed with respect to any claims that have been appealed. *See* Doc. 206. Plaintiffs respond that many of their causes of action are not subject to an immunity defense, and are therefore not on appeal. *See* Opp. at 4-5 (Doc. 214). But, in fact, the bulk of Plaintiffs' surviving causes of action *are* on appeal. The City Defendants have made plain, both in their opening brief and in their docketing statements in the Fourth Circuit, that they are appealing as to Plaintiffs' other causes of action under the doctrine of pendent appellate jurisdiction. *See Swint v. Chambers Cty Comm'n*, 514 U.S. 35, 50-51 (1995).

For example, the individual City Defendants have appealed the denial of qualified immunity as to all federal claims asserted against them.[1] In addressing this issue, the

[1] Plaintiffs also suggest that this Court's rejection of the City Defendants' assertions of immunity somehow "did not deny their immunities,...[or] even opine on the nature of their asserted immunities." Opp. at 4 (Doc. 214). This suggestion is belied by the Court's decisions, which specifically reject the City Defendants' immunity claims. *See,*

Fourth Circuit will have to address whether the Plaintiffs' amended complaint adequately alleges a constitutional violation. If it rules against the Plaintiffs on this issue, it will necessarily mean that no *Monell* liability can lie against the City. The City is therefore appealing this Court's denial of its motion to dismiss the *Monell* claims under the doctrine of pendent appellate jurisdiction, since "the issues raised by [the municipality] on appeal are 'inextricably intertwined' with those raised by the officers. *Altman v. City of High Point*, 330 F.3d 194, 207 n.10 (4th Cir. 2003).

Because the vast majority of Plaintiffs' claims are being appealed, this Court lacks continuing jurisdiction over those claims, and therefore should stay discovery as to the entire case.

2. The City Defendants also showed that the Supreme Court and Fourth Circuit have made clear that courts should take special care to protect defendants who are claiming immunity by avoiding discovery and other pretrial matters if possible. Doc. 206 at 6-7. Indeed, the Supreme Court has expressly held that careful case management of discovery cannot be relied on to protect immunity rights when the denial of immunity is on appeal, "given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (citation omitted); *see also id. at* 1953-54 (holding that a "promise[] [of] minimally intrusive discovery…provides cold comfort…for high-level officials who must

---

*e.g.*, Doc. 186 & 187. The fact that the Court suggested that the City Defendants could raise their immunity arguments again after discovery does not change the fact that the Court rejected the City Defendants' immunity arguments at this stage. The posture of this case is thus no different from the many cases in which government defendants have raised qualified immunity or public official immunity at the motion to dismiss stage. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

be neither deterred nor detracted from the vigorous performance of their duties."). That is particularly true here, given both the overlapping nature of Plaintiffs' numerous claims and the extraordinary length of the Complaint. Plaintiffs offer no clue as to how discovery could be cleanly demarcated so as to limit depositions and document requests against City Defendants to the few claims not on appeal. In fact, as the City Defendants have pointed out, defining the appropriate scope of discovery during the appeals would be inordinately complicated and would undoubtedly require the resolution of numerous motions to quash or enforce specific discovery demands. This dispute would waste the Court's valuable time and the Defendants' limited resources, and significantly diminish whatever time savings Plaintiffs anticipate from litigating in this Court and the Fourth Circuit simultaneously.

No matter how carefully this Court and the parties try to confine the scope of discovery during appeal, the end result would be piecemeal discovery at best, and unnecessary or duplicative and prejudicial discovery at worst. As noted above, if the City Defendants prevail on appeal, any discovery that occurred during the appeal could be rendered moot. And if any of the challenged claims survives interlocutory appeal, plaintiffs in this and/or the companion cases would undoubtedly try to impose supplemental discovery on them in light of the Fourth Circuit's decision, forcing the City Defendants to sit through repeated depositions and respond to additional document demands. Again, this would waste this Court's valuable time and the City Defendants' limited resources, and be highly prejudicial to Defendants.

