

On 31 March 2011, the Court dismissed twenty-seven counts of Plaintiffs' Second Amended Complaint. [DE 187]. The Court denied motions to dismiss the remaining counts, leading to an interlocutory appeal by the City of Durham and its officials, which the Fourth Circuit decided on 17 December 2012. *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012). On 27 February 2013, based on the Fourth Circuit's decision in *Evans*, Defendants moved for judgment on the pleadings on certain counts of the Second Amended Complaint: Nurse Levicy as to Counts 1, 2, and 18; Officer Smith as to Count 2; and Duke and DUHS as to Count 32. [DE 335, 336]. After being granted an extension of time to respond [DE 340], Plaintiffs filed their response to the motion for judgment on the pleadings on 30 May 2013. [DE 341]. In that response, Plaintiffs conceded that Counts 1 and 2 must be dismissed if the United States Supreme Court denied Plaintiffs' petition for a writ of certiorari to review *Evans*. [*Id.* at 2, 18]. Defendants timely filed a reply on 17 June 2013, rendering the motion fully briefed. [DE 343]. On 12 November 2013, the Supreme Court denied Plaintiffs' certiorari petition. *McFadyen v. City of Durham*, 134 S. Ct. 617 (2013).

On 14 March 2014, this Court held a status conference and announced that it would hold the case in abeyance for a period of sixty days, during which time it

would consider all pending motions. Several hours after the status conference, Plaintiffs filed a redline styled as a “corrected” response to Defendants’ motion for judgment on the pleadings. [DE 351]. In the “corrected” response, Plaintiffs attempted to withdraw their earlier concession that Count 1 must be dismissed if the Supreme Court denied their certiorari petition. [*Id.* at 2, 18]. On 24 March 2014, Defendants moved to strike Plaintiffs’ “corrected” response brief as untimely and unauthorized under the Local Rules, or in the alternative, for leave to file a supplemental reply brief to refute Plaintiffs’ new and contradictory position on Count 1. [DE 360, 361].

Any claims that should survive pending and anticipated dispositive motions are set for trial on 6 October 2014. [DE 358]. The parties are currently formulating a discovery scheduling order for the remaining claims. Given Plaintiffs’ “corrected” response brief, it is clear that the parties no longer agree on which claims remain.

QUESTION PRESENTED

Whether there is good cause to expedite briefing on Defendants' Joint Motion to Strike Plaintiffs' Untimely and Unauthorized "Corrected" Response Brief?

ARGUMENT

Under the Local Rules, Plaintiffs would ordinarily be required to file any response to Defendants' motion to strike within twenty-one days after service of the motion. LR 7.3(f). However, "[f]or good cause appearing therefor, a respondent may be required to file any response and supporting documents, including brief, within such shorter period of time as the Court may specify." *Id.* In light of the Court's stated intention to resolve pending motions during the sixty-day abeyance, and the need for the parties to complete discovery efficiently, good cause exists for expediting the deadline for Plaintiffs to respond to Defendants' motion to strike, and for Defendants to reply to any such response.

The sixty-day abeyance period will end on 16 May 2014. [DE 357]. Under the default briefing schedule, Plaintiffs' response to Defendants' motion to strike would not come due until 17 April 2014. *See* LR 7.3(f). Defendant's reply to Plaintiffs' response would not come due, and thus the motion to strike would not

be fully briefed, until 5 May 2014. *See* LR 7.3(h). As set forth in Defendants' brief in support of the motion to strike, Defendants do not believe there is any basis to consider Plaintiffs' "corrected" response brief, and therefore the motion for judgment on the pleadings remains fully briefed. [*See* DE 360, 361]. However, should the Court deny the motion to strike and grant Defendants' alternative motion for leave to file a supplemental reply brief addressing Plaintiffs' new position in the "corrected" brief, Defendants are prepared to submit a supplemental reply within three days of the Court's entry of an order so permitting. In that event, without an expedited briefing schedule on the motion to strike, at best Defendants' supplemental reply would not come due until near the end of the abeyance period, delaying the Court's consideration of the motion for judgment on the pleadings.

Given the 6 October 2014 trial date, the parties require a clear picture of all remaining claims to inform their trial preparation strategy. Plaintiffs' attempt to withdraw their concession of Count 1 through their "corrected" response brief has created uncertainty as to the remaining claims. Until the status of Count 1 is resolved, the parties cannot proceed effectively with discovery and trial preparation. Therefore, good cause exists for expedited briefing on Defendants' motion to strike, which will facilitate the Court's consideration of both the motion to strike and the pending motion for judgment on the pleadings within the sixty-

day abeyance period.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant Plaintiffs' motion to expedite briefing on Defendants' motion to strike and order an expedited briefing schedule as set forth in the accompanying Motion to Expedite Briefing.

This the 25th day of March, 2014.

/s/ Paul K. Sun, Jr.

Paul K. Sun, Jr.

N.C. State Bar No. 16847

Email: paul.sun@elliswinters.com

Thomas H. Segars

N.C. State Bar No. 29433

Email: tom.segars@elliswinters.com

Jeremy M. Falcone

N.C. State Bar No. 36182

Email: jeremy.falcone@elliswinters.com

Ellis & Winters LLP

1100 Crescent Green, Suite 200

Cary, North Carolina 27518

Telephone: (919) 865-7000

Facsimile: (919) 865-7010

Dixie T. Wells

N.C. State Bar No. 26816

Email: dixie.wells@elliswinters.com

Ellis & Winters LLP

333 N. Greene St., Suite 200

Greensboro, NC 27401

Telephone: (336) 217-4197

Facsimile: (336) 217-4198

Counsel for Duke Defendants

/s/ Dan J. McLamb

Dan J. McLamb

N.C. State Bar No. 6272

Email: dmclamb@ymwlaw.com

Yates, McLamb & Weyher, LLP

421 Fayetteville Street, Suite 1200

Raleigh, NC 27601

Telephone: (919) 835-0900

Facsimile: (919) 835-0910

Counsel for DUHS and Tara Levicy

CERTIFICATE OF SERVICE

I hereby certify that on 25 March 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and to Mr. Linwood Wilson, who is also registered to use the CM/ECF system.

This the 25th day of March, 2014.

/s/ Paul K. Sun, Jr.

Paul K. Sun, Jr.

N.C. State Bar No. 16847

Email: paul.sun@elliswinters.com

Ellis & Winters LLP

1100 Crescent Green, Suite 200

Cary, North Carolina 27518

Telephone: (919) 865-7000

Facsimile: (919) 865-7010

Counsel for Duke Defendants