3. Plaintiffs also claim that the City Defendants will still be subject to discovery even if they prevail on appeal, so discovery might as well begin now. *See* Opp. at 5 (Doc. 214). But this argument suffers from two fatal logical flaws. First, as noted above, the City Defendants' appeal includes the vast bulk of Plaintiffs' surviving claims. If the City Defendants are successful on appeal, any discovery following a decision by the Fourth Circuit might be extremely limited, at most.

Second, Plaintiffs fail to recognize that even a partially successful appeal may result in some City Defendants' being removed from this case altogether. If the Supervisory Defendants, for example, prevail on their qualified immunity arguments, they will no longer be defendants in this case. Plaintiffs appear to suggest that this makes no difference, since all the City Defendants will still be subject to discovery as witnesses, even if they are no longer parties. But there is an enormous difference between being subject to discovery as a *party* and being subject to it as a mere *witness*. At the very least, this difference affects the resources a person will put into both defending against Plaintiffs' discovery and engaging in his own affirmative discovery. Simply assuming, as Plaintiffs do, that participation as a witness is equivalent to participation as a party ignores the fundamental policy underlying the qualified immunity doctrine. *See Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) ("the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims' against government officials [will] be resolved prior to discovery.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2 (1987)); *Cloaninger v. McDevitt*, 555 F.3d 324, 330 (4th Cir. 2009) ("Unless the plaintiff's allegations state a claim of violation of clearly

established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

4. Plaintiffs also argue (Opp. at 5, Doc. 214) that they will be prejudiced by a stay, because any delay between the time of the events at issue and a trial may result in faded memories and the destruction of evidence. But there is no reason to think that a Fourth Circuit decision will take an inordinately long time, and Plaintiffs can ask that court to expedite its decision. Moreover, any delay in the resolution of this case has been caused entirely by Plaintiffs in this and the companion cases. By filing such inordinately long complaints and so many causes of action, and then filing amended complaints with still more causes of action, the Plaintiffs "required the Court to undertake the time-consuming process of wading through a mass of legally unsupportable claims and extraneous factual allegations in an attempt to 'ferret out the relevant material from a mass of verbiage.") Opinion at 221 (citation omitted) (Doc. 186).[2]

Finally, the Court has already rejected these same arguments when raised by Plaintiffs in the companion *Evans* and *Carrington* matters, when the Court denied their requests to compel discovery before the Motions to Dismiss were resolved. The reasons the Court gave then apply equally now, since the appeal is, for all intents and purposes,

[2] Nor have Plaintiffs been entirely candid about their evidentiary concerns. Plaintiffs assert that "[p]erhaps the most striking illustration of the prejudice caused by the stay up to this point in this action," was the demolition of the house located at 610 N. Buchanan Boulevard on 12 July 2010. Opp. at 5-6. Plaintiffs say that the demolition was "authorized by a permit Duke obtained from the City of Durham," and claim that the layout of the bathroom would otherwise have been used by the defense. Opp. at 6. But nowhere do Plaintiffs acknowledge that they were given ample notice of the demolition as well as an opportunity to preserve evidence in a manner of their choosing. *See* Notice of Duke University's Response to Plaintiffs' Allegation of Destruction of Evidence (Doc. No. 215) at 1-3. Plaintiffs' counsel visited the house and gathered and preserved evidence, and never filed any objection to the demolition in this Court. *Id.* at 2.

an extension of the Motions to Dismiss. As this Court wrote in the context of the *Evans* matter:

> [A]llowing discovery to proceed further at this time . . . would be premature and inefficient, particularly in light of the scope of this litigation and the number of claims asserted and the number of Defendants named. In addition, proceeding with full discovery at this time would likely result in significant discovery disputes that could only be resolved by determination of the issues raised in the Motions to Dismiss. . . . To the extent Plaintiffs raise general concerns regarding possible loss or destruction of evidence, the Court notes that Defendants have an ongoing duty to preserve potentially relevant evidence . . . and this Court can appropriately address if necessary any potential loss or destruction of such evidence.

Order (Nov. 12, 2008) (Doc. 82 in Civ. Action No. 1:07-739) at 3-4.

Four additional Defendants not affiliated with the City have now joined in support of the City Defendants' motion,[3] while Plaintiffs have failed to offer any compelling argument in opposition. For the reasons stated herein and in the City Defendants' opening brief, the motion for a stay of proceedings should be granted.

## CONCLUSION

For the reasons discussed above, the City's motion to stay all proceedings in this Court should be granted.

[3] The non-affiliated Defendants supporting the City Defendants' motion to stay are: DNA Security Inc., Brian Meehan, Richard Clark, and Linwood Wilson. *See* Doc. Nos. 211 & 212.

This the 26th day of May, 2011.

FAISON & GILLESPIE

By: /s/ Reginald B. Gillespie, Jr.

Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895
5517 Chapel Hill Boulevard, Suite 2000
Post Office Box 51729
Durham, North Carolina 27717-1729
Telephone: (919) 489-9001
Fax: (919) 489-5774
E-Mail: rgillespie@faison-gillespie.com

STEPTOE & JOHNSON LLP

By: /s/ Roger E. Warin

Roger E. Warin*
Michael A. Vatis*
Matthew J. Herrington*
Leah M. Quadrino*
John P. Nolan*
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 429-3000
Fax: (202) 429-3902
E-Mail: rwarin@steptoe.com
*(Motion for Special Appearance to be filed)

*Attorneys for Defendant City of Durham, North Carolina*

***SIGNATURES OF COUNSEL CONTINUED ON NEXT PAGE***

POYNER & SPRUILL LLP

By:/s/ Edwin M. Speas
Edwin M. Speas
North Carolina State Bar No. 4112
Eric P. Stevens
North Carolina State Bar No. 17609
Post Office Box 1801
Raleigh, North Carolina 27602-1801
Telephone: (919) 783-6400
Fax: (919) 783-1075
E-Mail: espeas@poynerspruill.com
E-Mail: estevens@poyners.com

*Attorneys for Defendant Mark Gottlieb*

KENNON, CRAVER, BELO, CRAIG & MCKEE, PLLC

By: /s/ Joel M. Craig
Joel M. Craig
North Carolina State Bar No. 9179
Henry W. Sappenfield
North Carolina State Bar No. 37419
4011 University Drive, Suite 300
Post Office Box 51579
Durham, North Carolina 27717-1579
Telephone: (919) 490-0500
Fax: (919) 490-0873
E-Mail: jcraig@kennoncraver.com
E-Mail: hsappenfield@kennoncraver.com

*Attorneys for Defendant Benjamin Himan*

***SIGNATURES OF COUNSEL CONCLUDED ON NEXT PAGE***

TROUTMAN SANDERS LLP

By: /s/ Patricia P. Shields
Patricia P. Shields
North Carolina State Bar No. 13005
D. Martin Warf
N.C. State Bar No. 32982
434 Fayetteville Street Mall
Two Hannover Square, Suite 1100
Raleigh, North Carolina 27601
Telephone: (919) 835-4100
Fax: (919) 829-8714
E-Mail: tricia.shields@troutmansanders.com
E-Mail: martin.warf@troutmansanders.com

*Attorneys for Defendants Patrick Baker, Steven Chalmers, Beverly Council, Ronald Hodge, Jeff Lamb, Lee Russ, and Michael Ripberger*

MAXWELL, FREEMAN & BOWMAN, P.A.

By: /s/ James B. Maxwell
James B. Maxwell
North Carolina State Bar No. 2933
Post Office Box 52396
Durham, North Carolina 27717
Telephone: (919) 493-6464
Fax: (919) 493-1218
E-Mail: jmaxwell@mfbpa.com

*Attorneys for Defendant David Addison*

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 26th day of May, 2011.

FAISON & GILLESPIE

By: /s/ Reginald B. Gillespie, Jr.
Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895